THE DIGEST

OF

ENGLISH CASE LAW

CONTAINING THE

REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. VI.

ELECTION LAW—EXTENT.

LONDON:

SWEET AND MAXWELL, LIMITED; 3, CHANCERY LANE.

STEVENS AND SONS, LIMITED; 119, 120, CHANCERY LANE.

1898.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

PRINCIPAL REPORTS CITED.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards).
A. & E.	Adolphus and Ellis. Q. B.
Addams Ecc.	Addams. Ecclesiastical.
Aleyn	Aleyn. K. B.
Amb.	Ambler. Ch.
Anderson	Anderson. C. P.
Andrews	Andrews. K. B.
Anst.	Anstruther. Ex.
App. Cas.	Law Reports, Appeal Cases (1876—1890).
Arn.	Arnold. C. P.
Arn. & H.	Arnold and Hodges. Q. B.
Asp. M. C.	Aspinall. Maritime Cases.
Atk.	Atkyns. Ch.
B. & Ad.	Barnewall and Adolphus. K. B.
B. & Ald.	Barnewall and Alderson. K. B.
B. & C.	Barnewall and Cresswell. K. B.
B. & S.	Best and Smith. Q. B.
B. C. C.	Lowndes and Maxwell. Bail Court.
B. C. Rep.	Saunders and Cole. Bail Court.
Ball & B.	Ball and Beatty. Ch. (Ireland).
Bar. & Arn.	Barron and Arnold. Election.
Bar. & Au.	Barron and Austin. Election.
Barnard. Ch.	Barnardiston. Ch.
Barnard. K. B.	Barnardiston. K. B.
Batty	Batty. K. B. (Ireland).
Beat.	Beatty. Ch. (Ireland).
Beav.	Beavan. Rolls Court.
Bell, C. C.	Bell. Crown Cases.
Bing.	Bingham. C. P.
Bing (N.C.)	Bingham. New Cases. C. P.
Bligh	Bligh. H. L.
Bos. & P.	Bosanquet and Puller. C. P.
Bos. & P. (N.R.)	Bosanquet and Puller. New Reports. C. P.
Bott P. L.	Bott's Poor Laws.
Br. & B.	Broderip and Bingham. C. P.
Br. & Lush.	Browning and Lushington. Adm.
Bro. C. C.	Brown. Ch.
Bro. P. C.	Brown. Cases in Parliament.
Buck	Buck. Bky.
Bull. N. P.	Buller's Law of Nisi Prius.
Bulst.	Bulstrode. K. B.
Bunb.	Bunbury. Ex.
Burr.	Burrows. K. B.
Burr. S. C.	Burrows. Settlement Cases.

[1891] Ch.	Law Reports, Chancery (1891 onwards).
C. B.	Common Bench Reports.
C. L. R.	Common Law Reports (1853—1855).
C. P. D.	Law Reports, Common Pleas Division (1875—1880).
Cab. & E.	Cababé and Ellis. Nisi Prius.
Cald. S. C.	Caldecott. Settlement Cases.
Camp.	Campbell. Nisi Prius.
Car. & K.	Carrington and Kirwan. Nisi Prius.
Car. & M.	Carrington and Marshman. Nisi Prius.
Car. & P.	Carrington and Payne. Nisi Prius.
Carter	Carter. C. P.
Carth.	Carthew. K. B.
Cary	Cary. Ch.
Cas. t. Hardwicke	Cases temp. Hardwicke. K. B.
Cas. t. Talbot	Cases temp. Talbot. Ch.
Ch. Cas.	Cases in Chancery.
Ch. Cas. Ch.	Choice Cases in Chancery.
Ch. D.	Law Reports, Chancery (1876—1890).
Ch. Pre.	Precedents in Chancery.
Ch. Rep.	Reports in Chancery.
Chit.	Chitty. Bail Court.
Cl. & F.	Clark and Finnelly. H. L.
Co. Rep.	Coke. K. B.
Coll. C. C.	Collyer. Ch.
Colles	Colles' Cases in Parliament.
Colt.	Coltman. Registration.
Comb.	Comberbach. K. B.
Comyns	Comyns. K. B.
Coop. t. Brough.	Cooper. Cases temp. Brougham.
Coop. t. Cott.	Cooper. Cases in Chancery temp. Cottenham.
G. Cooper	Ch.
C. P. Cooper	C. P. Cooper. Ch.
C. & J.	Crompton and Jervis. Ex.
C. & M.	Crompton and Meeson. Ex.
C. M. & R.	Crompton, Meeson and Roscoe. Ex.
Con. & L.	Connor and Lawson. Ch. (Ireland).
Cooper	Cooper. Ch.
Ct. of Sess. Cas.	Court of Session Cases (Scotland).
Cowp.	Cowper. K. B.
Cox	Cox. Ch.
Cox, C. C.	Cox. Crown Cases.
Cr. & Ph.	Craig and Phillips. Ch.
Craw. & D.	Crawford and Dix (Ireland).
Curt.	Curteis. Eccl.

D. P. C.	Dowling. Practice Cases.
D. (N.S.)	Dowling. Practice Cases, New Series.
D. & L.	Dowling and Lowndes. Practice Cases.
D. & R.	Dowling and Ryland. K. B.
Daniell	Daniell. Ex. Eq.
Dans. & Ll.	Danson and Lloyd. Mercantile.
Dav. & M.	Davison and Merivale. Q. B.
Deac.	Deacon. Bky.
Deac. & C.	Deacon and Chitty. Bky.
Dears. & B.	Dearsley and Bell. Crown Cases.
Dears. C. C.	Dearsley. Crown Cases.
De G.	De Gex. Bky.
De G. F. & J.	De Gex, Fisher, and Jones. Ch. App.
De G. & J.	De Gex and Jones. Ch. App.
De G. J. & S.	De Gex, Jones, and Smith. Ch. App.
De G. M. & G.	De Gex, Macnaghten and Gordon. Ch. App.
De G. & Sm.	De Gex and Smale. Ch.

Den. C. C.	Denison. Crown Cases.
Dick.	Dickens. Ch.
Dod.	Dodson. Adm.
Dougl.	Douglas. K. B.
Dow	Dow. H. L.
Dow & Cl.	Dow and Clark. H. L.
Dr. & Sm.	Drewry and Smale. Ch.
Drew.	Drewry. Ch.
Dr.	Drury. Ch. (Ireland).
Dr. & Wal.	Drury and Walsh. Ch. (Ireland).
Dr. & War.	Drury and Warren. Ch. (Ireland).
Drink.	Drinkwater. C. P.
Dyer	Dyer. K. B.
East.	East. K. B.
East, P. C.	East's Pleas of the Crown.
Eden	Eden. Ch.
Edwards	Edwards. Adm.
El. & Bl.	Ellis and Blackburn. Q. B.
El. Bl. & El.	Ellis, Blackburn and Ellis. Q. B.
El. & El.	Ellis and Ellis. Q. B.
Eq. Ca. Abr.	Equity Cases Abridged.
Eq. R.	Equity Reports (1853—1855).
Esp.	Espinasse. Nisi Prius.
Ex.	Exchequer Reports (1848—1856).
Ex. D.	Law Reports, Exchequer Division (1875—1880).
F. & F.	Foster and Finlason. N. P.
Fl. & K.	Flanagan and Kelly. Rolls (Ireland).
Falc. & F.	Falconer and Fitzherbert. Election.
Fitzg.	Fitzgibbon. K. B.
Fonb. (N.R.)	Fonblanque. Bankruptcy.
Forrest	Forrest. Ex.
Fort.	Fortescue. K. B.
Foster	Foster. Crown Cases.
Fox	Fox. Registration.
Free. C. C.	Freeman. Ch.
Free. K. B.	Freeman. K. B.
G. & D.	Gale and Davison. Q. B.
Gale	Gale. Ex.
G. Coop.	G. Cooper. Ch.
Giff.	Giffard. Ch.
Gilb. Eq.	Gilbert. Ch.
Glyn & J.	Glyn and Jameson. Bky.
Godb.	Godbolt. K. B.
Gow.	Gow. Nisi Prius.
H. Bl.	H. Blackstone. C. P.
H. L. Cas.	House of Lords Cases.
H. & C.	Hurlstone and Coltman. Ex.
H. & H.	Horn and Hurlstone. Ex.
H. & M.	Hemming and Miller. Ch.
H. & N.	Hurlstone and Norman. Ex.
H. & R.	Harrison and Rutherford. C. P.
H. & W.	Harrison and Wollaston. Bail Court.
Hag. Adm.	Haggard. Adm.
Hag. Cons.	Haggard. Consistory.
Hag. Ecc.	Haggard. Eccl.
Hall & Tw.	Hall and Twells. Ch.
Hardr.	Hardres. Ex.

Hare .....Hare. Ch.
Hawk. P. C. .....Hawkins's Pleas of the Crown.
Hay. & J. .....Hayes and Jones. Ex. (Ireland).
Hayes .....Hayes. Ex. (Ireland).
Hob. .....Hobart. K. B.
Hodges .....Hodges. C. P.
Hog. .....Hogan. Rolls (Ireland).
Holt .....Holt. K. B.
Holt, Eq. .....Holt. Eq.
Holt, N. P. .....Holt. Nisi Prius.
Hopw. & C. .....Hopwood and Coltman. Registration.
Hopw. & P. .....Hopwood and Philbrick. Registration.
Hurl. & W. .....Hurlstone and Walmsley. Ex.

Ir. C. L. R. .....Irish Com. Law (1850—1866).
Ir. Ch. R. .....Irish Chancery (1850—1866).
Ir. Eq. R. .....Irish Equity Reports.
[1894] Ir. R. .....Irish Law Reports (1894 onwards).
Ir. R. C. L. .....Irish Com. Law (1866—1878).
Ir. R. Eq. .....Irish Equity (1866—1878).

J. & H. .....Johnson and Hemming. Ch.
J. & W. .....Jacob and Walker. Ch.
J. Kelyng .....Sir J. Kelyng. Crown Cases.
J. P. .....The Justice of the Peace.
Jacob .....Jacob. Ch.
Jenk. .....Jenkins. Ex.
Jo. & Lat. .....Jones and Latouche. Ch. (Ireland).
Johns. .....Johnson. Ch.
Jones .....Jones. Ex. (Ireland).
Jones & C. .....Jones and Carey. Ex. (Ireland).
Jur. .....The Jurist.

K. & G. .....Keane and Grant. Registration.
K. & J. .....Kay and Johnson. Ch.
Kay .....Kay. Ch.
Keb. .....Keble. K. B.
Keen .....Keen. Rolls Court.
Keilw. .....Keilway. K. B.
Kel. .....Kelyng, Sir John. K. B.
Ken. .....Kenyon. K. B.
Knapp .....Knapp. P. C.
Knapp & O. .....Knapp and Ombler. Election.

L. & C. .....Leigh and Cave. Crown Cases.
L. & M. .....Lowndes and Maxwell. Bail Court.
L. M. & P. .....Lowndes, Maxwell, and Pollock. Bail Court.
L. T. .....Law Times, New Series.
L. J. (o.s.) Ch. K.B. etc. .....Law Journal Reports, 1822 to 1831.
L. J. Ch. .....Chancery.
,, Bk. .....Bankruptcy.
,, C. P. .....Common Pleas.
,, Ex. .....Exchequer.
,, M. C. .....Magistrates' Cases.
,, Q. B. .....Queen's Bench.
,, P. C. .....Privy Council.
,, P. & M. .....Probate and Matrimonial.
,, P. .....Probate, Divorce, and Admiralty.
,, Adm. .....Admiralty.
,, Ecc. .....Ecclesiastical.

From 1831 onwards.

L. R. H. L.	Law Reports, 1866 to 1875 inclusive.
L. R. P. C.	
L. R. Ch.	
L. R. Eq.	
L. R. Q. B.	
L. R. C. P.	
L. R. Ex.	
L. R. P. & M.	
L. R. A. & E.	
L. R. C. C.	
L. R. H. L. Sc.	
L. R. Ir.	Irish Law Reports (1879—1893).
Latch	Latch. K. B.
Leach, C. C.	Leach. Crown Cases.
Ld. Raym.	Lord Raymond. K. B.
Lev.	Levinz. K. B.
Lewin, C. C.	Lewin. Crown Cases.
Lit. Rep.	Littleton. C. P.
Ll. & G.	Lloyd and Goold. Ch. (Ireland).
Lofft	Lofft. K. B.
Longf. & T.	Longfield and Townsend. Ex. (Ireland).
Lush.	Lushington. Adm.
Lutw.	Lutwyche. C. P.
Lutw. Reg. Cas.	Lutwyche. Registration.

M. C. C.	Moody. Crown Cases.
M. & H.	Murphy and Hurlstone. Ex.
M. & M.	Moody and Malkin. Nisi Prius.
M. & P.	Moore and Payne. C. P.
M. & Rob.	Moody and Robinson. Nisi Prius.
M. & S.	Maule and Selwyn. K. B.
M. & Sc.	Moore and Scott. C. P.
M. & W.	Meeson and Welsby. Ex.
Macl. & R.	Maclean and Robinson. Scotch Appeals.
Mac. & G.	Macnaghten and Gordon. Ch.
M'Cle.	M'Cleland. Ex.
M'Cle. & Y.	M'Cleland and Young. Ex.
Macq. H. L.	Macqueen. H. L.
Madd.	Maddock. Ch.
Man. & G.	Manning and Granger. C. P.
Man. & Ry.	Manning and Ryland. K. B.
Manson	Manson. Bky. and Winding-up.
Marshall	Marshall. C. P.
Meg.	Megone. Company Cases.
Mer.	Merivale. Ch.
Mod.	Modern Reports.
Moll.	Molloy. Ch. (Ireland).
Mont.	Montagu. Bky.
Mont. & Ayr.	Montagu and Ayrton. Bky.
Mont. & B.	Montagu and Bligh. Bky.
Mont. & C.	Montagu and Chitty. Bky.
Mont & M'Ar.	Montagu and M'Arthur. Bky.
Mont. D. & D.	Montagu, Deacon, and De Gex. Bky.
Moore	Moore. C. P.
Moore Ind. App.	Moore. Indian Appeals.
Moore, P. C.	Moore. P. C.
Morrell	Morrell. Bky.
Moseley	Moseley. Ch.
Myl. & Cr.	Mylne and Craig. Ch.
Myl. & K.	Mylne and Keen. Ch.

N. & M.	Neville and Manning. K. B.
N. & P.	Neville and Perry. K. B.

N. R. .....New Reports (1862—1865).
Nelson .....Nelson. Ch.
New Sess. Cas. .....New Sessions Cases.

O'M. & H. .....O'Malley and Hardcastle. Election.

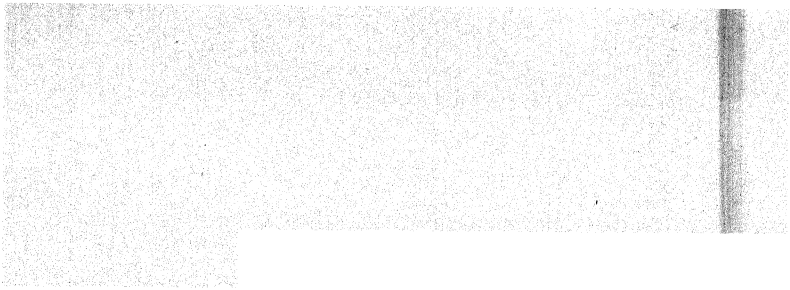
[1891] P. ..... Law Reports, Probate (1891 onwards).
P. D. .....Law Reports, Probate Division (1876—1890).
P. & D. .....Perry and Davison. K. B.
P. & K. .....Perry and Knapp. Election.
Peake, Add. C. .....Peake. Additional Cases, Nisi Prius.
Peake, N. P. .....Peake. Nisi Prius.
P. Wms. .....Peere Williams. Ch.
Phillim. .....Phillimore. Eccl.
Ph. .....Phillips. Ch.
Pol. .....Pollexfen. K. B.
Pop. .....Popham. K. B.
Price .....Price. Ex.

Q. B. .....Queen's Bench Reports (1841—1852).
Q. B. D. .....Law Reports, Queen's Bench Division (1876—1890).
[1891] Q. B. .....Law Reports, Queen's Bench (1891 onwards).

R. ..... The Reports, 1893—1895.
R. & R. .....Russell and Ryan. Crown Cases.
R. R. .....Revised Reports.
Railw. Cas. .....Railway and Canal Cases (1835—1854).
Raym. (Ld.) .....Lord Raymond. K. B.
Ridg. L. & S. .....Ridgway, Lapp and Schoales. K. B. (Ireland).
Ridgw. .....Ridgway. Parliamentary Cases.
Rep. Ch. .....Reports in Chancery.
C. Rob. .....Sir C. Robinson. Adm. (1798—1808).
W. Rob. .....W. Robinson. Adm. (1838—1847).
Rol. Abr. .....Rolle's Abridgment.
Rolle .....Rolle. K. B.
Rose .....Rose. Bky.
Russ. .....Russell. Ch.
Russ. & M. .....Russell and Mylne. Ch.
Ry. & Can. Traff. Cas. Rly. and Canal Cases (1874 onwards).
Ry. & M. .....Ryan and Moody. Nisi Prius.

Salk. .....Salkeld. K. B.
Sau. & Sc. .....Sausse and Scully. Rolls Ct. (Ireland).
Saund. .....Saunders. K. B.
Sayer .....Sayer. K. B.
Sch. & Lef. .....Schoales and Lefroy. Ch. (Ireland).
Scott .....Scott. C. P.
Scott (N.R.) .....Scott. New Reports, C. P.
Select Ca. Ch. .....Select Cases in Chancery.
Selw. N. P. .....Selwyn. Law of Nisi Prius.
Shower .....Shower. K. B.
Shower P. C. .....Shower. Parliamentary.
Sid. .....Siderfin. K. B.
Sim. .....Simons. Ch.
Sim. & S. .....Simons and Stuart. Ch.
Sm. & G. .....Smale and Giffard. Ch.
Smith .....Smith. K. B.
Smith .....Smith. Registration.

Spinks	Adm.
St. Tri.	State Trials.
Stark.	Starkie. Nisi Prius.
Str.	Strange. K. B.
Styles	Styles. K. B.
Swabey	Swabey. Adm.
Sw. & Tr.	Swabey and Tristram. Probate.
Swanst.	Swanston. Ch.
T. Jones	Sir T. Jones. K. B.
T. & M.	Temple and Mew. Crown Cases.
T. Raym.	Sir T. Raymond. K. B.
Tam.	Tamlyn. Rolls Court.
Taunt.	Taunton. C. P.
Term Rep.	Durnford and East. K. B.
Tothill	Tothill. Ch.
Turn. & R.	Turner and Russell. Ch.
Tyrw.	Tyrwhitt. Ex.
Tyrw. & G.	Tyrwhitt and Granger. Ex.
Vent.	Ventris. K. B.
Vern.	Vernon. Ch.
Vern. & S.	Vernon and Scriven. K. B.
Ves. sen.	Vesey, sen. Ch.
Ves.	Vesey, jun. Ch.
V. & B.	Vesey and Beames. Ch.
W. Bl.	Sir Wm. Blackstone. K. B.
W. Jones	Sir W. Jones. K. B.
W. Kelynge	Sir W. Kelynge. Ch.
W. R.	Weekly Reporter.
W. W. & D.	Wilmore, Wollaston and Davison. K. B.
W. W. & H.	Wilmore, Wollaston and Hodges. K. B.
West	West. H. L.
Wightw.	Wightwick. Ex.
Willes	Willes. C. P.
Wilmot	Wilmot's Notes. K. B.
Wils. Ch.	Wilson. Ch.
Wils. Ex.	Wilson. Ex.
Wils. K. B.	Wilson. K. B.
Wms. Saund.	Williams' Saunders. K. B.
Y. & C.	Younge and Collyer. Eq. Ex.
Y. & C. C. C.	Younge and Collyer. Ch.
Y. & J.	Younge and Jervis. Ex.
Yelv.	Yelverton. K. B.
Younge	Younge. Ex. Eq.



The Digest

OF

ENGLISH CASE LAW.

ELECTION LAW.

[BY A. H. BITTLESTON.]

A. PARLIAMENTARY.

1. *Registration of Voters.*
   - *a.* City and Borough Voters.
     - i. Occupation, 3.
     - ii. Premises, 14.
     - iii. Lodgers, 19.
     - iv. Yearly Value, 24.
     - v. Qualifying Period, 24.
     - vi. Rates and Taxes, 24.
     - vii. Residence, 34.
     - viii. Freemen and Liverymen, 39.
   - *b.* County Voters.
     - i. 40*s.* Freeholders.
       - a. Estates of Inheritance, 41.
       - b. Estates for Life, 43.
     - ii. Customary, Copyhold and other Tenants, 47.
     - iii. Lessees of Terms of Years, 47.
     - iv. Occupiers of 10*l.* Value, and at 50*l.* Rent, 49.
     - v. Inhabitant Householders, 50.
     - vi. Lodgers, 51.
     - vii. "Lands or Tenements," Sufficiency of Interest in and Title to, 51.
     - viii. Value, 59.
     - ix. Qualifying Period, 61.
     - x. Property in Boroughs, 62.
   - *c.* Particular Disqualifications, 63.
   - *d.* Making and Publication of Lists, 69.
   - *e.* Claims, 73.
   - *f.* Notice of Objections.
     - i. Form of, 76.
     - ii. Service.
       - a. Personal, 87.
       - b. By Post, 88.
     - iii. Consequences of giving Notice, 93.
   - *g.* Revising Barrister.
     - i. Power to Amend, 93.
     - ii. Other Matters relating to Revision Court, 101.
   - *h.* Appeals, 105.
2. *Election of Members.*
   - *a.* The Election.
     - i. The Writ, 113.
     - ii. Notice of Election, 113.
     - iii. Candidates, 113.
     - iv. Agents, 115.
     - v. Nomination, 117.
     - vi. Returning, Presiding, and other Officers, 117.
     - vii. The Poll, 120.
     - viii. Counting the Votes, 124.
     - ix. Declaration of Result of Poll, 124.
     - x. Return of Name of Successful Candidate, 124.
     - xi. Election Expenses, 125.
   - *b.* Petition.
     - i. Parties, 128.
     - ii. Abatement, 128.
     - iii. Grounds of, 128.
     - iv. Form of, 128.
     - v. Time for Filing, 129.
     - vi. Security for Costs, 129.
     - vii. Service, 130.
     - viii. Particulars, 130.
     - ix. Amendment, 131.
     - x. Discovery, 132.
     - xi. Withdrawal, 133.
     - xii. Trial, 133.
     - xiii. Costs, 138.
   - *c.* Corrupt and Illegal Practices.
     - i. Bribery, 141.
     - ii. Treating, 147.
     - iii. Undue Influence, 148.
     - iv. Illegal Practices, 148.
     - v. Election Commissioners, 150.

B. MUNICIPAL.

1. *Burgesses.*
   - *a.* Occupation, 152.
   - *b.* Residence, 154.
   - *c.* Rates, 155.

d. Under Special Charters and Customs, 157.
e. Particular Disqualifications, 160.
f. Making out Lists, 160.
g. Claims, 162.
h. Notice of Objections, 162.
i. Revision of Lists, 163.
k. Burgess Roll, 166.

2. *Election to Corporate Offices.*
a. Notice of Election, 168.
b. Aldermen and Councillors, 170.
c. Mayor, 183.
d. Elective Auditors, 188.
e. Revising Assessors, 188.
f. Nomination, 189.
g. Presiding and Returning Officers, 194.
h. The Poll, 196.
i. Production and Inspection of Burgess List and Voting Papers, 207.
k. Election Petition, 207.
l. Questioning Election in City of London, 213.
m. Corrupt and Illegal Practices, 214.

A. PARLIAMENTARY.

1. REGISTRATION OF VOTERS.

a. City and Borough Voters.

i. *Occupation.*

See also cases under A. 1, *a.* ii. (col. 14), *and* A. 1, *b.* v. (col. 50), *and under* B. 1, *a.* (col. 152).

Whether any Occupation of Rooms in House as Owner or Tenant.]—Although by the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 5, the term "dwelling-house" in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), is to mean part of a house separately occupied, yet in order to be entitled to the borough franchise as the occupier of a dwelling-house, the person must have an occupation in respect of which he can be rated to the relief of the poor, and therefore he is not entitled to such dwelling-house franchise by reason of the occupation of part of a house if he occupies such part as a lodger. The tenant of two rooms, which he took unfurnished at a weekly rent, had the exclusive use of such rooms, and a key of the outer door of the house. His landlord had also a key of the outer door, and resided in all the rest of the house, but supplied no attendance or service to such tenant:—Held, that such tenant occupied the rooms as a lodger, and consequently that, in respect of such occupation, he could not acquire the dwelling-house franchise under the Representation of the People Act, 1867. *Bradley* v. *Baylis*, Colt. 163; 51 L. J., Q. B. 183; 8 Q. B. D. 195; 46 L. T. 253; 30 W. R. 823; 45 J. P. 847—C. A.

The tenant of two rooms, which he took unfurnished at a weekly rent, had, in common with the other tenants of the house, which was wholly let out on similar tenancies, the use of the passages, staircase, street door, and usual conveniences of the house. The landlord and not the tenant was rated, and the landlord did all repairs inside and out, but he did not reside in the house, nor did he, save as aforesaid, retain the control and dominion over the house, or render any services to any of the tenants:—Held, that such tenant did not occupy the rooms as a lodger, but as an occupying tenant under the Representation of the People Act, 1867, and that he could therefore acquire the dwelling-house franchise in respect of such occupation. *Ib.*

The occupier of a floor in a house in which the landlord himself resides is a mere lodger, and, previous to 30 & 31 Vict. c. 102, was not entitled to be registered as a voter, although he has a key to the outer door. *Wauscy* v. *Perkins, Hill's Case*, 7 Man. & G. 151; 1 Lutw. Reg. Cas. 252; 8 Scott (N.R.) 979; 14 L. J., C. P. 75; 9 Jur. 116. S. P., *Crocker* v. *Lambeth*, 8 Scott (N.R.) 985; 7 Man. & G. 156, n.; 1 Lutw. Reg. Cas. 255, n.

The voter occupied for the qualifying year as his residence a room in a dwelling-house at a weekly rent, and had a right of ingress and egress by the stairs, passage and front door. He had a key of his room and also of the front door. All the rooms of the house were let to tenants as their residences with the like rights. During the qualifying year one of the tenants quitted his room and gave up his keys to the landlord, who thereupon took the usual steps to obtain a new tenant. The landlord did not reside in the house, nor exercise any control over it, nor, in fact, have any control except such (if any) as the law would confer on him by the vacating of the room by the out-going tenant:—Held, that the voter was an inhabitant occupier of a dwelling-house within 30 & 31 Vict. c. 102, s. 3, and 41 & 42 Vict. c. 26, s. 5, and not merely a lodger. *Anchetill* v. *Baylis*, Colt. 289; 52 L. J., Q. B. 104; 10 Q. B. D. 577; 48 L. T. 342; 31 W. R. 233; 47 J. P. 356—C. A.

Where the revising barrister finds as a fact that a voter, during the qualifying period, separately occupied as a separate dwelling-house two rooms on a flat in a tenement house, having the exclusive control of the said rooms and the use of the stairs, yard, &c., in common with the other inmates of the tenement house, the fact that the landlord also resided in the house does not per se as matter of law disfranchise the voter. Where the inmates of such a house are otherwise duly qualified, in order to deprive them of the franchise as inhabitant householders, the landlord must so reside upon the premises as to retain his quality of master, reserving to himself a general control and dominion over the whole structure. *M'Laughlin* v. *Chambers*, [1896] 2 Ir. R. 497—C. A.

A tenant of a set of chambers in the Inns of Court, forming a house within 2 Will. 4, c. 45, s. 27, does not cease to occupy them within the meaning of that section, by letting a room unfurnished to another person, he himself still retaining another room for his own use, and being bound to supply a clerk, a laundress, and coals for such person, and pay the rates and taxes, though such person has a key of the outer door and may look up his room if he pleases. *Smith* v. *Lancaster*, 1 Hopw. & C. 287; 39 L. J., C. P. 33; L. R. 5 C. P. 246; 21 L. T. 492; 18 W. R. 170.

A. occupied, as a counting-house, a room in a house, the landlord of which also had a counting-house there, but did not reside there. There was an outer door, which was locked at night. A. had no key of this door, nor was there any key-hole on the outside. A person employed and paid by the landlord lived in the house for the purpose of protecting the premises and letting in

the several tenants when the outer door was closed :—Held, that A. was tenant of a countinghouse, within 2 Will. 4, c. 45, s. 27. *Downing* v. *Luckett*, 5 C. B. 40 ; 2 Lutw. Reg. Cas. 33 ; 17 L. J., C. P. 31 ; 11 Jur. 993.

One who has the exclusive occupation of apartments in a house, at a rent, having a key of the outer door, and free and uncontrolled access thereto at all times—the landlord occupying a portion of the premises, but not residing therein—is entitled to be registered as tenant of a building, within 2 Will. 4, c. 45, s. 27. *Toms* v. *Luckett*, 5 C. B. 23 ; 2 Lutw. Reg. Cas. 19 ; 17 L. J., C. P. 27 ; 11 Jur. 993.

But the occupier of part of a house, where the landlord resides upon the premises and retains the key of the outer door, is a mere lodger, and is not a person occupying as owner or tenant. *Pitts* v. *Smedley*, 7 Man. & G. 85 ; 8 Scott (N.R.) 907 ; 1 Lutw. Reg. Cas. 196 ; Barr. & Arn. 344 ; 14 L. J., C. P. 73 ; 9 Jur. 69.

The occupier of part of a house, who has a key of the outer door, the landlord not residing in or occupying any portion of the premises, is entitled to a vote. *Score* v. *Huggett*, 8 Scott (N.R.) 919 ; 7 Man. & G. 95 ; 1 Lutw. Reg. Cas. 198 ; Barr. & Arn. 355 ; 14 L. J., C. P. 74 ; 9 Jur. 70.

B. occupied three rooms on the first floor of a house, in which the landlord resided. He had a key to the outer door. There was no internal communication between the three rooms, each having a separate door opening upon the landingplace :—Held, that he was not entitled to be registered. *Page* v. *Perkins*, 8 Scott (N.R.) 983 ; 7 Man. & G. 156 ; 1 Lutw. Reg. Cas. 255.

A. B., C. D. and E. were the lessees of a house, and alone were liable for the rent. They were, however, members of an association, out of the funds of which the rent was, in fact, paid, and whose servants, also paid out of the fund, had charge of the premises, which were used for the purposes of the association. Various members of the association transacted the business of the association upon the premises, and each of the lessees, when in London, frequented the premises, and transacted there the business of the association, and partly their own affairs :—Held, that the revising barrister was justified in finding that these lessees occupied as tenants. *Luckett* v. *Bright*, 2 C. B. 193 ; 1 Lutw. Reg. Cas. 456 ; Barr. & Arn. 737 ; 15 L. J., C. P. 85 ; 10 Jur. 75.

A master ropemaker in the dockyard at Chatham, occupied a house (as his residence) within the dockyard, belonging to the commissioners of the Admiralty. He paid no rent in money for it, but had it as part remuneration for his services ; no part of it was used for public purposes, the office at which he performed his public services being at a distance. It he had not had the house, he would have had an allowance for a house, in addition to his salary :—Held, that he occupied the house as tenant. *Hughes* v. *Chatham Overseers*, 7 Scott (N.R.) 581 ; 5 Man. & G. 54 ; 1 Lutw. Reg. Cas. 51 ; 13 L. J., C. P. 44 ; 7 Jur. 1136.

A sergeant on the permanent staff of the militia, as such occupied a house close to the premises in which the arms, accoutrements, &c., of the corps were stored, which was built expressly for the accommodation of the men employed in looking after the stores, under the provisions of the Militia Act, 1854. The house was assigned to him by the commanding officer as a place to live in ; and, if he left it without the permission of his officer, he would be guilty of a breach of discipline, for which he would probably be dismissed the service ; and he was liable to be turned out at any time. He had 2*s.* 4*d.* per week deducted out of his pay, as occupier of the house ; but he would not receive the 2*s.* 4*d.* extra if he resided elsewhere. He could perform the duties required of him equally well if he was living elsewhere, which he might do with his officer's permission :—Held, that the sergeant did not occupy the premises as tenant, within 30 & 31 Vict. c. 102, s. 3. *Fox* v. *Dally*, 2 Hopw. & C. 261 ; 44 L. J., C. P. 42 ; L. R. 10 C. P. 285 ; 31 L. T. 478 ; 23 W. R. 244.

The surgeon to Greenwich Hospital occupied, as such surgeon, the house at the infirmary of the hospital, which is appropriated by the Lords of the Admiralty to the person holding that appointment. By one of their regulations, it is required, that all officers having separate apartments are to inhabit those assigned to them ; and that no exchange or other appropriation of apartments is to be made without express permission. There is also an order in force by the inspector-general of hospitals, that surgeons of hospitals, when not provided with a residence within the hospital, are to be allowed 15*s.* a week lodging-money :—Held, that he did not occupy as tenant, inasmuch as he was required to occupy the same with a view to the more efficient performance of his duties as surgeon. *Dobson* v. *Jones*, 5 Man. & G. 113 ; 8 Scott (N.R.) 80 ; 1 Lutw. Reg. Cas. 105 ; Barr. & Arn. 243 ; 13 L. J., C. P. 126.

A. claimed to be registered as occupier of a house of the requisite yearly value to confer a vote ; the revising barrister found that he was the keeper of the Guildhall at B. ; that the house was the residence assigned by the corporation to the hall-keeper, and in which he was required to reside, and that it was necessary, for the due performance of his duties as hall-keeper, that he should reside there :—Held, that this was an occupation as servant to the corporation and not an occupation as tenant. *Clarke* v. *St. Mary, Bury St. Edmunds, Overseers*, 1 C. B. (N.S.) 23 ; 26 L. J., C. P. 12 ; 3 Jur. (N.S.) 645 ; 5 W. R. 21.

A lay clerk, appointed to his office by the dean and canons of Windsor, which office he held for life, or so long as he discharged his duties, which did not require residence, occupied a house, one of a number of houses, the freehold of which was vested in the dean and canons (that number being less than the number of lay clerks) ; he was not obliged to reside in it ; though he could let the house which he occupied without the permission of the dean and canons, he was not entitled to vote for the borough, either as owner or tenant. *Bridgewater* v. *Durant*, 11 C. B. (N.S.) 7 ; K. & G. 377 ; 31 L. J., C. P. 46 ; 8 Jur. (N.S.) 590 ; 5 L. T. 491 ; 10 W. R. 171.

A hospital incorporated by act of parliament consists of a master and twelve brethren. Each of the brethren is appointed for life, and takes oath, upon election, to obey the master and certain rules, for disobedience of which rules he may be removed. He also occupies exclusively certain rooms in the hospital of greater value than 10*l.* per annum, for which he is rated to the parish : —Held, that such occupation does not, under 2 Will. 4, c. 45, s. 27 (repealed), give a borough vote, as it is not an occupation as owner or tenant, the ownership being in the corporation aggregate, which must be taken also to occupy in the persons of its individual members. *Heath* v. *Haynes*, 3 C. B. (N.S.) 389 ; K. & G. 99 ; 27 L. J., C. P. 50 ; 4 Jur. (N.S.) 664 ; 6 W. R. 52.

Rating is not the test of occupation as tenant. *Ib.*

The members of the eleemosynary foundation of the Military Knights of Windsor are not entitled to vote for the borough of New Windsor, the constitution of the body, and the terms and mode of their appointments, shewing that they do not occupy the rooms which they hold in virtue of such appointments, within the castle of Windsor, either as owners or tenants, the legal estate being in the dean and canons of Windsor, and the occupation being entirely of an eleemosynary character, although during good behaviour. *Heartley* v. *Banks*, K. & G. 219; 5 C. B. (N.S.) 40; 28 L. J., C. P. 144; 5 Jur. (N.S.) 492; 7 W. R. 342.

To render the occupation of a voter an occupation "as tenant" within 2 Will. 4, c. 45. s. 27 (repealed), it is not essential that the voter's lessor should have a valid legal title to demise. Therefore where premises comprised in a settlement deed were demised to the voter by one of the trustees, who, until such demise, had himself occupied them, paying rent to the cestui que trust, without the interference of his co-trustee:—Held, that assuming any valid objection to exist to the lessor's title to demise, such objection did not affect the voter's qualification as the occupier "as tenant" of the demised premises. *Fowle* v. *Trevor*, Colt. 82.

During the qualifying year, and for some time previously, a separate room in the dwelling-house of claimant's father was allotted by him to the claimant, who slept in and occupied the room, separately and exclusively for his own purposes, as his own. The claimant's father was sole tenant of the premises, and had control of the door and of the rest of the house:—Held, that the claimant was not entitled to the franchise. *Clarke* v. *Buchanan*, 21 L. R., Ir. 201—C. A.

Claim as Lodger, though Landlord has not Control of Outer Door.]—See *Edwards* v. *Long*, *Brown's Case*, col. 20.

Occupation of Part of House, where Landlord lives in House.]—See *Hogan* v. *Sterrett*, and *Campbell* v. *Chambers*, col. 20.

As to Who is an Occupier of a Dwelling-house.]—See *Cuthbertson* v. *Hains*, col. 25.

Exclusive User of Room in Father's House.]—See *Beal* v. *Exeter Town Clerk*, col. 35.

Occupation of Tenant not affected by another's Right of Residence.]—See *Turish* v. *Lare*, col. 50.

Whether any Occupation of House as Owner or Tenant.]—A person claimed a borough vote in respect of his occupation of one of a series of houses known as Lord Coningsby's Hospital, to which he had been duly nominated. The persons who occupy these houses are nominated by the owner of certain estates, out of which fixed payments are made to such occupants, who are called servitors, and are subject to certain rules made for their government in 1614, when the hospital was founded, and which they must obey under the penalty of a fine. They pay no rent, and clothes and coals are supplied to them out of the funds of the hospital. When a man is appointed to one of the houses he holds it, with a garden near to it, for life, and cannot be disturbed in his occupation by any one, except for a murder or a felony, or something of that kind. None of the houses had ever been let by any of the persons appointed to them, but a garden appertaining to the house held by the claimant had been let by him because he was too old to cultivate it himself:—Held, that the claimant had a freehold interest in the house to which he had been appointed, and that his occupation was not of such an eleemosynary character as to prevent his acquiring the borough franchise as an inhabitant occupier under 30 & 31 Vict. c. 102, s. 3. *Fryer* v. *Bodenham*, 1 Hopw. & C. 204; 38 L. J., C. P. 185; L. R. 4 C. P. 529; 19 L. T. 645; 17 W. R. 294.

The Naval Knights of Windsor were incorporated by royal charter. According to the rules of the foundation, which was of a collegiate character, the members dined together in a common hall; each knight was on his election placed in the occupation of a dwelling-house forming part of the collegiate buildings which were conveyed to the corporation; he held the house, by virtue of his appointment for life, subject to expulsion in the event of his marrying or being guilty of certain offences or breaches of discipline; and had to keep it in repair:—Held, that the occupation of each knight was as a member of the corporation merely, and subject to regulations which were inconsistent with ownership in the individual, and therefore did not confer a right to a vote as an inhabitant occupier as owner or tenant. *Durant* v. *Kennett*, 1 Hopw. & C. 297; 39 L. J., C. P. 17; L. R. 5 C. P. 262; 21 L. T. 603; 18 W. R. 286.

The dean and chapter of Exeter is a corporation aggregate; there are five canons in the chapter, who are appointed for life, and five houses which the canons are entitled to occupy, and with their enjoyment of which the chapter cannot interfere. At the election of a canon he produces the key of the house occupied by his predecessor, and prays to be admitted. As one of the canons he is elected and decreed to be installed, and thereupon takes possession of his house. Each canon repairs his house at his own expense:—Held, that the proper inference was that each canon holds his house as a corporation sole and not as a member of the chapter; and that he is therefore entitled to a vote for the city in respect of it. *Ford* v. *Harington*, 1 Hopw. & C. 331; 39 L. J., C. P. 107; L. R. 5 C. P. 282; 21 L. T. 609; 18 W. R. 289.

Occupation as Tenant—Severance of Reversion.]—Premises consisting of five closes of land, a barn and other buildings of the annual value of 40*l.* were let to A. as tenant from year to year at the yearly rent of 40*l.*; prior to the last day of July, 1859, the landlord assigned his interest in the barn and other buildings to a third person for the express purpose of depriving the tenant of the right of voting, the premises retained by the landlord not being sufficient of themselves to confer a vote:—Held, that the requisitions of 2 Will. 4, c. 45, s. 27 (repealed), in respect of occupation under the same landlord had been substantially complied with, and that the severance of the reversion did not affect the tenant's right to be upon the register, the taking from the same landlord of premises of sufficient value being the principal test relied on by the legislature. *Smerdon* v. *Tucker*, 7 C. B. (N.S.) 37; K. & G. 305; 29 L. J., C. P. 93; 6 Jur. (N.S.) 557; 1 L. T. 549; 8 W. R. 151.

Bankrupt continuing to Occupy.]—A yearly tenant of a dwelling-house was adjudicated bank-

rupt, but his occupation of the house was never disturbed, and, after the adjudication, the landlord, on the usual quarter-days, accepted the rent from him. No act of any kind in relation to the bankrupt or the dwelling-house was ever done or signified by any one officially connected with the bankruptcy. At the next revision of the parliamentary and municipal lists of voters of the borough in which the house was situate, objection was taken to the name of the bankrupt being retained upon the lists, on the ground that, as by the 20th section of the Bankruptcy Act, 1883, the property of the bankrupt vested in his trustee, and as the bankruptcy occurred within the qualifying period, the bankrupt had not occupied the house as tenant during the whole of the period within the meaning of 30 & 31 Vict. c. 102, s. 3, sub-s. 2 :—Held, that the undisturbed holding over of the bankrupt, together with the subsequent sufferance, consent, and receipt of rent by the landlord, constituted a tenancy by the bankrupt as tenant to the landlord from the date of the adjudication, and that, his occupancy being otherwise continuous, he was entitled to have his name retained upon the lists. *Mackay* v. *McGuire*, Fox, 201 ; 60 L. J., Q. B. 24 ; [1891] 1 Q. B. 250 ; 64 L. T. 83 ; 39 W. R. 109 ; 55 J. P. 214.

Occupation of Room in Factory.]—The fact of the landlord contracting to furnish, and furnishing, power from a steam-engine to work a spinning-machine in a room in a factory, does not destroy the exclusive character of the occupation of a tenant of the room. *Wright* v. *Stockport Town Clerk*, 1 Lutw. Reg. Cas. 32 ; 5 Man. & G. 33 ; 7 Scott (N.R.) 561 ; Barr. & Arn. 39 ; 13 L. J., C. P. 50 ; 7 Jur. 1112.

Occupation of Stand or Stall in Market.]—A. and B. occupied respectively a stall and a stand in Spitalfields Market. A stall was erected on a fixed stand, upon which A. exposed goods for sale. The stand was a fixed standing place for a cart, from which B. could offer goods for sale. The whole area of the market was leased by one H., who allowed A., B., and others to occupy such stalls or stands at fixed prices, admittedly of an annual value exceeding 10*l.* The stands were not marked off, but their limits were known to H. and to the occupants of the market. If a stand was not occupied on any particular market day by the person paying for the right to occupy it, H. could allow any other applicant to occupy it, but the price agreed upon for the right to occupy was paid whether the stand were occupied on the several market days or no. H. could give A., B., and the other occupants of stalls or stands notice to quit at any time, which was sometimes given verbally :—Held, that A. and B. "occupied land or tenement of an annual value of not less than 10*l.* as tenants" within the meaning of ss. 5 and 7 (7), of the Representation of the People Act, 1884, as defined by s. 27 of the Reform Act, 1832, and were, therefore, entitled to be registered as voters on the occupiers' list. *Hall* v. *Metcalfe*, Fox, 227 ; 61 L. J., Q. B. 53 ; [1892] 1 Q. B. 208 ; 66 L. T. 496.

Husband and Wife—Wife Tenant of the Qualifying Premises.]—The husband of a married woman, who carried on business in her own name in premises occupied by her as tenant, and for which she paid the rates and taxes, is not qualified to vote in respect of such premises. *Prentice* v. *Markham*, Fox, 301.

Under an Unlawful Agreement.]—A partnership of twenty persons for carrying on the business of farming, is within the Companies Act of 1862 (25 & 26 Vict. c. 89, s. 4), and if not registered under that act is illegal. *Harris* v. *Amery*, 1 H. & R. 358 ; 1 H. & P. 294 ; 35 L. J., C. P. 89 ; L. R. 1 C. P. 148 ; 12 Jur. (N.S.) 165 ; 13 L. T. 504 ; 14 W. R. 199.

Where land and buildings have been rented by such partnership for carrying on such business, and the only occupation by its members is a constructive one arising out of the occupation of one who acted as manager, no qualification to confer a borough vote can be acquired by its members, as the occupation cannot be shewn without disclosing the illegal partnership. *Ib.*

Successive Occupation.]—A person on the register, whose qualification is there described to be land in his occupation in a particular parish, and who afterwards, during the year, changes his occupation for other land in the same parish, must send in a new claim, or he cannot retain his name on the list, although the description of the qualification on the register will apply equally to both occupations. *Burton* v. *Gery*, 5 C. B. 7 ; 2 Lutw. Reg. Cas. 4 ; 17 L. J., C. P. 66 ; 11 Jur. 948.

Where the right to vote depends upon the occupation of premises in immediate succession, the whole of the subject-matter composing the qualification must be fully described in the register. *Ib.*

A claim to the parliamentary franchise may be sustained by combining a series of occupation of dwelling-houses during the qualifying period—(a) partly by virtue of service, and partly under ordinary tenancies, or (b) wholly by virtue of service. *Turish* v. *Clark*, 18 L. R., Ir. 285—C. A.

G. claimed a vote for the borough of Lewisham in respect of the occupation of two houses in immediate succession, the first house being situated at Beckenham, and the second at Lower Sydenham. Before the passing of the Redistribution of Seats Act, 1885, both Beckenham and Lower Sydenham were included in the west division of the county of Kent ; but by that act Beckenham became included in the Sevenoaks division of the county, and Lower Sydenham became included within the area of the parliamentary borough of Lewisham, which borough was then first created :—Held, that G. was entitled to be registered as a voter for the borough of Lewisham by virtue of s. 17 of the Redistribution of Seats Act, 1885. *Down* v. *Steele*, Colt. 458 ; 55 L. J., Q. B. 36.

A person is entitled to be put on the list of voters who has occupied during the qualifying period in immediate succession a series of dwelling-houses partly by virtue of service and partly as an ordinary tenant. *Nicholson* v. *Yeoman*, Fox, 150 ; 59 L. J., Q. B. 104 ; 24 Q. B. D. 145 ; 61 L. T. 813 ; 54 J. P. 166.

—— **Rating.**]—See *Moger* v. *Escott*, and *Rogers* v. *Lewis*, col. 27.

—— **Occupation of Two Houses, where no Claim for Houses in Succession.**]—See *Turish* v. *Henderson*, col. 50 ; *Hurcum* v. *West Ham Town Clerk*, col. 93 ; *Foskett* v. *Kaufman*, col. 94 ; and *Bartlett* v. *Gibbs*, col. 97.

Joint Occupiers.]—Two claimants claimed in respect of a "house and land joint," and occupied

a dwelling-house which they rented above the value of 20*l.* a year, but with no land attached to it except a garden. On behalf of the claimants it was contended that the case came within the definition of a 10*l.* qualification under the Reform Act, 1832, s. 29, a house being a tenement. It was objected that one of the claimants' names was already on the overseers' occupiers' list for the same house, and that two persons could not have a joint occupation of a dwelling-house under the Representation of the People Act, 1867, s. 3:—Held, that the objections failed, and that both claimants were entitled to be registered in respect of the qualification. *Druitt* v. *Gossling*, Fox, 123; 58 L. J., Q. B. 109; 60 L. T. 325.

A., being lessee of a mill for a term of ninety-nine years, at 350*l.* rent, terminable on lives, took B., C. and D. into partnership in the business which he carried on at the mill; they lived in the house with him, and each paid one-fourth of the expenses, including rent, and received one-fourth of the profits; all four were rated for the premises:—Held, that B., C. and D. had each a right to a borough vote, and had properly claimed to have their names inserted on the list of 10*l.* occupiers as for one undivided fourth part of the house and mill. *Rogers* v. *Harvey*, K. & G. 169; 5 C. B. (N.S.) 3; 28 L. J., C. P. 17; 5 Jur. (N.S.) 199; 7 W. R. 17.

A person, otherwise qualified as an inhabitant occupier, as owner or tenant, of a dwelling-house in a borough, under 30 & 31 Vict. c. 102, s. 3, does not become a joint occupier within the proviso, and so lose his qualification, by letting to a lodger the exclusive use of a bedroom and the joint use of a sitting-room. *Brewer* v. *M'Gowen*, 1 Hopw. & C. 275; 39 L. J., C. P. 30; L. R. 5 C. P. 259; 21 L. T. 462; 18 W. R. 167.

G. and W. jointly rented a sitting-room, and each of them had a bedroom in the same house. The three rooms were of the requisite value:—Held, that the claimants were entitled to the franchise. *Gilliland's Case*, 28 L. R., Ir. 289—C. A.

The four canons of Bangor Cathedral by arrangement between themselves, resided each for three months in the year in the canonry, a residence set apart for their joint occupation. The value of the premises being admitted to be sufficient:—Held, that subject to the necessity of residence in or within seven miles of the borough during six months immediately preceding July 15th, this constituted an occupation by each during the qualifying period for the purpose of the franchise. *Jones* v. *Pritchard*, Fox, 259.

Four canons of a cathedral chapter entered into an arrangement that they should in every year occupy the canonry house in turn for three months at a time:—Held, that there had been no occupation for the qualifying period. *Rowland* v. *Pritchard*, Fox, 310; 62 L. J., Q. B. 319; 5 R. 311; 68 L. T. 586; 57 J. P. 759.

Prior to March, 1892, two sons lived with their father in premises of which he was the tenant, and which it became desirable to take down and rebuild. In March, 1892, it was arranged that the sons should become the joint tenants of other premises, and be jointly rated in respect of the same, in order to qualify themselves for the franchise. As soon as the arrangement was completed the father and the two sons moved into the premises of which the sons thus became the tenants, and resided there till August, 1893, when all three moved back into the premises of which the father was tenant, and which had been rebuilt in the interval. The sons paid the rent and poor rates of the premises of which they were the tenants, but the father was surety for the rent and paid all the household expenses of the establishment, including the maintenance of his two sons:—Held, that the sons were entitled to the franchise as joint rated occupiers of the premises of which they were tenants. *Mooney* v. *Chambers*, [1894] 2 Ir. R. 374—C. A.

Joint Tenancy — Separate Occupation.]—A claim to be placed on the register of parliamentary voters may be sustained by each of two persons who are joint tenants of an entire holding consisting of separately rated dwelling-houses and land, pay a single rent, and accept receipts in their joint names, but live each in one of the dwelling-houses separately, and work portions of the land severally, and the remainder jointly. *Torish* v. *Clark*, 18 L. R., Ir. 289—C. A.

Service Franchise—Occupation of Bedroom by virtue of Office or Employment—Tenant of Dwelling-house.]—H., a servant, occupied exclusively, by virtue of his service, a furnished bedroom in a dwelling-house belonging to his master, and had in common with another young man the use of a sitting-room in the same house. All the furniture belonged to the master, who did not reside in the house, but had free access at all times to every portion of it except H.'s bedroom, and had access to it whenever he asked for the key, which he had a right to demand whenever he chose; the bedrooms were made up by a charwoman who was paid by the master and did not reside on the premises:—Held, that H. was entitled to the franchise. *Hasson* v. *Chambers*, 18 L. R., Ir. 68—C. A.

R. was foreman of a shop and place of business in which a number of young men were employed. By virtue of that employment he and they lived in a separate house in which he had a bedroom that he occupied exclusively. He and the other employés took their meals in a common sitting-room, and the only resident in the house was a servant paid by the employer to attend to the occupants; R. had a latchkey for the hall door and had also charge of the other keys, and it was his duty to see that the doors were locked and the occupants within doors every night:—Held, that R. was entitled to the franchise. *Lynch* v. *Buchanan*, 18 L. R., Ir. 68—C. A.

The claimant, a shop assistant, had, during the qualifying period, by virtue of his employment, the sole use of a bedroom in a dwelling-house belonging to his employers, in which were a number of other bedrooms occupied by other persons in the same employment. The claimant and all the other persons residing in the house had their meals in a common room, of which they each had the joint use, in addition to the separate use of their respective bedrooms. The employers exercised a general control over the house, and enforced such control by means of a resident caretaker, but not otherwise:—Held, that each assistant who had the sole use of a bedroom under the above circumstances had obtained the service franchise by virtue of s. 3 of the Representation of the People Act, 1884. *Stribling* v. *Halse*, Colt. 409; 55 L. J., Q. B. 15; 16 Q. B. D. 246; 54 L. T. 268; 49 J. P. 727.

Each teacher in a college conducted by a religious community had, as such, during the

qualifying period, the exclusive use of a separate bedroom in the college by virtue of his office or employment as a teacher in the college, which was managed by a resident principal, under the supreme control of the superior-general of the community, who himself lived in Paris. The revising barrister having found that each bedroom so occupied constituted a "dwelling-house" for the purpose of the franchise, and was not inhabited by the person by whom the teachers were employed, or under whom they served:—Held, that the teachers were entitled to the franchise. *Stribling* v. *Halse* (16 Q. B. D. 246) followed. *Alexander* v. *Burke*, 22 L. R., Ir. 443—C. A.

—— **Cubicle.**]—A cubicle in a room, which structurally is not completely separate from the rest of the room, is not part of a house "separately occupied as a dwelling" within the meaning of s. 5 of the Parliamentary and Municipal Registration Act, 1878, so as to entitle the occupier to a vote. *Stribling* v. *Halse* (16 Q. B. D. 246) discussed. *Barnett* v. *Hickmott*, Fox, 412; 64 L. J., Q. B. 407; [1895] 1 Q. B. 691; 15 R. 256; 72 L. T. 236; 43 W. R. 284; 59 J. P. 230.

The appellant, a police constable, had, during the whole of the qualifying period, the exclusive occupation, by virtue of his service, of a cubicle which, with others occupied by other constables, was contained in a dormitory at a police-station. The cubicle was separated from the rest of the dormitory by a partition seven feet high, but there was a space of two or three feet between the top of the partition and the ceiling of the room. The constables occupying the several cubicles shared the air and light of the whole dormitory in common. The deputy chief-constable, who resided in a house adjoining the police-station, had absolute control over the use by the constables of their cubicles, and might impose conditions as to their use inconsistent with the substantial rights of a householder in his own house. No regulations had, however, been made as to, nor had the constables been in fact interfered with in, their use of the cubicles, and the appellant had, during the whole of the qualifying period, the key of his cubicle, and closed and locked it at pleasure:—Held (Rigby, L.J., dissenting), that the cubicle was not "part of a house separately occupied as a dwelling," within the meaning of s. 5 of the Parliamentary and Municipal Registration Act, 1878, and that the appellant was not entitled to the franchise in respect of it. *Barnett* v. *Hickmott*, supra, approved. *Clutterbuck* v. *Taylor*, 1 Smith, 59; 65 L. J., Q. B. 314; [1896] 1 Q. B. 395; 74 L. T. 177; 44 W. R. 531; 60 J. P. 278—C. A.

—— **Employer, who is—What amounts to Habitation by.**]—The industrial trainer of a workhouse occupied two rooms in the workhouse building. The master of the workhouse resided in other rooms, and another room was set apart for the use of the guardians who transacted business therein. It was part of the master's duty to lock the workhouse gates at a certain hour, and to report to the guardians if the industrial trainer was out after that time:—Held, that the master of the workhouse was not a person under whom the trainer served, within the meaning of 48 Vict. c. 3, s. 3; that the guardians could not be said to reside in the workhouse; and that the trainer was entitled to the franchise. *Adams* v. *Ford* or *Fox*, Colt. 403; 55 L. J., Q. B. 13; 16 Q. B. D. 239; 53 L. T. 666; 34 W. R. 64; 49 J. P. 711. See *Holly* v. *Burke*, and *Crossan* v. *Chambers*, col. 19.

—— **Soldier occupying Quarters in Barracks.**]—A non-commissioned officer in the service of the Crown claimed the parliamentary franchise as the inhabitant occupier of a dwelling-house in respect of rooms occupied by him as his quarters in barracks. He had inhabited the rooms, which consisted of a bedroom and sitting-room, during the qualifying period, subject, however, to certain regulations and powers of superior officers incident to military service, such, for instance, as the power of entry by the commanding officer at any time, and by other superior officers for the purpose of preserving order, and by certain officers at stated times for the purpose of inspection of the rooms, the power of the commanding officer to forbid any person to enter or leave the barracks at any time, and the obligation to be in his quarters at a stated hour every evening. The Crown supplied certain necessary articles of furniture for the rooms, the rest of the furniture being the claimant's own. The rooms formed part of one of the blocks of buildings situate within the barrack enclosure the remaining rooms in the block being occupied by other non-commissioned officers, some of whom were superior in rank to the claimant, and the senior of whom was bound to preserve order in the block, and would be entitled to enter the claimant's rooms for that purpose. The colonel commanding lived in a house situate within the walls of the barracks:—Held, that the claimant was entitled to the franchise under the 3rd section of the Representation of the People Act, 1884, on the ground that he had inhabited a dwelling-house within the meaning of that section, and that no person under whom he served had inhabited such dwelling-house. *Atkinson* v. *Collard*, Colt. 375; 55 L. J., Q. B. 18; 16 Q. B. D. 254; 53 L. T. 670; 34 W. R. 75; 50 J. P. 23.

Owner Rated instead of Occupier.]—See *Barton* v. *Birmingham Town Clerk*, col. 27.

Break in Occupation.]—*See cases at* A. 1, *a.* vii. (col. 34).

Parish, Alteration of—Order under Divided Parishes Act, Effect of.]—A right to vote in respect of a qualification within an isolated part of a parish at parliamentary elections for a borough comprising that part is not affected by an order made under the Divided Parishes and Poor Law Amendment Act (39 & 40 Vict. c. 61), amalgamating the part with a parish beyond the limits of such borough. *Foster* v. *Medwin*, Colt. 118; 49 L. J., C. P. 297; 5 C. P. D. 87; 42 L. T. 254; 28 W. R. 660; 44 J. P. 315.

ii. *Premises.*

See also A. 1, *b.* v. (col. 50), *and* B. 1, *a.* (col. 152).

"House."]—The word "house," as used in 2 Will. 4, c. 45, s. 27, is not restricted in meaning to a dwelling-house. *Daniel* v. *Coulsting*, 7 Man. & G. 122; 8 Scott (N.R.) 949; 1 Lutw. Reg. Cas. 230; Barr. & Arn. 380; 14 L. J., C. P. 70; 9 Jur. 258.

A building consisting of apartments once used as kitchens, shop, sitting-rooms, and bedrooms, and which possessed the usual conveniences to fit it for a dwelling-house, although the voter occupied the greater portion for warehousing goods

and as a sale-room, and let off another portion as workshops, is properly stated in the qualification in the list of voters as a house. *Ib.*

A building, the lower part of which is used as a cowhouse and a stable, and the upper part, consisting of a chamber, used as a dwelling-place, is properly described as a house. *Munn* v. *Denton*, 7 Man. & G. 66; 8 Scott (N.R.) 794; 1 Lutw. Reg. Cas. 178; Barr. & Arn. 324; 14 L. J., C. P. 43; 8 Jur. 1102.

The occupation of part of a house may confer a right to vote for a city or borough, under 2 Will. 4, c. 45, s. 27 (repealed), if there is an independent occupation and actual severance from the rest. *Henrette* v. *Booth*, 15 C. B. (N.S.) 500; 1 H. & P. 23; 33 L. J., C. P. 61; 9 Jur. (N.S.) 1293; 9 L. T. 392; 12 W. R. 173.

A person occupied, as tenant, the whole of the upper floor of a house. The floor consisted of an inner and outer room opening into each other, and were together of the requisite value to confer a vote. He resided in one room, and used the other as a shop. The outer room communicated with the landing on the staircase by an outer door, over which he had absolute control. The other floors of the house were occupied by other tenants in the same manner, and all the tenants had access to their several holdings from the street, through a door which was generally open in the day, but was allowed to swing to at night:—Held, that he occupied a house. *Ib.*

An occupant of a first floor, being part of a house, but which part is neither shop, warehouse, nor counting-house, nor building analogous to those mentioned in s. 27 of the 2 Will. 4, c. 45, there being no actual severance of it from the rest of the house, is not entitled to vote for a city or a borough. *Wilson* v. *Roberts*, 11 C. B. (N.S.) 50; K. & G. 430; 31 L. J., C. P. 78; 8 Jur. (N.S.) 719; 5 L. T. 838; 10 W. R. 429, n.

Part of a house used for residence does not confer a qualification for a borough vote as being included under the words "house, warehouse, counting-house, shop, or other building" within 2 Will. 4, c. 45, s. 27. *Cook* v. *Humber*, 11 C. B. (N.S.) 733; K. & G. 413; 31 L. J., C. P. 73; 8 Jur. (N.S.) 698; 5 L. T. 838; 10 W. R. 427.

In order that part of a house may be a house within the meaning of that enactment there must be an actual severance of the part from the rest of the house. *Ib.*

An occupier of part of a house may be qualified by reason of his occupation, although he may not have a key of the outer door, or may not have uncontrolled access to the tenement, or be free from any servitude or rights of entry reserved by the landlord, which affect only the value of the tenement, if from other circumstances it appears that the party claiming the qualification is substantially tenant of a separate dwelling, and not merely of apartments in the house of another; the true question being, not what is the nature of the occupation, but what is the nature of that which is occupied. *Ib.*

Where A. rented and resided in one side of a house, the side consisting of rooms on the ground-floor, having doors into the house passage or hall, which was shut off from the street by an outer door, kept closed night and day; and also of rooms on the upper floor, approached by a staircase used exclusively by him, between which and the room on the other side of the passage (occupied by his landlord, the owner of the whole house, who resided on the premises with his family), there was no communication—A. had a lock and key to each of his rooms, and both he and his landlord had keys of the street-door:—Held, that A.'s residence was not a house, but part of a house, without any actual severance from the rest, and that he was therefore not qualified, in respect of the subject of occupation, to be registered as a borough voter. *Ib.*

The tenant for business purposes of a separate room forming part of a set of chambers in the Temple, is not entitled to be registered as the occupier of a tenement, within 2 Will. 4, c. 45, s. 27 (repealed). *Cuthbertson* v. *Butterworth*, 1 Hopw. & C. 188; 38 L. J., C. P. 98; L. R. 4 C. P. 523; 21 L. T. 140; 17 W. R. 465.

See *Edwards* v. *Lang*, *Brown's Case*, col. 20; *Cuthbertson* v. *Hains*, col. 25; and *Friend* v. *Towers*, col. 96.

"Dwelling-house."]—When a house of ordinary construction, free from structural severance, is wholly let out to several tenants, who are the exclusively rated tenants, either of one room or of two rooms communicating by the common staircase, with the joint user of the passages and staircases, and equal control over the outer door, fastened or not, and with or without the joint user of conveniences outside such house:—Held, per Bovill, C.J., and Keating, J., that the tenements of such tenants are, and per Willes, J., and Brett, J., that they are not dwelling-houses within the 3rd section of the Representation of the People Act, 1867, 30 & 31 Vict. c. 102. *Ellis* v. *Burch*, *Thomson* v. *Ward*, 1 Hopw. & C. 530, 537; 40 L. J., C. P. 169; L. R. 6 C. P. 327; 24 L. T. 679.

The premises in respect of the occupation of which as a dwelling-house a borough franchise was claimed, consisted of two rooms, which were not structurally separated from the rest of the house of which they formed part, and were connected by a staircase and passages used by the voter in common with the tenants of the other rooms of the house, which were let out in a similar manner, the landlord not living in the house, and the outer door being under the sole control of the several tenants. These two rooms and the voter in respect of them were rated separately to the relief of the poor in all the rates made during the qualifying year, but until the first rate made after the commencement of the qualifying year, these rooms had not been separately rated from the rest of the house, and there was therefore a part of the qualifying year during which the rooms were not separately rated. The revising barrister found as a fact that the two rooms were occupied by the voter as a separate dwelling, and were separately rated to the relief of the poor:—Held, by Keating, J., and Denman, J., that the rooms constituted a "dwelling-house" within the 30 & 31 Vict. c. 102, s. 3; and by Brett, J., and Honyman, J., that they were not "a dwelling-house" within the meaning of that section. *Boon* v. *Howard*, 2 Hopw. & C. 208; 43 L. J., C. P. 115; L. R. 9 C. P. 277; 30 L. T. 382; 22 W. R. 535.

See *Friend* v. *Towers*, col. 96; *Edwards* v. *Lang*, *Brown's Case*, col. 20; *Cuthbertson* v. *Hains*, col. 25; and *Owens* v. *Hanrahan*, col. 30.

Rooms in House, whether Lodgings or Dwelling-house.]—See *Hogan* v. *Sterrett*, and *Campbell* v. *Chambers*, col. 20. *And see cases*, ante, A. 1, *a*. i. (col. 3).

"Counting-house."]—To entitle an occupier to a vote in respect of a counting-house under

2 Will. 4, c. 45, s. 27 (repealed), it need not consist of an entire building, or be structurally severed from the rest of the house of which it forms a part. *Piercy* v. *Maclean*, 1 Hopw. & C. 371; 39 L. J., C. P. 115; L. R. 5 C. P. 252; 22 L. T. 213; 18 W. R. 732.

Therefore a room let to and occupied as a counting-house by a tenant who has a key to the outer door of the house, and who has also, and to the exclusion of the landlord, the key of the door which separates such room from the landing of the staircase, which gives access to that and the other rooms of the house, is sufficiently constituted a counting-house. *Ib.*

See *Downing* v. *Lockett*, col. 5; and *Barton* v. *Birmingham Town Clerk*, col. 27.

Buildings.]—A cowhouse or a stable, substantially built of stone, the roof of which is tiled, having a door with a lock and key, and being suitable for the purpose for which it is used, and also conveniently placed for the occupation of the claimant's land, is a building, within the meaning of that word in 2 Will. 4, c. 45, s. 27. *Whitmore* v. *Wenlock Town Clerk*, 1 Lutw. Reg. Cas. 10; 7 Scott (N.R.) 489; 5 Man. & G. 9; 13 L. J., C. P. 55; 7 Jur. 1064.

A room in a factory, being a distinct or a separate portion thereof, of which the tenant has the exclusive use, and also the key of the door, is a building. *Wright* v. *Stockport Town Clerk*, 1 Lutw. Reg. Cas. 32; 5 Man. & G. 33; 7 Scott (N.R.) 561; Barr. & Arn. 39; 13 L. J., C. P. 50; 7 Jur. 1112.

A shed, described as standing against a wooden paling, but not fastened thereto; six posts put into the ground support a tarpaulin which forms the roof; one of the sides is boarded up with boards nailed to the posts: the shed is used to put barrows, posts, &c., into, and wharfage is paid for the use of it—is a warehouse or other building. *Watson* v. *Cotton*, 5 C. B. 51; 2 Lutw. Reg. Cas. 53; 17 L. J., C. P. 68; 11 Jur. 1106.

A claimant occupied a farm within a borough of the clear annual value of 10*l.* At the time of the demise of the farm there was no building on the land. An electioneering agent, having no interest in the land, caused a shed, made of boards, nailed to posts let into the ground, to be erected on the land, and the claimant occupied the shed, in which he kept agricultural implements:—Held, that the shed was not a building and that the claimant's occupation was not in the capacity of tenant. *Powell* v. *Boraston*, 18 C. B. (N.S.) 175; 1 H. & P. 179; 34 L. J., C. P. 73; 11 Jur. (N.S.) 160; 11 L. T. 734; 13 W. R. 465.

A claimant was a market gardener, and occupied a piece of land in a borough. At the time of the demise to the claimant there was no building on the land, but the claimant afterwards erected on the land at his own expense, a wooden structure, supported by wooden posts let into the ground, having boarded sides and a thatched roof. This shed was used by the claimant for storing potatoes, and other things connected with his business:—Held, that this structure was a building. *Powell* v. *Farmer*, 18 C. B. (N.S.) 168; 1 H. & P. 172; 34 L. J., C. P. 71; 11 Jur. (N.S.) 162; 11 L. T. 736; 13 W. R. 467. See *Norrish* v. *Harris*, infra.

Joinder of Buildings so as to Constitute one entire Qualification.]—A party occupied a house and shop separated from each other by a yard inclosed all round, save but for an open passage, communicating with the street:—Held, that such house and shop were not without the same curtilage, and therefore could not be joined together so as to constitute one entire qualification within 2 Will. 4, c. 45, s. 27 (repealed). *Powell* v. *Price* or *Pace*, 1 Lutw. Reg. Cas. 586; 4 C. B. 105; 16 L. J., C. P. 139; 11 Jur. 475.

A. occupied a stable and a coach-house, which adjoined one another, and were under the same roof, the stable standing at the back of the coach-house, and there being two grated windows looking from one into the other, but no internal communication by which a person could pass from one to the other. The door of the coach-house was under a covered gateway, leading from the street into a yard, in which yard was the stable door. Neither the stable nor the coach-house, separately, was of the yearly value of 10*l.*, but the two together were:—Held, that they formed but one building within 2 Will. 4, c. 45, s. 27, in respect of his occupation of which A. was entitled to be registered as a voter. *Joliffe* v. *Rice*, 6 C. B. 1; 2 Lutw. Reg. Cas. 90; 18 L. J., C. P. 25; 13 Jur. 39.

Certain premises consisted of a two-stalled stable built of brick, to which was annexed another brick building, of lower elevation; to which again was annexed an irregular wooden building. Each of the buildings had an opening into a common yard, but there was no internal communication between them. All three buildings were occupied under one landlord, and used by the claimant for the purpose of his trade:—Held, that the three buildings constituted but one building. *Pownall* v. *Dawson*, 11 C. B. 9; 2 Lutw. Reg. Cas. 177; 21 L. J., C. P. 14; 16 Jur. 549.

Two distinct buildings cannot be joined together, in order to constitute a right to be registered as a borough or a city voter. *Dewhurst* v. *Fielden* or *Fielder*, 7 Man. & G. 182; 8 Scott (N.R.) 1013; 1 Lutw. Reg. Cas. 274; 14 L. J., C. P. 126; 9 Jur. 376.

Joinder of Buildings and Land.]—A. occupied a house and a garden within a borough, taken by him of the same landlord at the same time, and at one entire rent. The house alone was not of the annual value of 10*l.*, but the house and garden together were of that value; but they were entirely separated by waste land and a row of buildings:—Held, that A. had a good qualification for a borough voter within 2 Will. 4, c. 45, s. 27, for in the words "land occupied therewith," "therewith" referred to time and not to locality. *Collins* v. *Tewkesbury Town Clerk*, 2 Lutw. Reg. Cas. 219; 22 L. J., C. P. 38; 17 Jur. 52.

The building referred to in 2 Will. 4, c. 45, s. 27, must be a building of some permanence, some utility, and of real value; but when held with land, although the value of the holding may be trifling, it will be sufficient to qualify if it adds to the bonâ fide value of the whole. *Norrish* v. *Harris*, 1 H. & R. 358; 1 H. & P. 305; 35 L. J., C. P. 101; L. R. 1 C. P. 155; 12 Jur. (N.S.) 627; 13 L. T. 762; 14 W. R. 479.

A substantial building used by a farmer for agricultural purposes connected with his own farm, is a sufficient building; and it is not necessary that it should be used for a strictly commercial purpose. *Ib.*

When the amount required for a borough qualification is made up partly by building and partly by land, there is nothing to define the

proportion which the building must bear to the value of the land; and it is therefore sufficient to give such qualification, so far as the value of the building is concerned, if the building bonâ fide adds to the land's annual value to be let, though in a small degree. *Ib.*

So a stone building consisting of four walls and a roof standing on land occupied by a farmer at a yearly rent of more than 10*l.*, and used by him for the purpose of storing guano in, is a building. *Ib.*

The building had three stone walls and a roof, and was open in front. The land was used for grazing the voter's cattle, and the building was useful as affording shade and shelter to them, and the building was worth about 5*s.* a year to the tenant:—Held, a building. *Ib.*

Premises Destroyed by Fire.]—A party rated as occupier of houses and yard, does not lose his right to appear on the list of voters by reason of the houses being destroyed by fire, he still continuing to hold the site on which they stood. *Whitley* v. *M'Cleane*. 14 L. T. 899.

Rooms in College.] — The 2 Will. 4, c. 45, s. 78 (repealed), which forbids any person to vote for the boroughs of Oxford or Cambridge in respect of the occupation of chambers or premises in any college, applies to the new franchises created by 30 & 31 Vict. c. 102. *Barnes* v. *Peters*, 1 Hopw. & C. 251; 38 L. J., C. P. 266; L. R. 4 C. P. 539; 17 W. R. 970. *And see same case*, col. 21.

Service Franchise — Whether Employer and Servant in same Dwelling-house — Bedroom over Coach-house.]—Where W.'s gardener, during the qualifying period, exclusively occupied a bedroom over W.'s coach-house, in which bedroom he took his meals, which were prepared by W.'s cook, and sent to him from W.'s house, the coach-house containing W.'s carriages, and being situate in a detached walled yard, separated from his house by an avenue, but included in the grounds surrounding it:— Held, that the gardener was entitled to the franchise. *Holly* v. *Burke*, 22 L. R., Ir. 463—C. A.

—— **Room over Stable.**]—C. as his employer's coachman occupied a room over the stable and was treated as a domestic servant. The stable was in the employer's yard and was a part of the curtilage of the dwelling-house—the house and yard being all included under the separate number in the poor-rate book; there was a separate gateway and gate from the yard into a back lane, and also a wicket leading from the yard into the lane. The gate and wicket formed the only access to the yard except by going through the employer's house, and were under her control. Another of the servants cleared out C.'s rooms:—Held, that C. was not entitled to the franchise. *Crossan* v. *Chambers*, 18 L. R., Ir. 68.

See *Hasson* v. *Chambers*, and *Stribling* v. *Halse*, col. 12.

iii. *Lodgers.*

Part of House Let by Resident Landlord, Lodgings, not Separate Dwelling-house.]—The fact that the landlord of a house let out in separate tenements lives in the house is a vital element to be considered in determining whether or not the occupiers of such tenements are lodgers, or qualified as inhabitant householders under the Representation of the People Act, 1884, and, as an all but universal rule, will prevent their successfully claiming the franchise in respect of such occupation otherwise than as lodger. The decision of such cases depends upon the effect of evidence given to establish a matter of fact; but it is a question of law whether any given matter of fact is conclusive upon the law, or whether there is any evidence to sustain any given findings of fact. In order to constitute lodgings which will qualify for the franchise, the part of the house occupied by the claimant must be part of one "dwelling-house"; and in the case of an inhabitant occupier of part of a house, claiming as such, it must be shewn that the part which he occupies is in itself one separate "dwelling-house," and not merely part of one. *Hogan* v. *Sterrett*, 20 L. R., Ir. 344—C. A.

Where the claimant, his landlord, and a third person were each occupiers of a separate flat of the house rented by the landlord, and all three used the stairs, hall-door, and yard in common, the revising barrister having decided that the claimant was not an inhabitant occupier but a lodger:—Held, that on the facts, the onus lay on the claimant of shewing that he was an inhabitant occupier and not a lodger, and that he had failed to do so. Held also, that the manner in which other houses in the street were occupied was not material to the question, as each claimant's case must be decided upon its own facts. *Campbell* v. *Chambers*, 20 L. R., Ir. 355—C. A. *See Bradley* v. *Baylis*, col. 3; *Hill's Case*, col. 4; and *Pitts* v. *Smedley*, col. 5.

Control of Landlord over House.]—A person proved that he had occupied, for twelve months before the 20th of July, lodgings in 39, Tighe Street, of the clear value of over 10*l.*, if let unfurnished; that the entirety of the house was let out in tenements; that the landlord did not reside on the premises, and had not retained any portion of them in his own hands; that no caretaker, or any representative of the landlord, resided in the house; and that the landlord had no key of the outer door, or any means, independently of the will of the tenants, of admitting himself into the house if the outer door was closed. There was an ashpit at the rear of the house common to all the tenants, which was cleaned periodically by a person employed and paid by the landlord for the purpose. The revising barrister decided, that in order to constitute the claimant a lodger, the landlord should have retained a control over the outer door of the house, entitling him to enter therein as of right, and independently of the consent of the tenants, and rejected the claim:—Held (dissentiente, Fitzgerald, B.), that the decision of the barrister was wrong, and that the claimant was entitled to be registered as a lodger. *Edwards* v. *Lang*, *Brown's Case*, Ir. R. 3 C. L. 394.

Per George and O'Brien, JJ.—The fact that a claimant may be liable to be rated as occupier for the premises in respect of which he claims as a lodger will not disentitle him to the lodger franchise, if he is not actually rated. *Ib.*

Per O'Hagan and O'Brien, JJ.—That the case shewed no such severance as to render the premises in a legal sense separate houses. *Ib.*

Per Fitzgerald, B.—That the opinion of the revising barrister was right, and that to prevent the premises constituting in a legal sense distinct dwelling-houses, the landlord should retain such

control over the house as would give him the constructive occupation of it as a dwelling-house. *Ib.*

Occupier of Part of House where Landlord no Control, not a Lodger.] — See *Anchetill* v. *Baylis*, col. 4; and *Score* v. *Huggett*, col. 5.

What Sufficient Residence.] — A person occupied lodgings in a borough in London, separately and as sole tenant, for the requisite twelve months. He had also a house in Dorsetshire, where he kept an establishment of servants all the year round. When in London, he resided at the lodgings, and had done so at intervals for two months out of the twelve:—Held, a sufficient residence to entitle him to vote as lodger for the borough. *Bond* v. *St. George, Hanover Square, Overseers*, 1 Hopw. & C. 427; 40 L. J., C. P. 47; L. R. 6 C. P. 312; 23 L. T. 494; 19 W. R. 101.

A person occupying a bedroom of sufficient value in a hotel by the year is not disentitled to the franchise, because he allows the landlord to let the room when he is away in the vacation, if he can return at any time. *Kelly* v. *Chambers, M'Connell's Case*, 28 L. R., Ir. 292.

The circumstance that the voter, for the convenience of his business, slept at a different place from the lodgings occupied by his wife and family during the twelve months immediately preceding the last day of July in any year, does not prevent his having a sufficient residence in such lodgings to qualify him for the lodger franchise, if he was not deprived by contract or otherwise of the power of returning to such lodgings when he chose to do so. *Taylor* v. *St. Mary Abbotts, Kensington, Overseers*, 1 Hopw. & C. 421; 40 L. J., C. P. 45; L. R. 6 C. P. 309; 23 L. T. 493; 19 W. R. 100.

Rooms in College.]—A set of rooms in a college at Oxford or Cambridge is a dwelling-house within 30 & 31 Vict. c. 102, and the occupier is therefore not entitled to vote for the borough as a lodger in respect of such rooms. *Barnes* v. *Peters*, 1 Hopw. & C. 251; 38 L. J., C. P. 266; L. R. 4 C. P. 539; 17 W. R. 970.

The occupier of a set of rooms in Trinity College, Dublin, is entitled to vote as a lodger in respect of them (Fitzgerald, J., diss.). *Barnes* v. *Peters* (supra) not followed. *Byrne* v. *M'Donogh*, Ir. R. 1 Reg. Ap. 175.

Separate Bedroom and Share in Sitting-room.]—To establish the lodger franchise, a claimant must occupy separately and as sole tenant. *Harris* v. *O'Connor*, Ir. R. 5 C. L. 64.

But where the claimant and his brother took a furnished sitting-room and two bedrooms at an annual rent of 45*l.*, occupying the sitting-room in common, and each his own bedroom separately, he was entitled to the franchise, although each bedroom was not of the clear letting value of 10*l.* *Ib.* But see *Gallagher* v. *Hay*, infra.

If a lodger has a separate bedroom of sufficient value, he will not be disqualified by reason only of being entitled to the joint use of a sitting-room. *Kelly* v. *Chambers, Gilliland's Case*, 28 L. R., Ir. 289—C. A.

A lodger with the exclusive use of one room under the annual value of 10*l.* cannot qualify himself for the franchise by adding thereto any portion of the annual value of another room he occupies jointly with other lodgers in the same house. *Gallagher* v. *Hay*, 32 L. R., Ir. 166—C. A.

Permitting other Persons to use Room.]—A claimant used one of the rooms mentioned in his claim as a workroom, and four men, not in his employment, worked at their trade in the same room. They occupied, at night, two beds in that room, and each paid to the claimant 2*s.* 6*d.* a week for permission to work and sleep there, but the claimant did not let the room to them. The other room was not of itself of sufficient value to confer the franchise on the claimant:—Held (O'Brien, J., and Fitzgerald, B., dissentientibus), that the claimant was entitled to the franchise. *Edwards* v. *Lang*, *Hackett's Case* (I.), Ir. R. 3 C. L. 459.

Shop and Parlour.]—A claimant occupied a shop and a parlour, and resided there as sole and separate tenant. The shop opened on the street, and communicated with the parlour, which communicated internally with a hall and staircase leading through the house. The premises, in respect of which the claim was made, were not exclusively of the shop, of the value of 10*l.* unfurnished:—Held, that he was entitled to the lodger franchise. *Lang* v. *Edwards*, Ir. R. 3 C. L. 155.

Room in Employer's House.]—A clerk who separately occupies a furnished bedroom of sufficient value, in the house of his employer, but is not bound to do so, and could discharge his duties equally well if he resided elsewhere, is entitled to be registered as a lodger, although, if he had to reside out of the house, he would receive an increase of salary as an equivalent for the loss of the bedroom, and would be obliged to give up possession of it at once, if he ceased to do business for, or was dismissed by, his employers. *Parker* v. *Campion*, Ir. R. 5 C. L. 75.

An assistant occupying a room in the house of his employer under an agreement to pay rent, and not as part of his duty as servant, is entitled to be registered as a lodger. *Bennett* v. *Evans*, Fox, 291; 5 R. 100; 68 L. T. 765.

Yearly Value.] — See *McCrea* v. *Buchanan*, col. 24.

Declaration accompanying Claim is Primâ facie Evidence.]—Sect. 23 of the Parliamentary and Municipal Registration Act, 1878, which enacts that in the case of a person claiming to vote as a lodger the declaration annexed to his notice of claim shall, for the purposes of revision, be primâ facie evidence of his qualification, is general, and applies to lodgers claiming for the first time under s. 4 of the Representation of the People Act, 1867, as well as to claims under s. 22 of the Parliamentary and Municipal Registration Act, 1878, by lodgers retaining the same lodgings in successive years. *Nuth* or *North* v. *Tamplin*, Colt. 249; 51 L. J., Q. B. 177; 8 Q. B. D. 247; 30 W. R. 346; 46 J. P. 692—C. A. Affirming 45 L. T. 652.

Claim must be as Lodger.]—A person qualified as a lodger, who has claimed as a householder, is not entitled to be registered as a lodger. *Cullen* v. *Patterson*, 18 L. R., Ir. 274.

Fresh Claim each Year Essential.]—The claim to be registered is an essential part of the qualification for the lodger franchise. The voter was on the old lodgers' list of voters for a borough for 1885. He made no claim to be registered for 1886; but the overseers, instead of causing the old lodgers' list for that year to be printed de novo from the claims served upon them, caused it to be printed from a copy of the old lodgers' list in the current register, from which they intended to erase the names in respect of which no claims had been received. They had, however, omitted to erase the name of the voter, and failed to discover the mistake before the list had been signed and published:—Held, that the voter was not entitled to have his name retained in the list for 1886. *Hermant* v. *Halse*, Fox, 12; 56 L. J., Q. B. 44; 18 Q. B. D. 412; 56 L. T. 337; 35 W. R. 503; 51 J. P. 135.

Old Lodger Claim — Omission of Part of Declaration — Mistake — Power to Amend.]—Where an old lodger, whose name is on the existing register, sends in, within the proper time for old lodger claims, a claim in respect of the same lodgings, but by mistake omits to state in the declaration of the claim that he is on the register of electors in respect of the same lodgings and desires to have his name inserted on the old lodger list, the revising barrister has power to correct the mistake by inserting the omitted statement. *Francis* v. *Metcalfe*, 1 Smith, 90; 75 L. T. 380; 45 W. R. 174; 61 J. P. 355.

—— Notice of Claim dated before Expiration of Qualifying Period.]—A person entered in respect of lodgings on a register of voters for the time being in force, and desirous of being entered on the next register in respect of the same lodgings, sent to the overseers within the time prescribed for that purpose a notice of his claim in Form H, No. 2, schedule 3, of the Registration Act, 1885, in which the declaration and attestation of his residence during the qualifying period were both dated six days before its expiration, and the overseers entered his name on the old lodger list:—Held, that the notice of claim was bad, and that the claimant's name must be erased from the list. *Jones* v. *Kent*, Fox, 109; 58 L. J., Q. B. 106; 22 Q. B. D. 204; 60 L. T. 320; 37 W. R. 303.

When a notice of claim was itself dated, but the attestation clause was not dated, both dates being required by the form:—Held, that there was no power to amend. *Smith* v. *Chandler*, Fox, 129; 58 L. J., Q. B. 103; 22 Q. B. D. 208; 60 L. T. 327; 37 W. R. 351; 53 J. P. 199.

A lodger claim sent in without the express authority of the lodger is bad, although he subsequently ratifies it. *Jones* v. *Beveridge*, 20 L. R., Ir. 383.

Notice of Claim to be on Old Lodgers' List not sent in in time.]—See *Whitwell* v. *North Riding Clerk of the Peace*, col. 76.

Signature to Claim.] — See *Hanbidge* v. *Beveridge*, col. 75.

Attesting Signature to Declaration.] — See *Body* v. *Halse*, col. 75.

Alteration of Claim and Declaration without Claimant's Authority.]—See *Gallagher* v. *Hay*, col. 76.

Power to Amend Declaration.]—See *Ainsley* v. *Nicholson*, col. 99.

Amending Statement in Declaration of an Occupation partly as Joint and partly as Sole Tenant by striking out all mention of Joint Tenancy.]—See *Reg.* v. *McKellar, Baker, Ex parte*, col. 100.

Amending Old Lodger Claim by inserting Name of Borough.] — See *Treadgold* v. *Grantham Town Clerk*, col. 98.

Amending Claim by inserting Specific Amount of Rent.]—See *Clarke* v. *Twrish* and *Pickard* v. *Baylis*, col. 99.

Description of Witness in Claim.]—See *Campbell* v. *Chambers*, col. 76.

iv. *Yearly Value.*

The proper criterion of clear yearly value within 2 Will. 4, c. 45, s. 27 (repealed), is the fair annual rent, without making any deduction on account of repairs or insurance. *Colvill* v. *Wood, Chatham Overseers*, 2 C. B. 210; 1 Lutw. Reg. Cas. 483; 15 L. J., C. P. 160; 10 Jur. 336.

What is the clear yearly value of premises is a question of fact for the revising barrister, and with his decision the court will not interfere. *Coogan* v. *Luckett*, 1 Lutw. Reg. Cas. 447; 2 C. B. 182; 15 L. J., C. P. 159; 10 Jur. 141.

Of Lodgings.] — The clear yearly value or market value of lodgings is to be ascertained by what they will really bring—that is, as much as the lessor can obtain by open competition. *McCrea* v. *Buchanan*, 26 L. R., Ir. 129—C. A.

v. *Qualifying Period.*

Compulsory Absence during Qualifying Period —No Constructive Residence.]—*See* 54 Vict. c. 11, *and cross at* A. 1, *a.* vii. (col. 34).

Claim to be Rated after 31st July in Qualifying Year, too late.]—See *Medwin* v. *Streeter*, col. 29.

Not Necessary to have been of Full Age during whole of Qualifying Period.]—See *Powell* v. *Bradley*, col. 66.

vi. *Rates and Taxes.*

See also B. 1, *c.*, post.

Occupation, to give Franchise, must be a Rateable one.]—See *Bradley* v. *Baylis*, col. 3.

Though Ratable, not Necessarily Sufficient.]—See *Heath* v. *Haynes*, col. 6.

Occupier of Part of House not Separately Rented.]—To entitle the occupier of part of a house to the franchise, under ss. 3, 61, of 30 & 31 Vict. c. 102, he must, notwithstanding the proviso in s. 19 of 32 & 33 Vict. c. 41, be separately rated to the relief of the poor, unless the case is brought within s. 3 or s. 4 of the last-mentioned act. *Cross* v. *Alsop*, 1 Hopw. & C. 444; 40 L. J.,

C. P. 53; L. R. 6 C. P. 315; 23 L. T. 589; 19 W. R. 131.

The 32 & 23 Vict. c. 41, s. 19, applies only where there has been an agreement in writing under s. 3, between the overseers and the owner of the premises, to receive the rates from him, or where there has been an order by the vestry for rating the owner instead of the occupiers, under s. 4. *Ib.*

H. occupied, exclusively and as sole tenant, for his dwelling rooms not so structurally severed from the rest of the building as to constitute of themselves a house. *Having* claimed to be rated, his name was inserted by the overseers in the rate-book bracketed with those of the other occupiers in the house, no sum being separately assessed against H., but the rental, ratable value, and rate in the pound of the whole house only, appearing in the appropriate columns. No sum had been paid or tendered by him in respect of poor-rates:—Held, that, whether or not he was the occupier of a dwelling-house within the meaning of 30 & 31 Vict. c. 102, s. 61, he was not "separately rated to the relief of the poor" within that section, nor had he done enough to entitle him to be "deemed to have been rated" within 2 Will. 4, c. 45, s. 30. *Cuthbertson* v. *Hains*, 1 Hopw. & C. 184; 38 L. J., C. P. 109; L. R. 4 C. P. 525; 17 W. R. 465.

Ratable Occupier, not rated, claiming as Lodger.]—See *Edwards* v. *Lang*, *Brown's Case*, col. 20.

Tenant's Name inserted in Rate-book beneath Landlord's—No Separate Assessment.]—A tenant and occupier of a house being omitted from the rate by the overseer, sent in a claim to be rated in respect thereof. His name was thereupon inserted, as an interlineation, upon the rate, between the name of his landlord (who had always hitherto been rated in respect of the premises) and that of another party, who was rated for other premises, but without any bracket or other connecting mark, and without any particular premises or amount of rating being carried out in the several columns referring to such particulars:—Held, that he was duly rated in respect of the premises he occupied. *Pariente* v. *Luckett*, 1 Lutw. Reg. Cas. 441; 2 C. B. 177; 15 L. J., C. P. 83; 10 Jur. 115.

Where a person's name had been inserted in all the requisite rates under that of his landlord, but nothing was carried out against the person's name, nor was it connected with that of the landlord by bracket or otherwise in the rate-book:—Held, that such person was sufficiently rated. *Judson* v. *Luckett*, 1 Lutw. Reg. Cas. 490; 2 C. B. 197; 15 L. J., C. P. 163; 10 Jur. 252.

Landlord Compounding for Poor-rates—Tenant thereby paying less than other Occupiers.]—By an agreement between a landlord and tenant, the poor-rates were to be paid by the former and included in the rent. The landlord compounded with the overseers for the poor-rates, and accordingly the premises occupied by the tenant were assessed to a composition of 4*s.* 8*d.* in respect of a poor-rate, instead of to the amount of 6*s.* 8*d.*; as they would have been had they been assessed to an equal amount in the pound to that payable by other occupiers in respect of such rate. The landlord duly paid such 4*s.* 8*d.*, and he afterwards paid two shillings so as to make up the full rate of 6*s.* 8*d.*:—Held, that there had not been such a payment of an equal amount in the pound to that payable by other occupiers in respect of the poor-rate as is required by 30 & 31 Vict. c. 102, s. 3, sub-s. 4, to qualify the occupier to the borough occupation franchise. *Durant* v. *Withers*, 2 Hopw. & C. 202; L. R. 9 C. P. 257; 43 L. J., C. P. 113; 22 W. R. 156.

Composition for Rates—House Rated at same Amount after agreed Period.]—A. was owner and occupier of a house of the clear annual value of 10*l.*, and was also the owner of the two adjoining houses. Under the provisions of a local act he entered into a composition in respect of rates for all three houses for one year, and after the expiration of the year the overseers continued to assess the house occupied by him at the sum compounded for, viz. 3*l.* 5*s.*, being much less than the ratable value, which sum he had paid:—Held, that he was rated in respect of the house he occupied. *Powell* v. *Jones*, 18 C. B. (N.S.) 83; 1 H. & P. 165; 11 Jur. (N.S.) 17; 11 L. T. 600; 13 W. R. 273.

Occupier's Name not in Rate when Made.]—A. occupied a dwelling-house for the requisite year. There had been two rates for the parish in the course of the year, and in each rate the name of A.'s landlord only appeared. A. paid to his landlord an increased weekly rent in consideration of the landlord paying the rates, and had paid all the rent due. The owners had written A.'s name in both rates without any claim on his part, and at a time subsequent to the making of the second rate:—Held, that he could not be said to have been rated to all rates made within the year, and that he was not entitled to be on the list of voters. *Norris* v. *Hastings Town Clerk*, *Andrew's Case*, L. R. 4 C. P. 498.

Where Reduction of Rates improperly Allowed.]—It is a condition precedent to the allowance of a reduction from the rates under 32 & 33 Vict. c. 41, s. 4, sub-s. 2, that the owner should give notice in writing to the overseers that he is willing to be rated whether the tenements of which he is owner shall be occupied or not. Where such written notice had not been given, but the reduction had nevertheless been allowed:—Held, that the occupier was disqualified from being placed on the list of voters, as *not* having paid the amount payable by other ordinary occupiers in respect of poor-rates under s. 3, sub-s. 4, of 30 & 31 Vict. c. 102. *Bennett* v. *Atkins*, 48 L. J., C. P. 95; 4 C. P. D. 80; 40 L. T. 66; 27 W. R. 231.

Held, also, that the overseers, being public officers, could not waive such notice in writing. *Ib.*

Omission of one Joint Occupier from the Rate.]—A. occupied jointly with B. In the poor-rate B. alone was assessed as occupier. A. bonâ fide paid the rates with his own hand, but without being called upon:—Held, that A. was not rated, and that the omission of his name was not cured by 6 & 7 Vict. c. 18, s. 75. *Moss* v. *St. Mary, Lichfield, Overseers*, 7 Man. & G. 72; 8 Scott (N.R.) 832; 1 Lutw. Reg. Cas. 184; 14 L. J., C. P. 56; 8 Jur. 1075.

Existing Partners rated under Firm Name.]—A., who had been solely rated in respect of the premises occupied by him in his business, got the

overseers to alter the rating to A. & Sons on the occasion of his taking his two sons into partnership, and carrying on business with them on the same premises under the partnership name of A. & Sons. When A. retired from the business, which he did some time afterwards, the two sons continued the business under the same name of A. & Sons, and paid the rates when called for:—Held, that the sons were rated within 30 & 31 Vict. c. 102, s. 6, being described on the rate, though inaccurately, by the partnership name, and that such inaccuracy was cured by 6 & 7 Vict. c. 18, s. 75. *Little* v. *Penrith Overseers*, 2 Hopw. & C. 26; 42 L. J., C. P. 28; L. R. 8 C. P. 259; 27 L. T. 552; 21 W. R. 122.

Omission of Name, not a Misnomer.]—The omission of a person's name in a rate is not a misnomer or an inaccurate description within 6 & 7 Vict. c. 18, s. 75. *Rogers* v. *Lewis*, 7 C. B. (N.S.) 29; K. & G. 279; 29 L. J., C. P. 85; 6 Jur. (N.S.) 612; 1 L. T. 68; 8 W. R. 279.

Omission of Name from Rate-book.]—Sect. 19 of 32 & 33 Vict. c. 41, provides that—"any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted." H. had, during the qualifying period, resided within the borough, and had occupied, as yearly tenant, a set of rooms as a "counting-house" within the meaning of 2 Will. 4, c. 45, s. 27 (repealed). This set of rooms was one of several separate sets in the same house which were similarly occupied. The landlord, who himself occupied part of the premises but did not sleep there, paid all rates for the whole house, and his name appeared on the rate-book as occupier. H. had not claimed to be rated or tendered payment of any rates; nor was his name entered in the book. The rent paid by H. was more than it otherwise would have been, in consideration of the landlord paying the rates:—Held, that the landlord was "liable to the payment of the rate instead of the occupier" within the first part of s. 19, and that H. was entitled to the franchise by virtue of the proviso at the end of the section. *Barton* v. *Birmingham Town Clerk*, 48 L. J., C. P. 87; 39 L. T. 352.

What are sufficient Particulars in the Rate.]—Where a rate bears upon its face the name of the occupier, the premises for which he is rated, the ratable value thereof, and the amount of the rate, such rating is sufficient. *Wright* v. *Stockport Town Clerk*, 1 Lutw. Reg. Cas. 32; 5 Man. & G. 33; 7 Scott (N.R.) 561; 13 L. J., C. P. 50; 7 Jur. 1112.

Where Claim is as Occupier of Premises in Succession.]—A claim to be registered as a parliamentary voter for a borough, under 30 & 31 Vict. c. 102, ss. 3, 26, as an inhabitant occupier of two houses in succession, is good, although, as respects the second house, the landlord is the person rated, and by his agreement with the claimant has paid the rates. *Moyer* v. *Escott*, 1 Hopw. & C. 645; 41 L. J., C. P. 86; L. R. 7 C. P. 158; 26 L. T. 99; 20 W. R. 368.

A claimant to vote for a borough in respect of different premises occupied in immediate succession, need not shew that he has been rated by name on the rate-books for the premises for which he claims a vote; provided he has paid all the rates, he is entitled to vote. *Rogers* v. *Lewis*, 7 C. B. (N.S.) 29; K. & G. 279; 29 L. J., C. P. 85; 6 Jur. (N.S.) 612; 1 L. T. 68; 8 W. R. 279.

A. was an occupier of premises B. previously to the 20th July, 1888, and up to the 6th May, 1889, on which date he became an occupier, in immediate succession, of premises C., and so continued during the remainder of the qualifying year. He was rated for the premises B. in the rate for the year 1888, the rate having been made for that year in March, 1888, and duly paid by him. Premises C. consisted of a new house, which was not included in the rate for the year 1889, made on the 4th March in that year, not having been then valued for the purpose of being rated:—Held, that A. was entitled to the franchise. *Criglington* v. *Anderson*, 26 L. R., Ir. 131—C. A.

A. was an inhabitant occupier of a rated dwelling-house previously to the 20th July, 1889, up to a date in the qualifying period, subsequent to the striking of the only rate made during the qualifying period, when he went into occupation in immediate succession of another house, in which he continued to reside during the remainder of the qualifying period. The second house had formerly been rated, but having fallen into ruin was omitted from the rate-book for several years, before and in the qualifying year. Subsequently to the striking of the rate in the qualifying period the house was repaired and became liable to be rated:—Held, that A. was entitled to the franchise. *McGaffigan* v. *Riddall*, 28 L. R., Ir. 257—C. A.

What constitutes making Rate during Qualifying Period.]—A poor-rate is not made during the qualifying twelve months within 30 & 31 Vict. c. 102, s. 3, unless it has been both signed by the parish officers and allowed by the justices during those twelve months. *Jones* v. *Bubb*, 1 Hopw. & C. 128; 38 L. J., C. P. 57; L. R. 4 C. P. 468; 19 L. T. 483; 17 W. R. 205.

Where no Rate had been made.]—The condition imposed by the Boundary Act, 1868, s. 14, on an occupier to entitle him to be registered under that section, viz. that he has been duly rated as an ordinary occupier to all poor-rates in respect of the premises, made after the passing of this act, does not apply to a case where, at the time of the registration, no poor-rate had been made since the passing of the act. *Clark* v. *Brown*, 1 Hopw. & C. 181; L. R. 4 C. P. 500.

Old Rate in force, till New Rate allowed and published.]—A rate was made on the 28th September, 1844, and to be made for thirteen weeks, from the 16th September to the 16th December. A new rate was made on the 23rd December, 1844, allowed on the 3rd January, 1845, and published on the 5th:—Held, that a claim under the 2 Will. 4, c. 45, s. 30, made on the 27th December, to be put upon the rate for the time being, was a claim to be put on the rate made in September. *Bushell* v. *Luckett*, 2 C. B. 111; 1 Lutw. Reg. Cas. 398; 15 L. J., C. P. 89; 10 Jur. 113.

A rate is not a complete and valid rate until allowance and publication. *Ib.*

Rate, when made—Tenant's Name inserted subsequently without any Claim by Tenant.]—A poor-rate for a parish in a borough, dated April, 1867, was not in fact signed by the parish

officers till August, 1867, in which month it was also duly allowed by two justices, and published. A. occupied a dwelling-house in the parish for the twelve months preceding the 31st of July, 1868, but his name was not included in the rate when it was signed, allowed and published. A.'s landlord had for some years paid the rates of A. and of his other tenants in full, they paying a higher rent in consequence. After the publication of the rate, and without any communication with A., his landlord requested the overseer to put the names of his tenants on the rate, and the overseer accordingly inserted A.'s name amongst those of the other tenants on the rate. The landlord subsequently gave a cheque for the amount of all his tenants' rates. A.'s name, having been inserted in the list of voters, was objected to, and he appeared before the revising barrister to support his vote:—Held, that the rate was "made" during the twelve months preceding the 31st of July, 1868, within 30 & 31 Vict. c. 102, s. 3; and was therefore a rate to which A. ought to have been rated. Held, also, that his landlord had not any implied authority from A. to make a claim to have his name inserted on the rate; and that, if there could be a ratification, A.'s conduct in appearing before the revising barrister was too late to be a ratification; and that therefore A. had not claimed to be rated within 2 Will. 4, c. 45, s. 30, and that he was not entitled to have his name retained on the list of voters. *Ainsworth* v. *Creeke*, 1 Hopw. & C. 141; 38 L. J., C. P. 58; L. R. 4 C. P. 476; 19 L. T. 824; 17 W. R. 229.

Claim to be Rated.]—Under 2 Will. 4, c. 45, s. 30, a claim to be rated to the poor-rate was limited to the rate for the time being. *Wansey* v. *Perkins (Lockey's Case)*, 1 Lutw. Reg. Cas. 249; 8 Scott (N.R.) 970; 7 Man. & G. 145; 14 L. J., C. P. 59; 9 Jur. 115.

—— **To whom Sent.**]—A. was duly appointed, in 1859, an assistant overseer, at a salary, and his appointment was confirmed by warrant of two justices, under 59 Geo. 3, c. 12. In 1861 he gave notice of an intention to resign, but withdrew it. Shortly afterwards a resolution was passed by the vestry, increasing his salary. He remained in the continuous discharge of his duties and received the increased salary, but no new appointment or confirmation was made by the justices:—Held, that he was an overseer within 2 Will. 4, c. 45, s. 30, to whom a claim to be rated in respect of premises could be made. *Gunter* v. *Addams*, 15 C. B. (N.S.) 512; 1 H. & P. 50; 33 L. J., C. P. 68; 9 Jur. (N.S.) 1295; 9 L. T. 391; 12 W. R. 1105.

Claim to be Rated after 31st of July of Qualifying Year, too late.]—The occupier of a dwelling-house situate and being in a borough, who had not been rated, had before the 20th of July, 1868, paid all poor-rates, which had become payable for the house previously to the 5th of January. A rate was made on the 15th of January, 1868, in which the occupier was not rated; and on the 24th of August he claimed to be rated "to all rates made since the 31st of July, 1867":—Held, that inasmuch as the qualification under 30 & 31 Vict. c. 102, s. 3, must be complete by the 31st of July of the qualifying year, the claim was too late. *Medwin* v. *Streeter*, 1 Hopw. & C. 157; 38 L. J., C. P. 180; L. R. 4 C. P. 488; 19 L. T. 827; 17 W. R. 380.

Occupation of New unrated Premises.]—Where a person removes to a newly-built house which has not been rated, nor any application made during the qualifying period to have it or the site rated, he is not entitled by reason of his occupation to either the parliamentary or municipal franchise. *McGaffigan* v. *Riddall* (28 L. R., Ir. 257) followed. *Palmer* v. *Wade*, [1894] 1 Q. B. 268; Fox, 323; 10 R. 416; 70 L. T. 407; 58 J. P. 511.

Where a person claiming to be entitled to vote under the 10*l.* occupation franchise, removes into new premises which have not been rated, nor any application made during the qualifying period to have them rated, he is not entitled by reason of such occupation to either the parliamentary or municipal franchise. *Wade* v. *Perkins*, Fox, 338. And see *Criglington* v. *Anderson*, col. 28.

Unrated Valueless Dwelling-house.]—The inhabitant occupier of a dwelling-house, which the official valuer having found to be of no value, was so entered in the valuation-book, and in respect of which accordingly no rate was struck:—Held, not entitled to the franchise. *Owens* v. *Hanrahan*, 26 L. R., Ir. 418—C. A.

Premises not rated during part of Qualifying Year.]—M. was an occupier of premises in a borough from the 20th July, 1887, during the whole of the qualifying year. The first occasion on which any person was rated in respect of the said premises was in March, 1888, when M. was rated as occupier thereof:—Held, that M. was entitled to the franchise. *McCartney* v. *Black*, 22 L. R., Ir. 591—C. A.

Premises marked exempt in Rate-book.]—B. was an inhabitant occupier of a dwelling-house which was marked in the rate-book as "exempt" under the provisions of 48 Vict. c. 3, s. 9 (9), and was not rated. The revising barrister decided that the house was not by law exempt, and should have been rated to the rate made during the qualifying period, and expunged B.'s name from the register of voters:—Held, that even if the house was not, by law, exempt, it was not the function of the revising barrister to revise the rate-book or the valuation roll, and that B. was entitled to the franchise. *McGaffigan* v. *Riddall*, 28 L. R., Ir. 257.

Non-payment of Rate previous to Qualifying Year Disqualifies, though Payment excused by Justices.]—The provision in s. 3, sub-s. 4, of the 30 & 31 Vict. 102, requiring the payment of poor-rates in order to qualify a person for the borough franchise, applies to arrears of rates made before the commencement of the qualifying year. *Abel* v. *Lee*, 40 L. J., C. P. 154; L. R. 6 C. P. 365; 23 L. T. 844; 19 W. R. 625.

A person claimed in 1870, to be placed on the list of inhabitant occupiers. His landlord was rated to the poor in respect of the qualifying premises to all the rates made within the year. A previous rate, in which the claimant was rated, had been made in June, 1869, from payment of which he was, in October, 1869, excused by the justices, under 54 Geo. 3, c. 170, s. 11:—Held, that he had not bonâ fide paid "an equal amount in the pound with that payable by other ordinary occupiers, in respect of all poor rates that had become payable by him in respect of the qualifying premises up to the preceding 5th of January,"

and was therefore not entitled to be registered. *Ib.*

Owner Paying Rates by Agreement with Occupier.]—Sect. 19 of 32 & 33 Vict. c. 41, enacts that—"The overseers in making out the poor-rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter into the occupier's column of the rate-book the name of the occupier of every ratable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid":—Held, that this clause applies not only to cases where the owner is "liable" by agreement with the overseers under s. 3, or by order of the vestry under s. 4 of the same act, but also to cases where the owner is liable by agreement with the occupier to pay the rates. *Barton* v. *Birmingham Town Clerk*, 48 L. J., C. P. 87; 39 L. T. 352.

Non-payment by Owner Disfranchises Occupier.]—A claimant is not entitled to the franchise as a rated occupier where the rates, payable in respect of the qualifying premises have not been paid, though the owner, and not the occupier, is the person liable to pay the rates, and though no notice of the rate being in arrear was given to the occupier, as required by the 30 & 31 Vict. c. 102, s. 28. *Clarke* v. *Buchanan*, 20 L. R., Ir. 244—C. A.

Tenant's Name in Rate-book—Payment by Landlord by Agreement.]—A., the occupier of a house, No. 3, in G. lane, was rated in respect of No. 4, by mistake. He occupied the premises No. 3 under an agreement with his landlord that the latter should pay the rates. His landlord had called upon him to pay, and he had paid all the rent due in respect of the said house, and the landlord had been called upon to pay and had paid all poor-rates due in respect thereof:—Held, that A. had been rated, and had paid the rates in respect of No. 3. *Cook* v. *Luckett*, 1 Lutw. Reg. Cas. 432; Barr. & Arn. 647; 2 C. B. 168; 15 L. J., C. P. 78; 10 Jur. 116.

The insertion of a party's name in a rate, in respect of premises, is a sufficient calling upon him to pay such rate, within 6 & 7 Vict. c. 18, s. 75. *Ib.*

Non-payment of Void Rate.]—A poor-rate not duly allowed and confirmed by two justices, pursuant to 43 Eliz. c. 2, s. 1, is void, and not merely irregular. The non-payment, therefore, of such rate does not disqualify a party from being placed upon a borough register. *Fox* v. *Davies*, 6 C. B. 11; 2 Lutw. Reg. Cas. 97; 18 L. J., C. P. 48; 13 Jur. 155.

Rate Good on Face of it.]—In a parish there were two churchwardens and four overseers, and an assistant overseer, who was appointed to assist the overseers of the poor of the parish in the performance of all the duties incident to the office of overseer of the parish except the collection of rates. A rate was made by the two churchwardens, one overseer, and the assistant overseer, and was allowed by two justices, and duly published, and not appealed against:—Held, that the rate being apparently good upon the face of it, the non-payment of it disqualified a party from being placed upon the borough list of voters. *Baker* v. *Locke*, 18 C. B. (N.S.) 52; 1 H. & P. 137; 34 L. J., C. P. 49; 11 Jur. (N.S.) 65; 11 L. T. 567; 13 W. R. 258.

Rate made before Claimant coming into Possession.]—A. came into occupation of the qualifying premises in August. A poor-rate had been made in April, and another was made in September following. A. had paid the last-mentioned rate, but no demand had been made upon him for (nor had he paid or tendered) his proportion of the April rate, under 17 Geo. 2, c. 38, s. 12, although it had not been paid by the outgoing tenant, whose name appeared upon that rate:—Held, that A. had paid all the poor-rates which had become payable from him in respect of the premises, the liability to pay the proportion of the April rate being only a liability subject to the contingency of the outgoing tenant having made default, and of the overseers demanding his proportion of the rate from A. *Flatcher* v. *Boodle*, 18 C. B. (N.S.) 152; 1 H. & P. 238; 34 L. J., C. P. 77; 11 Jur. (N.S.) 67; 11 L. T. 630; 13 W. R. 340.

Payment by Claimant's Employer, Payment by Claimant.]—B. was rated to the poor-rates and assessed taxes in respect of a house, and they were paid for him by the commissioners of the Admiralty, as part remuneration for his services:—Held, that this was a payment of rates and taxes by B., and that he was entitled to be registered as a voter for the borough in respect of his occupation of the house. *Hughes* v. *Chatham Overseers*, 7 Scott (N.R.) 581; 5 Man. & G. 54; 1 Lutw. Reg. Cas. 51; Barr. & Arn. 61; 13 L. J., C. P. 44; 7 Jur. 1136.

Payment by One Joint Occupier, Payment by all.]—Payment of an entire rate by any one of the parties jointly rated is a payment by each of the joint occupiers of his respective rate. *Wright* v. *Stockport Town Clerk*, 1 Lutw. Reg. Cas. 32; 5 Man. & G. 33; 7 Scott (N.R.) 561; Barr. & Arn. 39; 13 L. J., C. P. 50; 7 Jur. 1112.

Payment Necessary for Franchise though Excused.]—The rates which, under 30 & 31 Vict. c. 102, s. 3, and the prior and subsequent enactments which are to be construed with it, it is necessary that an inhabitant occupier should have paid before the 20th of July of the qualifying year are only the rates made and allowed after the 5th of January of the year preceding the qualifying year, and payable up to the 5th of January of the qualifying year; and the excusal of such rates, whether made before or after the commencement of the qualifying year, does not prevent a disqualification arising from their not having been paid or tendered before the 20th of July of the qualifying year. *Cull* v. *Austin*, *Austin* v. *Cull*, 1 Hopw. & C. 741; 41 L. J., C. P. 173; L. R. 7 C. P. 227; 26 L. T. 767; 20 W. R. 863.

What Amounts to a Tender.]—An occupier, claiming to be rated, called upon the overseer, and asked him whether there were any rates due, and said, "If there are, I am prepared to pay them." The overseer replied, "I will see to it." The occupier never made any further inquiry, and never heard again upon the subject. At the time of his calling he had money in his pocket sufficient to pay the rates:—Held, that this did not amount to a tendering of the rates, within 2 Will. 4, c. 45, s. 30. *Bishop* v. *Smedley*, 1 Lutw.

Reg. Cas. 384; 2 C. B. 90; 15 L. J., C. P. 73; 10 Jur. 269.

Premises Ratable but not Rated—Tender of Amount.]—The inhabitant occupier, during the whole or part of the qualifying period, of a dwelling-house which was ratable, and ought to have been rated, but was not rated for the relief of the poor to a rate which was made during the qualifying period, and during his occupation, is not entitled to the franchise. A dwelling-house which ought to have been rated, but was not, was subsequently valued, and the amount which the rate ought to have been was tendered, and a claim to be rated was served on the guardians under the provisions of 13 & 14 Vict. c. 69, s. 110:—Held, that the tender and claim had no effect. *McGaffigan* v. *Riddall*, 28 L. R., Ir. 257—C. A.

Arrears Accrued previously to Qualifying Year.]—A person claiming the county franchise as a rated occupier is not entitled to be registered unless he has paid on or before the next previous 1st July, all poor rates due by him in respect of the qualifying premises and not merely the rates assessed during the preceding calendar year. *Clarke* v. *Torish*, 18 L. R., Ir. 60—C. A.

Statute-barred Arrears.]—The occupier of premises is not disqualified by the nonpayment of arrears of rates due in respect of the premises, the recovery of which has become barred by statute, as against him, previously to the 31st December in the qualifying year. *McGrath* v. *Buchanan*, 26 L. R., Ir. 124—C. A.

Recovering Status of Voter by Payment of Arrears.]—In a borough, where before 2 Will. 4, c. 45, the right of voting according to the usages and customs thereof was in inhabitants paying scot and lot, B., being such inhabitant, had been omitted from the register in 1845, in consequence of the rates due from him on the 31st July in that year not having been paid. At the registration in the following year, the whole of the rates then due having been paid, B. claimed to be registered, and the barrister allowed the claim:—Held, that such decision was right. *Nicks* v. *Field*, 4 C. B. 63; 16 L. J., C. P. 61; 10 Jur. 1088.

Inhabited House Duty.]—The occupier of a house within 2 Will. 4, c. 45, s. 27 (repealed), who would, under that section, be disqualified by nonpayment of the inhabited house duty, is not the less disqualified because he occupied the ground floor as a shop and his qualification is so described in the list. *Lee* v. *Bradford Town Clerk*, 1 Hopw. & C. 733.

House-tax must be Paid Quarterly, although no Demand.]—By 43 Geo. 3, c. 161, s. 23 (repealed), the assessed taxes are payable and are to be paid quarterly, viz., on the 20th June, the 20th September, the 20th December, and the 20th March. By 43 Geo. 3, c. 141, assessed taxes are to be collected in equal moieties within twenty-one days after the 10th October and the 5th April, but it is provided that nothing in the act shall be construed to alter the times when the duties were payable under previous acts. The quarter's house-tax due from a party on the 20th December was not demanded until the 11th April, and he did not pay it until the 30th July:—Held, that a demand is unnecessary except previously to a levy in default of payment, and that as the taxes are payable quarterly, though collected half-yearly, he was not entitled to be registered. *Ford* v. *Smedley*, 12 C. B. 622; 2 Lutw. Reg. Cas. 203; 22 L. J., C. P. 35; 16 Jur. 1159; 1 W. R. 67.

On a Scrutiny there can be no Inquiry as to whether Voters, put on the Register without Objection, have been Rated.]—See *Salisbury Election Petition. In re, Ryder* v. *Hamilton*, col. 136.

vii. *Residence.*

See also B. 1, *b.* (col. 154).

Landlords of Furnished Houses.]—By 41 Vict. c. 3, s. 2, every man shall be entitled to be registered and to vote under the provisions of s. 3 of the Representation of the People Act, 1867, notwithstanding that during a part of the qualifying period, not exceeding four months in the whole, he shall, by letting or otherwise, have permitted the qualifying premises to be occupied as a furnished house by some other person.

What Sufficient.]—The residence required to entitle a person to be registered as a voter for a borough, under s. 33 (repealed) of the Reform Act, 2 Will. 4, c. 45, need not be an occupation as owner or tenant; but any actual residence for the prescribed period within the borough, or within seven miles thereof is sufficient. *Beal* v. *Ford*, 2 Hopw. & C. 374; 47 L. J., C. P. 56; 3 C. P. D. 73; 37 L. T. 408; 26 W. R. 146.

For a portion of the six months previously to the last day of July in the qualifying year, viz. from the 29th of March to the 29th of May, A. lived and slept with his wife and child in a room in a cottage allotted to the wife's mother by the trustees of the charity, the rules of which prohibited the inmates from allowing any stranger to reside with them:—Held that this was a sufficient residence to satisfy s. 33; and that the continuity of residence was not broken by A.'s absenting himself for one night, when sent to London upon his employer's business. *Ib.*

The residence must be either an actual occupation of a place of residence for some part of the time by the party himself, or an occupation by his family or servants, there being an animus revertendi on his part. *Whithorn* v. *Thomas*, 7 Man. & G. 1; 8 Scott (N.R.) 783; 1 Lutw. Reg. Cas. 125; Barr. & Arn. 259; 14 L. J., C. P. 38; 8 Jur. 1008.

A., a freeman of a borough, resided with a family, and carried on his business of wine merchant at G., more than seven miles from the borough. He paid 9*d.* a week for the use of a bedroom and a dark closet in the house of a friend at T., A. keeping the key of the closet, in which he deposited wine samples. He slept in the bedroom twelve times in the six months next before the 31st July:—Held that A. did not reside in T. for six months before the 31st July. *Ib.*

Occupation of Business Premises.]—Occupation of qualifying premises without actual residence within the borough or within seven miles thereof is not sufficient to confer a vote under s. 27 of 2 & 3 Will. 4, c. 45:—Semble, "residence" within this section is where a man sleeps and has his home. *Barlow* v. *Smith*, Fox, 293.

Clergyman exchanging Livings.—A clergyman claimed to be qualified to vote for a borough

in respect of the occupation of a dwelling-house above the value of 10*l.* in which he usually resided. He entered into an arrangement with another clergyman by which they agreed to exchange duties and residences for a certain period for the purpose of obtaining relaxation and a change of scene. In pursuance of this arrangement the claimant left his house and resided for two months, which included the last month of the qualifying year, at a distance of more than seven miles from the borough, in the house of the other clergyman, who came and resided during the same period in the claimant's house:—Held, that there was a break of residence which prevented the claimant from being duly qualified. *Ford* v. *Pye*, 2 Hopw. & C. 157; 43 L. J., C. P. 21; L. R. 9 C. P. 269; 29 L. T. 684; 22 W. R. 159.

Clergyman going Abroad.]—A rector of a parish lying within a parliamentary borough obtained a licence of non-residence, and was absent from October, 1872, to June, 1873, remaining during that period abroad; during his absence the glebe-house, which he usually inhabited, was occupied by a curate pursuant to the directions of the bishop:—Held, that he was not entitled to vote either under 2 & 3 Will. 4, c. 45, s. 27 (repealed), or under 30 & 31 Vict. c. 102, s. 3. *Durant* v. *Carter*, 2 Hopw. & C. 142; 43 L. J., C. P. 17; L. R. 9 C. P. 261; 29 L. T. 681; 22 W. R. 158.

When Absent during Service under Articles to a Solicitor.]—By 2 & 3 Will. 4, c. 45, s. 31, which makes provision for freeholders voting for a city being a county of itself, no freeholder shall be registered in any year "unless he shall have resided for six calendar months next previous" to a certain day in such year, within such city. During part of the prescribed period of six months, a freeholder who had a bedroom kept for his exclusive use in his father's house within such a city, was absent, serving under articles to a solicitor in London:—Held, that, being bound by the articles, he could not be deemed to have had either the liberty or intention to return to the room whenever he liked, and therefore had not "resided" within the city for the required time within the meaning of the act. *Ford* v. *Drew*, Colt. 1; 49 L. J., C. P. 172; 5 C. P. D. 59; 41 L. T. 478; 28 W. R. 137; 44 J. P. 58.

Constructive Residence.]—The appellant, who claimed to be registered as a voter for the city of Exeter, had a bedroom kept for his exclusive use in his father's house in Exeter. During the qualifying period he went to London in quest of employment, and having obtained a temporary situation in London he remained there for two months and then returned to his father's house in Exeter. He remained in Exeter three weeks and then went back to London, and obtaining employment there did not return to Exeter during the rest of the qualifying period:—Held, that the facts did not shew a constructive residence in Exeter during the qualifying period within the meaning of the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 31. *Beal* v. *Exeter Town Clerk*, Fox, 31; 57 L. J., Q. B. 128; 20 Q. B. D. 300; 58 L. T. 407; 36 W. R. 507; 52 J. P. 501.

Temporary Absence from House during Repairs.]—See *Turish* v. *Henderson*, col. 50.

Lodgers—Bedroom in Hotel taken for Year—Permission to let room during Lodger's absence.]—M. occupied a bedroom in an hotel by the year, and had the use of a sitting-room. The lodgings were of the requisite value. He gave leave to the hotel proprietor to let the room while he was absent on vacation, and the money paid by such persons was received by the proprietor of the hotel:—Held, that M. was entitled to the franchise. *McConnell's Case*, 28 L. R., Ir. 292—C. A.

What sufficient Residence as Lodger.]—See *Bond* v. *St. George, Hanover Square, Overseers*, and *Taylor* v. *St. Mary Abbott's, Kensington, Overseers*, col. 21.

Temporary Absence in Performance of Duty during Qualifying Period.]—See 54 Vict. c. 11.

Compulsory Absence — Imprisonment.]—M. was fined for being drunk and disorderly, and in default of payment he was sentenced to be imprisoned. The fine was not paid at the rising of the court, and M. was taken to the waiting-room of the gaol before being placed in a cell. After being in the waiting-room twenty minutes the fine was paid, and he was discharged:—Held, that M., who was otherwise entitled to the franchise, was not disqualified by such detention. *M'Curron* v. *Chambers*, 28 L. R., Ir. 294—C. A.

D., who was convicted of a criminal offence and sentenced to fourteen days' imprisonment with the option of paying a fine, not having availed himself of the alternative, underwent his term in gaol during the qualifying year:—Held, that he was not entitled to be registered as a voter in respect of the inhabitant household franchise. *Donnelly* v. *Graham*, 24 L. R., Ir. 127—C. A.

C., who was charged before justices with a criminal offence, was, during the qualifying year, remanded to gaol for a week in consequence of his refusal to give bail for his re-appearance before them at the end of that period. On the expiration of the week he was brought before them again, when the charge against him was dismissed, and he was discharged:—Held, that having been ultimately proved innocent, C.'s detention in gaol did not operate as a break in his inhabitant occupancy of his dwelling-house, and that he was entitled to be registered as a voter in respect of the inhabitant household franchise. *Connolly* v. *Riddall*, 24 L. R., Ir. 127—C. A.

M. was brought before justices on a criminal charge, and remanded to gaol for two days during the qualifying year. Upon being brought up again on the expiration of the two days, he either pleaded guilty or was convicted (it did not clearly appear which), but, in the exercise of the bench's discretion, was discharged:—Held, that having been lawfully (as his guilt proved) detained in gaol during a portion of the qualifying year, there was a break in his inhabitant occupancy of his dwelling-house, and he was not entitled to be registered as a voter in respect of the inhabitant household franchise. *Martin* v. *Hanrahan*, 24 L. R., Ir. 127—C. A.

A man has not resided in a borough for six calendar months next previously to the last day of July, when he has for a portion of that time been detained in a gaol situate more than seven miles distant therefrom, under a sentence of imprisonment for an assault, without the option of paying a fine. *Powell* v. *Guest*, 18 C. B. (N. S.) 72; H. & P. 149; 34 L. J., C. P. 69; 10 Jur. (N.S.) 1238; 11 L. T. 599; 13 W. R. 274.

G. was arrested, during the qualifying year and lodged in the police office on the charge of being drunk and disorderly in a public street. On the day of his arrest, and after a custody of some hours, he was admitted to bail. He appeared before the magistrates at the petty sessions court on the next day, was convicted and fined 5*s.* and costs, which he thereupon paid:—Held, that G.'s detention in the police office did not operate as a break in his inhabitant occupancy of his dwelling-house, and that he was entitled to the franchise, *Criglington* v. *Gallagher*, 26 L. R., Ir. 134—C. A.

A person who was otherwise entitled to the franchise as an inhabitant occupier was committed for trial on a criminal charge. His trial had not taken place at the time the revising barrister held his court:—Held, that he was not to be deprived of the franchise by his compulsory absence until his guilt was proved. *Charlton* v. *Morris*, [1895] 2 Ir. R. 541—C. A.

A voter was arrested and imprisoned, and, on being brought before a magistrate next day, was sentenced to imprisonment, with the option of a fine. He paid the fine and was discharged. The period of his detention did not extend over the whole of any one day:—Held, that as the law will not take notice of fractions of a day, the voter was not to be deprived of the franchise by reason of his compulsory absence for portions only of two successive days. *Holland* v. *Hagan*, [1895] 2 Ir. R. 551—C. A.

—— **Sailor.**]—A sailor engaged in the cross-channel or coasting trade who has entered into an agreement under the Merchant Shipping Act, under which he agreed to serve for a period of six months during the qualifying period, and who at any time during the said six months could be compelled to serve on board his ship, is compulsorily absent from his dwelling-house for the time during which he is engaged in his duty, and if so engaged in his duty at intervals during the qualifying period is thereby disqualified for the inhabitant occupier franchise. *Duffy* v. *Chambers*, 26 L. R., Ir. 100—C. A.

A sailor who is compulsorily absent from his dwelling-house (although leaving his wife and family in occupation) during part of the qualifying year, in pursuance of an agreement entered into by him under the Merchant Shipping Act, under which he could be seized and compelled to embark if he attempted to desert his ship, is thereby disqualified for the inhabitant occupier franchise. *Hussan* v. *Chambers*, 24 L. R., Ir. 139—C. A.

—— **Militiaman.**] — A non-commissioned officer on the staff of a militia regiment resided with his family in a house within a borough. During the annual training of the regiment he was absent from the borough twenty-six days of the qualifying year, but while so absent his house continued to be occupied by his wife, family and furniture. With the leave of his superior officer he returned at intervals during the annual training to his house in the borough, and could have returned there every night had the distance been less, as his duties did not require his attendance:—Held, following *Ford* v. *Barnes* (16 Q. B. D. 254) and *Spittall* v. *Brook* (18 Q. B. D. 426), that occupation under the circumstances was broken. *Donoghue* v. *Brook*, Fox, 100; 57 L. J., Q. B. 122; 58 L. T. 411.

A private in a militia regiment was compulsorily absent from his residence for training during part of the qualifying year. While at training he could not leave the regiment without breach of military discipline:—Held, that he was not entitled to the parliamentary franchise as an inhabitant occupier. *Martin* v. *Hanrahan*, 22 L. R., Ir. 452—C. A.

—— **Officers in the Army.**]—Where votes were claimed by persons in military service, the claimants, non-commissioned officers, had been absent for twenty-one days during the qualifying period from their quarters on duty elsewhere, and could not return without leave, but during such absence, in one case the claimant's wife and family, and in the other his furniture, remained in the quarters which were retained for him:—Held, that it not sufficiently appearing in those cases that there had been any constructive inhabitancy of the rooms by the claimants during the twenty-one days when they were in fact absent, they were not qualified under s. 3 of 48 Vict. c. 3. *Ford* v. *Barnes*, Colt. 396; 55 L. J., Q. B. 24; 16 Q. B. D. 254; 53 L. T. 675; 34 W. R. 78; 50 J. P. 37.

The appellant, a non-commissioned officer, resided with his family in barracks, situate within a borough, in separate rooms allotted to him by the quartermaster-general. During twenty-seven days of the qualifying year he was compulsorily absent from the borough, but while so absent his name was retained on the strength of the regimental depôt in the monthly returns to the War Office, and the rooms continued to be occupied by his furniture and his family; but he himself could not (unless by leave, which he had obtained for one or two days) return to the borough without being guilty of a breach of duty:—Held, following *Ford* v. *Barnes* (16 Q. B. D. 254), that the appellant had not occupied the rooms in the barracks during the qualifying period, and that he was not entitled to be registered as a voter for the borough. *Spittall* v. *Brook*, Fox, 22; 56 L. J., Q. B. 48; 18 Q. B. D. 426; 56 L. T. 364; 35 W. R. 520.

A freeman of a borough was an officer in the army serving with his regiment. When he obtained leave of absence, which he usually did for three months in the year, he used to reside at the house of his mother, within seven miles of the borough, occupying apartments there, which were always reserved for his use. He was unmarried, and had no other home than his mother's house:—Held, that in the case of an officer subject to the will and pleasure of the Queen, and who was therefore not sui juris, there could not be such an intention of returning as to constitute a constructive residence, and consequently that he was not qualified. *Ford* v. *Hart*, 2 Hopw. & C. 167; 43 L. J., C. P. 24; L. R. 9 C. P. 273; 29 L. T. 685; 22 W. R. 159.

—— **Servant at Hotel.**]—The claimant was tenant of a house in which his family resided, but by the terms of his employment, as a servant of an hotel, the claimant was obliged to remain in the hotel for six days and six nights in each week, the remaining day and night in each week being spent by him in his own house:—Held, that the claimant was entitled to the franchise in respect of the house. *M'Kendrick* v. *Buchanan*, 20 L. R., Ir. 206—C. A.

—— **Undergraduates at Universities.**]—The undergraduates of Oxford and Cambridge are

not permitted to reside in their rooms during the vacations, which comprise nearly six months of the year, without special leave from the college authorities, who are accustomed to let and otherwise make use of their rooms during their absence:—Held, that such compulsory absence amounted to a break of residence disqualifying them for the exercise of the franchise. *Tanner* v. *Carter*, Colt. 435; 55 L. J., Q. B. 27; 16 Q. B. D. 231; 53 L. T. 663; 34 W. R. 41.

In detached part of Parish that has ceased to be part of Borough.]—Before 1832, the election of a member of parliament for the borough of Bewdley was vested in the bailiff, burgesses and twelve capital burgesses, who were required to be resident within the borough, including the Far Forest, and who appointed the bailiff and burgesses. Far Forest is a detached part of a parish, and situate within the old borough. By 2 & 3 Will. 4, c. 64, s. 37, the detached part of a parish shall not be included within a borough, if, by reason of including it, the boundary of such borough would not be continuous, unless such detached part heretofore formed part of the borough, for the purpose of the election of members of parliament:—Held, that the proviso in 2 & 3 Will. 4, c. 64, s. 37, was inserted to preserve existing personal rights of voting, none of which depended upon the retention of Far Forest, and therefore it was not included within the present borough. *Palmer* v. *Allen*, 6 C. B. 51; 18 L. J., C. P. 265; 13 Jur. 708.

viii. *Freemen and Liverymen.*

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 209.

What Rights Preserved by 2 Will. 4, c. 45, s. 32.]—A qualification to vote in a borough election as an inhabitant householder is not preserved by the 2 Will. 4, c. 45, unless it has been retained continuously from the passing of that act. *Jeffrey* v. *Kitchener*, 7 Man. & G. 99; 8 Scott (N.R.) 923; 1 Lutw. Reg. Cas. 210; Barr. & Arn. 359; 14 L. J., C. P. 75; 9 Jur. 138. S. P., *Stanton* v. *Jeffrey*, 7 Man. & G. 109, n.; 8 Scott (N.R.) 933; 1 Lutw. Reg. Cas. 219, n.; 14 L. J., C. P. 79, n.; 9 Jur. 140.

In a borough every person who has been an inhabitant householder for six months next before the day of election was, at the time of the passing of 2 Will. 4, c. 45, entitled to vote. K. was thus entitled; but in the beginning of October, 1832, ceased to be an inhabitant householder for fourteen weeks:—Held, that he could not afterwards regain this franchise by becoming an inhabitant householder. *Ib.*

A freeman of the borough of Shrewsbury paying scot and lot, for upwards of two years last past, and down to the 25th March, 1851, occupied and resided in a house on the Wyle Cop, within the ancient and present limits of the borough, and since the 25th March, down to and on the 31st July, occupied and resided in a house at Coton hill, without the ancient but within the present limits of the borough. The revising barrister, holding him to be disqualified by 2 Will. 4, c. 45, s. 32, expunged his name from the list of freemen voters:—The court, without hearing any argument (the counsel for the respondent admitting that he could not support it), reversed the decision. *Jarvis* v. *Peele*, 11 C. B. 15; 2 Lutw. Reg. Cas. 182.

In a borough in which freemen by birth were entitled to vote prior to 2 Will. 4, c. 45, the right is preserved by s. 32, not only to those whose fathers were entitled to their freedom previously to the 31st March, 1831, but to the lineal descendants of all persons entitled to their freedom before that day. *Guydon* v. *Bencraft*, 18 C. B. (N.S.) 11; H. & P. 97; 34 L. J., C. P. 53; 10 Jur. (N.S.) 1206; 11 L. T. 483; 13 W. R. 267.

The right of voting in a borough was in the capital burgesses. In the corporation of the borough there were four classes, viz. first, capital burgesses; secondly, assistant burgesses; thirdly, landowners; and fourthly, free burgesses or commoners. The process by which a party became a capital burgess was as follows:—The senior free burgess becomes a landowner upon a vacancy occurring, and in like manner a landowner becomes an assistant burgess; but where a vacancy occurs amongst the capital burgesses, the majority of such body elect one of the assistant burgesses, without regard to seniority. Where, under such circumstances, A. was elected a capital burgess, he having been originally admitted a free burgess in respect of birth:—Held, that his right to vote was not taken away by the proviso in the 32nd section of the act, which enacts, that no person who shall have been elected, made or admitted a burgess or freeman since the 1st March, 1861, otherwise than in respect of birth or servitude, or who shall hereafter be elected, made or admitted a freeman otherwise than in respect of birth or servitude, shall be entitled to vote. *Gale* v. *Chubb*, 1 Lutw. Reg. Cas. 544; 4 C. B. 41; 16 L. J., C. P. 54; 11 Jur. 22.

Of London.]—The proviso in 2 Will. 4, c. 45, s. 32, and 5 & 6 Will. 4, c. 76, ss. 4, 5 (repealed), which excludes freemen and liverymen from voting in certain cases, does not apply to freemen and liverymen of the city of London. *Croucher* v. *Browne*, 2 C. B. 97; 1 Lutw. Reg. Cas. 388; 15 L. J., C. P. 74; 10 Jur. 184.

Freemen's Allotments.]—By a local act, resident freemen of a borough were empowered to elect from their body deputies to act for them in the management of the freemen's allotments, and the deputies were empowered to divide certain of the lands "into small allotments among the resident freemen desirous to become occupiers thereof, at a small annual rent, the allotments to be held by each resident freeman desiring to become the occupier, obtaining possession thereof, so long as he shall be willing to hold the same, and shall pay the annual rent, and conform to the regulations to be made from time to time by the deputies." The lands were vested absolutely in the deputies for the time being, in trust for the resident freemen, with power to sell the same, with the consent of a major part of the freemen assembled at a meeting convened for that purpose; and a power of re-entry was reserved to the deputies, in case any freeman should be in arrear of rent for his allotment for fourteen days, or should fail to conform to the provisions of the act or the rules of the deputies:—Held, that each allottee had a freehold estate of an uncertain duration in his allotment, which entitled him to vote in the election of members for the borough. *Beeson* v. *Burton*, 12 C. B. 647; 2 Lutw. Reg. Cas. 225; 22 L. J., C. P. 33.

Non-payment of Rates.]—A party entitled before 2 Will. 4, c. 45, to vote as an inhabitant householder paying scot and lot, does not by s. 33 lose his qualification by having omitted for one year to pay his rates before the last day of July. *Nicks* v. *Field*, 4 C. B. 63; 1 Lutw. Reg. Cas. 566; 16 L. J., C. P. 61; 10 Jur. 1088.

Change of Residence—Notice of Claim.]—It is not necessary for a freeman who, during the qualifying period, has changed his place of abode from a residence within one division of a borough to another within the borough or the seven miles limit, to serve a fresh notice of claim. In the case of a divided borough, if the revising barrister finds that the place of abode of a freeman is wrongly stated on the list, he is bound, on proof of the true place of abode and that the same is within the qualifying radius, in the case of a duly qualified freeman, to correct the place of abode as stated in the list, and to assign the freeman to the right division for the purpose of voting. *Nagle* v. *Campbell*, [1896] 2 Ir. R. 326—C. A.

b. County Voters.

i. 40*s. Freeholders.*

a. Estates of Inheritance.

When Tenure will be Presumed to be Freehold.]—Where A. was in possession of lands situate in an ancient borough, in respect of which parties had voted as freeholders at several elections, and nothing appeared in the case from which it could be inferred that such lands were holden at the will of any lord; but it appeared that the modes of alienation were not by way of feoffment and livery of seisin, but by grant, as also that the customs with reference to femes covert and to dower were different from those prevailing at common law with respect to freehold estates:—Held, that there was not sufficient to rebut the presumption that A. was seised in fee of such lands; and, therefore (such lands being of the value of 40*s.* by the year), that he had a right to be registered in respect thereof. *Busher* v. *Thompson*, 4 C. B. 48; 1 Lutw. Reg. Cas. 551; 16 L. J., C. P. 57; 11 Jur. 45.

Land Held of the Lord of the Manor that may be freely Alienated, Freehold.]—Persons who are seised in fee of land situate in a manor, having acknowledged that they hold of the lord by free deed, fealty, suit of court and a nominal yearly rent—the custom being that the land may be conveyed by any common assurance, there being no necessity for any licence from the lord to alien, nor for the enrolment of the assurance on the court-rolls, nor for any surrender, the lord having the right to compel by distress the new tenants to come in and acknowledge free tenure—are freeholders, and entitled to vote as such for a county. *Passingham* v. *Pitty*, 17 C. B. 299; 25 L. J., C. P. 4; 2 Jur. (N.S.) 837; 4 W. R. 122. See *Spencer* v. *Harrison*, col. 56.

Pews in Church.]—See *Greenway* v. *Hockin*, *Brumfitt* v. *Roberts*, and *Hinde* v. *Charlton*, cols. 56, 57.

Shareholders in Bridge.]—See *Wadmore* v. *Putney Overseers*, and *Tepper* v. *Nichols*, col. 58.

Rent-charge.]—See *Druitt* v. *Christchurch Overseers*, *Ashcroft* v. *Hopper*, and *Lowcock* v. *Broughton Overseers*, cols. 51, 52.

A grant of a rent-charge in fee of 40*s.* a year, issuing out of land of sufficient value to pay the same, confers a county qualification as a freehold tenement under 8 Hen. 6, c. 7, though there is no power of distress contained in the deed granting the rent-charge. *Dodds* v. *Thompson*, 1 H. & R. 319; H. & P. 285; 35 L. J., C. P. 97; L. R. 1 C. P. 133; 12 Jur. (N.S.) 625; 14 W. R. 476.

A person possessed of two several rent-charges in fee issuing out of two several pieces of freehold land in the same county, neither of which rent-charges alone is of the yearly value of 40*s.*, but which together are of the clear yearly value of 40*s.*, has a free tenement within 8 Hen. 6, c. 7, and is entitled to a county vote. *Wood* v. *Hopper*, 45 L. J., C. P. 108; 1 C. P. D. 192; 33 L. T. 531; 24 W. R. 187.

By an indenture of September, 1874, the reversion in fee in certain lands was conveyed to C., subject to certain terms of 1,000 years created by an indenture of demise of July, 1864, which reserved a ground-rent and a power of re-entry in default. C., by an indenture of January, 1875, granted to D. and to four other persons a rent-charge of 2*l.* 10*s.* each charged upon the lands, with a power of distress in default of payment, and the grantees were in the actual receipt of the same. The value of the reversion was sufficient to bear the charges:—Held, that the grantees of the rent-charges had "free land or tenement to the value of 40*s.* by the year," within 8 Hen. 6, c. 7, although the power of distress was nugatory. *Dawson* v. *Robins*, 2 Hopw. & C. 317; 46 L. J., C. P. 62; 2 C. P. D. 38; 35 L. T. 599; 25 W. R. 212.

Equitable Freehold—Lands vested in Trustees—Voluntary Association.]—Where an association of persons has purchased land for the purposes of an undertaking, and vested it by deed in trustees and managers upon such terms and conditions that, while the trusts of such deed subsist, the individual members of the association are respectively entitled only to a share in the net profits of the undertaking carried on upon the land, such members have not an equitable freehold in the land so as to acquire the county franchise, although the association is not incorporated or registered as a joint-stock company, but is a mere voluntary association without statutory powers or restrictions. *Baxter* v. *Brown* (7 Man. & G. 198) discussed and distinguished. *Watson* v. *Black*, Colt. 418; 55 L. J., Q. B. 31; 16 Q. B. D. 270; 54 L. T. 17; 34 W. R. 274.

As to how Yearly Value to be Estimated.]—See *Astbury* v. *Henderson*, *Hamilton* v. *Bass*, *Moorhouse* v. *Gilbertson*, *Barrow* v. *Buckmaster*, *Sherlock* v. *Steward*, cols. 59, 60; *Ashmore* v. *Lees*, col. 61.

Annual Value of 40*s.* must remain after Payment of Interest on Mortgages.]—See *Copland* v. *Bartlett*, *Lee* v. *Hutchinson*, *Bremish* v. *Stoke Overseers*, *Robinson* v. *Dunkley*, *Moore* v. *Carisbrooke Overseers*, and *Rolleston* v. *Cope*, cols. 54, 55.

Annual Payments issuing out of Lands in two Counties—Apportionment.]—See *West* v. *Robson*, col. 53.

b. Estates for Life.

Annual Payments issuing out of Lands, part of which only actually occupied—Apportionment.]—See *Mills* v. *Cobb*, col. 53.

Annuity payable out of Real and Personal Property of Benefit Society.]—See *Robinson* v. *Ainge*, col. 54.

What Amounts to an Estate for Life.]—By a private inclosure act, allotments of land, belonging to the resident freemen of a borough, were vested in deputies elected by the freemen in trust for them. The deputies had power to dispose of the whole or any part of these allotments, discharged from the right of the freemen, upon obtaining the consent of the major part of the freemen assembled in public meeting for that purpose; but subject to this power, the freemen obtaining possession of allotments were entitled to hold them, so long as they were willing to hold them, and paid the annual rent, and conformed to the orders and regulations made by the deputies:—Held, that the allottees had estates of freehold, qualifying them to vote for members for the county, as their estate might continue for life, and was not determinable at the mere will of the deputies. *Beeson* v. *Burton*, 2 Lutw. Reg. Cas. 225; 12 C. B. 647; 22 L. J., C. P. 33.

By 39 Eliz. c. 5, hospitals for the poor might be incorporated. Previously to that act they could be founded by royal licence or letters-patent. Before the act, A. founded a hospital for certain bedesmen, and made rules for its regulation. The bedesmen were appointed for life:—Held, that the hospital might be presumed to have been founded by licence; and therefore, that the bedesmen were entitled to be registered as freeholders. *Simpson* v. *Wilkinson*, 7 Man. & G. 50; 8 Scott (N.R.) 814; 1 Lutw. Reg. Cas. 168; 14 L. J., C. P. 49; 8 Jur. 1126.

Trustees of an almshouse were empowered by letters patent of incorporation to appoint and remove twenty-four inmates, "toties quoties sibi conveniens fore videbitur":—Held, that the inmates appointed under this power did not take an estate for life in the property enjoyed by them as such inmates, and were, therefore, not entitled to be registered as freeholders. *Davis* v. *Waddington*, 7 Man. & G. 37; 8 Scott (N.R.) 807; 1 Lutw. Reg. Cas. 159; 14 L. J., C. P. 45; 8 Jur. 1142.

A minister of a congregation of Particular Baptists, occupying, in virtue of his function, premises vested in trustees, to permit the minister to occupy them for the time being, and having been appointed by a call (given verbally) from the congregation to become their minister, which he had complied with, and having resided ever since in the premises, and there being no proof that the appointment was for life, except the minister's statement that he so considered it, and the opinion of an old deacon that it was so, is not entitled to vote as a freeholder. *Collier* v. *King*, 11 C. B. (N.S.) 14; K. & G. 385; 31 L. J., C. P. 80; 8 Jur. (N.S.) 676; 5 L. T. 674; 10 W. R. 131. See *Burton* v. *Brooks*, col. 105.

Incumbent — Equitable Interest.] — The incumbent of a vicarage as perpetual curate claimed to vote in respect of land of the value of 40*s.* per annum which had been conveyed in exchange to his predecessor "and his successors, vicars of the vicarage for the time being, for ever":—Held, that even if the incumbent was not a perpetual curate or corporation sole, he had at least a sufficient equitable freehold interest in the land to entitle him to vote for the county. *Wallis* v. *Birks*, 1 Hopw. & C. 365; 39 L. J., C. P. 106; L. R. 5 C. P. 222; 22 L. T. 268; 18 W. R. 734.

Actual and bonâ fide Occupation.]—The bailiff and bailiff burgesses of a town possessed land divided into portions called acres, which they had held from time immemorial, and by immemorial custom, as each acre became vacant, they invested some inhabitant of the town with the possession of it, to hold for his life, if he should continue to reside in the town, subject to all the rules and orders of the bailiff and bailiff burgesses. The holder of each acre manured and mowed it; but, by the custom, the bailiff and burgesses granted the after-grass of the acres, at a meeting held each year for the purpose, to other inhabitants, who were thereby entitled to depasture one cow each for five weeks from the 10th of September, after which the whole were thrown open to all the inhabitants to depasture sheep and cattle therein till the 15th of December. The holder of each acre was separately rated to the poor and church rates. Each acre was of an annual value above 40*s.* and under 5*l.*:—Held, that the holder of each acre had an equitable freehold estate, and was in actual and bonâ fide occupation, within 2 Will. 4, c. 45, s. 18, and was therefore entitled to vote in respect of it. *Trenfield* v. *Lowe*, 1 Hopw. & C. 237; 38 L. J., C. P. 191; L. R. 4 C. P. 454; 20 L. T. 394; 17 W. R. 673.

Variable annual Payments issuing out of Land.]—A hospital, consisting of a master and three ancient brethren, was incorporated, and by the terms of its constitution, as afterwards regulated by statute, its revenues, derived from lands vested in the corporation, were received by the master, who annually, after paying thereout taxes and other outgoings and reserving one-third to himself, was to pay 25*l.* to each of the three ancient brethren, 70*l.* to the chaplain, and after reserving a balance, not exceeding 60*l.*, to meet current expenses, was to divide the residue between certain other brethren called younger brethren, who were added to the number of the brethren from time to time, as the revenues of the charity increased, but no younger brother was to take under such division more than 25*l.*, and the surplus, if any, was left to accumulate until further additional brethren were appointed:—Held, that the younger brethren had no equitable estate in the lands of the hospital, and that, the annual payment to which they were entitled not being a rent-charge nor a free tenement within 8 Hen. 6, c. 7, they were not entitled to the county franchise. *Simey* v. *Marshall*, 2 Hopw. & C. 1; 42 L. J., C. P. 49; L. R. 8 C. P. 269; 27 L. T. 581; 21 W. R. 123.

Eleemosynary Occupation.]—Members of an eleemosynary foundation called the Shrewsbury Hospital were required by the constitutions to be widowers or bachelors of threescore years or upwards; each had to himself a set of chambers, which he held for life, subject to removal for certain offences, but he could not let the chambers, or take in any one to lodge with him therein. They received also a weekly dole or stipend, a gown, yearly, and other benefits; and they were to be chosen from poor and indigent people:—

Held, not entitled to vote for the county, not having an equitable estate of freehold in the chambers. *Freeman* v. *Gainsford*, 11 C. B. (N.S.) 68; K. & G. 448; 31 L. J., C. P. 33; 8 Jur. (N.S.) 717; 5 L. T. 611.

In 1692 the Earl of Rutland founded a hospital at Bottesford for fourteen poor men; and by a deed of 1762 the lands belonging thereto were vested in trustees, to permit the rectors for the time being of two parishes named to receive the rents and profits, and thereout pay to each of the fourteen inmates certain periodical sums (in the whole, amounting to 6*l*. 12*s*. 8*d*. per annum), and to expend upon them certain other sums in clothing, coals, medical and other attendance. Since 1778 the trustees had been in the habit of allowing the surplus revenue to be distributed amongst the inmates of the hospital, so that each had, down to 1864, been in the receipt of 9*s*. 3*d*. per week, exclusive of the allowance for clothing, &c.; but there appeared nothing in the deed of 1762 to warrant this increased allowance:—Held, that the inmates had not any equitable freehold estate or interest in the lands belonging to the hospital, so as to entitle them to be registered for the county. *Steele* v. *Bosworth*, H. & P. 106; 18 C. B. (N.S.) 22; 34 L. J., C. P. 57; 10 Jur. (N.S.) 1239; 11 L. T. 507; 13 W. R. 260.

Where Occupation only Partly Eleemosynary.]—In an institution called Lord Conyngsby's Hospital, founded A.D. 1614, the claimant occupied a house and garden to which he was appointed for his life, and from which he could not be disturbed, except for felony. He had let the garden. He and the other inmates were called servitors, but rendered no service, though they were bound to observe certain rules, under penalty of a fine. The gate was locked at 9 p.m., and none, without special leave, could after that hour enter or go out. No one could be absent more than three days without leave; attendance at chapel was required; misconduct was prohibited; clothes and coals were supplied to the servitors from the funds of the hospital:—Held, that the claimant possessed a freehold interest, and was entitled to vote as occupying as owner within 30 & 31 Vict. c. 102, s. 3. *Fryer* v. *Bodenham*, 1 Hopw. & C. 204; 38 L. J., C. P. 185; L. R. 4 C. P. 529; 19 L. T. 645; 17 W. R. 294.

Rooms for Life in Hospital controlled by Inmates.]—A hospital was founded, after 35 Eliz. c. 7, and before 39 Eliz. c. 5, for the accommodation and maintenance of certain persons; the property consisting of lands conveyed originally to feoffees, and this being for the benefit of such persons. Ordinances and rules of the hospital referred to the feoffees, but none were now known; and by the rules, the inmates were removable for certain irregularities, but no case of removal had occurred. There was no deed of endowment extant; but by the rules, the inmates were allotted rooms for their lives; they kept the keys of their respective rooms, and each room was worth 4*l*. a year. The inmates had the whole management of the property; they let a portion of the premises, and part of the property had been sold by them:—Held, that the inmates were entitled to be registered, under 2 Will. 4, c. 45, s. 18, being possessed of equitable freeholds in their rooms, and jointly interested in the other portion of the hospital. *Roberts* v. *Percival*, H. & P. 121; 18 C. B. (N.S.) 36; 34 L. J., C. P. 84; 11 Jur. (N.S.) 40; 11 L. T. 603; 13 W. R. 265.

Land Held by Poor Burgess at Will of Corporation.]—A corporation, being possessed of lands, made a by-law that the lands should be occupied by poor and necessitous burgesses at a rent to be fixed and named by the corporation at its pleasure. The by-law provided that only such persons were poor and necessitous burgesses as were declared so by a majority of the council of the borough. A person, who claimed to be entitled to a vote as a 40*s*. freeholder, had been declared a poor and necessitous burgess, and had been allotted one acre at a rent of 5*s*. per annum until further notice:—Held, that he had no freehold or equitable interest sufficient to entitle him to a vote; that the estate was held at the will of the council, and at the most his interest was not greater than that of a tenant from year to year. *Fernie* v. *Scott*, 1 Hopw. & C. 718; 41 L. J., C. P. 20; L. R. 7 C. P. 202; 25 L. T. 836; 20 W. R. 236.

Fees of Incumbent of Church.]—See *Kirton* v. *Dear*, col. 57; and *Beswick* v. *Alker*, col. 62.

Receipt of Rents of Land by Virtue of Office—Members of Chapter.]—The canons residentiary of a cathedral who are entitled under 4 & 5 Vict. c. 39, s. 25, to a fixed share in the corporate revenues, have no freehold qualification in respect of shares in the freehold lands of the corporation. *Harris* v. *Phillips*, [1891] 1 Q. B. 267; Fox, 223; 55 J. P. 281.

—— **Bedesmen.**]—Land was conveyed, in 1726, on trust to divide a portion of the rents amongst the bedesmen of D. Persons had been appointed such bedesmen by a corporation from very early times, and the appointment was for life, but such persons were not liable to perform, nor did they perform, any duties. Under the trusts they each received more than 40*s*. a year:—Held, that they were not entitled to vote in respect of any estate in land which had come to them by promotion to any office within 2 Will. 4, c. 45, s. 18, as the term "bedesmen" does not necessarily import such office. *Faulkner* v. *Buddington Overseers*, 3 C. B. (N.S.) 413; 27 L. J., C. P. 20; 4 Jur. (N.S.) 692; 6 W. R. 101.

—— **Parish Clerk.**]—A parish clerk, by virtue of his appointment, entitled to a twelfth share of twenty-six acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as he continues clerk, and his predecessors in the office having always enjoyed the same, has a freehold interest in his share, in respect of which he is entitled to be registered. *Roberts* v. *Drewitt*, 18 C. B. (N.S.) 48; H. & P. 132.

A claimant to a county vote, holding an appointment as parish clerk, and receiving as of right certain fees on burials in the parish churchyard, amounting to more than 40*s*. a year, the actual duties of opening the graves, &c., being wholly performed by the sexton, who had separate fees in consideration thereof, is not entitled to vote either as a holder of a freehold office, or of a freehold interest in land to the value of 40*s*. a year. *Bushell* v. *Eustes*, K. & G. 484; 11 C. B. (N.S.) 106; 31 L. J., C. P. 44; 8 Jur. (N.S.) 645; 5 L. T. 580; 10 W. R. 153.

Salaries derived from Land.] — The six preachers, lay clerks, bellringers, and other functionaries of the cathedral of Canterbury,

being paid salaries out of the chapter revenues, found to be "derived wholly or in part from lands and tenements situate in the parish of Christchurch Ville and other parishes," in the same division of the county, which were vested in the dean and chapter, have no such equitable estate in freehold land as entitle them to vote for a county. *Hall* v. *Lewis*, 11 C. B. (N.S.) 114; K. & G. 499; 31 L. J., C. P. 45; 8 Jur. (N.S.) 646; 5 L. T. 491; 10 W. R. 151.

Lease for Lives of Part of Waste of Manor.]—S. claimed to be entitled, as a freeholder, to vote for the county in respect of a lease of part of the waste of the manor. The burgesses of the borough had from time immemorial exercised rights of common of pasture over the manor, and at courts-leet holden for the borough, it had been the practice for 100 years past and upwards for the mayor and burgesses of the borough to present to the lord of the manor individual burgesses for occupation of pieces of waste land of the manor; in all such cases the person so presented took possession of the apportioned pieces of waste, and paid rent to the lord. About one-tenth of the wastes had been thus inclosed, but a sufficiency of such land was left for the use by the commoners of their rights of pasture. S. being duly presented for occupation of a piece of the waste land in accordance with the custom, entered into occupation, and in 1861 was granted a lease by the lord, similar to leases which, since 1838, had been granted in like cases, namely, a lease for three lives, with a covenant for renewal. S. continued to occupy under this lease, and paid rent to the lord:—Held, that he had such a freehold interest as would entitle him to be registered as a voter for the county. *Phillips* v. *Salmon*, 2 Hopw. & C. 339; 47 L. J., C. P. 53; 3 C. P. D. 97; 37 L. T. 579. *And see cases* post, A. 1, *b.* vii. (col. 51).

ii. *Customary, Copyhold and other Tenants.*

A tenant who holds his lands by customary tenure, although not strictly a copyhold, provided he has a permanent interest therein of the value of not less than 10*l.* (now 5*l.*) per annum, free of all charges, is entitled to be registered under 2 Will. 4, c. 45, s. 19 (repealed). *Garbutt* v. *Trevor*, 15 C. B. (N.S.) 550; H. & P. 69; 33 L. J., C. P. 73; 10 Jur. (N.S.) 131; 9 L. T. 535; 12 W. R. 471.

Beneficial Interest in Copyhold Tenements.]—See *Spencer* v. *Harrison*, col. 56.

When Tenure will be Presumed to be Freehold.]—See *Busher* v. *Thompson*, col. 41.

Land held of the Lord of the Manor that may be Freely Alienated, Freehold.]—See *Pissingham* v. *Pitty*, col. 41.

And see COPYHOLD (H. CUSTOMARY FREEHOLDS).

iii. *Lessees of Terms of Years.*

Chattel Rent-charge.] — By 30 & 31 Vict. c. 102, s. 5, a county vote is conferred upon every man who is entitled either as lessee or assignee to any lands or tenements of freehold, or of any other tenure whatever, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of not less than 5*l.*:—Held, that a person, to be entitled to a vote under this provision, must be lessee of a corporeal hereditament, which could be the subject of occupation, or assignee of a lease of such an hereditament, and that a chattel rent-charge, though originally created for more than sixty years, does not confer a vote. *Warburton* v. *Denton Overseers*, 1 Hopw. & C. 432; 40 L. J., C. P. 49; L. R. 6 C. P. 267; 23 L. T. 729; 19 W. R. 210.

Term vested in Trustees—Person in Receipt of Rents.]—A testator devised a term of 999 years to trustees, to pay the rents and annual produce to the claimant for life, and the residue after his decease to the children of the claimant:—Held, that the claimant was not possessed of the residue of a term originally created for not less than sixty years, and was, consequently, not entitled to the county franchise, under 2 Will. 4. c. 45, s. 20, and 6 & 7 Vict. c. 18, s. 74. *Gainsford* v. *Freeman*, 1 H. & R. 353; H. & P. 329; 35 L. J., C. P. 92; L. R. 1 C. P. 129; 12 Jur. (N.S.) 192; 13 L. T. 595; 14 W. R. 203.

Conditional Agreement for Lease.] — By an agreement made between the owners of an estate, the trustees of a building society, and C., the land was to be security for the advance by C. of moneys to be expended in building cottages thereon, and the owners were to grant to the occupiers of the cottages leases for ninety-nine years on the request of C., with the consent of the trustees. By a subsequent agreement between the trustees and the claimant, who occupied one of the cottages so built, it was agreed that on his paying certain moneys by instalments, and satisfying all the terms of the agreement and the rules of the society, the trustees should procure him a conveyance for ninety-nine years. Only a part of the money had been paid; no request for a lease had been made by C., and none had ever been granted:—Held, that the claimant was not entitled to the county franchise given by 30 & 31 Vict. c. 102, s. 5, as lessee or assignee for the unexpired residue of a term originally created for not less than sixty years. *Trotter* v. *Watson*, 1 Hopw. & C. 216; 38 L. J., C. P. 100; L. R. 4 C. P. 434; 19 L. T. 785; 17 W. R. 330.

Sub-lessees.]—A sub-lessee is a lessee within 30 & 31 Vict. c. 102, s. 5; but it is doubtful whether he must be in occupation as a sub-lessee under 2 Will. 4, c. 45, s. 20. *Charlton* v. *Stretford Overseers*, 1 Hopw. & C. 712; 41 L. J., C. P. 37; L. R. 7 C. P. 198; 25 L. T. 810; 20 W. R. 236.

Interest in Lease Divisible.]—A lease for a term of ninety-nine years, of which three years had expired, comprised several houses within a borough, one of them worth more than 10*l.* a year, and capable of conferring a borough vote; the residue individually worth less, but collectively more, than 10*l.* a year. Each house was occupied by a distinct tenant:—Held, that the interest in the lease was divisible, and that the lessee was entitled to a vote for the county, in respect of the residue of the houses. *Webb* v. *Birmingham Overseers*, 5 Man. & G. 14; 7 Scott (N.R.) 559; 13 L. J., C. P. 57; 7 Jur. 1090.

Occupying as Tenant.]—A., subsequently to the date of letters-patent, whereby was granted to him the custody of all the estate, real and

personal, of a lunatic, entered upon the occupation of the farms of the lunatic as they were quitted by the former tenants, and received the produce to his own use and benefit. In his annual account, passed before the master in chancery in July, 1847, he entered himself in the column of the tenants; and in the column of rent due at Lady-day, 1846, he inserted opposite his name the sum of 393*l.*, and in the column of rent he entered this sum as received:—Held, that he did not occupy the land as tenant, so as to be entitled to vote, under 2 Will. 4, c. 45, s. 20. *Burton* v. *Langham*, 5 C. B. 92; 2 Lutw. Reg. Cas. 78; 17 L. J., C. P. 253; 12 Jur. 631.

iv. *Occupiers at 50l. Rent, or of 12l. (now 10l.) Value.*

See 48 & 49 Vict. c. 3, sched. 2, part 1, abolishing 50*l.* rental qualification, saving existing rights.

Aggregate Value—Of Lands under different Landlords.]—The county franchise conferred by the occupation of lands of 12*l.* ratable value is not restricted to lands held under one landlord, nor is it any objection that being detached they are separately rated. *Huckle* v. *Piper*, 1 Hopw. & C. 680; 41 L. J., C. P. 42; L. R. 7 C. P. 193; 25 L. T. 809; 20 W. R. 235.

A man who occupies several pieces of land under different landlords, and is separately rated for them, may add their ratable values together for the purposes of a qualification under 30 & 31 Vict. c. 102, s. 6 (repealed). *Ib.*

A tenant who holds, under two different landlords, two different sets of premises, the rent of each being less than 50*l.* a year, though together they amount to more than that sum, is not entitled to a vote at a county election, under 2 Will. 4, c. 45, s. 20, and 6 & 7 Vict. c. 18, s. 73 (repealed). *Gadsby* v. *Barrow*, Barr. & Arn. 283; 7 Man. & G. 21; 8 Scott (N.R.) 799; 1 Lutw. Reg. Cas. 142; 14 L. J., C. P. 51; 8 Jur. 1031.

—— **Of Joint and Sole Holdings.**]—A. occupied solely as tenant a house and land at a yearly rent of 40*l.* He also jointly with his father rented and occupied other lands at a yearly rent of 64*l.* Both occupations were under the same landlord:—Held, that A.'s proportion of the joint rent could not be added to his separate rent, so as to constitute a qualification to vote for a county, under 2 Will. 4, c. 45, s. 20. *Smith* v. *Foreman*, 18 C. B. (N.S.) 144; H. & P. 231; 34 L. J., C. P. 93; 11 Jur. (N.S.) 42; 11 L. T. 673; 13 W. R. 291.

Rate-book not Binding.]—In regard to a claim to a county vote as a 12*l.* occupier, the revising barrister is not bound by the rated value appearing on the rate-book, but may take evidence and judge for himself as to whether the ratable value of the premises, in respect of which the claim is made, is 12*l.* or not. *Cooke* v. *Butler*, 2 Hopw. & C. 22; 42 L. J., C. P. 25; L. R. 8 C. P. 256; 27 L. T. 548; 21 W. R. 73.

Statement of Qualification in Claim—"Land as Occupier"—"Farm as Occupier."]—See *Firth* v. *Widdicombe-in-the-Moor*, and *Howitt* v. *Stephens*, col. 73.

Occupier's Name inserted by Mistake in Owners' List.—Sufficient Publication.]—See *Mather* v. *Allendale*, col. 70.

Proof of Notice of Claim.]—See *Sale, In re*, col. 102.

Part of Period of Occupation during Infancy.]—See *Hargreaves* v. *Hopper*, col. 66.

And see cases ante, A. 1, *a.* i. (col. 3); and A. 1, *a.* iv. (col. 24).

v. *Inhabitant Householders.*

See A. 1, *a.* i., and A. 1, *a.* ii., ante; and B. 1, *a.*, and B 1, *b.*, post (col. 152).

Compulsory Absence during Qualifying Period.]—See *Donnelly* v. *Graham*, *Connolly* v. *Riddall*, *Martin* v. *Hanrahan*, *Hassan* v. *Chambers*, *Criglington* v. *Gallagher*, and *Duffy* v. *Chambers*, cols. 36, 37.

Temporary Absence from House during Repairs.]—H.'s name appeared on the register of voters in a county, and was duly objected to. It was proved that he worked for an employer, by whom he was given, in addition to his wages, a house at a shilling a week. During the qualifying period he had lived in two houses, living in one from July 2 to August 22, while alterations were being effected in the other. He only paid rent for one house during this period. No succession claim was made:—Held, that he was not entitled to the franchise. *Torish* v. *Henderson*, [1894] 2 Ir. R. 155—C. A.

Right of Another to reside in Qualifying Premises.]—The mere fact that another person has an incorporeal right to reside in the house of an otherwise qualified tenant does not disqualify such tenant for the franchise as inhabitant householder. *Torish* v. *Love*, [1894] 2 Ir. R. 372—C. A.

Tenant holding over after Expiration of Notice to quit—New Tenancy created—Relation back.]—To compel them to pay off arrears of rent, several weekly tenants of dwelling-houses were served with notices to quit, which expired during the qualifying period. Each of the tenants continued in possession after the expiration of the notice for a substantial period. While so holding over each tenant was served with a summons for possession. In some of these cases before, and in others after, a decree for possession was obtained, a new contract of tenancy was made, whereby it was arranged that the several tenants should continue to hold upon the old terms, and that the new tenancy was to be deemed to have commenced in each case on the expiration of the old one. It was further agreed that each tenant should pay off arrears of rent:—Held, that the new contract was not capable of relating back for the purpose of the franchise, and that therefore none of the weekly tenants were entitled to the franchise. *Holland* v. *Chambers, Devine's Case*, [1894] 2 Ir. R. 442—C. A.

Occupation as Tenant—Tenant dying Intestate—Sole Next of Kin in Occupation—Letters of Administration.]—On the death intestate of the tenant of a house who had left Ireland, his father, who was his sole next of kin, and had been residing in the house, continued in occupation during the qualifying year, and paid the rent, without taking out letters of administration:—Held, that the father was entitled to be

registered as an inhabitant householder. After the expiration of the qualifying period the father took out letters of administration to his son :—Held, that the letters did not relate back for the purposes of the franchise. *Holland* v. *Chambers, Doherty's Case,* [1894] 2 Ir. R. 285—C. A.

Occupier of Dwelling-house not rated, because of no Value.]—See *Owens* v. *Hanrahan*, col. 30.

vi. *Lodgers.*

See cases, ante, A. 1, *a*. iii. (col. 19).

vii. "*Lands or Tenements,*" *Sufficiency of Interest in and Title to.*

Person entitled to Chattel Rent-charge not a Lessee of Lands or Tenements.]—See *Warburton* v. *Denton Overseers*, col. 48.

Rent-charge below Value of £5.—Occupation.]—By s. 18 of the Reform Act, 1832, no person shall be entitled to a county vote in respect of any freehold lands or tenements of which he may be seised for a life or lives, except he shall be "in the actual and bonâ fide occupation of such lands or tenements," or except the same shall be of the clear yearly value of not less than 10*l.* (reduced to 5*l.* by a subsequent act) :—Held, that a rent-charge for life below the yearly value of 5*l.*, being incapable of occupation, was not within the exception in s. 18, and therefore did not confer a county vote. *Druitt* v. *Christchurch Overseers*, Colt. 328 ; 53 L. J., Q. B. 177 ; 12 Q. B. D. 365 ; 32 W. R. 371.

Rent-charge in Actual Possession.]—A rent-charge was granted to A., B. and C. to hold to the said A., B. and C. to the use of the said A., B. and C., their heirs and assigns for ever as tenants in common :—Held, that such grant took effect at common law and not by operation of the Statute of Uses, 27 Hen. 8, c. 10, and that therefore neither A., B. nor C. had the rental possession of such rent-charge as required by 2 & 3 Will. 4, c. 45, s. 26, to entitle him to be registered as a voter in respect of his interest in the same, until he had actually received such rent or some part thereof. *Webster* v. *Ashton-under-Lyne Overseers, Orme's Case*, 2 Hopw. & C. 60 ; 42 L. J., C. P. 38 ; L. R. 8 C. P. 281 ; 27 L. T. 652 ; 21 W. R. 171.

When a conveyance granting a rent-charge operates under the Statute of Uses, 27 Hen. 8, c. 10, the person to whose use the rent-charge is granted is, by force of the statute, in the actual possession of such rent-charge, within 2 & 3 Will. 4, c. 45, s. 26, as soon as the grant is executed. *Webster* v. *Ashton-under-Lyne Overseers, Hadfield's Case*, 2 Hopw. & C. 89 ; 42 L. J., C. P. 146 ; L. R. 8 C. P. 306 ; 28 L. T. 901 ; 21 W. R. 637.

Where a rent-charge is created by means of a conveyance to uses, the grantee immediately acquires actual seisin by the words of the 27 Hen. 8, c. 10, s. 1, and is entitled to be registered in respect thereof, notwithstanding he may not have actually received any part of the rent. *Heelis* v. *Blain*, 18 C. B. (N.S.) 90 ; H. & P. 189 ; 34 L. J., C. P. 88 ; 11 Jur. (N.S.) 18 ; 11 L. T. 480 ; 13 W. R. 262.

Aliter, where the rent-charge is created by an ordinary grant at common law. *Ib.*

On 29th January, 1864, A. conveyed a rent-charge of 50*l.* to B., to the use of the five sons of A. No rent had been paid till June, 1864 :—Held, that the five sons of A. had been in actual possession of the rent-charge for six months previously to the 31st July, 1864, and were therefore entitled to be placed on the register. *Ib.*

A. being possessed of a rent-charge issuing out of freehold lands, granted it unto B., C. and D., and their heirs, to hold the same unto B., C. and D., and their heirs, to the use of A., B., C. and D., their heirs and assigns for ever, in equal one-fourth shares as tenants in common :—Held, that all the grantees took under the Statute of Uses, and that by force of the statute, and on the authority of *Heelis* v. *Blain* (18 C. B. (N.S.) 90), they were from the date of the deed in actual possession of their shares of the rent-charge, within s. 26 of 2 & 3 Will. 4, c. 45. *Lowcock* v. *Broughton Overseers*, Colt. 335 ; 53 L. J., Q. B. 144 ; 12 Q. B. D. 369 ; 51 L. T. 399 ; 32 W. R. 247.

The words "actual possession" in 2 Will. 4, c. 45, s. 26, mean a possession in fact as contra-distinguished from a possession in law. *Murray* v. *Thornley*, 2 C. B. 217 ; 1 Lutw. Reg. Cas. 496 ; Barr. & Arn. 742 ; 15 L. J., C. P. 155 ; 10 Jur. 270.

A rent-charge which had been originally created in 1838, payable quarterly, and which had been regularly paid to the grantee up to the 29th September, 1845, was by him assigned on the 19th January, 1846, to A., B. and C., in trust for themselves, D. and others. The first payment of the rent after the assignment was on the 29th April following :—Held, that D. was not entitled to be registered in respect of his having been six months in actual possession of the rent-charge, within 2 Will. 4, c. 45, s. 26. *Hayden* v. *Tiverton Overseers*, 1 Lutw. Reg. Cas. 510 ; 4 C. B. 1 ; 16 L. J., C. P. 88 ; 10 Jur. 950.

Freehold Interest in Rent-charge.]—Certain persons, who were seised in fee of a rent-charge of 120*l.* a year, subdivided it into fifty-four parts, and sold thirty-four of such parts, and by a deed in consideration of 52*l.* 5*s.*, paid by each of the purchasers, therein called "beneficiaries," the vendors, therein called "trustees," declared that they stood seised of one fifty-fourth part of the rent-charge in trust for each of the beneficiaries, his heirs and assigns absolutely, and that they stood seised of the remaining parts in trust for themselves, the trustees in fee. There was a covenant by each of the beneficiaries that in the event of his wishing to sell his share, he should first offer it to the trustees at a price to be ascertained, in case of dispute, by arbitration, and there was a clause declaring that the trustees, or other the trustees or trustee, for the time being of the deed, should "respectively have absolute power of sale over the rent and premises, exercisable at their or his discretion, without any further consent on the part of any person" :—Held, that the power of sale vested in the trustees by this deed was not one which they could exercise for their own benefit so as to enable them to forfeit the shares of the beneficiaries, and that, therefore, until such power of sale was exercised, each beneficiary had a freehold interest in the rent-charge, which (being of sufficient value for that purpose) entitled him to the county franchise. *Ashworth* v. *Hopper*, 45 L. J., C. P. 99 ; 1 C. P. D. 178 ; 33 L. T. 667 ; 24 W. R. 187.

Apportionment of Rent-charge.]—Owners of a piece of land, which was held by them subject to a rent-charge of 14*l.* 1*s.* 7*d.* per annum, conveyed a portion of it to eight persons as tenants in common in fee, subject to the payment of 4*l.* 5*s.* per annum as their proportion of the rent-charge; the grantors covenanting to pay the remainder themselves, or to indemnify the grantees therefrom, and reserving to them the power to distrain upon the rest of the land for any excess of rent-charge which they might be compelled to pay. It was admitted that the residue of the land was of sufficient value to satisfy the portion of the rent-charge so agreed to be paid thereout:—Held, that although in point of law the land so conveyed was liable to the whole rent-charge of 14*l.* 1*s.* 7*d.*, yet, for the purpose of the elective franchise, the interest of the eight grantees was to be taken to be the value of the land conveyed to them, after deducting the proportion only of the rent-charge covenanted to be paid by them. *Barrow* v. *Buckmaster*, 12 C. B. 664; 2 Lutw. Reg. Cas. 235; 22 L. J., C. P. 65; 17 Jur. 117; 1 W. R. 68.

A rent-charge of 5*l.* a year issued out of an estate. The owner of the rent-charge was in actual occupation of a small part of the land; but if the rent-charge was apportioned between such part and the whole estate, he would not have 40*s.* a year issuing out of land occupied by him:—Held, that he could not apportion 40*s.* a year of the rent-charge on the land in his occupation, so as to gain the county franchise. *Mills* v. *Cobb*, 36 L. J., C. P. 75; L. R. 2 C. P. 95; 12 Jur. (N.S.) 1007; 15 L. T. 469; 15 W. R. 224. See *West* v. *Robson*, infra.

Owner of Rent-charge on Lands in Two Counties.]—A claimant of the county franchise in county N. was the owner of a life rent-charge of 100*l.* per annum, charged upon lands in counties N. and L. The annual value of the land in county N. was considerably above 5*l.*, but if the rent-charge were apportioned ratably to the quantity and annual value of the land in each county, the proportion issuing out of the land in county N. would be below 5*l.*:—Held, that the value of the rent-charge in county N. was insufficient to confer the franchise. *Bearn* v. *Watson*, Colt. 268.

Lands in two counties, A. and B., were devised to trustees in fee, out of the rents and profits, to pay certain annual sums to certain persons, and the yearly sum of 10*l.* apiece to each of the fellows of a college. Less than 10*l.*, but more than 40*s.* per annum, would be realised from the lands in county A. if all the annual payments under the will were made out of the county; but if the lands in both counties were apportioned ratably to the amounts received from the lands in each for making such annual payments, a less sum than 40*s.* a year would be apportioned for the lands in county A. to the payment of the 10*l.* a year to each fellow:—Held, that such fellows were not owners of a rent-charge within 2 Will. 4, c. 45, s. 18, as there was no power of distress. *West* v. *Robson*, 3 C. B. (N.S.) 422; K. & G. 141; 27 L. J., C. P. 262; 4 Jur. (N.S.) 666; 6 W. R. 659.

Held, also, that they had not an estate by devise, nor an office within s. 18. *Ib.*

Held, also, that the lands in the two counties must be deemed to be ratably apportioned for the payment of the annual sums under the will; and that therefore the fellows had not freeholds of the value of 40*s.* a year in county A. *Ib.*

Annuity Payable out of Real and Personal Property of Benefit Society.]—A member of a benefit society was entitled to an annuity of more than 10*l.* a year out of the funds of the society if the property was sufficient to admit of it. The income of the society arose partly from real property vested in trustees, and partly from contributions and fines paid by the members. The funds of the society were sufficient to pay all the annuities in the current year, and if each annuity was apportioned between the income derived from the real property and from other sources, the part payable out of income derived from real property would be more than 5*l.*:—Held, that he had no direct interest, legal or equitable, in the lands belonging to the society, and was not entitled to a county vote as a freeholder for life under 30 & 31 Vict. c. 102, s. 5, sub-s. 1. *Robinson* v. *Ainge*, 1 Hopw. & C. 193; L. R. 4 C. P. 429; 19 L. T. 644; 17 W. R. 317.

Grant of Rent-charge by Reversioner—Power of Distress Nugatory.]—See *Dawson* v. *Robins*, col. 42.

Separate Rent-charges may be Added together.]—See *Wood* v. *Hopper*, col. 42.

Qualification stated in Claim as "Rent-charge on Freehold House."]—See *Sherwin* v. *Whyman*, and *Nichols* v. *Bulwer*, col. 96.

Mortgaged Land.]—A mortgagor, in actual possession of a freehold estate of inheritance, has no right to vote for a county, unless the premises are of the annual value of 40*s.* above all charges, including interest on the mortgage. *Copland* v. *Bartlett*, 6 C. B. 18; 2 Lutw. Reg. Cas. 102; 18 L. J., C. P. 50; 13 Jur. 127.

A mortgagor of freehold premises, in possession of the rents and profits, is not entitled to be registered as a county voter, unless he receives therefrom 40*s.* by the year, after deducting money paid annually by him by way of interest on a sum secured by a mortgage which contains no mention of interest, the time for repayment of the principal mentioned in such mortgage having expired, such annual payment being in fact a consideration for remaining in possession. *Lee* v. *Hutchinson*, 2 Lutw. Reg. Cas. 159; 8 C. B. 16; 20 L. J., C. P. 4.

An allottee of three shares in a building society, in October, 1850, purchased freehold land, of the value of 6*l.* per annum. The amount of the purchase-money and expenses was advanced to him by the society upon mortgage of the land so purchased. By the rules of the society each member was required to pay 1*s.* 6*d.* weekly for each share, and to execute to the trustees a mortgage to secure to them the sum in which the member might be indebted to the society, "with a premium for prior advance equal to 5*l.* per cent. per annum upon the amount advanced until repaid, and such sum, not exceeding 2*s.* 6*d.* per share per annum for incidental expenses, as the committee should think fit"; such mortgage reserving to the trustees a power of sale, in case the member should fail for twenty-six weekly meetings to pay, observe and perform all or any of the subscriptions, payments, covenants, agreements and regulations on his part to be paid, observed and performed. No default had been made in the payment of the contributions required by the rules; and the mortgagor

had always been, and still remained, in actual possession of the property. The amount of principal money due to the society on the 30th of January, 1851, was 47*l.* 10*s.* 3*d.* The weekly contributions of 1*s.* 6*d.* per share (amounting to 11*l.* 14*s.* per annum) were appropriated by the society thus: 8*l.* 18*s.* in part liquidation of the principal mortgage debt, 2*l.* 10*s.* for premium or interest, and 6*s.* for incidental expenses:—Held, that these contributions constituted a charge upon the land, within 8 Hen. 6, c. 7, and consequently that the mortgagor was not possessed of an estate of the clear yearly value of 40*s.* at the least above all charges. *Beamish* v. *Stoke Overseers*, 11 C. B. 29; 2 Lutw. Reg. Cas. 189; 21 L. J., C. P. 9; 16 Jur. 597.

A. purchased land of the annual value of 3*l.*, and mortgaged it to a building society for 73*l.*, to secure the monthly payments due on his share, amounting annually to 4*l.*; power to enter was reserved in case of failure to pay instalments. He was entitled to redeem by payment of the monthly instalments, and had, without default, paid off 71*l.*, up to the 31st January, 1863, between which time and holding of the revision court the balance, 2*l.*, had become due and been paid:—Held, that he acquired a freehold interest in the land of the annual value of 40*s.* above all charges, and was therefore qualified to vote for the county. *Robinson* v. *Dunkley*, 15 C. B. (N.S.) 478; H. & P. 1; 33 L. J., C. P. 57; 9 Jur. (N.S.) 1342; 9 L. T. 481; 12 W. R. 202.

Mortgage interest may be apportioned for the purpose of ascertaining whether the freehold is of the annual value of 40*s.* above all charges; and therefore a freeholder is entitled to be registered as a voter for a county in respect of freehold land in the county of the annual value of 5*l.*, although such land is, with other land of the annual value of 50*l.*, subject to a mortgage for 300*l.*, the interest of which is 15*l.* a year. *Moore* v. *Carisbrooke Overseers*, 2 Lutw. Reg. Cas. 233; 12 C. B. 661; 22 L. J., C. P. 64; 17 Jur. 116; 1 W. R. 67.

The claimant to a county vote borrowed 300*l.* of a building society in which he held three shares, and mortgaged freehold tenements of which he was the owner in fee to such society for securing to it "the subscriptions, payments, redemption-moneys and fines in relation to the sum of 300*l.* by monthly instalments of 3*l.* 9*s.*," extending over ten years. The annual value of the tenements was 31*l.* 4*s.*, and the annual payment to the society was 41*l.* 8*s.*, two-thirds of which were in discharge of principal and one-third of interest. The claimant had only two years more of such payments to make, and he might redeem the property for 73*l.* 1*s.*:—Held, that he had an interest in the property of the value of 40*s.* by the year, within 8 Hen. 6, c. 7, and was therefore entitled to a vote for the county. *Rolleston* v. *Cope*, 1 Hopw. & C. 488; 40 L. J., C. P. 160; L. R. 6 C. P. 292; 24 L. T. 390; 19 W. R. 927.

Beneficial Interest in Lands subject to Trust for Sale.]—A testator devised copyhold cottages to trustees upon trust to sell and to stand possessed of the proceeds and pay the interest, dividends, &c., to his wife during her widowhood, and, after her decease or marriage, upon trust for his children who should be living at the time of his decease; the share of a son or sons to be vested and payable to him or them on attaining twenty-one, and the share of a daughter to be vested at twenty-one or marriage, and to be to her sole and separate use. The wife predeceased the testator; and the surviving trustees were admitted as customary tenants of the cottages. The testator left three sons and a daughter. The latter married and had issue, who were infants. Pursuant to a verbal arrangement amongst themselves (in which agreement the daughter's husband had concurred, but to which the trustees were no parties), the cestuis que trustent agreed to keep the cottages unconverted; and the rents (about 50*l.* per annum) were received by the trustees and divided amongst them:—Held, that, inasmuch as one of the cestuis que trustent was a married woman and had issue who were infants, no election could be made to take the cottages in their actual state, and so determine and extinguish the converting trust; and consequently that the testator's sons had not such an estate (legal or equitable) in the copyhold cottages as entitled them to be registered as voters for the county under 2 Will. 4, c. 45, s. 26, and 30 & 31 Vict. c. 102, s. 5. *Spencer* v. *Harrison*, Colt. 61; 49 L. J., C. P. 188; 5 C. P. D. 97; 41 L. T. 676; 28 W. R. 985; 44 J. P. 235.

Lands and Mill vested in Trustees for Benefit of all Partners in Business, and to be deemed to be Personalty.]—Several persons formed a co-partnership, to build and carry on their trade in a mill. For this purpose money was subscribed by all of them, and freehold lands purchased, which were conveyed to the use of trustees absolutely. By a partnership deed subsequently executed, "the trustees were to be seised and possessed of the estates, &c., upon trust for the benefit of themselves and their partners in the joint concern"; and it was agreed that "the lands and mill to be built, &c., shall be deemed and considered as or in the nature of personal estate, and not real estate." The mill was afterwards built, and the fulling trade carried on therein, and the profits distributed among the partners. The amount of interest possessed by each partner was sufficient to confer a vote, provided the interest acquired by such shares could be considered as an interest in real property:—Held, that such partners had an equitable seisin in a sufficient estate to enable them to vote for the county. *Baxter* v. *Newman*, 7 Man. & G. 198; 8 Scott (N.R.) 1019; 1 Lutw. Reg. Cas. 120, n.; 14 L. J., C. P. 193; 9 Jur. 829.

Pews.]—By a statute trustees were empowered to take down a chapel and build another on or near its site, and appropriate the pews or seats to the persons who subscribed towards the building, and who were to be deemed proprietors of such pews or seats, which should be vested in them in fee-simple; it was not known in whom the freehold of the soil was before the statute:—Held, that such proprietors had not any freehold in the soil covered by these pews or any profit arising thereout. *Greenway* v. *Hockin*, 1 Hopw. & C. 403; 39 L. J., C. P. 103; L. R. 5 C. P. 235; 22 L. T. 304.

Under a private act a church was built by certain subscribers and proprietors, in whom the freehold was vested. By the act the trustees were empowered "to let or sell and transfer and convey, for the purpose only of attending divine service," certain of the pews and seats to the inhabitants of certain parishes, subject to the

payments of rents and assessments, and with a power of entry for non-payment. By a subsequent private act, reciting that doubts had arisen as to the estate and interest which the subscribers and proprietors of the church took in the pews, it was enacted that the fee-simple and inheritance of and in the pews should be vested in the subscribers or the proprietors for the time being of the pews, their heirs and assigns for ever:—Held, that the proprietor of a pew did not under either of these acts acquire such a freehold interest in any portion of the soil of the church as to entitle him to a vote for the county, but merely an easement, or a qualified right to the occupation and enjoyment of the pew for the purpose of attending the services of the church. *Brumfitt* v. *Roberts*, 1 Hopw. & C. 387; 39 L. J., C. P. 95; L. R. 5 C. P. 224; 22 L. T. 301; 18 W. R. 678.

By a local act a church was to be taken down and rebuilt. Trustees were appointed by the act, the materials of the old church and those of the new being vested in them. The rights of the rector and his successors were reserved. The trustees were to allot pews in the new church to the former holders of pews in the old church, and were authorised to lease for three years, or sell the fee-simple of other pews, unto any persons being inhabitants of or residents within the district. The proprietor of any such pew might dispose of it to any purchaser, provided the latter was an inhabitant of or a resident within the district, but to no one else. If any proprietor died, and the pew did not descend to any person who was an inhabitant of or a resident within the district, the pew was to revert to the trustees. A pew had been bought in pursuance of the act, and re-sold to a proprietor, an inhabitant of the district; he did not occupy it himself, but let it, receiving by way of rent more than 40*s.* annually. The proprietor claimed to vote in respect of the pew, as having a freehold tenement of 40*s.* by the year:—Held, that he was not entitled to vote, as the effect of the purchase from the trustees was not to create a freehold tenement, under 8 Hen. 6. c. 7, but only a right to sit in the pew during divine service. *Hinde* v. *Chorlton*, 36 L. J., C. P. 79; L. R. 2 C. P. 104; 12 Jur. (N.S.) 1008; 15 L. T. 472; 15 W. R. 226.

Occupation of Premises as Minister for Life.]—See *Burton* v. *Brooks*, col. 105.

Fees of Incumbent of Church.]—An incumbent of a district church was, as such, entitled—(1) To the freehold of the church (not found by the revising barrister to be of any annual value); (2) To two sums of 150*l.* and 50*l.*, paid annually under orders in council by the ecclesiastical commissioners and the governors of Queen Anne's Bounty to the incumbent for the time being of the church; (3) To fees for marriages, baptisms and churchings performed within the church; (4) To fees under a local act in respect of the burial in a cemetery out of the parish of persons who had died within the district (items (3) and (4) each amounting to more than 40*s.* a year):—Held, that he was not shewn to have 40*s.* a year from land within the parish, so as to entitle him to the county franchise, the marriage, &c., fees (though received for ceremonies in part necessarily performed within the church) being paid for the personal services of the incumbent. *Kirton* v. *Dear*, 1 Hopw. & C. 349; 39 L. J., C. P. 36; L. R. 5 C. P. 217; 21 L. T. 532; 18 W. R. 144.

Purchaser who has not taken Possession or received Conveyance.]—A purchaser of land who has not received a conveyance, and who has allowed the vendor to remain in actual possession, is not entitled to vote for the county in respect of such land, although the same is sufficient in value and other respects to confer a vote, and although he is a purchaser for value by a binding contract capable of being enforced in equity. *Awlay* v. *Lewis*, K. & G. 36; 17 C. B. 316; 25 L. J., C. P. 121; 2 Jur. (N.S.) 164; 4 W. R. 286.

Shareholders in Company.]—Where a company duly registered holds freehold lands, the shareholders have no interest in the lands entitling them, or any of them, to vote for the county wherein the lands lie. *Bulmer* v. *Norris*, K. & G. 321; 9 C. B. (N.S.) 19; 30 L. J., C. P. 25; 7 Jur. (N.S.) 342; 3 L. T. 470; 9 W. R. 122.

The proprietors of a music-hall possessed of real estate, by deed vested the same in trustees, who were to deal with and manage it for the general body of shareholders, who were to have an interest in the net profits in proportion to the amount of their respective shares:—Held, that such shareholders had not any equitable interest in the realty, so as to entitle them to be registered for the county. *Freeman* v. *Gainsford*, 18 C. B. (N.S.) 185; H. & P. 255; 34 L. J., C. P. 95; 11 Jur. (N.S.) 116; 11 L. T. 675; 13 W. R. 343.

A claimant was possessed of a share in a corn exchange company. The land on which the corn exchange was built was freehold, and was vested in trustees. The income was derived from letting offices and cellars beneath, and stands and stalls in the exchange. The claimant's interest was of the clear yearly value of 40*s.* The company was registered under 7 & 8 Vict. c. 110, s. 58 (repealed):—Held, that the claimant had not a freehold interest in land in respect of his share in the company. *Bennett* v. *Blain*, 15 C. B. (N.S.) 518; H. & P. 35; 33 L. J., C. P. 63; 10 Jur. (N.S.) 130; 9 L. T. 506; 12 W. R. 175.

Shareholders entitled to Tolls but not to Soil of Bridge.]—Before the Thames Navigation Act, 1870, the shareholders in Putney Bridge had only a right to the toll for the passage over the bridge, but not to any land belonging to the bridge (the toll being vested in trustees, for the shareholders, and the land in trustees, for certain other persons), and therefore such shareholders were not qualified to be on the list of county voters as having, in respect of their shares, any estate in land. By the Thames Navigation Act, 1870, the bridge and lands belonging, as well as the tolls, were vested in a committee of management appointed from the shareholders of the bridge, but they were so vested, "subject to the trusts" on which the same were held at the passing of that act:—Held, therefore, that such shareholders were no more qualified as such to be on the list of county voters, than they had been before the passing of that act. *Wadmore* v. *Putney Overseers*, 41 L. J., C. P. 49; L. R. 7 C. P. 212; 26 L. T. 28; 20 W. R. 239.

By a local act commissioners were appointed for the purpose of building a bridge. By a subsequent act the commissioners were empowered to convey the tolls and profits to persons contracting to build the bridge. The commissioners granted the bridge, materials, tolls, and profits,

with all the ground and soil adjacent vested in them, to trustees, for the shareholders in the bridge:—Held, that the commissioners had no power to convey the land to the trustees, and that therefore the shareholders of the tolls and profits had no estate in the land, and therefore no qualification for a claim to vote. *Tepper* v. *Nichols*, 18 C. B. (N.S.) 121; H. & P. 202; 34 L. J., C. P. 61; 11 Jur. (N.S.) 18; 11 L. T. 509; 13 W. R. 270.

Members of Corporation.]—The members of a corporation, which is seised in fee-simple of freehold lands, have no such estate, legal or equitable, in the lands of the corporation as gives them the franchise for the county, although their individual shares in the profits realised from such lands by the corporation exceed 40*s.* a year each. *Acland* v. *Lewis*, K. & G. 334; 9 C. B. (N.S.) 32; 30 L. J., C. P. 29; 7 Jur. (N.S.) 421; 3 L. T. 470; 9 W. R. 123.

And see cases, ante, A. 1, *a.* i. (col. 3).

viii. *Value.*

Yearly Value.]—The criterion of value under 8 Hen. 6, c. 7, is not what the land actually produces, but what in its existing state it reasonably may produce. *Astbury* v. *Henderson*, 15 C. B. 251; 3 C. L. R. 164; 24 L. J., C. P. 20; 1 Jur. (N.S.) 258; 3 W. R. 67.

A. bought a piece of freehold land intending it for building purposes, for which it was suitable. If let upon a building lease, the land would be worth a ground-rent of 15*l.* a year, and A. had received a bonâ fide offer for that sum, but had refused it as insufficient:—Held, that although the land was unbuilt upon, and unlet, and consequently unproductive, A. was nevertheless entitled to be registered as the owner of a freehold estate of the clear yearly value of 40*s.* *Ib.*

Where freehold premises are let at a certain rent, and the landlord does the repairs, in estimating the clear yearly value above all charges, with reference to a county franchise, the average annual cost of the repairs (though not a charge) must be deducted from the annual rent, if such repairs are necessary, in order to obtain that amount of rent. *Hamilton* v. *Bass*, 2 Lutw. Reg. Cas. 213; 12 C. B. 631; 22 L. J., C. P. 29; 17 Jur. 115.

An owner of freehold land let it at a yearly rent of 40*s.*, part of the terms of the letting being that he should pay the tenants' rates; if he had not so agreed, the rent to have been obtained would have been less by the amount of the rates:—Held, that he had not an estate of the clear yearly value of 40*s.* so as to entitle him to a vote for a county; and that the 18 Geo. 2, c. 18, s. 6, did not apply. *Moorhouse* v. *Gilbertson*, 14 C. B. 70; 2 Lutw. Reg. Cas. 260; 2 C. L. R. 38; 23 L. J., C. P. 19; 17 Jur. 1184; 2 W. R. 58.

The owner of freehold land, on which was a rent-charge, granted a part of it in fee, subject to a proportion of the rent-charge. The conveyance contained covenants by the grantor to pay, and to indemnify the grantee against the remainder; there was a power of distress to the grantee over the residue of the land in case he was compelled to pay more than his proportion. The rent-charge was thus fairly apportioned, and the residue of the land was sufficient to meet its proportion:—Held, that in estimating the value of the grantee's land with reference to the county franchise, the apportioned part only of the rent-charge was to be deducted from the annual value; for that the charges to be deducted under 8 Hen. 6, c. 7, and the subsequent statutes, were such as were ultimately payable out of the land, and not primarily charged upon it. *Barrow* v. *Buckmaster*, 12 C. B. 664; 2 Lutw. Reg. Cas. 235; 22 L. J., C. P. 65; 17 Jur. 117.

A., and several other persons, claimed to be registered for a county, as the owners each of an undivided thirty-fifth share of freehold property, producing a net rental sufficient to give to each of them 2*l.* 0*s.* 6*d.* per annum. This was reduced to less than 40*s.* to each owner, by the allowance of a commission of 5*l.* a year to one of the thirty-five, who undertook the management of the property, and the transmission to each of the others of his share. The barrister having found that "the allowance of such commission was, from the nature of the property, necessary for the collection of the rents":—Held, that the court was bound by his finding, and therefore could not say that the claimants had freeholds of the clear yearly value of 40*s.* *Sherlock* v. *Steward*, 7 C. B. (N.S.) 21; K. & G. 286; 29 L. J., C. P. 87; 6 Jur. (N.S.) 611; 1 L. T. 100; 8 W. R. 89.

Lands of the annual value of 3,627*l.* were granted to six trustees to pay themselves 5*l.* apiece yearly, and apply the residue towards charitable purposes. The trustees were in the actual occupation of a portion of the lands of the annual value of 54*l.*, in respect of which they claim to be entitled to vote, as being in the receipt of 40*s.* a year for life issuing out of lands in their actual occupation:—Held, that they had no power to pay themselves their 5*l.* apiece out of that portion of the lands in their actual occupation, but that it must be apportioned over the whole of the trust estate, and that they therefore had not 40*s.* a year issuing out of lands in their actual occupation. *Mills* v. *Cobb*, 36 L. J., C. P. 75; L. R. 2 C. P. 95; 12 Jur. (N.S.) 1007; 15 L. T. 469; 15 W. R. 224.

Rate-book not binding as to Ratable Value.]—See *Cooke* v. *Butler*, col. 49.

Deduction of Charges.]—A sum of money voluntarily laid out by landlords in improving their property is not a charge to be deducted in ascertaining the net annual value for the purpose of the county franchise, within 8 Hen. 6, c. 7. *Buckley* v. *Wrigley*, 1 Hopw. & C. 661; L. R. 7 C. P. 185; 25 L. T. 835.

Tenants in common in fee of houses and land, expended of their own accord 21*l.* 19*s.* 1*d.* in laying on a supply of water for the convenience of their tenants. For this expenditure an additional rent was charged, but if the whole outlay was deducted in the year of qualification, the annual value would not have been sufficient for each landlord to have a freehold of 40*s.*:—Held, that such deduction should not be made. *Ib.*

Charge on whole Land to be apportioned in ascertaining for purpose of Franchise Value of part.]—See *Barrow* v. *Buckmaster*, *Mills* v. *Cobb*, *Bearn* v. *Watson*, and *West* v. *Robson*, col. 53.

Ascertaining Value of Mortgagor's Interest in Mortgaged Land.]—See *Lee* v. *Hutchinson*, *Copland* v. *Bartlett*, *Beemish* v. *Stoke Overseers*, *Robinson* v. *Dunkley*, and *Moore* v. *Carisbrooke Overseers*, cols. 54, 55.

Variable Pensions.]—A hospital was founded in 1673, by a duke, and real property was conveyed to trustees, for the benefit of poor pensioners residing in it. One of the ordinances regulating the hospital declared that whenever more than 100*l.* remained in the treasury, the surplus should be equally distributable among the pensioners. A private act of parliament, regulating the hospital, enacted that, instead of having the surplus revenue divided among the original number of pensioners, additional pensioners were to be chosen, and the trustees were directed, from time to time, to add as many more pensioners as the revenues of the hospital would allow; and the trustees were to pay the pensioners such fixed stipends as they should think fit, and to lessen, increase, vary, change and alter such weekly stipends as they should find requisite, so that the stipend should at no time be reduced below 3*s.* 6*d.* a week. The pensioners were also entitled to receive coals and certain clothing; but the case found, that the 3*s.* 6*d.* a week, and the coals and clothing, would be insufficient to confer the franchise; the pensioners were actually in the receipt of 10*s.* besides the coals and clothing:—Held, that the pensioners were not absolutely entitled to more than 3*s.* 6*d.* a week besides the coal and clothing, and therefore, were not entitled to the franchise. *Ashmore* v. *Lees*, 2 C. B. 31; 1 Lutw. Reg. Cas. 337; 15 L. J., C. P. 65; 9 Jur. 1109.

ix. *Qualifying Period.*

Compulsory Absence during.]—See *Donnelly* v. *Graham*, *Connolly* v. *Riddall*, *Martin* v. *Hanrahan*, col. 36, and *Hassan* v. *Chambers*, col. 37.

Claim by Succession.]—C., previously to his death, which occurred on the 6th of April, 1879, held a house as yearly tenant. The claimant married C.'s daughter, and in 1868 with his wife went to reside in C.'s house, and continued there subsequently. The business of a publican was conducted in the house by the claimant's wife, who supported the establishment, paid the rent and rates out of profits, and took out the annual spirit licence in C.'s name up to his death. After C.'s death the claimant and his wife carried on the business, and paid the rent and rates, the receipts for rent being given to the "representatives of C.," and the receipts for rates to the claimant in his own name. The spirit licence was duly transferred to the claimant. C. had two sons who survived him, and no other next of kin. They consented to the claimant residing in the house after C.'s death. No administration was taken out to C., who died intestate:—Held, that the claimant was not entitled to be registered as a voter under 13 & 14 Vict. c. 69, s. 14 (Ireland), as a person to whom lands, tenements, or hereditaments had come by succession (similar in terms to 2 Will. 4, c. 45, s. 26). *Topham* v. *Kelleher*, 6 L. R. Ir. 235—C. A.

"Succession," within the meaning of the above section, is the legitimate devolution of property upon the death of one person to another, legally ascertained as successive, in the place and stead of the former voter.—*Ib.*

Occupation during—Letters of Administration taken out subsequently—Relation Back.]—See *Holland* v. *Chambers*, *Doherty's Case*, col. 51.

Tenant holding over after Expiration of Notice to Quit—Subsequent New Contract—Relation Back.]—See *Holland* v. *Chambers*, *Devine's Case*, col. 50.

Six Months' Actual Possession of Rentcharge.]—See *Hayden* v. *Tiverton Overseers*, col. 52.

Voter must be of Age before Expiration of, but not during Whole of.]—See *Hargreaves* v. *Hopper* and *Powell* v. *Bradley*, col. 66.

x. *Property in Boroughs.*

Unity of Occupation—2 & 3 Will. 4, c. 45, s. 24.]—A minister of a church was stated to have, as minister, such a freehold interest in the rents received from the letting of pews in the church as entitled him to a vote for the county. He occupied as such minister the parsonage-house, and in respect of such occupation acquired a right to a vote for the borough:—Held, that there was no such unity of occupation as would, according to 2 & 3 Will. 4, c. 45, s. 24, disentitle him to the county vote. *Berwick* v. *Alker*, 2 Hopw. & C. 36; 42 L. J., C. P. 26; L. R. 8 C. P. 265; 27 L. T. 422; 21 W. R. 72.

Occupation of Land in Fee-Simple, together with a House in Borough.]—Where a voter claimed as owner in fee-simple of a piece of land one mile distant from a house in the borough, of which he was owner and occupier, and in respect of which he had a vote for the borough; it was held that the revising barrister was right in deciding that he was entitled to have his name inserted in the list of voters for the county. *Saunders* v. *Searson*; *Saunders* v. *Smith*, Colt. 150; 50 L. J., C. P. 117; 43 L. T. 438; 29 W. R. 289; 45 J. P. 22.

Two Distinct Qualifying Properties in a Borough—No Right to Vote for County in respect of Either.]—The respondent's name appeared twice on the list of borough voters for the borough of T., in respect of a freehold house, and also of a dwelling-house, both occupied by him within the borough. In revising the list for the borough, the revising barrister had placed against the entry of the respondent's name in respect of the freehold house a note to the effect that the respondent was not entitled to vote in respect of that qualification for the borough, he being on the same list of voters in respect of another qualification, in accordance with the directions of 41 & 42 Vict. c. 26, s. 28, sub-s. 14. On the revision of the county list an objection was made to the respondent's name being retained on the list of voters for the county in respect of the same freehold house, on the ground that the qualifying property was of such value as would confer on him the right of voting at parliamentary elections for the borough of T. (2 Will. 4, c. 45, s. 24). The revising barrister held that the effect of the note opposite the respondent's name was to place him in the position, so far as that property was concerned, of a person having no qualifying property in the borough, and retained his name on the county list:—Held, on appeal, that the revising barrister was wrong; that the effect of 2 Will. 4, c. 45, s. 24, was not altered by 41 & 42 Vict. c. 26, s. 28, sub-s. 14; and that the respondent was not entitled to be retained on the list of county voters in respect of that qualification. *Chilcot* v. *Bullen*, Colt. 282; 46 L. T. 63; 45 J. P. 815.

Interest in a Lease of Several Houses in Borough divisible.]—See *Webb* v. *Birmingham Overseers*, col. 48.

Owner of House in Borough Let in Separate Tenements.]—An owner of a copyhold house within a borough, who does not occupy, but lets it out in separate tenements, is disqualified, in respect of such house, for a county vote, the house being of sufficient value to give him a borough vote, although the separate tenements are each not of a value to qualify for a borough vote. *Proctor* v. *Annison*, 7 C. B. (N.S.) 48; K. & G. 297; 29 L. J., C. P. 90; 6 Jur. (N.S.) 656; 1 L. T. 187; 8 W. R. 140.

Since 30 & 31 Vict. c. 102.]—A person who was, at the time of the passing of the 30 & 31 Vict. c. 102, properly on the list of voters for a county in respect of a qualification situate within a borough has no right to have his name retained on that list in a case where that act has rendered the qualification sufficient to confer a vote for the borough. *Bunting's Case*, *Charlton* v. *Johnson*, 1 Hopw. & C. 49; 38 L. J., C. P. 37; L. R. 4 C. P. 426; 19 L. T. 560; 17 W. R. 141.

What a Sufficient Statement of Objection that Qualifying Property is in a Borough.]—See *Siney* v. *Dixon*, col. 77.

c. Particular Disqualifications.

See also B. 1, *e.*, post (col. 160).

Recipients of Alms.]—Land was devised to trustees to distribute a portion of the rents unto the poorest inhabitants of a tything as the trustees should think fit. The portion generally amounted to 40*l.* a year, and was annually distributed amongst about eighty of the labouring population of the tything, according to the discretion of the trustees, in sums varying from 2*s.* 6*d.* to 12*s.* 6*d.*, according to the necessities of the recipient and the number of his family. A. and B., who were agricultural labourers and inhabitants of the tything, and on the list of voters for the borough, received each during the electoral year, 12*s.* 6*d.* of the money so distributed under the trust. Neither of them had during such period received parochial relief, but A. had frequently in previous years received parochial relief, and B. had two years before applied for parochial relief, but had been refused on the ground that it was considered he did not need it:—Held, that both persons had received alms within s. 36 of 2 Will. 4, c. 45, and were therefore disqualified from voting. *Harrison* v. *Carter*, *Cook's Case and Port's Case*, 2 Hopw. & C. 324; 46 L. J., C. P. 57; 2 C. P. D. 26; 35 L. T. 511; 25 W. R. 182.

The appellant during the qualifying period was an alms-person in a certain hospital, where he occupied gratuitously and resided in a room assigned to him by the trustees of the charity; he also received a weekly allowance of 10*s.* in addition to washing, and half-a-ton of coals at Christmas, and he occupied a separate plot of ground assigned to him. The alms-persons were elected from poor deserving men of good character, and they could be removed from the hospital by the trustees for certain causes:—Held, that the appellant had received disqualifying alms within the meaning of s. 36 of the Reform Act, 1832, and that he was not entitled to be registered as a voter. *Dix* v. *Kent*, Fox, 186; 63 L. T. 641; 39 W. R. 173; 55 J. P. 213.

By the provisions of a charity, regulated by a scheme of the charity commissioners, a certain number of the poor inhabitants of a borough, who had not been for two years in the receipt of parish relief, were received into an almshouse, where certain weekly payments and other benefits were bestowed upon them. They were liable to be removed for misconduct and other causes:—Held, that they had received alms within s. 36 of 2 & 3 Will. 4, c. 45, and were therefore disqualified from voting. *Baker* v. *Monmouth Town Council*, 53 L. T. 668; 34 W. R. 64; 49 J. P. 776.

The claimants during the qualifying period occupied almshouses in a borough and received out of a charitable fund for the sustenance of the inmates allowances of 6*s.* a week. The charity was regulated by an act of parliament, which provided that the inmates of the almshouses were to be persons "who from age, ill-health, accident, or infirmity should be unable to maintain themselves":—Held, that the facts shewed a receipt of "alms which by the law of parliament disqualify from voting" under the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 36, and that the claimants were not entitled to be registered as voters. *Edwards* v. *Lloyd*, Fox, 54; 57 L. J., Q. B. 121; 20 Q. B. D. 302; 58 L. T. 409; 52 J. P. 519.

The Licensed Victuallers' Asylum is an institution incorporated under royal charter. The design of the institution is to receive and maintain decayed aged licensed victuallers and their wives and widows. Only those who have contributed to the funds of the institution as subscribers or donors are eligible to be elected as inmates of the asylum. The funds of the institution are largely augmented by private benevolence. The inmates are subject to various rules of discipline, which may be altered from time to time by the board of management. No person having an income exceeding a certain amount is qualified to be elected or to remain an inmate of the asylum. The funds of the institution are applied, among other things, in augmentation of the incomes of the inmates up to a limit fixed from time to time by the board:—Held, that the rules of the institution do not necessarily shew that the inmates are in receipt of alms such as to disqualify them from the franchise under the provisions of 2 & 3 Will. 4, c. 45, s. 36. *Daniels* v. *Allard*, Fox, 70.

Brethren of a charterhouse founded, under letters patent in 1384, who, during the qualifying period, live in houses of which they are for the time being legal owners, and have a legal right to participate in the funds of the institution until removal for good cause shewn, upon which they have a right to be heard, and who have voted at parliamentary elections for a great number of years without objection, are not in receipt of alms within s. 36 of the Reform Act, 1832, so as to be disqualified from being put on the register of voters for the election of a member of parliament. *Cowen* v. *Kingston-upon-Hull Town Clerk*, 1 Smith, 96; 66 L. J., Q. B. 185; [1897] 1 Q. B. 273; 75 L. T. 593; 45 W. R. 413; 61 J. P. 356.

To take the benefits of an incorporated charity, as one entitled permanently to share in its revenues, resources and advantages, is not a receiving of alms, so as to disqualify from voting. *Smith* v. *Hall*, 15 C. B. (N.S.) 485; H. & P. 11;

33 L. J., C. P. 59; 9 Jur. (N.S.) 1340; 9 L. T. 413; 12 W. R. 172.

Freemen of a borough entitled to be registered as voters for members of parliament were brethren of hospitals which were corporations possessing landed estates. The income was divisible annually among the brethren in equal proportions, and each brother had a house assigned to him, which he was bound to repair. The right of appointing brethren was vested in trustees. No instance of removal of a brother was known. A candidate for appointment must be fifty-six years old, "except lame, blind or impotent persons, and unfit for husbandry, and should be an inhabitant or a child of one having no competent means of living":—Held, that freemen of the borough were not disqualified by reason of being brethren of the hospitals. *Ib.*

The mere fact that occupation was originally conferred from charitable motives, and is still enjoyed with restrictions, will not, if the interest of the occupier amounts to freehold, preclude him from the franchise. *Fryer* v. *Bodenham*, 38 L. J., C. P. 185; L. R. 4 C. P. 529; 19 L. T. 645; 17 W. R. 294; 1 Hopw. & C. 204.

Recipients of Parochial Relief.]—A freeman who has within the year been excused from paying a poor-rate, under 54 Geo. 3, c. 170, s. 11, upon proof before the justices of inability through poverty to pay such rate, is not disqualified from being registered, as having received parochial relief within 2 Will. 4, c. 45, s. 36. *Mashiter* v. *Dunn*, 6 C. B. 30; 2 Lutw. Reg. Cas. 112; 18 L. J., C. P. 13.

Quære, whether obtaining medical attendance and medicine on loan from guardians of a union, under 4 & 5 Will. 4, c. 76, s. 58, was, before 48 & 49 Vict. c. 46, a receiving of parochial relief. *Devenish* v. *Digby*, 13 C. B. (N.S.) 28.

A son of a pauper was summoned before justices (his name being on the list of voters for a borough), and he consented to pay 1*s.* 6*d.* a week towards his father's maintenance; which offer was accepted by the guardians, and he continued to pay this sum each week that his father remained within the union, the residue of the sum necessary for his father's complete maintenance being defrayed out of the funds of the union. On an objection to the son's qualification as an elector, on the ground of his receiving parochial relief:—Held, not a receipt of alms. *Trotter* v. *Trevor*, 13 C. B. (N.S.) 48; K. & G. 531; 32 L. J., C. P. 59; 9 Jur. (N.S.) 443; 7 L. T. 678; 11 W. R. 92.

The wife of the appellant, being near her confinement, applied to the relieving officer of the union for an order for the attendance of a medical man. The guardians authorised the relieving officer to give her an order for such attendance, but she was in fact attended during her confinement by an uncertificated midwife, who was sent to her and paid by the relieving officer:—Held, that the relief afforded to the wife was "medical assistance" within 48 & 49 Vict. c. 46, s. 2, and that the appellant was not disqualified from being registered as a parliamentary voter. *Honeybone* v. *Hambridge*, 56 L. J., Q. B. 46; 18 Q. B. D. 418; 56 L. T. 365; 35 W. R. 520; Fox, 26; 51 J. P. 103.

The appellant and others had, during a portion of the qualifying period, and at a time when great distress prevailed, been employed by the board of guardians of the union in which they resided to break stones, and had received payment for their work. The payments received had not been in any way commensurate with the amount of work done, but with the wants of each person employed; and had varied according to the number of children belonging to such person:—Held, that the payments so made constituted relief given to the persons employed; and that they were therefore disqualified from being registered by reason of their having been in receipt of parochial relief within s. 36 of the Representation of the People Act, 1832. *Magarrill* v. *Whitehaven Overseers*, 55 L. J., Q. B. 38; 16 Q. B. D. 242; 53 L. T. 667; 34 W. R. 275; Colt. 448; 49 J. P. 743.

Application for a receipt of provision under 29 & 30 Vict. c. 38, for the interment of a deceased member of his family during the qualifying year is sufficient to disqualify the recipient, though otherwise entitled to the franchise, from being registered as a parliamentary voter. *Kerr* v. *Chambers*, 20 L. R., Ir. 207—C. A.

See *Hayward* v. *Scott*, col. 103.

Police Constables.]—By 10 Geo. 4, c. 44, s. 18, a constable of the metropolitan police force is disqualified from voting at the election of a member of parliament for certain counties or for any city or borough within the metropolitan police district:—Held, that such a constable is a person "incapacitated by law or statute from voting," within 41 & 42 Vict. c. 26, s. 28, sub-s. 7, and consequently is not entitled to be retained on the list of voters under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102). *Doulon* v. *Halse*, 56 L. J., Q. B. 41; 18 Q. B. D. 421; 56 L. T. 340; 35 W. R. 502; Fox, 1; 51 J. P. 183. *See* 50 Vict. c. 9, s. 1, and Schedule.

Serjeants-at-mace, appointed by a corporation, under the provisions of its charter, with a salary paid by the treasury, out of the fund of the corporation, are not constables appointed for the borough under 5 & 6 Will. 4, c. 76 (repealed), so as to be prohibited from voting in the election of members of parliament by 19 & 20 Vict. c. 69, s. 9, although their original appointment takes place subsequently to 5 & 6 Will. 4, c. 76. *De Boinville* v. *Arnold*, 1 C. B. (N.S.) 3; 26 L. J., C. P. 65; 3 Jur. (N.S.) 642; 5 W. R. 21.

Aliens.]—Persons born in Hanover before 1837, resident in this country and not naturalised; persons born in Hanover since 1837, resident in this country and not naturalised; and persons born in Prussia of Hanoverian parents born before 1837, and now resident in this country and not naturalised, are all aliens and not entitled to the franchise. *Isaacson* v. *Durant*, 55 L. J., Q. B. 331; 17 Q. B. D. 54; 54 L. T. 684; 34 W. R. 547. See *Finsbury Case*, 4 O'M. & H. 172.

Minors.]—To entitle a voter to be registered in respect of the 12*l.* occupation franchise under the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 6, he must have been of full age on the last day of July in the qualifying year. *Hargreaves* v. *Hopper*, 45 L. J., C. P. 105; 1 C. P. D. 195; 33 L. T. 530; 24 W. R. 186.

To entitle a party to be registered under 2 Will. 4, c. 45, s. 27 (repealed), in respect of the occupation of premises, it is not necessary that he should have been of full age during the whole of the prescribed period of occupation. *Powell* v. *Bradley*, 18 C. B. (N.S.) 65; H. & P. 159

34 L. J., C. P. 67; 10 Jur. (N.S.) 1246; 11 L. T. 602; 13 W. R. 272.

See *Londonderry Case*, col. 135.

Prisoner.]—See *Jones, In re*, col. 121.

Peers.]—A peer of parliament is incapacitated from voting at an election for members of the house of commons; and is therefore not entitled to be placed on the register of voters. The revising barrister ought to strike out the name from any list on it being proved to be that of a peer of parliament, although no notice of objection has been given. *Beauchamp (Earl)* v. *Madresfield Overseers*, 42 L. J., C. P. 32; L. R. 8 C. P. 245; 27 L. T. 606; 21 W. R. 124; 2 Hopw. & C. 41.

An Irish peer, who at the time of registration is not a member of the house of commons, is incapacitated by law from voting at parliamentary elections, and therefore is not entitled to have his name inserted on the register of parliamentary election. *Rendlesham* v. *Haward*, 43 L. J., C. P. 33; L. R. 9 C. P. 252; 29 L. T. 679; 22 W. R. 157; 2 Hopw. & C. 175.

Letter-carrier.]—A letter-carrier to a post-office, who had resigned his situation within twelve months before the 31st July, being disqualified from voting until after twelve months from the resignation of such situation by 22 Geo. 3, c. 41, s. 1 (repealed), was not entitled to be registered. *Austin's Case*, 7 Man. & G. 97; 8 Scott (N.R.) 921; 14 L. J., C. P. 72; 9 Jur. 163.

Clerk to Inspector of Taxes.]—A clerk to a receiving inspector of taxes is not disqualified from being registered. *Clonishaw's Case*, 8 Scott (N.R.) 947; 1 Lutw. Reg. Cas. 228, n.; 7 Man. & G. 97, n.

Tide-waiter.] — By 22 Geo. 3, c. 41, s. 1 (repealed), no commissioner or other officer or person whatsoever concerned or employed in charging, collecting, levying or managing the customs, or any branch thereof, is to have a vote:—Held, that a glut tide-waiter, being a person whose name is on a list, confirmed by the commissioners of customs, of persons ready to act as tide-waiters, and liable to be called on to act whenever there may be occasion, was both within the mischief and the words of the act, and was, therefore, disqualified from voting. *Pownall* v. *Hood*, 2 Lutw. Reg. Cas. 170; 11 C. B. 1; 21 L. J., C. P. 12; 16 Jur. 618.

Women.]—Women are subject to legal incapacity to vote at an election either for a borough or for a county, though possessed of the proper qualification. *Charlton* v. *Lings*, 38 L. J., C. P. 25; L. R. 4 C. P. 374; 19 L. T. 534; 17 W. R. 284; 1 Hopw. & C. 1. *Charlton* v. *Kessler*, L. R. 4 C. P. 397; 1 Hopw. & C. 42.

And cannot therefore appeal from the decision of a revising barrister. *Wilson* v. *Salford Town Clerk*, 38 L. J., C. P. 35; L. R. 4 C. P. 398; 19 L. T. 483; 17 W. R. 161; 1 Hopw. & C. 44.

Clerk to Election Agent.]—See *Buckrose Case*, col. 136.

Persons making Payments not included in Expenses.]—Payments made by the secretary of a political association and also by a member of a local branch thereof were not included in the return of election expenses:—Held, that the votes of both persons must be struck off. *Buckrose Case*, 4 O'M. & H. 110.

Candidates reported as guilty of Bribery.]—In order to disqualify a candidate from being registered as a voter, by reason of personal bribery, or bribery by an agent with his knowledge and consent, under 31 & 32 Vict. c. 125, s. 43 (repealed), he must be found by the report of the election judge under s. 11, sub-s. 14, to have been so guilty. It is not enough that the judge states facts from which personal bribery or other corrupt practice might be inferred. *Grant* v. *Pugham Overseers*, 47 L. J., C. P. 59; 3 C. P. D. 80; 37 L. T. 404; 26 W. R. 169; 2 Hopw. & C. 384.

Conveyances to Multiply Votes.]—A conveyance is not void within 7 & 8 Will. 3, c. 25, s. 7, unless the vendor is party or privy to the illegal object. *Marshall* v. *Bown*, 7 Man. & G. 188; 8 Scott (N.R.) 899; 1 Lutw. Reg. Cas. 278; 14 L. J., C. P. 129; 9 Jur. 164.

Where the object which the vendees of an estate had in view by their purchase was to acquire for themselves votes, for the purpose of multiplying votes for the election of members of parliament, and such object was known and acquiesced in by the vendor's solicitor, but it did not appear that the vendor knew what was the object of the vendees or that he had any intention, by the sale of the estate, so to multiply votes:—Held, that the case did not fall within 7 & 8 Will. 3, c. 25, s. 7. *Hoyland* v. *Bremner*, 2 C. B. 84; 1 Lutw. Reg. Cas. 381; 15 L. J., C. P. 133; 10 Jur. 36; Barr. & Arn. 611.

A conveyance made for a bonâ fide consideration, in trust, as to one-tenth, for the grantor himself, and, as to the other nine-tenths, for certain other parties, who amongst themselves contributed nine-tenths of the purchase-money, is not within 7 & 8 Will. 3, c. 25, s. 7, notwithstanding the avowed object of the grantor is to multiply, and of the other parties to acquire, the right of voting. *Thornley* v. *Aspland*, 2 C. B. 160; 1 Lutw. Reg. Cas. 423.

A bonâ fide grant of a rent-charge by a man to his son and his son-in law, expressed to be made for a nominal consideration only, is not within 7 & 8 Will. 3, c. 25, s. 7, though all the parties contemplated the creation of votes. *Newton* v. *Crowley Overseers*, 2 C. B. 207.

A conveyance of land by one vendor to several vendees, for a bonâ fide consideration, is valid, although the avowed object of the vendor is to multiply, and that of the vendees to acquire, the right of voting. *Alexander* v. *Newman*, 2 C. B. 122; 1 Lutw. Reg. Cas. 404; 15 L. J., C. P. 134; 10 Jur. 313; Barr. & Arn. 657.

A conveyance made to carry into effect a real bonâ fide contract of sale, where the purchase-money is paid and the possession taken, without any secret reservation or trust whatever for the benefit of the seller, is not within 7 & 8 Will. 3, c. 25, s. 7, notwithstanding it is made with a view to the multiplying of votes, or the splitting of freeholds; the intention of the statute being to avoid such conveyances only, made with that view, as are in themselves fraudulent and collusive. *Riley* v. *Crossley*, 2 C. B. 146; 1 Lutw. Reg. Cas. 420; 15 L. J., C. P. 144; 10 Jur. 316; Barr. & Arn. 682.

A conveyance made by a father to his two sons, in consideration of natural love and affec-

tion, and with the object of multiplying votes, is not void, if fraud in fact is not found by the revising barrister. *Newton* v. *Hargreaves*, 2 C. B. 163; 1 Lutw. Reg. Cas. 424; 15 L. J., C. P. 154; 10 Jur. 317; Barr. & Arn. 690.

A conveyance of property by a father to his son to give him a qualification to vote, is not invalid, but is a bounty. *May* v. *May*, 33 Beav. 81.

The question, whether the circumstances attending a conveyance or a grant amount to fraud or not, is a question of fact for the revising barrister to determine, and is not one which the court can entertain upon appeal. *Newton* v. *Mobberley Overseers*, 2 C. B. 203; 1 Lutw. Reg. Cas. 427; 15 L. J., C. P. 154; 10 Jur. 318; Barr. & Arn. 695.

Under 7 & 8 Will. 3, c. 25, s. 7, and 10 Ann. c. 23, s. 1, a fraudulent conveyance executed for the mere purpose of conferring a vote is void only to the extent of preventing the right of voting from being acquired, but is valid and effectual as between the parties to it to pass the interest. *Phillpotts* v. *Phillpotts*, 10 C. B. 85; 20 L. J., C. P. 11. See *Groves* v. *Groves*, 3 Y. & J. 163, post, col. 114.

Premises taken to obtain Votes.]—See *Mooney* v. *Chambers*, col. 12.

Resolution of House of Commons purporting to Disfranchise.]—See *Bulmer* v. *Norris*, col. 121.

Register conclusive except in case of Inherent Incapacity.]—See *Stowe* v. *Jolliffe*, col. 136.

d. Making and Publication of Lists.

See also B. 1, *f*. post (col. 160).

Whether Occupation Joint or Several.]—In the list of borough voters made out by the over-seers, pursuant to 6 & 7 Vict. c. 18, s. 13, it is not necessary that it should appear whether the occupation is joint or sole. *Daniel* v. *Camplin*, 8 Scott (N.R.) 999; 7 Man. & G. 167; 1 Lutw. Reg. Cas. 264; 14 L. J., C. P. 121; 9 Jur. 403; Barr. & Arn. 425.

Parish Partly in Two Parliamentary Divisions — Constitution of Parish for Poor-law Purposes—Deeping Fen Drainage Act, 1856.]—The effect of the Deeping Fen Drainage Act, 1856, was to constitute Deeping St. Nicholas a separate parish for poor-law purposes only, so that the name of a voter who had a qualification in respect of premises occupied by him in that part of such parish locally in Kesteven, and in the petty sessional division of Bourne, was rightly retained on division 1 of the occupiers' list for the South Kesteven or Stamford parliamentary division of Lincolnshire. Sect. 9 and schedule 17 of the Redistribution of Seats Act, 1885, control and override the general provisions of s. 18 of the same act. *Skinn* v. *Phillips*, Fox, 386.

Description of Voter's Place of Abode.]—In a register of county voters, the place of abode of a voter is only required to be stated where he has one in the United Kingdom. *Walther* v. *Payne*, 2 C. B. 12; 1 Lutw. Reg. Cas. 324; 15 L. J., C. P. 38; 9 Jur. 1014; Barr. & Arn. 541.

Travelling abroad is a sufficient description in the column marked "Place of Abode." *Ib.*

Description of Qualification in Case of Successive Occupation.] — See *Burton* v. *Gery*, col. 10.

As to Misdescriptions of Qualifying Property and of Nature of Qualification, and other Errors in Preparation of Lists.] — *See cases*, post, A. 1, *g*. (col. 93).

Indictment against Overseer—Wilful Breach of Duty.]—An indictment will not lie against an overseer for wilful breaches of the duties imposed upon him by the Registration Act of 1843, in preparing and publishing voters' lists, inasmuch as for every such breach of duty—the duties being new duties created or re-created by the statute—a special tribunal is created by s. 51 of the act, and a penal action given by s. 97, which excludes the remedy by indictment. *Reg.* v. *Hall*, 60 L. J., M. C. 124; [1891] 1 Q. B. 747; 64 L. T. 394; 17 Cox, C. C. 278.

Wilfully Inserting Unqualified Persons in List of Voters.]—In an action against an overseer for a penalty under 2 Will. 4, c. 45, s. 76, for wilfully inserting in the list of voters the names of persons not entitled to vote, it is not essential that he should have acted from any corrupt motive; it is sufficient if he has acted wilfully. *Turr* v. *McGahey*, 7 Car. & P. 380.

Signature of List by Overseers.]—The 6 & 7 Vict. c. 18, s. 13, which enacts, that the overseers of every parish in a borough shall make out certain lists of voters, and shall sign such lists, is, as to the signing, directory only; and therefore a list made out by the overseers is valid, though unsigned. *Morgan* v. *Parry*, 17 C. B. 334; 25 L. J., C. P. 141; 2 Jur. (N.S.) 285; 4 W. R. 286.

Publication—What Sufficient.]—C. was entitled to be and was placed by the overseers upon the list of persons qualified to vote for the county by reason of the occupation of lands or tenements of the rateable value of 12*l*. or upwards per annum. This list, which was headed "Voters as occupiers of rateable value of 12*l*. or upwards," was printed alphabetically after the list of persons entitled to vote in respect of property in the parish, and was signed at the end by the overseers: but the printer by mistake, on the sheet which commenced with C.'s name, inserted the heading applicable to the preceding list, viz., "List of persons entitled to vote in respect of property." The overseers published the list as printed. There was no evidence that any person had in fact been misled. The revising barrister decided that there had not been a publication of the list as a 12*l*. list; and that the interpolated heading was not "a misnomer of a thing so denominated as to be commonly understood," within 6 & 7 Vict. c. 18, s. 101; and he therefore expunged the name of C. and all the names which followed his upon the list. The court, on appeal, reversed his decision; and held that there had been a sufficient publication of this part of the list as a 12*l*. list. *Mather* v. *Allendale Overseers*, 40 L. J., C. P. 76; L. R. 6 C. P. 272; 23 L. T. 539; 19 W. R. 284; 1 Hopw. & C. 461.

Parish Church — Duty of Overseer where Parishes have been united for Ecclesiastical Purposes.]—Notices and lists under the Regis-

tration Act, 1843, must, by s. 23, where there is no parish church, be published in some public and conspicuous place within the parish. Where, in the city of London, the church of parish A. has been pulled down, and the benefice united for ecclesiastical purposes alone with that of parish B., whilst the respective parishes continue to exist as separate and distinct, with separate parish officers, the overseer of parish A. is not bound or entitled under the section to affix such notices relating exclusively to his parish to the door of the church of parish B., but must find some public and conspicuous place for their publication in parish A. The removal of such notices by the incumbent of the united benefice from the door of the church of parish B. is not an offence within s. 25. *Hildred* v. *Ingram*, 64 L. J., M. C. 57.

Overseers ought to Publish List as Received from Clerk of the Peace.]—See *Nosewortlhy* v. *Buckland-in-the-Moor*, col. 91.

Late Publication of Claims by Overseer.]—An overseer received claims in due times from occupiers and from lodgers not already on the register, but published a list of them some days after the time specified in the 2nd schedule, part 2 of the Registration Act, 1885: —Held, that this did not invalidate the lists, and that the revising barrister was right in accepting and revising them. *Wells* v. *Stanforth*, 55 L. J., Q. B. 12; 16 Q. B. D. 244; 54 L. T. 183; 50 J. P. 631; Colt. 451.

Declaration as to Misdescription in List.]—A declaration by a person entered on a list of voters as to a misdescription in such list cannot be received as evidence by a revising barrister, unless it has been sent within the statutory times to the town clerk or clerk of the peace. *Duking* v. *Fraser*, Colt. 455; 55 L. J., Q. B. 11; 16 Q. B. D. 252; 34 W. R. 366—D.

Notice of Lodger's Claim to be on List not sent in in Time.]—See *Whitwell* v. *North Riding*, col. 76.

Expenses.]—*By 54 Vict. c. 18, half the registration expenses in respect of a parish in a parliamentary borough, not also municipal, are to be paid out of the county fund, and half out of the parish poor-rate.*

By 6 & 7 Vict. c. 18, s. 55, all expenses incurred by the town clerk of a borough in carrying into effect the provisions of the act shall be defrayed out of the poor-rate in the several parishes. On a mandamus to the guardians of the poor of a parish to pay the sum certified by the town council as the contribution of their parish towards defraying the expenses so incurred:—Held, that the town clerk was not entitled to remuneration for personal attendance and trouble in the performance of the duties imposed upon him by the act. *Reg.* v. *St. Mary, Kingston-on-Hull Governors*, 2 El. & Bl. 182; 22 L. J., Q. B. 324; 17 Jur. 914.

The town clerk of a borough is not entitled under 6 & 7 Vict. c. 18, s. 55, to be paid out of the poor-rates for copying and arranging the lists of voters for the parish in a borough; and if he employs and pays another to do this work when it might be done by himself and his usual staff of clerks, he is not entitled to be reimbursed; and the officers of any parish making such payment to the town clerk are liable to be surcharged the amount by the auditor. *Reg.* v. *Allday*, 7 El. & Bl. 799; 26 L. J., Q. B. 292; 3 Jur. (N.S.) 961; 5 W. R. 625.

But see 30 & 31 Vict. *c.* 102, s. 31.

The London County Council is the proper authority to certify under 6 Vict. c. 18, s. 55, for the costs of the returning officer who prepares the register of parliamentary voters for the parliamentary borough of Deptford (transferred by s. 40 of the Local Government Act, 1888, to London), notwithstanding s. 92 of the latter act, which retains it in the county of Kent for county parliamentary purposes. "Occupation voters" in sub-s. 2 of s. 92, means county occupation voters and not those for a parliamentary borough. *Weller* v. *Collins*, 54 J. P. 441.

Register not Final until Signed and Delivered to Sheriff.]—The alphabetical printed lists of voters for a county do not constitute the final and true register of persons entitled to vote, until they have been signed and delivered by the clerk of the peace to the sheriff. *Brumfitt* v. *Brenner*, 9 C. B. (N.S.) 1; K. & G. 352; 30 L. J., C. P. 33; 7 Jur. (N.S.) 371; 3 L. T. 375; 9 W. R. 144.

There may be cases in which the clerk of the peace is authorised to make correction of a mistake in the printed lists before signing and delivering them, and the document, when so corrected and signed and delivered, will be the final and true register. *Ib.*

The 6 & 7 Vict. c. 18, s. 47, so far as it requires the delivery to the sheriff to be made before the 30th November, is directory only, and failure to comply with it does not avoid the register. *Ib.*

In revising the lists of voters for a county, the barrister, by inadvertence, drew his pen through the name of A., which he did not intend to strike out. Discovering his error, he partially effaced the obliterating mark, and did not place his initials against the line in the margin, which by 6 & 7 Vict. c. 18, s. 41, he should have done, if he had intended an alteration. In printing the lists to form the register for the ensuing year, the clerk of the peace, assuming that A.'s name had been expunged by the revising barrister, omitted it, and a few copies of the printed book were sold before the error was discovered. Having his attention called to the blunder, the clerk of the peace corrected it by causing a fresh leaf to be printed, inserting A.'s name in the proper place, with the consecutive number prefixed to it, with the addition of the letter A., thus: "5638 A." and sent copies of the newly-printed leaf to the purchasers of the before-mentioned so-called copies, requesting them to substitute it for the corresponding leaf in the book so sold to them. The clerk of the peace afterwards signed and delivered to the sheriff the book as corrected:—Held, that the book so signed and delivered to the sheriff was the register for the year, and consequently that a notice of objection signed by A. was a good notice. *Ib.*

Examined Copy of Register Admissible in Evidence.]—The register of voters at a parliamentary election is a document of such a public nature as to be admissible in evidence upon its mere production by the returning officer, and therefore an examined or a certified copy of it is also admissible. *Reed* v. *Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; 6 Jur. (N.S.) 828.

Jurisdiction of High Court over List.]—The court has no general jurisdiction to interfere with the lists of voters in cases in which no appeal lies under the 6 & 7 Vict. c. 18. *Allen, In re*, 6 C. B. (N.S.) 234; K. & G. 258; 28 L. J., C. P. 256; 5 Jur. (N.S.) 1011; 7 W. R. 397.

The name of a voter appeared in the list of voters for a borough, and also in the list for the county. His qualification in respect of the latter being objected to, and he not appearing to support his vote, the revising barrister, intending to strike his name out of the county list, by mistake expunged it from the borough list:—Held, that the court had no power to give him relief, or to make any order under 6 & 7 Vict. c. 18, s. 67. *Ib.*

e. Claims.

See also B. 1, *g.* post (col. 162).

Description of Nature of Qualification.]—A claimant to a borough vote in a borough in which there existed both occupation and freehold qualifications, described the nature of his qualification in his notice of claim to the overseers, as "house":—Held, a sufficient description of a qualification in respect of the occupation of a house of the annual value of 10*l.*, but that if necessary for more clearly describing it, the revising barrister had power to amend it by inserting the correct description in the list of voters. *Ford* v. *Boon*, 41 L. J., C. P. 28; L. R. 7 C. P. 150; 25 L. T. 830; 20 W. R. 251; 1 Hopw. & C. 668.

The description of the nature of a qualification to vote for a borough as part of a house, is sufficient. *Judson* v. *Luckett*, 2 C. B. 197; 1 Lutw. Reg. Cas. 490; 15 L. J., C. P. 163; 10 Jur. 252; Barr. & Arn. 707.

"On the register of voters for the township of M." is sufficient, although, in the form given in 6 & 7 Vict. c. 18, schedule (A.), No. 5 (repealed), the word "parish" only is used. *Gudsby* v. *Warburton*, 7 Man. & G. 11; 1 Lutw. Reg. Cas. 136; 8 Scott (N.R.) 775; 14 L. J., C. P. 41; 9 Jur. 17; Barr. & Arn. 272.

A 12*l.* occupier served upon the overseers on the 25th of August, a notice of a claim as follows:—"I claim to be inserted on the list of voters for the division of East Devonshire"; and in the third column "the nature of qualification" was stated to be "Land, as occupier":—Held, a good notice under 31 & 32 Vict. c. 58, s. 17 (repealed), and 6 & 7 Vict. c. 18, s. 15. *Firth* v. *Widdicombe-in-the-Moor Overseers*, 41 L. J., C. P. 38; L. R. 7 C. P. 172; 25 L. T. 833; 20 W. R. 234; 1 Hopw. & C. 653.

In a notice of claim to be inserted in a list of voters for a city or borough, pursuant to 6 & 7 Vict. c. 18, s. 15, schedule (B.), No. 6, it is enough to describe the nature of the qualification in the third column of the form as a house, notwithstanding the qualification in reality consists in the occupation of two houses in immediate succession, provided the whole qualification is accurately described in the fourth column. *Hitchins* or *Hutchins* v. *Brown*, 2 C. B. 25; 15 L. J., C. P. 38; 9 Jur. 1058.

In the statement of a claim to vote, on the list of claimants for a county, it is sufficient for a party, claiming in respect of occupancy of a farm as tenant liable to a 50*l.* rent, to fill up the third column with "Farm as occupier," and the fourth with "Cambridge-road," the farm being there situate. *Howitt* v. *Stephens*, K. & G. 183; 5 C. B. (N.S.) 30; 28 L. J., C. P. 105; 5 Jur. (N.S.) 123; 7 W. R. 55.

In a claim for a county vote in respect of an undivided fifty-first part of a freehold fee-farm rent, arising from an assignment of land-tax, it is sufficient if the nature of the qualification be stated as "freehold fee-farm"; or at any rate it is competent for the barrister to amend, by prefixing the words "one undivided fifty-first part of and in," as he does not thereby alter the qualification. *Cooper* v. *Ashfield*, 5 C. B. (N.S.) 16; K. & G. 200; 28 L. J., C. P. 35; 5 Jur. (N.S.) 293.

Description of Qualifying Property.]—If the rent-charge is charged upon two properties, out of one of which, by itself, enough issues to give the claimant the franchise in point of amount, but out of the other not enough, it is sufficient to state, in the fourth column of claim, the name of the owner of the first-mentioned property only. *Ib.*

The directions given at the head of the form of notice of claim in schedule (A.) (repealed), of 6 & 7 Vict. c. 18, intend, that, if the qualifying property is a house, &c., in a street or lane, or other like place in a parish, the street or lane shall be mentioned, and if the houses are numbered, the number also shall be given; but that, if the house, &c., is not in a street or lane, or other like place, but in a road, or upon a common or the like, then the name of the property shall be given, if known by any, or the name of the occupying tenant. *Eckersley* v. *Barker*, 8 Scott (N.R.) 899; 7 Man. & G. 76; 1 Lutw. Reg. Cas. 287; 14 L. J., C. P. 65; Barr. & Arn. 334; 9 Jur. 331.

See *Hitchins* v. *Brown*, and *Howitt* v. *Stephens*, supra.

As to Power of Revising Barrister to amend Claim.]—*See cases*, post, A. 1, *g.* (col. 98).

Agent Authorised to Sign Notice of Claim—Power to Delegate Authority.]—The appellant had signed a printed authority to an agent to claim a vote for him and to sign his, the appellant's, name, and to appear and support the claim. The agent delegated his authority to a clerk in his employment to sign the claim. Objection was taken, and the revising barrister expunged the claimant's name, on the grounds that the agent had no power to delegate the authority, and that he was not satisfied that the claimant had given due notice of his claim or proved it, as under 6 & 7 Vict. c. 15, s. 38:—Held, that the claim was good, and the signature by the clerk of the agent under his instruction was the same as though the agent himself had signed it. *Brown* v. *Tombs*, 60 L. J., Q. B. 38; [1891] 1 Q. B. 253; 64 L. T. 114; Fox, 196; 55 J. P. 359.

Notice of Claim—To whom to be Directed.] A parish was divided into four districts, popularly known as, though not legally, townships; one of the overseers of such parish, together with an assistant overseer, undertaking the exclusive management of one of these so-called townships. In that capacity, each of such overseers respectively published a separate notice, requiring persons entitled to vote in respect of property situate within his so-called township to send in their claims to him and the assistant overseer. A notice of claim directed "To the overseers of

the township of A." is sufficient, as being a description which must have been commonly understood to apply to the overseers of the parish in which such township was situated. *Elliott* v. *St. Mary Within Overseers*, 4 C. B. 76; 1 Lutw. Reg. Cas. 575; 16 L. J., C. P. 101; 11 Jur. 69.

Lodger's Claim dated before Expiration of Qualifying Period.]—A person entered in respect of lodgings on a register of voters for the time being in force, and desirous of being entered on the next register in respect of the same lodgings, sent to the overseers within the time prescribed for that purpose a notice of his claim in form H. No. 2, schedule 3, of the Registration Act, 1885, in which the declaration and attestation of his residence during the qualifying period were both dated six days before its expiration, and the overseers entered his name on the "old lodger" list without adding the words "objected to":—Held, that the notice of claim was bad, and that the claimant's name must be erased from the list. *Jones* v. *Kent*, 58 L. J., Q. B. 106; 22 Q. B. D. 204; 60 L. T. 320; 37 W. R. 303; Fox, 109.

Lodger's Claim not Signed by Claimant.]—A lodger's claim to be admitted to the parliamentary franchise must (if he can write) be signed or marked by his own hand; and in such case, if his name be subscribed to the claim by another person, at the request and in presence of the claimant, it is insufficient. *Hanbidge* v. *Beveridge*, 26 L. R., Ir. 423—C. A.

Lodger Claim—Attesting Witness not present at time of Signature.]—Under the Parliamentary and Municipal Registration Act, 1878, schedule H. (2), a form of declaration is required to be signed and dated each year by a claimant for registration on the old lodger list of voters. To this form is attached an attestation clause running as follows: "I, the undersigned, hereby declare that I have witnessed the above signature of the above-named [claimant], at the date stated above, and that I believe the claim to be correct.—Dated the day of . (Signed) C. D.":—Held, that under this form of attestation the witness must himself see the claimant sign, and must attest the claim in his presence, so that attestation subsequent to the signing, even though made at the claimant's request and upon an acknowledgment by him of his signature, is insufficient. *Body* v. *Halse*, 61 L. J., Q. B. 57; [1892] 1 Q. B. 203; 66 L. T. 499; 40 W. R. 206; Fox, 240.

Attestation Clause not Dated—Power to Amend.]—When a notice of claim was dated at the foot of the notice only, but was not also dated in the attestation clause, such double dating being required by schedule 3, form H. Registration Act, 1878 (48 Vict. c. 15), s. 18:—Held, that the mistake was such as the revising barrister had no power to amend under the Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2. *Smith* v. *Chandler*, 58 L. J., Q. B. 103; 22 Q. B. D. 208; 60 L. T. 327; 37 W. R. 351; 53 J. P. 199; Fox, 129.

Description of Witness to Lodger Claim.]—Where the witness to a claim for the lodger franchise described himself therein as "agent," he being, in fact, a registration agent, and the revising barrister amended accordingly, although holding the original description sufficient:—Held, that the description of "agent" was sufficient. *Campbell* v. *Chambers*, 22 L. R., Ir. 460—C. A.

Alteration of Claim without Claimant's Authority.]—A lodger claim and declaration cannot without the knowledge and authority of the claimant be altered after it is duly signed and attested. *Gallagher* v. *Hay*, 32 L. R., Ir. 166—C. A.

Service of, by Post.]—The production of a stamped duplicate notice of claim duly delivered to the postmaster, and directed to the overseers, is sufficient evidence of the notice of claim having been given to the overseers, at the place mentioned in such duplicate, on the day on which such notice would, in the ordinary course of post, have been delivered at such place, notwithstanding its actual delivery to the overseer is delayed until after the time limited by the act in consequence of pressure of business at the post-office. *Bayley* v. *Nantwich Overseers*, 2 C. B. 118; 1 Lutw. Reg. Cas. 363.

Service on Sunday.]—Where the 20th of July falls on a Sunday, service of a notice of claim, by leaving it at the overseer's place of abode on that day, is good service. *Rawlins* v. *West Derby Overseers*, 2 C. B. 72; 1 Lutw. Reg. Cas. 373; 15 L. J., C. P. 70; 10 Jur. 268; Barr. & Arn. 599.

Notice of Claim delivered out of time.]—Where the notice of a claim to be placed on the old lodgers' list has not been sent in to the overseers on or before the date prescribed by s. 22 of the Municipal and Parliamentary Registration Act, 1878 (41 & 42 Vict. c. 26), the revising barrister has no jurisdiction to entertain such claim. *Whitwell* v. *North Riding Clerk of the Peace*, 59 L. J., Q. B. 96; 61 L. T. 811; Fox, 152; 54 J. P. 263.

Late Publication of Claim by Overseer.]—See *Wells* v. *Stanforth*, col. 71.

Signature of Claimant—Jurisdiction of Revising Barrister to inquire as to.]—If a notice of claim be received by the town clerk of a borough, and the claimant's name is duly inserted in the list of claimants, it is not competent to the revising barrister to inquire into the circumstances under which the claimant's signature was attached to the notice of claim. *M'Gregor* v. *Chambers, Brown's Case*, [1894] 2 Ir. R. 129—C. A.

See *Leonard* v. *Alloways*, and *Davis* v. *Hopkins*, col. 102.

New Claim where Change of Occupation.]—See *Burton* v. *Gery*, col. 10.

No new Claim where Change of Residence.] See *Nagle* v. *Campbell*, col. 41.

f. Notice of Objections.

See also B. 1, *h.* post (col. 162).

i. *Form of.*

Must Specify Grounds.]—A notice of objection sent to a voter on the list of 12*l.* occupiers for a county must specify the grounds of objection according to the provisions of 28 & 29 Vict. c. 36,

s. 6. *Bennett* v. *Brunyate, Alderson's Case*, 38 L. J., C. P. 65; L. R. 4 C. P. 407; 19 L. T. 283; 17 W. R. 202; 1 Hopw. & C. 80.

On Ground of Poor-law Relief.]—A notice of objection stating that the objection is grounded on any of the columns of the register is insufficient, where the ground of objection is that the person objected to had received poor-law relief during the qualifying period. *Quinlan* v. *M'Carthy*, 28 L. R., Ir. 246—C. A.

Where Objection is for Non-residence—Power of Amendment.]—By the Reform Act, 1832 (2 & 3 Will. 4, c. 45), s. 32, no freeman of a city or borough is entitled to be registered as a parliamentary voter in any year unless "he shall have resided for six calendar months next previous to the last day of July (now by the Parliamentary and Municipal Registration Act (41 & 42 Vict. c. 26), s. 7, 15th of July), in such year within such city or borough or within seven statute miles from the place where the poll for such city or borough shall heretofore have been taken." A notice of objection was served on a freeman of Norwich dated August 12, and containing as the ground of objection the statement "That you do not reside at 12, Clifton Street, Norwich." The revising barrister held that the notice was sufficient, but amended it by substituting in it the words "That you have not resided at 12, Clifton Street, Norwich, for six calendar months next preceding the 15th day of July last, and that you have not throughout that period resided within the city of Norwich or seven miles thereof":—Held, that the notice was bad, that the defect in it was not a "mistake" within the meaning of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), s. 28, sub-s. 2, and that the revising barrister had no power to amend. *Bridges* v. *Miller*, 57 L. J., Q. B. 125; 20 Q. B. D. 287; 58 L. T. 405; 36 W. R. 509; Fox, 47; 52 J. P. 518.

Where Objection is that Voter is on County List for a Borough Qualification.]—A notice of objection to a voter on the register of county voters, stated that the objection was grounded on the third column, and that it related to the nature of his interest in the qualifying property. The objection sought to be proved was, that the qualifying property, being situate within a parliamentary borough, was such and so occupied as to give the right of voting for the borough:—Held, a sufficient notice of objection within the terms of 28 Vict. c. 36, s. 6. *Simey* v. *Dixon*, 41 L. J., C. P. 18; L. R. 7 C. P. 190; 25 L. T. 811; 20 W. R. 238; 1 Hopw. & C. 626.

Where the Notice is of an Objection as to Nature of Qualification, an Objection that Qualifying Property is misdescribed should not be entertained.]—See *Smith* v. *Woolston*, col. 102.

No Objection to be entertained without Notice that does not appear on the face of the Register.] — See *Smith* v. *James* and *Warren* v. *Maule*, col. 102.

Date.]—Where a notice of objection to a person on the list of voters for any county is delivered to overseers and is defective under the Parliamentary Registration Act, 1843, s. 7, the defect is not cured by the publication by the overseers, under s. 18, of the name of the person objected to. The omission of a part of the date from such a notice is a defect which invalidates it, and cannot be amended. *Freeman* v. *Newman*, 53 L. J., Q. B. 108; 12 Q. B. D. 373; 51 L. T. 396; 32 W. R. 246; Colt. 342.

A notice of objection, dated of the day and month without the year, is insufficient. *Beenlen* v. *Huckin*, 4 C. B. 19; 1 Lutw. Reg. Cas. 526; 16 L. J., C. P. 49; 10 Jur. 1059. See *Jones* v. *Jones*, post, col. 86.

Direction of Notice.]—A person on the list of voters for the city of Rochester, in the county of Kent, was described therein as of Canal-road, Frindsbury. A notice of objection sent to him, directed as above, with the addition of the words "Rochester, Kent," is properly directed. *Cotton* v. *Prall, Akenhead's Case*, 36 L. J., C. P. 67; L. R. 2 C. P. 86; 12 Jur. (N.S.) 1018; 15 L. T. 468; 15 W. R. 223; H. & P. 335.

So a person on the list of voters for the city of Rochester, in the county of Kent, was described therein as of St. Margaret, Rochester, and a notice of objection sent to him, directed "Cazeneuve-street, St. Margaret, Rochester, Kent," is properly directed. *Cotton* v. *Prall, Frankenstein's Case*, 12 Jur. (N.S.) 1019; 15 L. T. 468.

Description of Voter objected to.]—A notice of objection, under 6 & 7 Vict. c. 18, s. 17, was in the following form: "To Mr. Sidney Rice Force. I hereby give you notice, that I object to the name of Force Sidney Rice being retained," &c.:—Held, that the voter objected to was sufficiently described, and, if not, that the inaccuracy was cured by 6 & 7 Vict. c. 18, s. 101. *Force* v. *Flood*, 15 C. B. (N.S.) 543; H. & P. 56; 33 L. J., C. P. 71; 10 Jur. (N.S.) 134; 9 L. T. 508; 12 W. R. 174.

In a borough which had been divided into polling districts a notice of objection served on a voter omitted to state the particular polling district to which such voter belonged:—Held, that the notice of objection was bad. *Kenny* v. *Keneally*, [1895] 2 Ir. R. 544—C. A.

A notice of objection specified the voter objected to by name and by his number on a specified list, but omitted to state the voter's parish as required by the statutory form:—Held, that the omission having been found to be a bonâ fide mistake and not misleading, the revising barrister was entitled to amend the notice by putting in the name of the parish, and had rightly done so. *Sandford* v. *Beal*, 65 L. J., Q. B. 73; 73 L. T. 406; 1 Smith, 1.

"Take notice, that I object to your name being retained in the list of voters for the parish of St. Thomas, New Sarum, in the southern division of the county of Wilts," is a sufficient notice, to the person addressed, of objection to his vote for the county, being either to the like effect as the form given, within s. 7, or "so as to be commonly understood," within 6 & 7 Vict. c. 18, s. 101. *Lambert* v. *St. Thomas, New Sarum, Overseers*, 12 C. B. 643; 2 Lutw. Reg. Cas. 222; 22 L. J., C. P. 31; 17 Jur. 3.

Abode of Voter.]—A notice of objection to a borough voter, sent by post, need not, on the face of it, show the voter's place of abode. *Barclay* v. *Parrott*, 1 C. B. (N.S.) 49; 26 L. J., C. P. 77; 3 Jur. (N.S.) 672; 5 W. R. 75.

Whether List of Voters, in which Name objected to appears, sufficiently specified—

Power to Amend.]—A notice of objection given to overseers was to the names "in the Blockhouse List," "division 1." There are three lists of parliamentary voters for the Blockhouse:—firstly, householders and occupiers; secondly, freemen; and, thirdly, lodgers; but the only one of these which is divided is the first:—Held, that the notice did, at all events, sufficiently specify the list, to which the objection referred, to authorise an amendment by the revising barrister under s. 28, sub-s. 2 of 41 & 42 Vict. c. 26. *Bollen* v. *Southall*, 54 L. J., Q. B. 589; 15 Q. B. D. 461; 34 W. R. 45; Colt. 368; 49 J. P. 119.

The notice of objection to a county voter sent to the overseers and the voter, respectively, need not state whether the name of the voter is on the list of voters entitled to vote in respect of the franchises existing before 30 & 31 Vict. c. 102, or on the list of 12*l.* occupiers made out by the overseers under the provisions of that act. *Chorlton* v. *Johnson, Ree's Case*, 38 L. J., C. P. 39; L. R. 4 C. P. 400; 19 L. T. 530; 17 W. R. 119; 1 Hopw. & C. 54.

A.'s name appeared on the list of persons entitled to vote for a borough in respect of property occupied within it. There was another list of persons entitled to vote in respect of rights other than those conferred by the Reform Act, amongst whom were "potwallers." A notice of objection served upon A., under 6 & 7 Vict. c. 18, s. 17, following the form (11), schedule (B.), except that, after the words "entitled to vote," which occur there, were inserted the words "as householder," was not vitiated thereby. *Allen* v. *House*, 7 Man. & G. 157; 8 Scott (N.R.) 987; 1 Lutw. Reg. Cas. 255; 14 L. J., C. P. 79; 9 Jur. 230.

The note at the foot of the form No. 10, in schedule (B.), to 6 & 7 Vict. c. 18 (the form of notice of objection to be given to overseers in cities and boroughs), states, "If more than one list of voters, the notice of objection should specify the list to which the objection refers":—Held, that this note applies only to those cases where the overseers make out more than one list, and, therefore, is not applicable to the city of London, where the overseers make out only the list of householders, the list of freemen being made out by the secondary. *Quigley's Case*, 8 Scott (N.R.) 954; 7 Man. & G. 127; 1 Lutw. Reg. Cas. 235; 14 L. J., C. P. 60; 9 Jur. 113; Barr. & Arn. 386.

There being two lists of voters for a city, prepared by the overseers of the parish of C., viz. the list of 10*l.* occupiers and the list of voters under the reserved rights, the following notice to the overseers sufficiently specifies the former list:—"To the overseers of C. I give you notice that I object to the name of J. A. being retained on the list of persons entitled under the Reform Act to vote for the city of W." *Huggett* v. *Lewis*, 15 C. B. 245; 24 L. J., C. P. 38; 1 Jur. (N.S.) 19; 3 W. R. 109.

Notices of objection given in the forms of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), schedule form I., satisfy the requirements of the note to those forms that they "should specify the list to which the objection refers," by specifying such list with regard to the various kinds of franchise, e.g. the list of freeholders, occupiers or lodgers, and need not specify the particular parochial list to which the objection refers. *Mordlock* v. *Farrer, Hall* v. *Grapper*, 49 L. J., C. P. 160; 5 C. P. D. 73; 41 L. T. 470; 28 W. R. 395.

Description of Objector's Place of Abode.]—A notice of objection, giving the true place of abode of the objector, that being another and different place from that inserted against his name on the list of voters, is sufficient. *Knowles* v. *Brooking*, 2 C. B. 226; 1 Lutw. Reg. Cas. 461; 15 L. J., C. P. 197; 10 Jur. 289.

A notice of objection describing the place of abode of the objector in the same way as it was described upon the register of voters, thus: "Poplar-grove, Didsbury"; adding "on the register of voters for the township of Manchester," is sufficient. *Gadsby* v. *Warburton*, 7 Man. & G. 11; 8 Scott (N.R.) 775; 1 Lutw. Reg. Cas. 136; 14 L. J., C. P. 41; 9 Jur. 17; Barr. & Arn. 272.

In a notice of objection to a county voter, the objector described himself as "J. B., of 'The Oaks,' on the register of voters for the parish of S. W." In the fourth column of the list of voters for that parish the objector's name appeared, and the description of his qualification was then stated as "The Oaks":—Held, that such notice of objection and list of voters could not be coupled together for the purpose of ascertaining the objector's place of abode; and that the description as of "The Oaks," without stating any parish or other known locality, was insufficient, and the notice of objection, therefore, bad. *Woollett* v. *Davis*, 4 C. B. 115; 1 Lutw. Reg. Cas. 607; 16 L. J., C. P. 185; 11 Jur. 477.

The notice of objection served upon the appellant omitted to state the place of residence of the objector, but described him as "on the list of parliamentary voters for the borough of H." There was no other person of the same name on that list, and the objector was well known, being both clerk to the magistrates and coroner. It was found as a fact that no one had been misled by the omission to state the place of residence, and the revising barrister amended the notice by inserting it:—Held, that the omission was a mistake within the meaning of 41 & 42 Vict. c. 26, s. 28, sub-s. 2, and that he was justified in amending it. *Adams* v. *Bostock*, 51 L. J., Q. B. 175; 8 Q. B. D. 259; 45 L. T. 443; 30 W. R. 460; Colt. 275; 46 J. P. 136.

Where notices of objection to certain county voters were signed "John Badgery, Burnard's-terrace, on the register of electors for the township of Bodmin borough," without stating that Burnard's-terrace was situated in Bodmin, the revising barrister finding as a fact that nobody had been misled by the omission:—Held, that the description of the objector's place of abode was sufficient to satisfy the Registration Order, 1889, forms 5 (A.) and (B.) *Hicks* v. *Stokes*, [1893] 1 Q. B. 124; 5 R. 96; 41 W. R. 123; Fox, 303; 57 J. P. 678.

A notice of objection to a county vote was signed: "G. C., of Churchyard, on the list of parliamentary voters for the parish of Petersfield":—Held, that the place of abode of the objector was insufficiently described under the Registration Act, 1885 (48 Vict. c. 15), s. 18 schedule 2 form I. No. 2. *Humphrey* v. *Earle*, 57 L. J., Q. B. 124; 20 Q. B. D. 294; 58 L. T. 403; 36 W. R. 510; Fox, 39; 52 J. P. 518.

A notice of objection was signed:—"F. N. (place of abode as described on the register): 22, Southampton-street, Bloomsbury, London, W.C. (present place of abode): 110, Guildford-street, Russell-street, W.C." There is only one Guildford-street in the Western Central Postal District of London, and the objector lived there, but there is no Russell-street near it:—Held,

that "London" might be supplied in the second address from the preceding one, and "Russell-street" rejected as surplusage, and that the notice was therefore sufficient. *Norris* v. *Pilcher*, 38 L. J., C. P. 69; L. R. 4 C. P. 417; 19 L. T. 563; 17 W. R. 225; 1 Hopw. & C. 173.

A notice of objection to a voter for a borough was in the following form:—"To Mr. C. S., 1, Olney-place. Take notice, I object to your name being retained on the list of voters for the parish of Cheltenham. (Signed) J. F., of No. 5, Sherbourne-street, on the list of voters for the parish of Cheltenham:"—Held, that the description of the objector's place of abode, No. 5, Sherbourne-street, meant Sherborne-street, Cheltenham, and was sufficient. *Sheldon* v. *Flutcher*, 5 C. B. 14; 2 Lutw. Reg. Cas. 11; 17 L. J., C. P. 34; 11 Jur. 949.

Whether a notice of objection designates on the face of it an objector's place of abode, is a question of law. *Ib.*

Whether such designation is sufficiently particular, is a question of fact. *Ib.*

In a notice of objection, the objector describing himself as of "No. 398, High-street, Cheltenham, on the register of voters for the parish of Cirencester," and on the register so referred to the objector was described as of Cheltenham only, the notice is sufficient. *Prwen* v. *Cox*, 2 C. B. 1; 1 Lutw. Reg. Cas. 304; 15 L. J., C. P. 17; 9 Jur. 994; Barr. & Arn. 514.

The person objecting to a vote ought, under 6 & 7 Vict. c. 18, s. 7, to give or send the notice of objection, signed with his name, and having annexed his true place of abode at the time of signing. *Courtis* v. *Blight*, K. & G. 475; 11 C. B. (N.S.) 95; 31 L. J., C. P. 48; 8 Jur. (N.S.) 619; 5 L. T. 450; 10 W. R. 172.

What is his true place of abode is a question of fact rather than of law. *Ib.*

If he has bonâ fide two places of abode, he may state either in such notice. *Ib.*

In the notice of objection to a borough voter, as not being entitled to have his name retained on the list of voters, the objector must give his place of abode. *Thackway* v. *Pilcher*, 36 L. J., C. P. 73; L. R. 2 C. P. 100; 15 L. T. 443; 15 W. R. 223.

Where the description of the place of abode was that given in the list of voters, and by which the objector might easily be found, though he might be found more easily by a fuller one, it is sufficient. *Ib.*

An objector described as his place of abode, a place where he had lived, but from which he had recently removed. It was the same as appeared on the register against his name. His new abode was very near to the old one, and being well known in the locality he could easily be found:—Held, that the actual place of abode should have been described, and that the notice was, therefore, insufficient. *Culver* v. *Roberts*, 1 Hopw. & C. 616; 25 L. T. 751; 20 W. R. 147.

A party whose name was on the list of voters for the parish of F. A., his place of abode being there described as "F.-street," there being no other person of the same name on the list, served a notice of objection, in which he signed himself as of the parish of F. A., on the list of voters for the parish of F. A.:—Held, sufficient. *Wills* v. *Adey*, 2 C. B. 246; 1 Lutw. Reg. Cas. 481; 15 L. J., C. P. 205; Barr. & Arn. 782.

If an objector to a voter for a county has changed his place of abode since the last publication of the register of voters, it is not a sufficient compliance with 6 & 7 Vict. c. 18, s. 7, schedule (A.) (repealed), form 5, that he inserts in his notice of objection his place of abode as described on such register; he must state his place of abode at the time of giving the notice. *Melbourne* v. *Greenfield*, 7 C. B. (N.S.) 1; K. & G. 261; 29 L. J., C. P. 81; 6 Jur. (N.S.) 510: 1 L. T. 93; 8 W. R. 67.

A misdescription in that respect is not cured by s. 101, that section only applying where there is an inaccuracy or a mistake in the mode of describing that which the party intended to describe. *Ib.*

The sufficiency of the description of an objector's place of abode in a notice of objection to a county voter, is a question of fact for the revising barrister, to be decided after hearing evidence if necessary. *Jones* v. *Pritchard*, 38 L. J., C. P. 67; L. R. 4 C. P. 414; 19 L. T. 563; 17 W. R. 175; 1 Hopw. & C. 91.

An objector in his notice of objection, described his place of abode as Bronygraig (without other description):—Held, that such a description is not bad in law on its face, but that it is matter of evidence for the revising barrister whether it in fact gives the requisite information. *Ib.*

Whether such place of abode is sufficiently described is a question of fact, on which the finding of the barrister is conclusive. *Thackway* v. *Pilcher*, supra.

Whether List of Voters on which Objector's Name appears sufficiently specified—Power to Amend.]—In a notice of objection to a claim to be placed on a list of parliamentary voters, the objector described both the claimant and himself as "on the occupiers' list of parliamentary voters (and county electors or burgesses) for the parish of St. Pancras (southern division)." In consequence of the passing of the County Electors Act (51 & 52 Vict. c. 10), the said occupiers' list was for the first time sub-divided, each sub-list being made out in three divisions, the first containing the names of persons qualified both as parliamentary voters and as county electors, the second of those qualified as parliamentary voters only, and the third of those qualified as county electors only. It being contended that the notice of objection was invalid, inasmuch as it omitted to specify which of the last-mention sub-divisions the objection referred to, the revising barrister held that he had power to amend the notice of objection:—Held, that the revising barrister was right in so holding. *Hartley* v. *Halse*, 58 L. J., Q. B. 100; 22 Q. B. D. 200; 60 L. T. 322; 37 W. R. 302; Fox, 118.

A notice of objection was signed: "R. B. on the list of parliamentary voters for the parliamentary borough of Battersea and Clapham." The borough of Battersea and Clapham consists of two divisions, those of Battersea and Clapham, and contains two parishes, those of St. Mary, Battersea, and Clapham. The Battersea division is wholly in the parish of St. Mary, Battersea, the Clapham division is partly in that parish and partly in that of Clapham. The name of the objector was in the list of occupiers for the parish of Clapham in the Clapham division:—Held, that the notice was insufficient, as it did not state the parish on the list of voters for which the objector's name was to be found. *Wood* v. *Chandler*, 57 L. J., Q. B. 126; 20 Q. B. D. 297; 36 W. R. 522; Fox, 61; 52 J. P. 520.

A notice of objection to a voter for the city of B., signed by W. T., describing himself as "on the list of voters for the parish of C.," and the

objector's name was not on the householders' or freeholders' list for the parish of C., but was upon the general list of freemen of the city, where he was stated to be "of the parish of C.," is insufficient. *Tedhall* v. *Bristol Town Clerk*, 1 Lutw. Reg. Cas. 7; 7 Scott (N.R.) 486; 5 Man. & G. 5; 13 L. J., C. P. 49; 7 Jur. 1041; Barr. & Arn. 8.

The parliamentary borough of Liskeard consists, first, of the municipal borough which is part of the parish of Liskeard; secondly, of so much of the parish of Liskeard as is not within the municipal borough; and thirdly, of the parish of St. Cleer. Each of these places has separate parochial officers and rates, and for the purpose of distinction the first is known as "the borough of Liskeard," and the second is known as "the parish of Liskeard." In a notice of objection to a person on the list of parliamentary voters for the borough, and given under 41 & 42 Vict. c. 26, the objector was described as being "on the list of parliamentary voters for the parish of the borough of Liskeard, Division 1":—Held, that such notice of objection was sufficient, as the borough of Liskeard was a parish as defined by s. 4 of 41 & 42 Vict. c. 26, and the notice followed the words of the form (I.) No. 2, in the schedule to such act. *Sargent* v. *Rodd*, 49 L. J., C. P. 195; Colr. 14; 44 J. P. 299.

The borough of Warrington consists of three townships, one being Warrington, each having a separate overseer, and a separate list of voters, the register being composed of the three lists. A notice of objection was signed "S. D. on the list of voters for Golborne-street in the borough of Warrington." The barrister found that there was only one Golborne-street in the borough, and that it was wholly in the township of Warrington; and that the description of the abode given would be commonly understood as designating the list for the township of Warrington:—Held, that the notice was sufficient. *Allen* v. *Warrington Town Clerk*, 30 L. J., C. P. 113; L. R. 5 C. P. 291; 22 L. T. 169; 18 W. R. 317; 1 Hopw. & C. 413.

A notice of objection was signed "H. J., of 36, New King-street, on the list of voters for the parish of W." There are two lists of parliamentary voters for the parish of W., viz. List No. 1, Division 1, being the list of persons entitled under the Reform Act, 1832, or by s. 3 of the Representation of the People Act, 1867, and List No. 3, being the list of lodgers under 41 & 42 Vict. c. 26, s. 22. There are also two lists of burgesses for the parish of W. The name of H. J. was on the parliamentary list, No. 1, Division 1. The revising barrister held the notice to be invalid for omitting to state that the objector was on the "parliamentary" list, and also for omitting to define on which of the several lists his name appeared; and that he had no power to amend:—Held, that the objector was not bound to state upon which of the several lists his name appeared; but that it was enough if he followed the words of the note appended to the form (I.) No. 2, in the schedule to 41 & 42 Vict. c. 26. But, semble, that the omission to state that the objector was on one of the "parliamentary" lists was fatal, but was a mistake which the revising barrister had power to amend, and ought to have amended, under s. 28, sub-s. 2. *James* v. *Howarth*, 49 L. J., C. P. 169; 5 C. P. D. 225; 28 W. R. 923; Colr. 87; 44 J. P. 554.

When part of a parish is included in one of the polling districts of a county and the other part is in another of such districts, a note of objection to a county voter which describes the objector as on the register of voters for the parish is sufficient, notwithstanding 31 & 32 Vict. c. 58, s. 22, enacts that where a parish forms part of more than one polling district, the part of such parish in each district "shall be deemed to be a separate parish for the purposes of the revision of voters, and the list and register of voters." *Charlton* v. *Tonge Overseers*, 41 L. J., C. P. 33; L. R. 7 C. P. 178; 26 L. T. 25; 20 W. R. 338; 1 Hopw. & C. 632.

A county objector described himself as on the register of voters for the township of S. (S. having its own overseers, and being divided into two polling districts):—Held, a sufficient description of the register on which the objector's name was to be found. *Ib.*

Where there are two lists of voters for a borough, a notice of objection should distinctly state on which list the objector's name appears. *Crowther* v. *Bradney*, 15 C. B. (N.S.) 536; H. & P. 63; 33 L. J., C. P. 70; 9 L. T. 444; 12 W. R. 176. S. P., *Barton* v. *Ashley*, 2 C. B. 4; 1 Lutw. Reg. Cas. 307; 15 L. J., C. P. 36; Barr. & Arn. 318.

In the borough of Lancaster the register is composed of four separate lists of names, comprising one list for each of the three townships into which the borough is divided, made out by the respective overseers, and a list of freemen made out by the town clerk. A notice of objection, describing the objector, who was on the list of freemen, as being on the list of voters for the borough of Lancaster, is insufficient. *Farrer* v. *Edsworth*, 1 Lutw. Reg. Cas. 517; 4 C. B. 9; 16 L. J., C. P. 132; 10 Jur. 1012.

Held, also, that the defect in the notice was not an inaccurate description, and therefore was not cured by s. 101 of 6 & 7 Vict. c. 18. *Ib.*

In a notice of objection the objector described himself as being "on the list of freemen for the city of C." There were two classes of lists in the city; the one included the list of freemen under the Municipal Corporations Act; the other the list of freemen entitled to vote in the election of members of parliament:—Held, that the notice of objection sufficiently shewed that the objector was a voter on the latter list. *Feddon* v. *Sawyers*, 2 Lutw. Reg. Cas. 246; 12 C. B. 680; 22 L. J., C. P. 15; 17 Jur. 141.

A borough, D., consisted of parishes S. and E. There were two separate lists, one of persons entitled to vote in respect of property in S., and another of persons entitled to vote in respect of property in E. A notice of objection, signed "E. W. C., 69, Durnford-street, in the list of voters for the borough of D. and township of E.," is sufficient. *Oram* v. *Cole*, 18 C. B. (N.S.) 1; H. & P. 87; 34 L. J., C. P. 52; 10 Jur. (N.S.) 1206; 11 L. T. 451; 13 W. R. 268.

In the parish of St. Paul, Bedford, there are two lists of voters for the borough, called "the ten pound list, or new qualification list," and "the reserved right list." A notice of objection describing the objector, who was on the new qualification list, as being "on the list of voters for the parish of St. Paul," is sufficient. *Samuel* v. *Hitchmough*, K. & G. 522; 13 C. B. (N.S.) 3; 32 L. J., C. P. 55; 9 Jur. (N.S.) 414; 7 L. T. 360; 11 W. R. 92.

In the borough of Maldon there are five lists of voters, one of freemen and four of occupiers in different parishes. The name of W. D., the objector, was included in the freemen's list as "W. D., St. Peter's, Maldon," but it was not in

the occupiers' list for that parish. Beneath the signature of W. D. was added "Full Bridge-street, St. Peter's, Maldon," and at the foot of the notice, "on the list of voters for the parish of St. Peter, in the borough." It was objected that the notice did not state W. D. was upon the freemen's list:—Held, that the notice was insufficient. *Bright* v. *Dereniah*, 36 L. J., C. P. 71; L. R. 2 C. P. 102; 12 Jur. (N.S.) 1019; 15 L. T. 471; 15 W. R. 225.

The parliamentary borough of Penryn consists of six several places, having separate overseers and lists of voters, one of such places being called "the borough of Penryn"; the objector, being on the list for that place, sent a notice of objection to a voter in which he described himself as "on the list of voters for the borough of Penryn":—Held, that the notice of objection sufficiently indicated on which of the six lists the objector was. *Moon* v. *Andrew*, 38 L. J., C. P. 97; L. R. 4 C. P. 431; 19 L. T. 452; 1 Hopw. & C. 75.

In a borough there were two lists of voters, one of rated occupiers and the other of voters under the reserved rights, but the latter list contained only one name, which was that of the objector. A notice of objection sent to the overseers omitted to state on which list the name of the person objected to appeared. The overseers knew to which list the notice applied, and were not misled or delayed by the omission. The revising barrister held that the notice was sufficient:—Held, that, under the peculiar circumstances of the case, the court could not say that he was wrong. *Aldridge* v. *Medwin*, 38 L. J., C. P. 45; L. R. 4 C. P. 464; 19 L. T. 452; 1 Hopw. & C. 67.

Objector's Signature.]—In a notice of objection in respect of the occupation franchise delivered by the objector to the overseers, it is a sufficient compliance with form I. No. 1 of schedule 2 to the Registration Act, 1885, if the signature of the objector precedes the list of names of persons objected to, instead of following them and appearing at the foot of the list. *Sutton* v. *Wade*, 60 L. J., Q. B. 28; [1891] 1 Q. B. 269; 63 L. T. 588; 39 W. R. 223; Fox, 169; 55 J. P. 342.

The notice of objections under 6 & 7 Vict. c. 18, s. 17, must be signed by the objector himself, and not by his agent. *Toms* v. *Cuming*, 8 Scott (N.R.) 910; 7 Man. & G. 88; 1 Lutw. Reg. Cas. 200; 14 L. J., C. P. 67; 9 Jur. 90; Barr. & Arn. 347.

The question, whether or not a notice of objection signed by a party whose name is spelt incorrectly on the list of voters is sufficient, is one of fact only, and therefore, not one upon which a case can be submitted to the court. *Hinton* v. *Hinton*, 8 Scott (N.R.) 995; 7 Man. & G. 163; 1 Lutw. Reg. Cas. 259; 14 L. J., C. P. 58; 9 Jur. 91; Barr. & Arn. 421.

Leonard Sedgwick being on a county register of voters for a parish, where the entry stood thus:—"Sedgwick, Leonard, M.A.—Fenecote Hall, freehold house and land, the hall," in his usual mode of signature, signed a notice of objection to a claimant to vote in such a way, that though the christian name Leonard was legible the surname was nearly illegible, being found by the revising barrister not to be decipherable by a person unacquainted with the objector's mode of signing his name, by ordinary diligence, and without recourse to the entry on the register of the objector's name, or other extraneous assistance:—Held, that whether the object of the statute, in requiring a signature to a notice of objection was merely to authenticate the document, or whether it was to give information to the objectee and to the revising barrister, the signature was sufficient. *Sedgwick* v. *Trevor*, K. & G. 534; 13 C. B. (N.S.) 30; 32 L. J., C. P. 60; 9 Jur. (N.S.) 603.

The usual signature of the objector was engraved upon a stamp, and this stamp was impressed by the objector himself upon the notice of objection:—Held, that the notice of objection was properly signed by the person objecting, under 6 & 7 Vict. c. 18, s. 17. *Bennett* v. *Brumfitt*, 37 L. J., C. P. 25; L. R. 3 C. P. 28; 17 L. T. 213; 16 W. R. 131; H. & P. 407.

To prove that the notice of objection, retained by the postmaster under 6 & 7 Vict. c. 18, s. 100, in order to be sent to a claimant, was signed by the hand of the objector, it is enough to produce the duplicate notice of objection signed by the objector, and stamped by the postmaster. *Lewis* v. *Roberts*, 11 C. B. (N.S.) 23; K. & G. 402; 31 L. J., C. P. 51; 8 Jur. (N.S.) 485; 5 L. T. 351; 10 W. R. 80.

A notice of objection served on the overseers, dated the 12th August, but signed on the 18th August, is a good notice. *Jones* v. *Jones*, 1 H. & R. 341; H. & P. 320; 35 L. J., C. P. 94; L. R. 1 C. P. 140; 12 Jur. (N.S.) 123; 13 L. T. 633; 14 W. R. 204. Contra, *Parkinson* v. *Brophy*, 15 Ir. C. L. R. 346.

It is not necessary that it should be signed by an objector on the day it bears date so long as it is signed by him on any day on which it is qualified to object. *Ib.*

The objector could not swear that he signed several notices of objection on the day they purported to bear date, but the notices were duly signed by him before they were served, and they were duly served within the limits of time for giving notice:—Held, that the general prima facie presumption that all documents are made at the day they bear date applies to notices of objection. *Kenny* v. *Keneally*, [1895] 2 Ir. R. 544.

Notice not Bad because Objector's Name Struck Out on Revision.]—A notice of objection is good that is given by a person whose name at the time of serving the notice was on the list prepared by the overseers, though his name was subsequently erased from the list by the revising barrister before his objection came on for hearing. *Pease* v. *Middlesbrough Town Clerk*, 62 L. J., Q. B. 94; [1893] 1 Q. B. 127; 5 R. 99; 68 L. T. 766; Fox, 286; 57 J. P. 759.

One Notice to Overseers for all Names Objected to in the Parish.]—In the notice to overseers, under 6 & 7 Vict. c. 18, s. 7, it is competent to a person to insert all the names on the list of voters in the parish objected to by him, a separate notice for each not being necessary. *Smith* v. *Holloway*, 1 H. & R. 315; H. & P. 281; 35 L. J., C. P. 100; L. R. 1 C. P. 143; 12 Jur. (N.S.) 164; 13 L. T. 468; 14 W. R. 202.

Form of Duplicate Notice, where Service by Post.]—See *Toms* v. *Cuming*, *Birch* v. *Edwards*, *Benesh* v. *Booth*, and *M'Niffe* v. *Wilson*, col. 92.

Objector cannot Appeal because Notice held Bad, if Names Objected to are Subsequently Struck Off.]—See *Jones* v. *Marshall*, col. 106.

Decision of Revising Barrister that Notice Bad Reviewable by Election Judge.]—See *Bewdley Borough*, col. 136.

ii. *Service.*

(a) Personal.

By leaving Notice at Address on List.]—Notice of objection to a vote was put into the letter-box of the house described on the list of voters as the place of abode of the voter whose vote was the subject of the objection. The voter had not lived at that address for two years, and there was no evidence that he had received the notice:—Held, that this was not a sufficient service of the notice within 6 Vict. c. 18, s. 17. *Gifford* v. *St. Luke's, Chelsea*, 59 L. J., Q. B. 98; 24 Q. B. D. 141; 61 L. T. 810; Fox, 139; 54 J. P. 230.

An objector purported to serve a notice of objection to the retention of a name upon the list of voters, by putting the notice under the door of the house which was described in the list as the place of abode of the voter. The objector knew that the voter did not reside there; he knew where he resided, and he knew there was no probability of the voter getting the notice:—Held, that the notice of objection had not been duly served. *Magee* v. *Mortimer*, 28 L. R., Ir. 251—C. A.

Where the agent of the objector went to the house mentioned in the list of voters as the place of abode of the person objected to, between nine and ten o'clock in the evening, and after knocking several times and receiving no answer, put the notice of objection inside the usual entrance-door of the house, and there left it; and the barrister decided that the time and mode of service were unreasonable:—Held, that the service was not sufficient. *Watson* v. *Pitt*, 2 Lutw. Reg. Cas. 73; 5 C. B. 77; 17 L. J., C. P. 143; 12 Jur. 121.

The place of abode of a voter for a borough was in the hamlet of A., but his qualifying property, consisting of a wharf, was situate in the hamlet of B. In the list of voters his place of abode was stated to be in B., but in point of fact he never did reside in B.:—Held, that a notice of objection left at the wharf was improperly served. *Allen* v. *Greensill*, 4 C. B. 100; 1 Lutw. Reg. Cas. 592; 16 L. J., C. P. 142; 11 Jur. 476.

On Overseers.]—See *Freeman* v. *Newman*, A. 1, *f.* i.

On Assistant Overseer.]—A service of notice of objection upon an assistant overseer appointed to perform all the duties of an overseer pursuant to 59 Geo. 3, c. 12, s. 7, is a sufficient service, although he has not made out or signed the list of voters objected to. *Points* v. *Atwood*, 6 C. B. 38; 2 Lutw. Reg. Cas. 117; 18 L. J., C. P. 19; 13 Jur. 83.

On Collector of Poor-rates, acting for Overseers, at his Office.]—Notice of objection to the name of the appellant being retained on the list of voters for the borough of Bedford, was sent to the office of the collector of poor-rates, appointed by the guardians of the poor of five parishes, constituting the borough of Bedford. The collector was in the habit of discharging all the ordinary overseer's duties, including that of making up the lists. He transacted the whole of the business connected with the poor-rates and the preparation of the list of voters at his said office, which was within the borough, where all the parish books were kept, and all notices of claims and objections were sent. The collector produced such notices to any voter requiring to see them, and also attended to produce them at the revising barrister's court. The overseers did nothing whatever besides receiving notice of claims and objections if sent to them, and signing the lists which the collector produced to them, and there was no other office in the borough where any parish business was transacted:—Held, that the collector's office was "the place for transacting parochial business" within 6 & 7 Vict. c. 18, s. 101, and that the notice was duly served. *Green* v. *Mepham*, 48 L. J., C. P. 92; 39 L. T. 450.

And, semble, that the collector was a person executing the duties of overseers of the poor within that section. *Ib.*

On Churchwarden who has not signed List.]—The list of voters was signed by three of the overseers and one of the churchwardens, and the service of the notice of objection was upon another churchwarden, who had not signed the list:—Held, that the notice was well served. *Beenlen* v. *Hockin*, 4 C. B. 19; 1 Lutw. Reg. Cas. 526; 16 L. J., C. P. 49; 10 Jur. 1059.

(b) By Post.

Sending a notice of objection to the party objected to by the post is a sufficient substitute for giving the notice to the party, or leaving it at his place of abode as required by s. 7 of 6 Vict. c. 18. *Bishop* v. *Helps*, 2 C. B. 45; 1 Lutw. Reg. Cas. 353; 15 L. J., C. P. 43; Barr. & Arn. 572. S. P., *Hickton* v. *Antrobus*, 2 C. B. 82; 1 Lutw. Reg. Cas. 363.

A notice of objection sent by post is not vitiated by the fact of the postmaster receiving it out of the usual hours of business prescribed by the postmaster-general. *Hannaford* v. *Whiteway*, 1 C. B. (N.S.) 53; 26 L. J., C. P. 76; 3 Jur. (N.S.) 673; 5 W. R. 75. S. P., *Paddon* v. *Whiteway*, 1 C. B. (N.S.) 62.

The duties of a postmaster in receiving and forwarding notices of objection are merely ministerial, and may, in his absence, be performed by a clerk. *Allan* v. *Waterhouse*, 1 Lutw. Reg. Cas. 92; 8 Scott (N.R.) 68; 13 L. J., C. P. 129; 8 Jur. 426. S. C., sub nom. *Cooper* v. *Coates*, 5 Man. & G. 98; Barr. & Arn. 229.

A notice of objection was delivered open, and in duplicate, to a postmaster's managing clerk, who compared the notice with the duplicate, and stamped and returned the latter to the party bringing the same:—Held, that the clerk could act for the postmaster, and that the production of such stamped duplicate before the revising barrister, was evidence of the due service of the notice of objection. *Ib.*

Under 6 & 7 Vict. c. 18, s. 100, a notice of objection may be posted by an agent for the objector. *Cuming* v. *Toms* or *Jones*, 7 M. & G. 29; 8 Scott (N.R.) 827; 1 Lutw. Reg. Cas. 151; 14 L. J., C. P. 54; 8 Jur. 1052.

The notice of objection sent by post should have an address on the outside as well as in. *Birch* v. *Edwards*, 5 C. B. 45; 2 Lutw. Reg. Cas. 37; 17 L. J., C. P. 32; 12 Jur. 18. See *Barclay* v. *Parrott*, col. 78.

Notices of objection were posted by the objector at L. on the 19th of August, the 20th

being the last day for giving notice of objection. They were delivered separately to the postmaster at L., and were by him tied up in a parcel and so sent through the post to T., the person to whom the outside one was addressed; and, with the exception of that addressed to T., they never reached the persons objected to. In other instances where the notices were similarly dealt with, there was no evidence whether any of the notices reached any of the persons objected to or not. The address indorsed on the notices of objection in no case included the polling district or any post-town or the name of the county, but merely the rural townland in which the qualifying property was situated; but it was in every case the same as that given in the list of voters. In proof of the service of the notices the objector produced duplicates of the notices, duly stamped by the postmaster as of the 19th August:—Held, affirming the decision of the revising barrister, that the notices were sufficiently addressed, and (Deasy, L.J., diss.) that, having been duly posted pursuant to the provisions of the 113th section of the 13 & 14 Vict. c. 69—identical with s. 100 of 6 & 7 Vict. c. 18—the service was not rendered invalid by non-delivery through the mistake or default of the post-office officials. *Moore* v. *Forrest*, 6 L. R., Ir. 142—C. A.

Per Deasy, L.J.—The stamped duplicate is only primâ facie evidence of service under the 113th section, and is liable to be, and in this instance was, rebutted. *Ib.*

If an objector, in order to prove service of his notice of objection, produces a duplicate stamped at the post-office, and the person objected to then produces the notice actually served to prove the duplicate incorrect, the objector may rely on this notice actually served. *Norris* v. *Pilcher*, 38 L. J., C. P. 69; L. R. 4 C. P. 417; 19 L. T. 563; 17 W. R. 225; 1 Hopw. & C. 173.

The objector, in proof of the service of a notice of objection on P., produced an alleged duplicate, stamped by a postmaster. P., in answer, produced the notice he had actually received, which he admitted he had received in due time, but which differed from the alleged duplicate:—Held, that the objector might rely on the notice so produced by P. and his admission as proof of due service of a notice of objection. *Ib.*

Delivery "in the Ordinary Course of Post."]—Where a notice of objection, properly directed, is posted, the production of the stamped duplicate is sufficient evidence of the due service of the notice, although, in consequence of a delay (however caused) in the post-office, it does not reach the hands of the person objected to until after the time prescribed by the statute. *Hornsby* v. *Robson*, 1 C. B. (N.S.) 63; 26 L. J., C. P. 55; 3 Jur. (N.S.) 674. See *Moore* v. *Forrest*, supra; and *Bayley* v. *Nantwich Township*, col. 76.

By 6 & 7 Vict. c. 18, s. 100, the production by a person, who has posted a notice of objection to a name on the list of parliamentary voters, of a duplicate notice stamped with the post-office stamp, shall be evidence of the notice having been given to the person objected to at the place mentioned in such duplicate on the day on which such notice would "in the ordinary course of post" have been delivered at such place. Where a notice of objection is posted at such time and place that it would be delivered, supposing the general rules of the post-office as to the delivery in the district to be followed, on or before the last day for serving notices of objection, that is a good service, within the above section, upon a soldier in barracks, notwithstanding that, by reason of special arrangements made between the military authorities and the post-office, letters for soldiers in barracks are not delivered by the post-office but are called for by an orderly, and that the notice is not in fact delivered to the soldier till after the last day for serving such notices. *Childs* v. *Cox* (20 Q. B. D. 290) overruled. *Kemp* v. *Wanklyn*, 63 L. J., Q. B. 520; [1894] 1 Q. B. 583; 9 R. 325; 70 L. T. 478; 42 W. R. 369; Fox, 360; 58 J. P. 605—C. A.

See *Hornsby* v. *Robson*, and *Moore* v. *Forrest*, supra.

Notices of objection to borough voters under 6 Vict. c. 18, s. 17, were addressed to barracks in which the voters resided, and were posted in time to have been delivered on August 20 by postmen in the ordinary course of post at places within the borough elsewhere than at the barracks. Letters addressed to the barracks were never delivered at the barracks by postmen, but were taken from the post-office by orderlies. On the evening of August 20 the letters addressed to the barracks were taken from the post-office by orderlies. Some of such letters were distributed at the barracks on August 20, others on August 21, while with respect to others there was no evidence as to the time of distribution:—Held, that the facts did not shew that there was any "ordinary course of post" to the barracks within the meaning of s. 100, and that therefore there was no evidence that the notices had been served on August 20. *Childs* v. *Cox*, 20 Q. B. D. 290; 58 L. T. 338; 36 W. R. 505; Fox, 84.

Notice of objection to the retention of his name on the supplemental list of inhabitant occupiers in their polling district, was addressed to each of a number of persons to the townland in which he resided, and was posted on the 19th August, at D., from which town the notice would in ordinary course have reached the local post-office (situate within a short distance of the townland in each case) at mid-day on the 20th, and would have remained there till called for. There was no postal delivery at any of the townlands, and the notice could not have reached the person objected to unless he went or sent to his local post-office, or unless by some accidental delivery or conveyance. At the revision a stamped duplicate copy of the notice in each case was produced to prove service, but no other evidence of service was given or tendered, or any proof that any person objected to was aware of the posting of the notice, or had sent to his post-office on the 19th or 20th, or received the notice on or before the 20th:—Held, that the notices had been duly served. *Adams* v. *Buchanan*, 18 L. R., Ir. 292—C. A.

Where, by the ordinary course of post, a notice of objection would reach the voter in time, the production of the stamped duplicate of such notice is sufficient to entitle the objector to call upon the voter to prove his right to be registered, although, in fact, the notice of objection was not delivered, until after the 25th August. *Bishop* v. *Cox*, 1 Lutw. Reg. Cas. 363; 10 Jur. 16.

Objection to the name of C. being retained on the supplemental list of parliamentary voters. The "place of abode" of C., as described in the list, was "Regeens, Lusk"; the notice of objection was directed to "C., Regeens, Lusk," was stamped at the post-office, Dublin, as of the 18th of August, and would have, in the ordinary

course of post, reached Lusk, which is very near Regeens, on the morning of the 19th of August; the 20th was the last day for giving notice of objection; there was no postal delivery at Lusk, and the notice might remain in the office till called for:—Held (Deasy, L.J., diss.), that there was evidence, under the 113th section of the 13 & 14 Vict. c. 69 (Ireland),—identical with s. 100 of 6 & 7 Vict. c. 18,—of the notice having been given to C. at Regeens, Lusk, on or before the 20th of August, in the ordinary course of post. *Hudson* v. *Louth*, 6 L. R., Ir. 69—C. A.

Notice of objection was sent by post addressed to W., the place of abode of the person objected to, and the objector fulfilled all the requirements of 6 & 7 Vict. c. 18, s. 100. The notice was posted on August 18th, and would reach the post-office nearest to W., in the morning of the 19th. There was no delivery of letters thence to W., and the notice could only reach the person to whom it was addressed at W., by some private accidental conveyance:—Held, that these facts were no evidence that the notice would be delivered on or before August the 20th, and that, therefore, the statute was not complied with, and the requisite notice of objection had not been given to entitle the objector to raise his objection before the revising barrister. *Lewis* v. *Evans*, 44 L. J., C. P. 41; L. R. 10 C. P. 297; 31 L. T. 487; 23 W. R. 244; 2 Hopw. & C. 279.

Sufficiency of Address.]—Upon the revision of the list of parliamentary voters for the county of Down, it appeared that notices of objection were posted at Belfast, which is situated partly in the county of Down and partly in the county of Antrim, and which notices, though addressed to the places of abode of the persons objected to as appearing on the list of voters, did not apparently contain the name of either post-town or county. In one case the address was "Church Ballee," which is a townland in the county of Down. The revising barrister held that the notices of objection were insufficiently addressed, and therefore bad ex facie:—Held, on appeal, that the notices were not necessarily or as matter of law insufficiently addressed, and that the decision of the revising barrister should therefore be reversed. *Finnegan* v. *Cavan*, 6 L. R., Ir. 137—C. A. See *Moore* v. *Forrest*, 6 L. R., Ir. 142, ante, col. 89.

A notice of objection to a county vote sent by post, addressed to the voter at his place of abode, as described in the list of voters, is sufficient; and it is neither necessary nor proper to add the name of the parish or township contained in the heading of the list. *Flint* v. *Sharp*, 17 C. B. 281; 25 L. J., C. P. 36; 1 Jur. (N.S.) 1141; 4 W. R. 24.

Unauthorised Correction of Address on List—Notice sent to Corrected Address.]—The list of voters mentioned in 6 & 7 Vict. c. 18, s. 100, is, as regards county voters, the copy of the register sent to the overseers by the clerk of the peace of the county, and the overseers ought to publish it as they receive it, without alteration. *Noseworthy* v. *Buckland-in-the-Moor Overseers*, 43 L. J., C. P. 27; L. R. 9 C. P. 233; 29 L. T. 675; 22 W. R. 155; 2 Hopw. & C. 127.

When, therefore, the overseers altered the copy of the register by changing the description of the residence of one of the voters thereon from what it had ceased to be, to what was then the real address, and published the list as so altered, and the voter being objected to, the objector, in order to prove service of the notice of objection, proved posting such notice, addressed to the voter according to the altered address published by the overseers:—Held, that the notice was insufficient, not being in compliance with 6 & 7 Vict. c. 18, s. 100, which requires the notice to be directed to the voter "at his place of abode, as described in the said list of voters." *Ib.*

Delivery on Sunday.]—A notice of objection sent by post, so that it would, in the ordinary course of the post, be delivered on a Sunday, is nevertheless well served. *Colville* v. *Lewis* or *Rochester Town Clerk*, 2 C. B. 60; 1 Lutw. Reg. Cas. 380. See *Rawlins* v. *West Derby*, col. 76.

Duplicate Notice.]—The duplicate notice of objection, stamped by the postmaster, and produced by the objector, must be precisely the same as the one sent, and, therefore, if it is not signed by the objector himself, the service is bad. *Toms* v. *Cuming*, 8 Scott (N.R.) 910; 7 Man. & G. 88; 1 Lutw. Reg. Cas. 200; 14 L. J., C. P. 67; 9 Jur. 90; Barr. & Arn. 347.

A notice of objection sent by the post, having the address of the voter to whom it was to be sent written on the outside, and the paper produced as the duplicate containing only in the inside the address of the voter, but omitting the external direction, is not a duplicate within 6 & 7 Vict. c. 18, s. 100. *Birch* v. *Edwards*, 5 C. B. 45; 2 Lutw. Reg. Cas. 37; 17 L. J., C. P. 32; 12 Jur. 18.

The duplicate notice of objection stamped by the postmaster, produced before the revising barrister, had written at the top of it the word "Copy":—Held, that (assuming that the word "copy" was not on the notice transmitted by the postmaster to the person objected to) the notice was well served. *Benesh* v. *Booth*, 18 C. B. (N.S.) 111; H. & P. 223; 34 L. J., C. P. 99; 11 L. T. 479; 13 W. R. 271.

Service of notice of objection was held to be sufficiently proved, although the address on the duplicate notice produced was only to A. B. at a particular street without mentioning any town, where the name of the town appeared on the stamp of the post-office with which such duplicate was stamped. *M'Niffe* v. *Wilson*, 1 Ir. R. (Reg. and Land App.) 10. See *Lewis* v. *Roberts*, col. 86.

On Overseers.] — Notices of objection to borough votes were inclosed by the objector in an envelope, directed "To the overseers of the parish of St. Anne, Westminster"; it was sent by post, and was delivered to, and received by, the overseers in due time, and the notices were included in the printed list, but no duplicate notice, stamped according to 6 & 7 Vict. c. 18, s. 100, was produced in proof of service:—Held, that the service was sufficiently proved. *Smith* v. *Huggett*, 11 C. B. (N.S.) 55; K. & G. 434; 31 L. J., C. P. 38; 8 Jur. (N.S.) 617; 5 L. T. 425; 10 W. R. 131.

The same of notices of objection to county votes under s. 7. *Ib.*

Notices of objection to a voter for the county of Middlesex were sent to the overseers, by post, inclosed in one envelope, addressed "To the overseers of the parish of Acton, in the county of Middlesex," and were duly received and published by them:—Held, that this was a sufficient

service; and that the objector was not bound to show that he had complied with all the requirements as to posting in s. 100 of 6 Vict. c. 18. *Smith* v. *James*, 11 C. B. (N.S.) 62; 5 L. T. 525; 10 W. R. 131.

A notice of objection to a county vote was addressed "To the overseers of the parish or township of B." without adding the county. The notice, however, having been found to have reached the hands of the overseers before the 25th August:—Held, that the notice and service were sufficient. *Jones* v. *Innous*, 17 C. B. 290; 25 L. J., C. P. 78; 1 Jur. (N.S.) 1112; 4 W. R. 84.

A notice of objection to a county vote was addressed "To the overseers of the parish or township of B.," without adding the county. The overseers having acted upon the notice, although it did not appear when it reached their hands:—Held, that the notice and service were sufficient; for, that, in the absence of any finding to the contrary, the court would assume that the overseers had done their duty. *Godsell* v. *Innous*, 17 C. B. 295; 25 L. J., C. P. 79; 1 Jur. (N.S.) 1112; 4 W. R. 85.

iii. *Consequences of giving Notice.*

Power to Withdraw.]—Giving notice of an objection to a claim to vote is the exercise of a public duty; and therefore the objector has no power to withdraw an objection once made. *Proudfoot* v. *Barnes*, 36 L. J., C. P. 68; L. R. 2 C. P. 88; 12 Jur. (N.S.) 1017; 15 L. T. 439; 15 W. R. 223.

Claims for Compensation.]—The Bath court of requests had no jurisdiction over a claim made by a voter against an objector, for compensation for loss of time in attending the revising barrister's court, on a notice of objection. *Roberts* v. *Hunby*, 3 M. & W. 120; 6 D. P. C. 82; 7 L. J., Ex. 45.

An unfounded objection to a voter's name in the list, pursuant to 2 Will. 4, c. 45, s. 47 (repealed), by which he was prejudiced, having to attend the revising barrister, did not give such a legal or equitable claim for compensation for loss of time as enabled him to sue under the Westminster Court of Requests Act, and where the commissioners proceeded on the claim, they were restrained by prohibition. *Soames* v. *Rawlings*, 2 C. M. & R. 744; 4 D. P. C. 501; 1 Tyr. & G. 46; 1 Gale, 299; 5 L. J., Ex. 55.

g. Revising Barrister.

See also B, 1, *i.* post (col. 163).

i. *Power to Amend.*

Nature of Qualification.]—The revising barrister has no power to amend a claim for a borough parliamentary vote where the effect of such amendment would be to change the nature of the qualification on which the claim is based. *Bartlett* v. *Gibbs* (5 Man. & G. 81); *Foskett* v. *Kaufman* (16 Q. B. D. 279); and *Plant* v. *Potts* ([1891] 1 Q. B. 256) followed. *Harcum* v. *West Ham Town Clerk*, 63 L. J., Q. B. 306; [1894] 1 Q. B. 579; 9 R. 271; 70 L. T. 505; 42 W. R. 321; Fox, 345; 58 J. P. 510—C. A.

The revising barrister in revising the ownership list in a parliamentary county under the Registration Act, 1885, which incorporates s. 28 of the Parliamentary and Municipal Registration Act, 1878, amended the list in the third column headed "Nature of qualification," by substituting "leasehold" house for "freehold" house:—Held, that the barrister had no power to make the amendment, inasmuch as it altered the nature of the qualification. *Foskett* v. *Kaufman* (16 Q. B. D. 279) followed. *Plant* v. *Potts*, 60 L. J., Q. B. 33; [1891] 1 Q. B. 256; 63 L. T. 730; Fox, 206; 55 J. P. 277—C. A.

In a list of voters, the nature of the appellant's qualification was described in the third column as "dwelling-house," and in the fourth column the name and situation of the qualifying property were described as "5, Victoria Cottages." The respondent objected to the appellant's name being retained on the list, whereupon the appellant asked the revising barrister to amend the third column of the list by altering "dwelling-house" to "dwelling-houses in succession," and the fourth column by altering "5, Victoria Cottages" to "High-street, Wapping, and 5, Victoria Cottages." The appellant had not sent in a declaration under s. 24 of the Parliamentary and Municipal Registration Act, 1878. The barrister refused to amend:—Held, that the barrister was right, as the amendment would alter the nature of the qualification; and the effect of s. 28, sub-s. 13 of the act of 1878, on sub-s. 1 of that section, is to limit the power of making such an amendment to cases in which a declaration has been duly sent in under s. 24 of that act. *Porrett* v. *Lord* (5 C. P. D. 65) disapproved. *Foskett* v. *Kaufman*, 55 L. J., Q. B. 1; 16 Q. B. D. 279; 54 L. T. 64; 34 W. R. 90; Colt. 466; 50 J. P. 484—C. A.

The appellant's qualification being described on a list of voters as a house "8, Birley-place," he made and sent in a "declaration for amending misdescription," under 41 & 42 Vict. c. 26, s. 24, schedule form M. that the correct description was "houses in succession," "8, Birley-place, and 9, Birley-place:"—Held, that the revising barrister was right in expunging the appellant's name from the list, for there had been an alteration in the nature of the qualification, and to substitute "houses in succession" for "house" would be such a change in the description of the qualifying property as was not authorised by s. 28 of the act. *Porrett* v. *Lord*, 49 L. J., C. P. 176; 5 C. P. D. 65; 42 L. T. 28; 28 W. R. 393; Colt. 46; 44 J. P. 186.

A party claiming a borough vote in respect of the occupation of two houses in immediate succession, in his notice to the overseers (sent in pursuant to 6 Vict. c. 18, schedule B. form No. 6), described under column 3 his "nature of qualification" as "dwelling-house," and under column 4 ("description of qualifying property") specified the two houses in respect of which he claimed:—Held, that having regard to the Registration Order, 1895, schedule 2, part 1, s. 19, sub-s. 1 (*b*), the qualification was not sufficiently described. *Soutter* v. *Roderick*, 65 L. J., Q. B. 145; [1896] 1 Q. B. 91; 73 L. T. 576; 44 W. R. 205; 1 Smith, 22, 36.

Held further (Vaughan Williams, J., doubting), that giving to the qualification stated a reasonable construction, it must be taken to be for successive occupation, and that the revising barrister had power, under s. 28, sub-s. 13 of the Registration Act, 1878, to amend the description of the qualification "for the purpose of more clearly and accurately describing the same." *Ib.*

The qualification of a voter was stated in the third column of the list to be "offices, successive

occupation," and in the fourth column "High Street and Charles Street," whereas it was proved that during the whole of the qualifying period he had occupied one office only, namely, in High Street, and would have had by reason of such occupation a good and sufficient qualification. The misdescription was an error of the overseers:—Held, that the revising barrister had power under 41 & 42 Vict. c. 26, s. 28, to correct the mistake, and should have amended the list by striking out the words "successive occupation" and "Charles Street." *Lynch* or *Blosse* v. *Wheatley*, 54 L. J., Q. B. 289; 14 Q. B. D. 504; 53 L. T. 49; Colt. 364.

The claimant's name appeared in the list of voters twice in succession, first, as the rated occupier of a house and small garden, South Main Street, and, immediately beneath, as the rated occupier of a house and yard in Mall Lane. It was proved that during the qualifying year he had moved from the one premises to the other:—Held (diss. Fitzgerald, B.), that the revising barrister was wrong in holding that he could not amend by placing the claimant's name on the list as the occupier of premises held in immediate succession. *Kelleher* v. *Tarrant*, Ir. R. 3 C. L. 130.

The statement of facts on a claim to be admitted to the parliamentary franchise must be sufficient to constitute a legal franchise of some defined character, and then, if the proved facts turn out to be insufficient to establish a legal franchise of that character, but one sufficient to establish a legal franchise of another character, the claimant may be registered. If the legal nature of the qualification derived from premises mentioned in the claim is not sufficiently stated, the claim can be amended; but no qualifying property which is not mentioned can be added. *Melaugh* v. *Chambers*, 20 L. R., Ir. 286—C. A.

See *Hitchins* v. *Brown*, col. 73.

The 6 & 7 Vict. c. 18, s. 40 (repealed), empowers the revising barrister to insert the qualification of a voter in the list, where it has been wholly omitted, or to amend the description where it is insufficiently stated, but it does not authorise him to amend a qualification imperfectly stated, by adding a new qualification. *Onions* v. *Bowdler*, 5 C. B. 65; 2 Lutw. Reg. Cas. 59; 17 L. J., C. P. 70; 11 Jur. 1041.

In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden," and the "description of the qualifying property" was stated to be "part bailiff's tenement." An objection was taken that the nature of the qualification was wrongly described. It was proved before the revising barrister that the voter was an inhabitant occupier of a part of a dwelling-house, and the barrister amended the list by adding the word "dwelling-house" before "tenement":—Held, that, looking at the whole entry, the words "tenement and garden" might fairly be read as intended to be used in the vulgar but inaccurate sense of a small house, and to describe the qualification arising from the occupation of a dwelling-house, and consequently that the barrister had power to amend the entry as he had done for the purpose of more accurately defining the qualification:—But held, that the proper alteration would have been to strike out the words "tenement and garden," and substitute the word "dwelling-house." *Dashwood* v. *Ayles*, 55 L. J., Q. B. 8; 16 Q. B. D. 295; 53 L. T. 58; 34 W. R. 53; Colt. 486; 50 J. P. 132; 49 J. P. 776—C. A.

In the overseers' list of occupiers entitled to vote for a division of a county, the "nature of the qualification" of a voter was described as "tenement and garden" and the "description of the qualifying property" was stated to be "School Yard." The "nature of the qualification" of thirty-three other voters was described in the same way. As to two of the thirty-three the "description of the qualifying property" was stated to be "School Yard," as to five "Cat Lane," as to three "High Street," as to five "Bridge." In each case the voter occupied a dwelling-house and garden of a less annual value than 10*l.*:—Held, that looking at all the cases together, the revising barrister might fairly consider that the words "tenement and garden" were intended to describe a dwelling-house, and that he had power to amend the description by striking out the words "and garden," and inserting the word "dwelling-house" before "tenement," though it would have been better to strike out "tenement" also. *Minifie* v. *Banger*, 55 L. J., Q. B. 10; 16 Q. B. D. 302; 53 L. T. 590; Colt. 493; 50 J. P. 131—C. A.

The respondent had a sufficient qualification for the borough franchise as the occupier of a dwelling-house under the Representation of the People Act, 1867, s. 3, but not under the Reform Act, 1832, s. 27, the yearly value of the house being under 10*l.* The respondent's qualification was described in the list as "house." The respondent being objected to, the revising barrister was of opinion that such description was sufficient, but he amended it by adding the word "dwelling" to the word "house," and retained the respondent's name on the list:—Held (without determining whether the description as it originally stood was sufficient), that the case came within the provisions of the Parliamentary and Municipal Registration Act, 1878, s. 28, sub-s. 12, and the revising barrister had power to make the amendment, and his decision was therefore correct. *Friend* v. *Towers*, 52 L. J., Q. B. 109; 10 Q. B. D. 87; 48 L. T. 973; 31 W. R. 247; Colt. 310; 47 J. P. 197.

One who occupied a farm of sufficient value to confer the franchise for a county was described in the third column of the register as tenant. This description being objected to, the revising barrister held it to be "commonly understood as designating a tenant occupying at a rent, and therefore sufficient; but that, at all events, for the purpose of more clearly and accurately defining the qualification, he had power to amend by changing tenant into "farm, as occupying tenant," and he amended accordingly:—The court upheld his decision. *Birks* v. *Allison*, 32 L. J., C. P. 51; 13 C. B. (N.S.) 24; 9 Jur. (N.S.) 692; 7 L. T. 786; 11 W. R. 90.

In a claim to vote for a county the qualification was stated to be "rent-charge on freehold house":—Held, that inasmuch as there is but one kind of rent-charge, namely, a freehold rent-charge, which can confer a vote, the qualification was sufficiently stated; but that if it was inaccurate, it could be amended by inserting the word "freehold" before the word "rent-charge." *Sherwin* v. *Whyman*, 43 L. J., C. P. 36; L. R. 9 C. P. 243; 29 L. T. 680; 22 W. R. 127; 2 Hopw. & C. 185.

The qualification in respect of which a county franchise was claimed was described on the list as "freehold rent-charge of 16*l.* per annum issuing out of freehold houses." In support of this the claimant proved that he was seised in fee of the land on which the houses referred to were

built, and that he had let the same out on a long building lease at a yearly rent of 16*l.*:—Held, that the qualification proved was a different one from that described, and that the revising barrister had no power to amend the description, as the amendment which would be required would alter the qualification described, instead of more clearly and accurately defining it, to which the power of amendment is limited. *Nichols* v. *Bulwer*, 1 Hopw. & C. 472; 40 L. J., C. P. 82; L. R. 6 C. P. 281; 23 L. T. 542; 19 W. R. 282.

See *Cooper* v. *Ashfield*, col. 74, and *Ford* v. *Boon*, col. 73.

Description of Qualifying Property.]—Where a party claiming to vote for a borough has occupied different premises in immediate succession, during the twelve calendar months next previously to the last day of July, they ought all to be set forth in the description of his qualification in the list of voters. *Bartlett* v. *Gibbs*, Barr. & Arn. 98; 1 Lutw. Reg. Cas. 73; 7 Scott (N.R.) 609; 5 Man. & G. 81; 13 L. J., C. P. 40.

An omission in the list of any of such premises amounts to a misdescription of his qualification, which the barrister has no power to amend under 6 & 7 Vict. c. 18, s. 40 (repealed). *Ib.* See *Hurcum* v. *West Ham Town Clerk*, ante, col. 93.

The nature of the qualification of a voter was described on the parliamentary list as "dwelling-houses in succession," and the name and situation of the qualifying property were described in the fourth column of the list "as 44, Oxford Street and 34, Prospect Place, Cowick Street." He had, in fact, occupied three houses in succession during the qualifying period, but the overseer by mistake omitted to specify the third house, viz. 31, Prospect Place, and the occupation of the two only as they appeared on the list was insufficient to give the vote. These facts were proved before the revising barrister, and he was asked to amend the fourth column, and did so by striking out the figures "44" and "34":—Held by Stephen and Cave, JJ. (Lord Coleridge, C.J., dissenting), that under 41 & 42 Vict. c. 26, s. 28, the revising barrister had power to correct the mistake, although it should not have been corrected by striking out the numbers, and that the list should be amended by inserting "and 31" after the words "Oxford Street" in the fourth column of the list. *Ford* v. *Hoar*, Colt. 351; 54 L. J., Q. B. 286; 14 Q. B. D. 507; 53 L. T. 44; 33 W. R. 566; 49 J. P. 103.

Where a person's right to be admitted to the parliamentary franchise depends upon his occupation of different premises in immediate succession, his claim must set forth and describe the several qualifying premises, and if it omit to do so, the revising barrister has power, under s. 4 of the Parliamentary Registration (Ireland) Act, 1885 (48 Vict. c. 17), to amend or correct it. *Dempsey* v. *Keegan*, 18 L. R., Ir. 280—C. A.

M. claimed to be registered as an inhabitant "occupier" in respect of the premises, 1, Cottage-row, in the borough of Londonderry. The claim described the qualifying premises as "dwelling-house, 1, Cottage-row, in immediate succession from dwelling-house, Corbett-street, Londonderry." It was proved that M. had gone to reside at No. 1 in September, 1885, from No. 8, Cottage-row, which latter premises he had occupied for about three weeks immediately after the house in Corbett-street, where he had resided since before the previous 20th July, and that the premises so immediately occupied had been omitted from the claim, owing to the claimant's considering it unnecessary to mention them:—Held, that the claim was defective in not setting out all the qualifying premises, and that the revising barrister had no power to amend it in this respect. *Melaugh* v. *Chambers*, 20 L. R., Ir. 286. See *Burton* v. *Gery*, col. 10

Where a voter's qualification appears in the list to consist of a successive occupation of houses, the numbers of each, if each has a number, must be stated. But, if evidence is given to supply the omission of a number, the revising barrister may amend. *Flounders* v. *Donner*, Barr. & Arn. 588; 2 C. B. 63; 1 Lutw. Reg. Cas. 365; 15 L. J., C. P. 81; 10 Jur. 207.

The description of a qualification which is "insufficient" by reason of being erroneous, may be amended, provided the qualification described is not a different qualification from that proved. *Bendle* v. *Watson*, 1 Hopw. & C. 591; 41 L. J., C. P. 15; L. R. 7 C. P. 163; 25 L. T. 806; 20 W. R. 145.

A house was described on the register as No. 4. It had formerly been so numbered, but some years back it was changed by the local authorities to No. 9. The person objected to had been in occupation when it was No. 4, and continuously since:—Held, that the barrister had power, and ought to have amended. *Ib.*

A person sent in a claim to vote for a borough, but omitted, in stating the locality of his qualification, to insert the number of his house, which was situate in a street. On objection being made, the barrister amended the claim, and inserted the claimant's name in the list of voters:—Held, that the barrister was right in making the amendment, and inserting the claimant's name in the list of voters. *Barlow* v. *Mumford*, 36 L. J., C. P. 65; L. R. 2 C. P. 81; 12 Jur. (N.S.) 964; 15 L. T. 441; 15 W. R. 221.

The nature of the interest of a county voter was described in the 3rd column of the register as "freehold land," and the description of his qualification in the 4th column was "Plots, 166," &c. (specifying fifteen numbers), "Victoria Estate."—The voter having parted with all the plots specified, except one, which was freehold land of sufficient qualifying value, notice of objection grounded on the 3rd column, and relating to the voter's interest, was given, and objection taken before the revising barrister that the qualification was misdescribed. He, so deciding, expunged the voter's name:—Held, first that the barrister ought not to have entertained any other objection than the one of which notice was duly given; secondly, that as the identity of the property was not changed by the diminution of it he had power to amend, and should, under the circumstances, have amended the description in the 4th column by striking out the numbers of the plots which the voter had ceased to own. *Smith* v. *Woolston*, 48 L. J., C. P. 84; 4 C. P. D. 73; 40 L. T. 198; 27 W. R. 535.

See *Foskett* v. *Kaufman*; *Porrett* v. *Lord*, col. 94; and *Lynch* v. *Wheatley*, col. 95.

Old Lodger's List—Name of Borough omitted on Claim.]—A revising barrister has power to examine an old lodger claim though no objection has been made to it, and if it contains a mistake of a technical but not misleading character, has a discretion, which he should exercise, to amend it, in order to prevent a bonâ fide claim being defeated. *Treadgold* v. *Grantham Town Clerk*, Fox, 402; 64 L. J., Q. B. 29; [1895] 1 Q. B. 163; 15 R. 55; 71 L. T. 729; 58 J. P. 787.

Lodger Claim — Amount of Rent.]—It is essential that every lodger claimant should state whether he pays rent for his lodgings or not, what is the specific amount of any rent he pays, and to whom he pays it; and in the event of his occupying lodgings without paying rent, he must specifically show that he is exonerated by agreement from doing so without their losing the essential character of lodgings. A claim by a lodger under 31 & 32 Vict. c. 49, s. 4 (as extended by 48 Vict. c. 3, s. 7, sub-s. 3), in the form No. 31 in schedule 1 to the Parliamentary Registration (Ireland) Act. 1885 (48 Vict. c. 17), stated the "amount of rent paid" at "10*l.* and upwards, including the salary," and another like claim by another lodger stated such rent as "10*l.* and upwards" only. The revising barrister was called upon by the claimants to amend the claims (as having been so filled in by "mistake") by inserting specific amounts for the rents payable, but he was of opinion that he had no power to do so, and rejected the claim:—Held, that the revising barrister had power, if necessary, to amend the claims by inserting a specific sum for the rent payable. if he had sufficient materials before him for the purpose. *Clarke* v. *Torish*, *Aiken's Case*, 18 L. R. Ir. 207—C. A.

Discretion as to amending new Lodger Claim —Amount of Rent—Address of Landlord.]—A claim by a lodger under 41 & 42 Vict. c. 26, s. 22, in the form in the schedule (H.), No. 2, for the first time to have his name inserted in the list of persons entitled to vote for a borough, omitted to state the amount of rent and the address of his landlord. These particulars were supplied at the revision; but the revising barrister declined to amend under s. 28, sub-s. 2:—Held, that this being the case of a mistake, not in a "list of voters," but in a list or a catalogue of claims, it was not obligatory on the revising barrister to correct or amend it, but discretionary only; and, he having exercised his discretion for reasons which the court thought satisfactory, his decision was affirmed. *Pickard* v. *Baylis*, Colt. 98; 49 L. J., C. P. 182; 5 C. P. D. 235; 41 L. T. 509; 28 W. R. 256; 44 J. P. 89.

Lodger Declaration.]—The declarations in certain claims made by lodger claimants contained words (describing the nature of the interests of the claimants) which ought to have been erased; the declarations in other claims contained words (also describing the nature of the interest of the claimants) which were erased, but ought to have been left standing; in other declarations there were mistakes of a similar character. The revising barrister was asked to amend the declarations, but refused to do so on the ground that the declarations being insufficient he had no power to amend them:—Held, that the revising barrister was wrong, and that, as the declaration was an integral part of the claim, and he had power to amend mistakes in a claim under 41 & 42 Vict. c. 26, s. 28, sub-s. 2, he had jurisdiction and ought to have amended the declarations. *Ainsley* v. *Nicholson*, Fox, 146; 59 L. J., Q. B. 102; 24 Q. B. D. 144; 61 L. T. 809; 54 J. P. 166—D.

Lodger Declaration—Description of Qualification.]—The declaration annexed to the notice of claim for a lodger vote for a parliamentary borough stated that the applicant occupied partly as joint tenant and partly as sole tenant, and that the lodgings were of a clear yearly value, if let unfurnished, of 10*l.* or upwards. Upon objection being taken to the vote on the ground that the declaration was not in the form required inasmuch as it should have stated the value to be 20*l.*, where the occupation was as joint tenant, the revising barrister having found as a fact that the occupation was sole, amended the declaration by striking out all mention of the joint tenancy and allowed the vote:—Held, that this was a "mistake" which the revising barrister had power to amend under s. 28, sub-s. 2, of the Parliamentary and Municipal Registration Act, 1878, and not a change in the description of the qualification within the meaning of sub-s. 13. *Reg.* v. *McKellar*, *Baker*, *Ex parte*, Fox, 275; 62 L. J., Q. B. 97; [1893] 1 Q. B. 121; 5 R. 64; 67 L. T. 527; 41 W. R. 142; 57 J. P. 41. See *Francis* v. *Metcalfe*, and *Smith* v. *Chandler*, col. 23.

Voter's Place of Abode.]—The place of abode of a voter is no part of his qualification. *Luckett* v. *Knowles*, Barr. & Arn. 730; 2 C. B. 187; 1 Lutw. Reg. Cas. 451; 15 L. J., C. P. 87; 10 Jur. 99.

A voter's place of abode was described in the list of voters for the city of London, as Greenwich, whereas his true place of abode was Queen-square, Bloomsbury; both of these places are within seven miles of the city of London:—Held, that this statement of the place of abode was an inaccurate description, which the revising barrister had power to correct. *Ib.* See *Nagle* v. *Campbell*, col. 41.

Power to Transfer Name from one List to another.]—Sect. 15 of the Parliamentary and Municipal Registration Act, 1878, enacts that where the whole or part of the area of a municipal borough is co-extensive with or included in the area of a parliamentary borough, the lists of parliamentary voters shall, so far as practicable, be made out and revised together; and specifies the mode in which overseers of parishes shall make out the lists. By sub-s. 2, where the parish is situate wholly or partly both in the parliamentary borough and the municipal borough, the lists shall be made out in three divisions: Division 1 shall comprise the names of the persons entitled both to be registered as parliamentary voters and to be enrolled as burgesses; division 2 shall comprise the names of the persons entitled to be registered as parliamentary voters, but not to be enrolled as burgesses; division 3 shall comprise the names of the persons entitled to be enrolled as burgesses, but not to be registered as parliamentary voters. By s. 28, sub-s. 15, where a list is made out in divisions the revising barrister shall place the name of any person in the division in which it should appear according to the result of the revision, regard being had to the title of the person to be on the list both as a parliamentary voter and a burgess, or only in one of those capacities, and shall expunge the name from the other division (if any), in which it appears. An objection in respect only of a voter's qualification for the parliamentary franchise having been taken to the retention of his name in division 1, the revising barrister struck the name off division 1; and was thereupon asked to place it in division 3, but refused so to do unless proof was given of a qualification entitling the voter to be on the burgess roll:—Held, that the decision of the revising barrister was right, and that he was not bound, under

s. 28, sub-s. 15, to place the name in division 3. *Greenway* v. *Bachelor*, Colt. 322; 53 L. J., Q. B. 179; 12 Q. B. D. 376; 50 L. T. 270; 32 W. R. 320.

A revising barrister has no power to transfer the name of an elector from division 3 of the occupiers' list to division 1, the elector having made no claim to be put on division 1. *Lord* v. *Fox*, Fox, 266; 61 L. J., Q. B. 60; [1892] 1 Q. B. 199; 65 L. T. 617.

On the register of voters for a parish in a county, the name of a voter appeared under the heading "Voters in respect of property, including occupiers of 50*l.* and upwards." His true qualification was as a 12*l.* occupier, but his name had been omitted by the overseers from the list of 12*l.* occupiers made out by them, and he had made no claim to be placed thereon, as provided by 31 & 32 Vict. c. 58, s. 17 (repealed):—Held, that there had been a mistake in a list, within 6 & 7 Vict. c. 18, s. 40 (repealed), which should have been amended by the insertion of the voter's name in the list of 12*l.* occupiers. *Ballard* v. *Robins*, 2 Hopw. & C. 384; 47 L. J., C. P. 50; 3 C. P. D. 92; 37 L. T. 436; 26 W. R. 80.

Should amend inaccurate Heading of List.]—See *Mather* v. *Allendale*, col. 70.

Sufficiently accurate Claim ought not to be amended.]—If the revising barrister is of opinion that the description in the notice of claim given to the overseers, though not strictly accurate, is sufficient to notify the real nature of the claim, he ought not to amend the claim, but to treat it as if the description had been strictly accurate. *Eaden* v. *Cooper*, 11 C. B. 18; 2 Lutw. Reg. Cas. 183; 21 L. J., C. P. 32; 16 Jur. 549.

Notice of Objection.]—See *Sandford* v. *Beal*, col. 78; *Hartley* v. *Halse*, col. 82; *Bridges* v. *Miller*, *Freeman* v. *Newman*, col. 77; *Bollen* v. *Southall*, col. 79; and *Adams* v. *Bostock*, col. 80.

ii. *Other Matters relating to Revision Court.*

Declaration to amend Misdescription—Evidence to Contradict.]—Notwithstanding a declaration by a person objected to, made under s. 24 of 41 and 42 Vict. c. 26, evidence is admissible in support of the objection, and to contradict the declaration. *Tranior* v. *Starbuck*, Fox, 340.

Declaration as to Misdescription in List not Evidence unless sent to Clerk of Peace within statutory Time.]—See *Daking* v. *Fraser*, col. 71.

Whether Nature of Qualification proved as described in List.]—When the nature of a person's right to vote for a borough is inserted in the list as "dwelling-house," he is not bound to prove a qualification under 30 & 31 Vict. c. 102, s. 3, but may shew that he is qualified to vote in respect of a house under 2 Will. 4, c. 45, s. 27 (repealed). *Townshend* v. *St. Marylebone Overseers*, 1 Hopw. & C. 606; 41 L. J., C. P. 25; L. R. 7 C. P. 143; 25 L. T. 749; 20 W. R. 148.

The nature of the qualification of a voter was stated, in the list of persons entitled to vote for a county, as "leasehold house and garden." He was the owner of a house and garden held on lease for lives:—Held, that the description of his qualification was sufficient. *Jones* v. *Jones*, 1 Hopw. & C. 95; 38 L. J., C. P. 43; L. R. 4 C. P. 422; 19 L. T. 561; 17 W. R. 204.

Proof of Notice of Claim.]—The revising barrister is entitled, under ss. 37 and 38 of 6 and 7 Vict. c. 18, to require proof that a person, who claims in consequence of the omission of his name from the 12*l.* occupiers' list, gave due notice of his claim to be inserted in such list. The fact that the overseers have inserted his name in the list of claimants for that franchise is not sufficient proof that he has given due notice of claim. *Sale, In re*, Colt. 152; 50 L. J., Q. B. 113; 43 L. T. 635; 45 J. P. 207.

The giving notice of a claim to the overseers to be placed on the list of voters for a county, is a matter entirely between the claimant and the overseers; and if the name of such claimant is placed on the list by the overseers, the revising barrister has no power to put such claimant to proof of his notice of claim. *Davies* v. *Hopkins*, 3 C. B. (N.S.) 376; 27 L. J., C. P. 6; 4 Jur. (N.S.) 690; 6 W. R. 68. S. P., *Meade* v. *Cooper*, Ir. R. 3 Ch. 125.

Where the name of a person inserted in the list of claimants for a county is objected to, the revising barrister has only to consider whether the claimant is entitled to be on the list "in respect of his qualification described on such list;" he is not to require proof of due notice of the claim, for that is a matter between the claimant and the overseers. *Davies* v. *Hopkins* (27 L. J., C. P. 6) followed. *Leonard* v. *Alloways*, 48 L. J., C. P. 81; 40 L. T. 197.

Cannot go behind Notice of Claim purporting to be duly signed.]—See *M'Grory* v. *Chambers*, *Brown's Case*, col. 76.

Can go behind Rate-Book.]—See *Cooke* v. *Butler*, col. 49.

What Objections should be Entertained.]—The revising barrister should not entertain any other objection than the one of which notice was duly given. *Smith* v. *Woolston*, 48 L. J., C. P. 84; 4 C. P. D. 73; 40 L. T. 198; 27 W. R. 535.

If the qualification of a voter is good on the face of the register, the revising barrister has no power to strike out such voter's name, on the ground that the qualification is insufficient in law, unless the retention of the name on the list has been duly objected to. *Smith* v. *James*, 1 H. & R. 338; H. & P. 317; L. R. 1 C. P. 138; 12 Jur. (N.S.) 125; 13 L. T. 69; 14 W. R. 201.

Two Persons on List for same Qualifying Property—Notice of Objection to one only.]—A person, to whose name being retained on the list of voters objection has been made on the sole ground that he is not tenant of the qualifying property, is entitled, on showing that he is duly qualified as such tenant, to have his name retained on the list, although another person (to whom no objection has been made) is also on the list of voters in respect of the same property. *Warren* v. *Maule*, Fox, 400; 15 R. 53; 71 L. T. 731.

Duty to expunge Name of Incapacitated Person whether objected to or not—Temporary Disqualification.]—The revising barrister is required by sub-s. 7 of 41 and 42 Vict. c. 26, s. 28,

to expunge the name of every person, whether objected to or not, where it is proved before him that such person was on the last day of July then next preceding, incapacitated by any law or statute from voting at an election for the parliamentary borough, or an election for the municipal borough, as the case may be, to which the list relates:—Held, that the "incapacity" here referred to means such incapacities as those mentioned in *Stow* v. *Jolliffe* (L. R. 9 C. P. 734), not a mere temporary disqualification by reason of the receipt of parochial relief during the qualifying period; consequently, that, in absence of a notice of objection, the revising barrister was not bound to expunge the name of a person who had been in the receipt of such relief. *Hayward* v. *Scott*, Colt. 76; 49 L. J., C. P. 167; 5 C. P. D. 231; 28 W. R. 988; 44 J. P. 122.

Ought to strike out Peers, although not objected to.]—See *Beauchamp* v. *Madresfield*, col. 67.

Agent's Authority to represent Voter at Revision.]—At the hearing of an objection to a name being retained on a list of parliamentary voters, B. stated that he appeared on behalf of the voter; and he refused to answer a question put to him by the objector, whether or not he had been requested by the voter to appear on his behalf. The revising barrister declined to order him to answer the question, and allowed him to give evidence in support of the voter's qualification:—Held, that sub-s. 11 of 41 and 42 Vict. c. 26, s. 28, does not require that a person appearing on behalf of a voter, against whom objection is made, should have been authorised by the voter to do so. *Ford* v. *Smerdon*, 49 J. P. 760.

Barrister appearing at Revision Court as Agent for Association.]—A barrister who appears on behalf of a party or other person, though not as counsel, is within s. 41 of 6 Vict. c. 18. An association is a "party" within that section. *O'Connor* v. *Nicholson*, Fox, 250.

Right to Expel Person from Court.]—By 28 Vict. c. 36 (the County Voters Registration Act, 1865), s. 16, "it shall be lawful for any revising barrister . . . to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his lawful orders in respect of the same." A revising barrister ordered the plaintiff to be removed from his court, which he was then holding for the revision of the lists of voters for a county; the ground of the order was that, in the previous year, whilst the defendant was sitting as revising barrister, the plaintiff had wrongfully withheld certain documents, and had thereby caused W., a claimant to be registered as voter, to be deprived of his vote. The plaintiff having sued in a county court for wrongful expulsion from the defendant's court, the latter, by way of special defence, relied upon the provisions of 28 Vict. c. 36, s. 16, and the judge nonsuited the plaintiff on the ground that the question of interruption having been decided by a revising barrister, his discretion could not be reviewed before another tribunal:—Held, that the special defence was not proved, and that the nonsuit was wrong. *Willis* v. *Maclachlan*, 45 L. J., Q. B. 689; 1 Ex. D. 376; 35 L. T. 218.

Revision Court not a Court of Law—Taxation of Solicitor's Bill.]—The court of a revising barrister is not a court of law within 6 & 7 Vict. c. 73, s. 37, so as to exclude the jurisdiction of a court of equity to order the taxation of a bill containing items for business done in that court. *Andrew, In re*, 17 Beav. 510; 23 L. J., Ch. 129; 17 Jur. 1145; 2 W. R. 46.

Power of Revising Barrister to close Lists—Refusal to reopen Claim or Objection during subsequent formal Business.]—A revising barrister appointed four sittings for the revision of the lists of parliamentary and municipal electors for a division of a borough, and public notice was given that the lists would be closed at the end of the fourth sitting. At the end of that sitting the revising barrister asked whether there were any more persons present who desired to be heard, and upon being satisfied that there were not, declared the lists closed. The next day, when the revising barrister sat to take the objection list for the purpose of striking out the names of persons who, having been duly objected to, had not appeared, he allowed evidence to be given of the due service of a notice of objection to a voter and of the nature of the objection, but refused to hear the evidence of the voter, on the ground that the lists were closed on the previous day, and expunged his name from the list of parliamentary voters:—Held, that the voter was not entitled to be heard, and that the revising barrister was justified in expunging his name from the list. *Reg.* v. *Soden*, 1 Smith, 115; 66 L. J., Q. B. 183; [1897] 1 Q. B. 188; 76 L. T. 161; 45 W. R. 234; 61 J. P. 150.

A revising barrister appointed two days for the revision of the lists of parliamentary and municipal electors for a particular division of a borough, and public notice was given that at the end of the second day the lists would be closed. At the end of the second day, there being no more persons present who desired to be heard, the revising barrister declared the lists closed, and disallowed the claims of all persons who had not appeared or whose claims had not been otherwise established. On the following day, when the revising barrister was sitting in court performing the work of calling out, expunging, and initialling the names of all claimants whose claims had been disallowed, two claimants, who had not appeared or been represented on the days fixed for the revision of the lists, appeared before the revising barrister and required to be heard in support of their claims:—Held, that the claimants had no right to be heard, although at the time their names had not in fact been expunged from the lists. *Reg.* v. *Soden*, 1 Smith, 77; 65 L. J., Q. B. 501; [1896] 1 Q. B. 634; 74 L. T. 520; 44 W. R. 449; 60 J. P. 390—C. A.

Where two for one Place, one cannot rehear Case decided by the other.]—When two revising barristers are appointed for the same county, city, or borough, under 6 & 7 Vict. c. 18, s. 29, it is not competent for one barrister to rehear and decide upon a case which has been heard and finally determined by his colleague. *Blain* v. *Pilkington Overseers*, 18 C. B. (N.S.) 6; H. & P. 92; 34 L. J., C. P. 55; 10 Jur. (N.S.) 1237; 11 L. T. 452; 13 W. R. 269.

Lists to be revised, though published out of Time.]—See *Wells* v. *Stanforth*, col. 71.

Mistake of, in striking Name out of wrong List, cannot be corrected.]—See *Allen, In re*, col. 73.

Mistake of Clerk of the Peace as to Revising Barrister's Correction of List.]—See *Brumfitt* v. *Bremner*, col. 72.

Value of Premises, Question of Fact for Barrister.]—See *Coogan* v. *Luckett*, col. 24; and *Sherlock* v. *Steward*, col. 60.

Whether Mistake in spelling Objector's Name material—Question of Fact for Barrister.]—See *Hinton* v. *Hinton*, col. 85.

Election Judge might review an express Decision.]—See *Bewdley Borough*, and *Salisbury, In re, Ryder* v. *Hamilton*, col. 136.

Election Judge now bound by Register as revised, except in case of inherent Incapacity.—See *Stowe* v. *Jolliffe*, col. 136.

As to when an Appeal lies from the Decision of a Revising Barrister, and as to the Case stated by him on such Appeal.]—*See cases*, A. 1, *h*, infra.

h. Appeals.

See also B. 1, *i.*, post (col. 163).

On Questions of Evidence.]—The minister of a dissenting congregation occupied premises, worth more than 40*s.* per annum, under the trusts of a deed, one of which was, "to permit and suffer him, for and during his life, if he should so long continue minister of the congregation, to occupy the premises rent free." The revising barrister found, upon the minister's own statement, that the appointment was for life:—Held, that, there being no appeal on questions of evidence, it must be taken on the finding that the minister had an equitable estate for life, which entitled him to vote. *Burton* v. *Brooks*, 2 Lutw. Reg. Cas. 197; 11 C. B. 41; 21 L. J., C. P. 7; 16 Jur. 569.

Qualification in different Divisions—Selection for Voting—Marking Name in Division not selected.]—The right to appeal from a revising barrister's decision in respect of claims to vote is still governed by s. 42 of the Parliamentary Registration Act, 1843. Objections made against a claim must relate to the right of the claimant to have his name inserted in a list of voters; and where a person already entered as a voter in more than one division of a parliamentary borough has elected the division in which he will vote, no appeal will lie from a decision directing his name to be marked as not entitled to vote in another division under s. 28, sub-s. 14 of the Parliamentary and Municipal Registration Act, 1878. *Reg.* v. *Liverpool Revising Barrister*, Fox, 375; 64 L. J., Q. B. 131; [1895] 1 Q. B. 155; 15 R. 123; 71 L. T. 636; 43 W. R. 220.

From Refusal to hear Person.]—The refusal of a revising barrister to hear a person appearing before him is not a matter of appeal within s. 42 of 6 Vict. c. 18. *O'Connor* v. *Nicholson*, Fox, 250. And see *Reg.* v. *Soden*, col. 104.

As to Sufficiency of Description of Qualifying Property.]—A party, whose name appeared on the register for a county, was objected to, on the ground that the property was not sufficiently described therein for the purpose of being identified. The barrister having decided that the description was sufficient, the court declined to interfere. *Wood* v. *Willesden Overseers*, Barr. & Arn. 527; 2 C. B. 15; 1 Lutw. Reg. Cas. 314; 15 L. J., C. P. 41; 9 Jur. 1100.

Women cannot appeal.]—See *Wilson* v. *Salford*, col. 107.

Stating a Second Case after Point once decided.—Although the decisions of the court upon cases stated by revising barristers are by 6 & 7 Vict. c. 18, s. 66, declared to be final and conclusive in the case upon the point of law adjudicated upon, it is nevertheless competent to a revising barrister, upon a future occasion, and between other parties, again to raise the question, even in relation to the same property qualification. *Roberts* v. *Percival*, 18 C. B. (N.S.) 36; H & P. 121; 34 L. J., C. P. 84; 11 Jur. (N.S.) 40; 11 L. T. 603; 13 W. R. 265. See *Webster* v. *Ashton-under-Lyne, Hadfield's Case*, post, col. 112.

No Grievance, No Appeal.]—The revising barrister being of opinion that a notice of objection was bad, allowed the objector to appeal. Proceeding, however, to inquire into the validity of the votes he held them bad also, and thereupon struck them off (thus giving effect to the notice of objection), and he directed that the names should be reinstated if the court held the notice to be bad. The objector having appealed:—Held, that the appeal could not be heard (the votes being struck off); that the objector was an appellant without a grievance, and the parties off had not appealed. *Jones* v. *Marshall*, 1 Hopw. & C. 738.

Court will not interfere with Decision as to Value of Premises.]—See *Coogan* v. *Luckett*, col. 24, and *Sherlock* v. *Steward*, col. 60.

Notice of, to Revising Barrister.]—Notice of appeal must be given in strict accordance with the provisions of s. 42 of 6 Vict. c. 18. A verbal notice given in proper time, that is supplemented by a written notice delivered after the proper time, is, therefore, an invalid notice. *Guise* v. *Dilke*, Fox, 283.

No Appeal on Question of Sufficiency of Signature to Notice of Objection.]—See *Hinton* v. *Hinton*, col. 85.

Consolidating Appeals.]—The revising barrister has no power to consolidate appeals that do not depend upon the same state of facts, and upon the same decision in point of law. *Prior* v. *Waring*, 5 C. B. 56; 2 Lutw. Reg. Cas. 45; 17 L. J., C. P. 73; 11 Jur. 1086.

Where the barrister found that the consolidated cases depended upon the same point of law as that decided in the principal case, the court refused to remit the case, in order that the qualifications of the parties, whose cases were consolidated, might be stated. *Hutchins* v. *Brown*, Bar. & Arn. 545.

Appeals cannot be consolidated unless they depend upon the same precise point of law, to be decided on the same facts. *Robson* v. *Brown*, 1 C. B. (N.S.) 34; 26 L. J., C. P. 81; 3 Jur. (N.S.) 674.

If appeals have been consolidated which do not depend upon the same point of law, the court will dismiss the consolidated appeals. *Ashcroft's Case*, 1 Hopw. & C. 48; 38 L. J., C. P. 72; 19 L. T. 452; 17 W. R. 142.

Where an appeal, which the revising barrister had intended to consolidate (indorsing on the case the words "Consolidated appeal"), was defective by reason of the person, whose name the revising barrister had indorsed as respondent, not having consented to answer the appeal on behalf of himself and the other persons whose names appeared in the schedule:—Held, that such defect, although fatal to the consolidation of the appeal under 6 & 7 Vict. c. 18, s. 44, did not affect its vitality as a single appeal under s. 42. *Druitt* v. *Lane*, Colt. 307.

It is not necessary that the indorsement on the back of the case in a consolidated appeal should set forth the names of all the appellants; it is sufficient if it give the name of the person who appeals on behalf of himself and the other appellants, the names, &c., of the other appellants appearing in the body of the case. *Sherwin* v. *Whyman*, 2 Hopw. & C. 185; 43 L. J., C. P. 36; L. R. 9 C. P. 243; 29 L. T. 680; 22 W. R. 127. See *Wanklyn* v. *Woollett*, infra, and *Brown* v. *Tamplin*, col. 109.

Consolidated Appeal—Some of Respondents Women.]—A woman, not being a person within the meaning of 6 & 7 Vict. c. 18, s. 42, cannot appeal from the decision of a revising barrister. Where appeals had been consolidated, in which some of the respondents were women, the court dismissed the appeals as improperly consolidated. *Wilson* v. *Salford Town Clerk*, 1 Hopw. & C. 44; 38 L. J., C. P. 35; L. R. 4 C. P. 398; 19 L. T. 483; 17 W. R. 161. See *Bennett* v. *Brumfitt*, *Ashcroft's Case*, 1 Hopw. & C. 48; 38 L. J., C. P. 72; L. R. 4 C. P. 399, n.; 19 L. T. 452; 17 W. R. 142.

Death of Revising Barrister before Case finally settled.]—Where a revising barrister assented to the substance of a special case agreed upon between the parties thereto, but died without having finally settled the terms in which the statement should be made, the court refused to allow the case to be entered. *Nettleton* v. *Burrell*, Barr. & Arn. 297; 7 Man. & G. 35; 2 D. & L. 598; 8 Scott (N.R.) 738; 1 Lutw. Reg. Cas. 157; 14 L. J., C. P. 37; 8 Jur. 1033.

Case not signed by Respondent—Agreement to waive Formalities.]—The court cannot entertain an appeal against a decision of a revising barrister, unless the requirements of the 6 & 7 Vict. c. 18, s. 42, have been duly complied with, or there is a clear and unequivocal consent to waive the performance of them. *Scott* v. *Durant*, 18 C. B. (N.S.) 205; H. & P. 269; 34 L. J., C. P. 81; 11 Jur. (N.S.) 115; 11 L. T. 676; 13 W. R. 316.

The revising barrister for a borough, at his court, holden on the 28th October, decided against an appellant's claim to be on the register, and assented to a case being stated for the opinion of the court; and it was agreed that all formalities should be waived. No case was agreed on till the 4th November, when the appellant's solicitor submitted a draft case to the respondent's solicitor. The respondent refused to sign it. On the 5th November the barrister signed the case, and it was transmitted to the court:—Held, that the appeal was not complete. *Ib.*

Signature and Indorsement of Case by Barrister.]—In the absence of the indorsement the master has no authority to enter, nor the court jurisdiction to hear, the appeal. *Wanklyn* v. *Woollett*, 1 Lutw. Reg. Cas. 597; 4 C. B. 86; 16 L. J., C. P. 144; 11 Jur. 129.

The same rule is applicable to consolidated appeals. *Ib.*

Where the case transmitted to the master is not signed, as well as endorsed, the court will not hear the appeal, where the respondent does not appear. *Burton* v. *Blake*, 11 C. B. 47.

An appeal tendered within the proper time having been rejected by the officer, because the indorsement had not been signed by the revising barrister, the court allowed it to be entered de bene esse, on the fifth day of the term, due diligence appearing to have been used to obtain the signature within the first four days. *Pring* v. *Estcourt*, 1 Lutw. Reg. Cas. 505; 4 C. B. 71; 16 L. J., C. P. 10; 10 Jur. 928.

Where a case transmitted is not signed by the revising barrister at the end of it the court cannot entertain the appeal. But the respondent consenting, the court allowed the case to be signed nunc pro tunc. *Burton* v. *Brooks*, 2 Lutw. Reg. Cas. 197; 11 C. B. 41; 21 L. J., C. P. 7; 16 Jur. 569.

The provision in the 58th section of the 13 & 14 Vict. c 69 (Ireland), which corresponds to the 42nd section of the 6 & 7 Vict. c. 18, as to the signature and indorsement of appeals from the revising barrister, is directory and not mandatory; and the time for such signature and indorsement may be effectually extended by consent of the parties beyond the termination of the revision sessions. When the time had been so extended by consent, the appeal was entertained though the case was signed and endorsed by the revising barrister after the sessions had terminated, the decision having been pronounced and notice of intention to appeal having been given during such sessions. *Topham* v. *Kelleher*, 6 L. R., Ir. 285—C. A.

Notice of, to Court.]—The notice of an appellant's intention to prosecute his appeal must be signed by the appellant himself; the signature of an agent will not suffice. *Petherbridge* v. *Ash*, 4 C. B. 74; 1 Lutw. Reg. Cas. 507; 10 Jur. 950.

Where an appeal was tendered within the first four days of the term, with a notice imperfectly signed, the court refused to allow the appeal to be entered (the defect being cured) on the fifth day. *Ib.*

Where a notice has not been given within the first four days of the term, the court has no jurisdiction to order the master to enter the appeal. *Autey* v. *Topham*, Barr. & Arn. 1; 1 Lutw. Reg. Cas. 1; 5 Man. & G. 1; 7 Scott (N.R.) 402; 1 D. & L. 785; 13 L. J., C. P. 39; 7 Jur. 995.

When the statement in writing by the revising barrister is duly transmitted to the masters, but the notice of intention to prosecute the appeal is not sent in time, the appeal cannot be entered. *Simpson* v. *Wilkinson*, 1 Lutw. Reg. Cas. 5; 5 Man. & G. 3; 7 Scott (N.R.) 406; 1 D. & L. 786; 13 L. J., C. P. 39.

An affidavit by the clerk of the attorney to the appellant, stating that the notice, which is required to be signed by the appellant, had, by mistake, not been sent, cannot be received as a substitute for such notice. *Ib.*

Notice of, to Respondent.]—The decision of the revising barrister took place on the 16th October. The appellant's attorney was taken ill in the last week of that month, and died on

the 7th November:—Held, that this was no excuse for the absence of the notice to the respondent required by 6 & 7 Vict. c. 18, s. 62; and that the court has no power to aid the appellant by postponing the hearing. *Pring* v. *Estcourt*, 4 C. B. 73.

The day appointed for hearing registration appeals is the first day appointed for that purpose by the court within 6 & 7 Vict. c. 18, s. 64, which requires ten days' notice at least to be given to the respondent of the appellant's intention to prosecute the appeal. *Norton* v. *Salisbury Town Clerk*, 1 Lutw. Reg. Cas. 538; 4 C. B. 32; 16 L. J., C. P. 9; 10 Jur. 970.

An application by a respondent for leave to deliver paper books after the proper time, does not dispense with the notice required to be served upon him by 6 & 7 Vict. c. 18, s. 62. *Grocer* v. *Buntemps*, 4 C. B. 70; 1 Lutw. Reg. Cas. 544, n.; 16 L. J., C. P. 63; 10 Jur. 971.

A waiver by the respondent of the notice to him required by 6 & 7 Vict. c. 18, s. 64, will not enable the court to entertain the appeal in his absence. *Newton* v. *Mobberly Overseers*, Barr. & Arn. 695; 2 C. B. 203; 1 Lutw. Reg. Cas. 427; 15 L. J., C. P. 154; 9 Jur. 995.

The court has no power to entertain an appeal (where the respondent fails to appear), unless the appellant has served upon the respondent a notice of his intention to prosecute the appeal ten clear days before the first day appointed by the court for hearing appeals, exclusive both of the day of service of the notice and of the day so appointed. *Clarke* v. *Beaton*, 5 C. B. 76.

A consolidated case of appeal, naming the returning officer of a borough as respondent, was signed on the 31st of October; notice of appeal was not given to him till the 4th of November; the first day appointed for hearing appeals was the 13th of November; the respondent not appearing:—Held, that the appeal could not be heard. *Brown* v. *Tamplin*, 2 Hopw. & C. 17; 42 L. J., C. P. 37; L. R. 8 C. P. 241; 27 L. T. 610; 21 W. R. 125.

Semble, that where the respondent appears, he is precluded from objecting to the form of the service of the notice of appeal. *Rawlins* v. *West Derby Overseers*, Barr. & Arn. 599; 2 C. B. 72; 1 Lutw. Reg. Cas. 373; 15 L. J., C. P. 70.

The decision of the revising barrister was not given until Saturday, the 30th October. The notice to the respondent was served on Tuesday, the 2nd November, the first day appointed for hearing the appeals being the 11th:—Held, that the case was within the proviso in s. 64 of 6 & 7 Vict. c. 18, empowering the court to postpone the hearing where there has not been reasonable time to give the notice. *Palmer* v. *Allen*, 5 C. B. 5; 2 Lutw. Reg. Cas. 42; 18 L. J., C. P. 265.

When an appellant gave his notice of intention to prosecute his appeal to the respondent at the same time that he gave it to the masters of the court, but not so as to leave ten days at least, as required by 6 & 7 Vict. c. 18, s. 64, between the date of giving such notice and the day appointed for hearing these appeals, the court would not postpone the hearing. *Luckett* v. *Voller*, 11 C. B. (N.S.) 1; K. & G. 371; 31 L. J., C. P. 43; 8 Jur. (N.S.) 676; 5 L. T. 312; 10 W. R. 105.

The court adjourned the hearing of an appeal, in order to give the appellant time to give the notice, the case not having been settled and delivered to the appellant until the eighth day of term. *Burton* v. *Blake*, 11 C. B. 47.

The court will not postpone the hearing of an appeal in order to afford time to give the necessary notice, upon a suggestion that the difficulty has arisen from the circumstance of the appointment of an unusually early day for the hearing of appeals, there having been ample time to give the notice between the day appointed and the day on which the decision of the revising barrister was pronounced. *Adey* v. *Hill*, 4 C. B. 38; 16 L. J., C. P. 63; 10 Jur. 971.

Delivery of Paper Books to the Court.]—The 6 & 7 Vict. c. 18, s. 60, enacts, that all appeals from the revising barristers shall be presented according to the ordinary rules and practice of the court, with respect to special cases, so far as the same may be applicable; and the appellant, therefore, ought to deliver paper books to the chief justice and the senior puisne judge, and the respondent to the two junior puisne judges of the court. *Allan* v. *Waterhouse*, 1 Lutw. Reg. Cas. 93; 7 Scott (N.R.) 485; 1 D. & L. 787; *S. C.*, sub nom. *Cooper* v. *Coates*, 5 Man. & G. 98.

The court, under particular circumstances, allowed the paper books to be delivered by the respondents nunc pro tunc. *Colville* v. *Rochester Town Clerk*, 1 Lutw. Reg. Cas. 380.

Where the paper books have not been delivered four days before the first day for hearing, application must be made to the court to allow the paper books to be delivered. *Croucher* v. *Browne*, 9 Jur. 976.

If one party neglects to deliver his paper books, the other must do so for him, or when the case is reached it will be struck out. *Shedden* v. *Butt*, 2 Lutw. Reg. Cas. 188; 11 C. B. 27.

If the paper books are not delivered to the judges four days before the day for hearing, the court will not afterwards allow them to be delivered nunc pro tunc, without some sufficient reason being given to excuse the neglect. *Palmer* v. *Allen*, 5 C. B. 1; 2 Lutw. Reg. Cas. 1; 17 L. J., C. P. 65; 11 Jur. 977.

The delivery of paper books is a matter quite within the discretion of the court, and where they had not been delivered to the judges' clerks four clear days before the first day appointed for hearing appeals, the court permitted their delivery nunc pro tunc, there appearing to be sufficient time to enable the judges to peruse them. *Elliot* v. *St. Mary Within Overseers*, 1 Lutw. Reg. Cas. 508.

Respondent not Appearing.]—The revising barrister not only made the overseers of a parish respondents in a case for the opinion of the court, but inserted specific names; it turned out that some of those named were not overseers, and some not named were; notice was given to all those persons who were named, and also to all the overseers; no one appeared as respondent:—Held, that the court had jurisdiction to hear the case. *Brumfitt* v. *Roberts*, 1 Hopw. & C. 387; 39 L. J., C. P. 95; L. R. 5 C. P. 224; 22 L. T. 301; 18 W. R. 678.

Where the appellant appears, and the respondent does not, the court will adhere to its former practice of hearing the appellant's case argued before it will reverse the decision of the revising barrister. *Pownall* v. *Hood*, 2 Lutw. Reg. Cas. 170; 11 C. B. 1; 21 L. J., C. P. 12; 16 Jur. 618.

On proof that he has served notice of appeal the appellant will be heard, though the respondent does not appear. *Ib.*

The court will require the case of the appellant

to be argued if he appears, though no one appears for the respondent. *Cooper* v. *Harris*, 7 Man. & G. 97 ; 8 Scott (N.R.) 921 ; 14 L. J., C. P. 72.

The court cannot entertain an appeal in the absence of the respondent, unless there is an affidavit of service upon him of notice of the appellant's intention to prosecute the appeal. *Colville* v. *Rochester Town Clerk*, 2 C. B. 60 ; 1 Lutw. Reg. Cas. 380.

A respondent not appearing upon an appeal being called on, the appeal will be dismissed, unless the appellant is prepared with an affidavit of the due service of the notice to the respondent, required by the 6 & 7 Vict. c. 18, s. 62, or with a special affidavit of circumstances to bring him within the proviso in s. 64. *Aldworth* or *Allworth* v. *Dore*, 2 Lutw. Reg. Cas. 67 ; 5 C. B. 87 ; 17 L. J., C. P. 142.

Appellant not Appearing.]—Where the respondent appears, but the appellant does not, the decision of the revising barrister will be affirmed with costs, unless it appears that a similar point is involved in another case standing for argument. *Bage* v. *Perkins*, Barr. & Arn. 414 ; 7 Man. & G. 156 ; 1 Lutw. Reg. Cas. 255 ; 8 Scott (N.R.) 983. S. P., *Crocker* v. *St. Mary, Lambeth*, 7 Man. & G. 156, n. ; 1 Lutw. Reg. Cas. 255, n. ; 8 Scott (N.R.) 985 ; *White* v. *Pring*, 8 C. B. 13.

Absence of Both Parties.] — Where neither party appears the case will be struck out, and the court will not, without sufficient reason being shewn, restore it to the paper. *Wansey* v. *St. Peter le Poor Overseers*, 7 Man. & G. 162 ; 8 Scott (N.R.) 992.

Practice on the Hearing.]—The court will hear only one counsel on each side. *Gadsby* v. *Warburton*, Barr. & Arn. 426 ; 1 Lutw. Reg. Cas. 136 ; 7 Man. & G. 11 ; 8 Scott (N.R.) 775 ; 14 L. J., C. P. 41 ; 9 Jur. 113.

The appellant has the right to begin. *Webb* v. *Birmingham Overseers*, 5 Man. & G. 14 ; 7 Scott (N.R.) 435 ; 1 Lutw. Reg. Cas. 6 ; 13 L. J., C. P. 57.

The court, on the motion of the appellant's counsel, reversed the revising barrister's decision without argument, the respondent's counsel stating that he could not support the decision. *Jarvies* v. *Shrewsbury Town Clerk*, 2 Lutw. Reg. Cas. 182.

Decisions of election committees of the House of Commons are not receivable as authorities upon the argument. *Whithorn* v. *Thomas*, Barr. & Arn. 259 ; 1 Lutw. Reg. Cas. 125 ; 7 Man. & G. 1 ; 8 Scott (N.R.) 783 ; 14 L. J., C. P. 38.

Whether Facts Sufficiently Stated.]—Semble, that a statement in a case, that A. had slept in T. "about twelve times," was uncertain and insufficient ; but the revising barrister being present in court, the court permitted the case to be altered by him instanter. *Ib.*

Where a case found that a claimant "stated" certain matters, it was remitted, upon the ground that it set forth evidence, and not facts. *Pitts* v. *Smedley*, Barr. & Arn. 344 ; 1 Lutw. Reg. Cas. 196 ; 7 Man. & G. 85 ; 8 Scott (N.R.) 907 ; 14 L. J., C. P. 73 ; 9 Jur. 69.

The court will not remit a case for the insertion of a fact which the barrister considered to be immaterial. *Hinton* v. *Wenlock Town Clerk*, Barr. & Arn. 257 ; 1 Lutw. Reg. Cas. 123 ; 7 Man. & G. 166, n. ; 2 D. & L. 598 ; 14 L. J., C. P. 37 ; 8 Jur. 988.

Or allow a material omission in the case to be waived by consent, but will send it to be restated. *Webb* v. *Birmingham*, Barr. & Arn. 5 ; 5 Man. & G. 14 ; 7 Scott (N.R.) 435 ; 13 L. J., C. P. 57.

Appellant must Rely on Facts stated in, and Questions raised by, Case.]—The decision of the barrister will be affirmed, if it does not appear from the facts stated that his decision was wrong. *Watson* v. *Cotton*, 5 C. B. 51 ; 2 Lutw. Reg. Cas. 53 ; 17 L. J., C. P. 68.

The court will not allow any objections to be taken upon the argument of the appeal which are not raised in the case. *Simpson* v. *Wilkinson*, Barr. & Arn. 308 ; 7 Man. & G. 50 ; 8 Scott (N.R.) 814 ; 1 Lutw. Reg. Cas. 168 ; 14 L. J., C. P. 49. S. P., *Nunn* v. *Denton*, Barr. & Arn. 324 ; 7 Man. & G. 66 ; 8 Scott (N.R.) 794 ; 1 Lutw. Reg. Cas. 178 ; 14 L. J., C. P. 43.

When the statements of fact by the barrister involve the construction by him of a deed, the court cannot look at the deed to see if he has stated the effect of it correctly. *Hillgrove* v. *O'Shea*, Ir. R. 3 C. L. 119.

Previous Decision of Court not Conclusive.]—The application of 6 & 7 Vict. c. 18, s. 66, which enacts that a decision shall be final and conclusive, is limited to the case in which the decision is given. *Webster* v. *Ashton-under-Lyne Overseers, Hadfield's Case*, 2 Hopw. & C. 89 ; 42 L. J., C. P. 146 ; L. R. 8 C. P. 306 ; 28 L. T. 901 ; 21 W. R. 637.

Practice where Case Remitted to Barrister.]—Where a case is remitted, the practice is that the case is handed by the master to the attorney for the appellant, by whom it is transmitted to the barrister, who returns it to the attorney, and he returns it to the master. *Coogan* v. *Luckett*, Barr. & Arn. 716.

Costs.]—Where only one side is heard, the successful party is entitled to costs. *Allen* v. *House*, Barr. & Arn. 415 ; 7 Man. & G. 157 ; 8 Scott (N.R.) 987 ; 1 Lutw. Reg. Cas. 255 ; 14 L. J., C. P. 79.

But it is not a general rule that the successful party is entitled to costs, where the court hears only one side. *Walker* v. *Payne*, Barr. & Arn. 541 ; 1 Lutw. Reg. Cas. 324 ; 15 L. J., C. P. 38.

The court will not give costs though only one side is heard, where a question of law, the fair subject of a doubt, is involved. *Croucher* v. *Browne*, 2 C. B. 97 ; 1 Lutw. Reg. Cas. 388 ; 15 L. J., C. P. 74.

Where the decision of the barrister is affirmed without hearing the respondent, the practice is to grant costs. *Passingham* v. *Pitty*, 17 C. B. 299 ; 25 L. J., C. P. 4 ; 2 Jur. (N.S.) 837.

Where the decision upon an appeal is adverse to the claim of franchise, semble, that the court will grant or withhold costs according as it sees that there was reasonable ground for the appeal ; but that, where the decision against the appellant supports the franchise, costs will be given as a matter of course. *Clark* v. *St. Mary, Bury St. Edmunds Overseers*, 1 C. B. (N.S.) 23 ; 3 Jur. (N.S.) 645.

A respondent will not be allowed costs where the case is a reasonably fit one for argument. *Collier* v. *King*, 11 C. B. (N.S.) 478.

The general rule as to costs, even when the court decides adversely to the claim for the franchise, is to give the respondent his costs,

unless the court is of opinion that there was reasonable ground for the appeal upon the legal construction of the statutes. *Harris* v. *O'Connor*, Ir. R. 5 C. L. 64.

The court made an order under s. 38 of 41 & 42 Vict. c. 26, for payment of the costs of a successful appeal by the town clerk, who had been named as respondent. *Nuth* v. *Tamplin*, 8 Q. B. D. 258, n.—C. A.

When the court sends a case back to the revising barrister to decide a matter of fact which he has referred to the decision of the court instead of deciding it himself, and the appellant then drops the appeal, the respondent is not entitled to costs. *Lawe* v. *Maillard*, 38 L. J., C. P. 179; L. R. 4 C. P. 547.

Court has no Jurisdiction over List of Voters, Except where an Appeal lies.]—See *Allen, In re*, col. 73.

2. ELECTION OF MEMBERS.

a. The Election.

i. *The Writ.*

As to giving certified Copy of Writ in Evidence.]—See *Reed* v. *Lamb*, col. 146.

ii. *Notice of Election.*

See 35 & 36 Vict. c. 33, schedule 1, part 1; schedule 2. *And see* B. 2, *a.* post, col. 168.

iii. *Candidates.*

Disqualification.]—To incapacitate a person from being elected as a member of the house of commons, as "executing, holding or enjoying" a contract made for the public service within 22 Geo. 3, c. 45, s. 1, such contract must at the time of the election be an executory one. *Manchester Election Petition, In re, Royse* v. *Birley*, 38 L. J., C. P. 203; L. R. 4 C. P. 296; 20 L. T. 786; 17 W. R. 827.

Where, therefore, under a contract for the supply of goods, the goods had been delivered to and accepted by the government before the election, and at the time of the election nothing remained to be done under the contract except for the government to pay the price which previously had become ascertained and was payable, the contractor was held not to be disqualified, since the contract at the time of the election was executed, and not within the statute. *Ib.*

The 22 Geo. 3, c. 45, s. 1, applies only to cases where the person contracting with the government knew, or ought reasonably to have known, that he was so dealing with the government. *Ib.*

An army clothier, who contracts with a colonel of a regiment or his agents to furnish clothing for such regiment, is not within 22 Geo. 3, c. 45, which renders all persons holding contracts for the public service incapable of being elected or sitting in the house of commons. *Thompson* v. *Pearse*, 1 Br. & B. 25; 3 Moore, 260.

The standing counsel to the India board is disqualified. *See* 29 & 30 Vict. c. 20; 14 L. T. 465.

In 1848 Mitchell was convicted in Ireland of treason-felony, and sentenced to transportation for fourteen years. He escaped within that time, and did not afterwards undergo the rest of the sentence or obtain a pardon. In 1853 he was naturalised as a citizen of the United States, and was at the time of his election, 1875, a natural-born British subject who had become an alien:—Held, that he was on both these grounds disqualified from being elected a member of the house of commons. *Tipperary Election Petition, In re, Morton* v. *Scully, Moore* v. *Scully*, Ir. R. 9 C. L. 217.

The election of a candidate for another constituency is not a disqualification. *Belfast Case*, 4 O'M. & H. 105.

Where Disqualification of Candidate known to Electors, rival Candidate entitled to Seat, though in a Minority.]—See *Reg.* v. *Franklin; Trench* v. *Nolan; Tipperary Election Petition, In re, Morton* v. *Scully*, col. 123; and *Drinkwater* v. *Deakin*, col. 144.

Conveyances for Qualification.]—The court will not assist a party in recovering an estate conveyed by him for an illegal purpose, such as to enable the grantee to vote at an election, or sit in parliament. *Groves* v. *Groves*, 3 Y. & J. 163.

Injunction granted to restrain the defendant from suing for a rent-charge, granted to qualify him to sit in parliament, the purpose never having been answered. *Platamone* v. *Staple*, Coop. 250.

Bill for re-conveyance of qualification to sit in parliament, given by father to his son, dismissed with costs. *Curtis* v. *Perry*, 6 Ves. 747; 6 R. R. 28.

Where a father assigned property to a son for the purpose of giving a qualification, and by a letter the son promised to pay the father a rent-charge out of the lands equivalent to the rents, the court refused to enforce the arrears of the rent-charge, holding the transaction to be only colourable. *Johnstone, In re*, 2 Jo. & Lat. 222; 9 Ir. Eq. R. 227.

P. being seised of an estate in a lease of lives renewable for ever, subject to a head-rent equal in amount to a rent which a sub-tenant of a moiety thereof held at, executed an agreement in writing to let the other moiety thereof, which was in his own possession, to D., his brother, for the lives of D. and two others, and the life of the survivor, free from rent and assessments during D.'s life, and after that to be subject to a yearly rent of 350*l.*; leases to be executed at the request of either party. There was evidence that the object of this gift was to enable D. to qualify as member of parliament for the city of Cork, where the lands lay. P. died intestate, in possession, and without having executed the lease:—Held, that this agreement could not be enforced against the heir of P., the object of it being to give D. a qualification for parliament, and that there was no agreement for valuable consideration, and that as an imperfect gift the court of equity could not enforce it. *Callaghan* v. *Callaghan*, 8 Cl. & F. 374. *And see* 4 Ir. Eq. R. 441.

Right to be Present in Polling Station.]—See *Clementson* v. *Mason*, col. 120.

Right of Action against Presiding Officer.]—See *Pickering* v. *James*, col. 120.

Liability of, for Election Expenses.]—See *Martin* v. *Tomkinson*, col. 119; *Morris* v. *Burdett, Morris* v. *Cochrane, Wathen* v. *Sandys*, and *Muntz* v. *Sturge*, col. 126.

Liability for Bribery by Agent of Fellow Candidate.]—See *Malcolm* v. *Perry*, col. 141.

iv. *Agents.*

Evidence to Establish Agency.]—The funds of a political association of 200 members were chiefly supplied to the secretary by the respondent, and these funds were mainly spent in treating at meetings held to promote the respondent's election:—Held, that the secretary of the association was the agent of the respondent. *Truscott* v. *Bevan*, 44 L. T. 192.

The circumstances which may lead to a presumption of agency stated. *Collins* v. *Price*, 44 L. T. 192.

The liability of candidates for the corrupt acts of members of political associations explained. *Heywood* v. *Dodson*, 44 L. T. 285.

The liability of candidates for the corrupt acts of members of political associations considered. *Spencer* v. *Harrison*, 44 L. T. 283. See *Walsall Case*, 4 O'M. & H. 123; *Hexham Case*, *Ib.* 145; *Worcester Case*, *Ib.* 153; *Rochester Case*, *Ib.* 158.

Where the petitioner makes out a primâ facie case of agency, it must be accepted unless rebutted by the respondent. *Birkbeck* v. *Bullard*, 4 O'M. & H. 84; 54 L. T. 625.

The law of election agency explained. *Tomline* v. *Tyler*, 44 L. T. 187.

See *Manchester Case*, 4 O'M. & H. 121; and *Belfast Case*, col. 134.

Member of Candidate's Committee.]—A member of a committee which conducts an election for a candidate, is such an agent as will bind his principal by his acts. *Honeywood* v. *Geary*, 6 Esp. 119.

Action against Member of Committee for Price of Refreshments Supplied to Voters.]—In an action by an innkeeper against one of the committee of a candidate at a contested election, for refreshments supplied to voters, which were, in fact, ordered through a third party, M.:—Held, that the innkeeper was bound, in order to recover in the action, to prove that M. was employed by the defendant and others to give the order, and that the defendant, in so employing M., was not acting as agent for any other person; or else that M. was a principal jointly with the defendant, or with the defendant and others; and that it would make no difference, that the innkeeper, at the time, considered M. as authorised to contract on behalf of the candidate, if in fact he was not so authorised. *Thomas* v. *Edwards*, 2 M. & W. 215; 1 Tyr. & Gr. 872.

Person Ordering Refreshments for Voters Liable to Pay unless known to be an Agent.]—If a person who was not himself a candidate, and who was not known to the party who supplied refreshments to be an agent of a candidate, opened a public-house at an election and ordered supplies for the voters, he was personally liable to pay, and the 7 & 8 Will. 3, c. 24 (repealed), afforded him no defence, if the goods were supplied entirely on his credit. *Thomas* v. *Harries*, 6 Car. & P. 615.

Payments by Agents, other than Expense Agent, to Canvassers—Not Recoverable from Candidate.]—It is unlawful for any election agent or sub-agent, except the expense agent, to make payments on behalf of the candidate even for current disbursements, and such payments cannot be recovered from the candidate. An election sub-agent, who was a solicitor, employed canvassers for the work of the election, and paid them out of his own moneys. The expense agent having disallowed these payments, the sub-agent brought an action against the candidate in the district registry for the money expended. The candidate obtained the common order to tax the plaintiff's account as a solicitor's bill of costs, and then obtained an order to stay further proceedings in the action pending the taxation. On the taxation the candidate objected to the payments as illegal under the second section of the Corrupt Practices Act, 1863 (26 & 27 Vict. c. 29):—Held, that the payments were illegal; that although the sub-agent had an implied authority to employ canvassers, he had no implied authority to pay them, and therefore he could not recover the amount expended from the candidate. *Parker, In re*, 52 L. J., Ch. 159; 21 Ch. D. 408; 47 L. T. 633; 31 W. R. 212; 47 J. P., 36, 516—C. A.

Held, also, that the candidate could take the objection of illegality on the taxation of the bill of costs. *Ib.*

Personal Liability of, to Canvassers.]—An election agent is not liable to be sued for the services of persons employed by him in canvassing voters, without proof of an undertaking on the part of such agent to make himself personally liable for those services. *Longbottom* v. *Rodgers*, 2 Man. & G. 427.

But slight evidence is sufficient to shew that the credit was given to the agent. *Ib.*

Action by, for Remuneration for Services.]—In an action for work and labour, the plaintiff, who was an attorney, proved that he had rendered professional services for the defendant as his agent at a contested election for a seat in parliament. It also appeared on the plaintiff's evidence, that the plaintiff voted at the election for the defendant, although by law a paid agent is forbidden to vote. The defendant gave evidence to shew that the plaintiff agreed to render his services gratuitously. The judge directed the jury that the plaintiff was entitled to a verdict, unless the defendant made out to their satisfaction that the services were to be gratuitous:—Held a misdirection, and that the true question for the jury should have been, whether, taking all the evidence together, the plaintiff had made out he was to be paid for the services. *Hingeston* v. *Kelly*, 18 L. J., Ex. 360.

Taxation of Bill, where Agent a Solicitor.]—The charges of solicitors, employed as electioneering agents, are taxable under 6 & 7 Vict. c. 73, s. 37. *Osborne, In re*, 25 Beav. 353; 27 L. J., Ch. 532; 4 Jur. (N.S.) 296; 6 W. R. 401.

But a solicitor who has been employed as an electioneering agent will not be allowed to have his costs taxed. *Oliver, In re*, 36 L. J., Ch. 261; L. R. 2 Eq. 3; 15 W. R. 331.

Insufficient Return of Expenses by—Relief.]—See *Buckrose Case*, col. 138.

—— **Costs of Recriminatory Case.**]—See *Buckrose Case*, col. 139.

Procuring unqualified Person to Vote.]—See *Stepney Case*, 4 O'M. & H. 178.

Candidate not Liable for Bribery by Agent of other Joint Candidate before Joint Candidature.]—See *Malcolm* v. *Perry*, col. 141.

v. *Nomination.*

See also B. 2, *f.*, post, col. 189.

Refusal to Nominate, unless Expenses Prepaid.]—The expenses of carrying into effect the provisions of the Ballot Act, 1872 (35 & 36 Vict. c. 33), are to be borne in the first instance by the returning officer, and to be apportioned between and recovered by him from the several candidates. *Davis* v. *Kensington* (*Lord*), 43 L. J., C. P. 370; L. R. 9 C. P. 720; 30 L. T. 610; 22 W. R. 707.

The prepayment of or security for the estimated amount of such expenses cannot be insisted upon by the returning officer as a condition precedent to his putting the candidate in nomination. *Ib.*

When, therefore, the returning officer refused to nominate one of two candidates on the ground that he declined to submit to such a demand, the return of the other candidate was declared void. *Ib.*

Persons Disturbing the Proceedings—Powers of Sheriff.]—If, at a county court held for the election of knights of the shire, a freeholder interrupts the proceedings, by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace. *Spilsbury* v. *Micklethwaite*, 1 Taunt. 146; 9 R. R. 717.

Result of Shew of Hands immaterial, if Poll demanded and Day fixed, although not Held.]—See *Wexford Election Petition*, col. 125.

Insufficient Time between Nomination and Polling Day.]—See *Clare Case*, 4 O'M. & H. 164.

vi. *Returning, Presiding, and other Officers.*

See also B. 2, *g.*, post, col. 194.

Returning Officer—Duty of, as to Annual Appointment of Election Auditor.]—The 17 & 18 Vict. c. 102, s. 15 (repealed), enacting that, once in every year, in August, the returning officer of every county shall appoint an election auditor for and during the year then next ensuing, and until another appointment of election auditor shall be made, is directory, and an appointment in March, 1857, by the sheriff, who came into office in that month, was valid, and superseded an appointment made in 1854. *Reg.* v. *Griffiths*, 7 El. & Bl. 952; 26 L. J., Q. B. 313; 3 Jur. (N.S.) 618.

—— **Action against, for Refusing to Receive or Count Vote.**]—Any person who has a right to vote at an election for members of parliament may maintain an action against the returning officer for maliciously refusing to admit his vote, and may recover damages for the injury, though the persons for whom he offered to vote were elected. *Ashby* v. *White*, 2 Lord Raymond, 938; 3 *Id.* 320; 1 Smith L. C., 10th ed., 231; 14 Howell, St. Tr. 695.

A person was on the register of voters for a borough, and tendered his vote for one of the candidates at a contested election for a member to serve in parliament for that borough; the returning officer mistaking the duty required of him by 6 & 7 Vict. c. 18, s. 81, allowed a scrutiny upon, and finally refused to receive and record, the vote. He had ceased to reside in the borough, or within seven miles thereof, for some time before the election, and was, therefore, not entitled to vote. In an action against the returning officer:—Held, that a person on the register of voters, but having lost his right to vote by the provisions of 6 & 7 Vict. c. 18, s. 79, cannot recover damages against a returning officer (no malice existing) for refusing to receive his vote at the poll. *Pryce* v. *Belchers*, 4 C. B. 867; 16 L. J., C. P. 264.

If a returning officer, without malice or any improper motive, but exercising his judgment honestly, refuses to receive the vote of a person entitled to vote at an election, no action will lie against him at the suit of such person. *Tozer* v. *Child*, 7 El. & Bl. 377; 26 L. J., Q. B. 151; 3 Jur. (N.S.) 774; 5 W. R. 287—Ex. Ch.

Upon the election of a member of parliament, A.'s vote, having been objected to, was rejected by the returning officer's deputy, as being the vote of a paid agent of the candidate for whom it was tendered, and a note to that effect was entered by the deputy in the poll-book:—Held, that this substantially amounted to a recording of the vote by the deputy, whereby it became the duty of the returning officer, on the inspection of the poll-book, to cast up that vote with the other votes recorded for the same candidate; and for breach of which duty the returning officer was liable in an action. *M'Gowan* v. *Sedley*, 8 Ir. C. L. R. 342—Ex. Ch.

In an action against a returning officer, for refusing the vote of an inhabitant on the election of a member of parliament, the malice of the defendant is an essential ingredient to support such action. *Cullen* v. *Morris*, 2 Stark. 577; 20 R. R. 742.

And malice must be proved as well as laid. *Drewe* v. *Coulton*, 1 East, 563, n.; 6 R. R. 346, n. S. P., *Milward* v. *Sargeant*, 1 East, 577, n.; 6 R. R. 350.

—— **Liability of, for Refusing Copy of Poll.**]—An action lies against a returning officer at an election, for 500*l.* penalty, under 7 & 8 Will. 3, c. 25, s. 6, for not delivering a copy of the poll to a candidate, on being required. *Smith* v. *Phillips*, 1 Bro. P. C. 69.

—— **Cannot Return Himself.**]—See *Reg.* v. *Owens*, 2 E. & E. 86; 28 L. J., Q. B. 316; 5 Jur. (N.S.) 764; 7 W. R. 566.

—— **Charges of—Taxation.**]—At a parliamentary election the high sheriff was the returning officer, the duties being performed on his behalf by a firm of solicitors, one of whom was under-sheriff. The returning officer's charges included a charge for professional assistance rendered to him by the under-sheriff's firm, which was disallowed on taxation, on the ground that no detailed account was sent in to the returning officer within fourteen days of the return, as required by s. 5 of the Returning Officers Act, 1875:—Held, that the charge was wrongly disallowed on the above ground, the section not being applicable as between the returning officer and the candidates to charges made for work done for the returning officer by his own agents. *Essex Election* (*South-Eastern Division*), *In re*, 56 L. J., Q. B. 356; 19 Q. B. D. 252; 57 L. T. 104; 36 W. R. 44.

The right of a returning officer under s. 2 of the same act to be paid his reasonable charges and expenses is not limited to such charges only as have been vouched under ss. 4 and 5 of the

act, nor is a charge made by him to be disallowed merely because in the account sent in by him to the candidates it appears under a wrong heading. A returning officer is not limited to charging for such services and expenses as come verbatim et literatim within the description in the schedule to the act, if they are services and expenses of one of the kinds mentioned in the schedule. *Ib.*

A charge for storing ballot-boxes from one election to another in order to avoid the expense of procuring fresh ones was therefore allowed, although no such charge is expressly provided for in the schedule to the act. *Ib.*

A returning officer at a parliamentary election is not entitled to remuneration for personal services rendered by him in the conduct of the election, under the heading of professional or other assistance, which he has not as a matter of fact employed. *Shoreditch (Hoxton Division) Election, In re, Walker, Ex parte*, 56 L. T. 529.

By s. 4 of 38 & 39 Vict. c. 84, it is enacted that an application to tax the returning officer's charges at a parliamentary election may be made, within fourteen days from the delivery of the account, to the county court having jurisdiction at the place of nomination for the election:—Held, that an application made within the time specified to the registrar of the county court when the judge was not sitting was properly made. *Reg.* v. *Bloomsbury County Court Judge*, 56 L. T. 321; 51 J. P. 212—C. A. Affirming 55 L. J., Q. B. 443; 17 Q. B. D. 778.

Where the accounts of a returning officer have been taxed by the registrar of a county court under the Parliamentary Elections (Returning Officers) Act, 1875 (38 & 39 Vict. c. 84), s. 4, the county court judge has no jurisdiction to review the registrar's taxation. *Reg.* v. *Lambeth County Court Judge*, 17 Q. B. D. 96. *See* 49 & 50 Vict. c. 57.

A candidate at a parliamentary election may take the benefit of a taxation of the returning officer's charges made at the instance of another candidate. The fact that he has agreed to pay the full charges, and was not a party to the taxation, does not deprive him of that right. *Martin* v. *Tomkinson*, 62 L. J., Q. B. 400; [1893] 2 Q. B. 121; 5 R. 411; 69 L. T. 285; 57 J. P. 725.

—— **Irregularities of, not affecting Result.**]—See *Clare Case*, 4 O'M. & H. 163, 166.

—— **Expenditure of, in erecting Polling Booths.**]—See *Muntz* v. *Sturge*, col. 126.

—— **Liability of, to pay Costs of Petition.**]—See *Sheil* v. *Ennis*, col. 139.

—— **Rejection of Votes by—Double Return.**]—See *Sheil* v. *Ennis*, col. 125.

—— **No Action by, against Hundred for Damage to Hustings.**]—See *Allen* v. *Ayre*, col. 126.

Presiding Officer—Appointment of.]—Semble, the appointment of a presiding officer need not be in writing. *Reg.* v. *Garvey*, 16 Cox, C. C. 252.

—— **Duty of, at Polling Station—Right of Action of Defeated Candidate for Neglect.**]—Under the Ballot Act, 1872 (35 & 36 Vict. c. 33), it is the duty of the presiding officer at a polling station, or a clerk deputed by him, whichever of them in fact undertakes it, to deliver to the voters ballot papers bearing the official mark, and to be present, so that each voter, before placing his ballot paper in the box, can shew to him the official mark on its back; but primâ facie, and in the absence of it appearing that a clerk has been deputed by such presiding officer to fulfil it, the duty lies on such officer. *Pickering* v. *James*, 42 L. J., C. P. 217; L. R. 8 C. P. 489; 29 L. T. 210; 21 W. R. 786.

But it is doubtful whether there is a similar duty as to ascertaining, before the voters put their ballot papers in the box, whether they are properly marked with the official mark. *Ib.*

When the presiding officer or clerk commits a breach of duty, he is liable to an action for damages by the party aggrieved, though the breach may not be wilful or malicious. *Ib.*

When a declaration sufficiently states the duty, and a breach thereof by the defendant, and after stating facts not sufficiently shewing the plaintiff is aggrieved, alleges that "by reason of such neglect of duty, the plaintiff was prevented from being elected," such allegation is one of fact, and sufficient to shew the plaintiff is aggrieved. *Ib.*

Register conclusive on Presiding Officer, except where inherent Incapacity to Vote.]—See *Stowe* v. *Jolliffe*, col. 136.

Election Auditor—Fee of.]—A. was proposed and seconded with his own consent, as a candidate at an election for a county, but withdrew before the shew of hands. No bills of charges or claims against him were sent to the election auditor:—Held, that he was nevertheless liable under 17 & 18 Vict. c. 102, and 21 & 22 Vict. c. 87 (repealed), to pay the election auditor the fee of 10*l.* *Edwards* v. *Whitehurst*, 5 H. & N. 131; 29 L. J., Ex. 329; 1 L. T. 302; 8 W. R. 183.

Mayor to be Returning Officer in Boroughs not Counties of themselves.]—*See* Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 244.

vii. *The Poll.*

See also B. 2, *h.*, post, col. 196.

Insufficient Time between Nomination and Polling Day.]—See *Clare Case*, 4 O'M. & H. 164.

Candidate, in whose favour Shew of Hands was, does not, by Withdrawing after Polling Day fixed, entitle the other to the Seat.]—See *Wexford Election Petition*, col. 125.

Candidates who go to the Poll liable for Cost of Polling Booths.]—See *Muntz* v. *Sturge*, col. 126.

Reasonable Time to Vote.]—See *Aylesbury Division of Bucks Election*, 4 O'M. & H. 59.

Right of Candidate to be Present in Polling Stations.]—A candidate at a parliamentary or municipal election has a general right to be present in a polling station at the election, and not merely a qualified right to be present for the purpose of undertaking the duties of an agent, or of assisting his agent. *Clementson* v. *Mason*, 44 L. J., C. P. 171; L. R. 10 C. P. 209; 32 L. T. 325; 23 W. R. 620.

Ballot Paper—Absence of Official Mark.]—A ballot paper which conforms in other respects to the requirements of the Ballot Act, 1872 (35 & 36 Vict. c. 33), is not void because it has not on the face of it the official mark directed by s. 2 of that act to be marked on both sides of the ballot paper. *Pickering* v. *James* (L. R. 8 C. P. 489 : ante, col. 120) considered. *Akers* v. *Howard*, 55 L. J., Q. B. 273 ; 16 Q. B. D. 739 ; 54 L. T. 651 ; 34 W. R. 609 ; 50 J. P. 519.

Voter's Mark on Ballot Paper, Sufficiency of.]—The enactment in the Ballot Act, 1872, s. 2, as to the ballot paper being secretly marked by the voter, is an absolute enactment, and must therefore be obeyed strictly, but the manner in which the voter is to mark such paper is enacted only in the directory part of the statute, and therefore it is sufficient if it is obeyed substantially. *Woodward* v. *Sarsons*, 44 L. J., C. P. 293 ; L. R. 10 C. P. 733 ; 32 L. T. 867.

A ballot paper may be well marked, although the mark does not discolour the paper, or appear to have been made with a pencil, if from any circumstances the court can infer that the marks were intentionally made. A ballot paper may be well marked for one candidate, although a great portion of the cross is opposite the name of another candidate, if the point of intersection of the crossing lines is opposite the name of the former. A ballot paper marked only with a cross on the back of the paper is bad. *McLaren* v. *Milne Home*, 50 L. J., Q. B. 658 ; 7 Q. B. D. 477 ; 45 L. T. 350 ; 30 W. R. 85.

And it has been held, that a ballot paper ought not to be rejected because the voter's mark, placed on the right hand side, after the candidate's name, is placed on the left of the vertical line delineated on the ballot paper. *Sheil* v. *Ennis*, Ir. R. 8 C. L. 240.

See *Buckrose Case*, col. 124.

Ballot Papers.]—See *Cirencester Case*, 4 O'M. & H. 194.

Only Method of Voting against Candidate.]—In the election of a member of parliament, there is no way of defeating the election of one candidate but by voting for another. *Rex* v. *Monday*, Cowp. 530.

Prisoner not let out to vote.]—The court will not grant a habeas corpus to enable a prisoner, in custody upon a conviction of misdemeanour, to vote at an election of a member of parliament. *Jones, In re*, 4 N. & M. 340 ; 2 A. & E. 436 ; 1 H. & W. 7 ; 4 L. J., K. B., 97.

Voter cannot be excluded by a Resolution of the House of Commons.]—A resolution of the House of Commons has no effect to exclude from the enjoyment of the franchise of voting any person or class in whom the right is already vested by statute. *Bulmer* v. *Norris*, K. & G. 321 ; 9 C. B. (N.S.) 19 ; 30 L. J., C. P. 25 ; 7 Jur. (N.S.) 342 ; 3 L. T. 470 ; 9 W. R. 122.

Voting Twice, Effect of—Personation.]—It was proved that a vote had been given by some unknown person in the name of a voter, W., for the respondent. W. afterwards voted for the petitioner :—Held, that a vote must be added to the petitioner's number and a vote deducted from the respondent. *St. Andrews Election*, 4 O'M. & H. 32.

A voter, whose name appeared twice in the register, voted twice for the petitioner under a mistaken notion that he was entitled to do so :—Held, that the first vote was good and the second bad. *Ib.*

S. B. having voted in the Stepney Division and then in Whitechapel :—Held, that the first vote was good, and that the second did not, unless given with a corrupt intention, involve the offence of personation. Where a voter's name is wrongly placed upon the register for two divisions of the same borough he is entitled to elect in which he will vote. *Isaacson* v. *Durant*, 54 L. T. 684 ; 4 O'M. & H. 34. See *Finsbury Case*, 4 O'M. & H. 174.

Agent procuring Unqualified Person to Vote.]—See *Stepney Case*, 4 O'M. & H. 178.

Vote of Clerk receiving no Extra Pay for Election Work.]—See *Buckrose Case*, col. 136.

Rejecting Vote of Paid Agent—Note of Rejection in Poll Book a Record of the Vote.]—See *McGowan* v. *Sedley*, col. 118.

Freeman on Register—Non-residence.]—See *Londonderry Case*, col. 136.

Change of Qualifying Premises between the Registration and the Election.]—A voter in a borough, who is registered as a 10*l.* householder, in respect of a house in E. Place, loses his vote, if, after the registration, and before the election, he removes to another house of equal value in E. Place, although the house to which he removes is in every respect within the description contained in the register. *Reg.* v. *Ellis*, Car. & M. 565.

If A., who is registered as an elector for a borough as a 10*l.* householder, gives up the house in respect of which he is registered, and takes another of superior value within the same borough, after the registration and before the election, he loses his vote ; and if, before and at the time of the election, a new tenant has taken possession of the house that A. has left, and is paying rent for it, the fact that a few articles of A.'s furniture remain in the house, and that A. retains one of the two keys of it, will make no difference. *Reg.* v. *Bowler*, Car. & M. 559.

A. was indicted for giving a false answer to the question, whether he had the same qualification to vote as that for which he was registered. He had occupied a house at the time of the registration, for which he was on the register as a voter, but he had left it before the election, and the landlord's agent had, before the election, given the key of it to B., who had put horses into the stable and beer into the cellar ; but B.'s rent did not commence till after the election :—Held, that in the absence of evidence of the determination of the tenancy of A., the indictment could not be supported. *Rex* v. *Harris*, 7 Car. & P. 253.

Duty of Returning Officer as to receiving Votes of Persons on Register who have ceased to be qualified.]—See *Pryce* v. *Belchers*, col. 118.

Under Ballot Act, Register conclusive on Presiding Officer except where inherent Incapacity to Vote.]—See *Stowe* v. *Jolliffe*, col. 136.

Duty of Presiding Officer at Polling Station.]—See *Pickering* v. *James*, col. 120.

Ballot Paper not handed to Presiding Officer.]—A voter who had been personated went to the poll and claimed to vote; he answered the usual questions and took the oath, and thereupon received a ballot paper; instead of returning it to the presiding officer, he put it into the ballot box:—Held, that the vote was bad. *Buckrose Case*, 4 O'M. & H. 110.

Liability of Returning Officer for Rejecting Vote.]—See *Ashby* v. *White*, col. 117; *Tozer* v. *Child*, *Cullen* v. *Morris*, and *Drewe* v. *Coulton*, col. 118.

Marked Register not Conclusive that Voter has voted.]—When the marked register shews that a voter has already voted, it is primâ facie sufficient for adding his subsequently-tendered vote to the poll that he swears he did not previously vote, and that the marked register is wrong. When the marked register shews that a voter did not vote, it is not conclusive on a scrutiny, but it may be proved that the voter did vote, and his vote, on a paper bearing the number of another elector, will be valid. *Sheil* v. *Ennis*, Ir. R. 8 C. L. 240.

Voter called upon to Identify Ballot Paper.]—See *Finsbury Case*, 4 O'M. & H. 176.

Evidence of Voting.]—See *Isaacson* v. *Durant*, col. 136.

When Votes Null and Void, so as to Entitle Opposing Candidate to Seat.]—A vote given for a disqualified candidate is not a mere nullity, unless the voter had notice of the disqualification; and, therefore, where a disqualified candidate has, under such circumstances, a majority of votes, the defeated candidate cannot claim a scrutiny. *Reg.* v. *Franklin*, Ir. R. 6 C. L. 239.

A candidate in a minority, declared entitled to the seat, where the rival candidate had been unseated for disqualification (arising from intimidation and undue influence by himself and his agents), which existed previously to the election, and, in the opinion of the majority of the court, had been brought to the knowledge of the electors before they voted for him. *Trench* v. *Nolan*, Ir. R. 6 C. L. 464; 27 L. T. 69; 20 W. R. 833.

When notice of the disqualification of a candidate is brought home to the electors, who vote for him, their votes are simply thrown away. *Tipperary Election Petition*, *In re*, *Morton* v. *Scully*, *Moore* v. *Scully*, Ir. R. 9 C. L. 217.

See *Drinkwater* v. *Deakin*, col. 144.

If Ballot Act substantially complied with, and Result not affected by Mistake in Form, Election Good.]—Although a parliamentary or municipal election will be void by the common law of parliament, if it is so conducted that either there is no real electing by the constituency at all, or it is not really conducted under the subsisting election law, which is now an election by ballot, yet if there is no reasonable ground to believe that a majority of the electors may have been prevented from voting in favour of the candidate they preferred, and if the election is substantially an election by ballot, the election will not be void by the common law of parliament, notwithstanding there may have been mistake or misconduct in the use of the machinery of the Ballot Act. *Woodward* v. *Sarsons*, 44 L. J., C. P. 293; L. R. 10 C. P. 733; 32 L. T. 867.

The Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 13, is only declaratory of what would have been the law applicable to elections under that act if that section had not existed, and therefore to render an election invalid for non-observance of the rules or forms of the Ballot Act, the non-observance must be so great as to amount to a conducting of the election contrary to the principle of an election by ballot, and be such that it either did or might have affected the result of the election. *Ib.*

Vote of Alien—Whether Voter a Person on the Register.]—Whether the vote of an alien on the register will be struck off on a scrutiny, considered. Where, on a scrutiny, one person claims to be the person on the register, and it is alleged that another person who does not himself claim the vote, is the person on the register, the nature of the qualification may be inquired into for the purpose of deciding who is the voter. *Sheil* v. *Ennis*, Ir. R. 8 C. L. 240.

viii. *Counting the Votes.*

Ballot Papers—Validity.]—A ballot paper marked with a cross in the corner above the line is void for uncertainty. *Buckrose Case*, 4 O'M. & H. 110.

A ballot paper marked on the back with the figures 33 was in the absence of evidence showing that the voter could be identified by the writing allowed. *Buckrose Case*, supra.

A ballot paper was rejected which had been marked with a cross on the back opposite one of the names and could be seen through the paper, and a ballot paper marked on the front in the usual way was allowed though there was a cross on the back opposite the other candidate's name. *Buckrose Case*, supra.

Ballot papers with a cross opposite one name and a line opposite the other name were rejected on the ground of uncertainty. *Buckrose Case*, supra.

The fact that a ballot paper is marked with a circle instead of a cross does not invalidate the vote. *Buckrose Case*, supra.

A vote was disallowed where the ballot paper was marked with a cross immediately upon the name of a candidate. *Buckrose Case*, supra.

See *Cirencester Case*, 4 O'M. & H. 194; *McLaren* v. *Milne-Home*, *Sheil* v. *Ennis*, and *Ackers* v. *Howard*, col. 121.

Voter entered in Poll Book as rejected should have been Counted.]—See *M'Gowan* v. *Sedley*, col. 118.

Votes wrongly rejected by Returning Officer—Double Return.]—See *Sheil* v. *Ennis*, col. 125.

ix. *Declaration of Result of Poll.*

Liability of Returning Officer for Refusing Copy of Poll to Candidate.]—See *Smith* v. *Phillips*, col. 118.

x. *Return of Name of Successful Candidate.*

When Return Complete.]—The return of a member to serve in parliament is not made until the writ with the certificate of the returning officer

indorsed thereon reaches the hands of the clerk of the crown in chancery so that he may act upon it. *Poole Election Petition, In re, Hurdle* v. *Waring*, 43 L. J., C. P. 209; L. R. 9 C. P. 435; 30 L. T. 329; 22 W. R. 735.

A Returning Officer cannot return himself.]—See *Reg.* v. *Owens*, 2 E. & E. 86; 28 L. J., Q. B. 316; 5 Jur. (N.S.) 764; 7 W. R. 566.

Double Return.]—At an election when there were two candidates for one seat, the returning officer, by rejecting several votes given for the petitioner, reduced the numbers to equality, and was accordingly obliged, under the circumstances, to make a double return. The court having decided that those votes had been illegally rejected, certified that the petitioner ought to have been returned. *Sheil* v. *Ennis*, Ir. R. 8 C. L. 240.

Return where Candidate in whose favour Show of Hands was, withdraws before Poll.]—At a nomination, the show of hands being in favour of A., a poll was demanded for B., and a day fixed for the poll. Afterwards A. gave out that he withdrew from the contest, and the returning officer declared B. to be duly elected. On a petition against his election, and claiming the seat for A.:—Held, that neither A. nor B. was elected, but that the election was void. *Wexford Election Petition*, Ir. R. 3 C. L. 612. See *Reg.* v. *Cooper*, 39 L. J., Q. B. 273; L. R. 5 Q. B. 457.

In Action for Bribery the Return not required to prove the Election.]—See *Reg.* v. *Clark*, col. 146.

xi. *Election Expenses.*

What are—Meetings Preliminary to Candidature.]—Where a meeting is held or other expenses are incurred with the object of inducing a person to become a candidate at an election, the question whether the costs of the meeting and other expenses are "election expenses" is one which must be answered in relation to the particular circumstances of the case. *Birkbeck* v. *Bullard*, 4 O'M. & H. 84; 54 L. T. 625.

—— **Persons Paid to Keep Order.**]—Money paid by an agent of a candidate for the employment of persons to keep order at meetings connected with the election is an expense connected with the management and conduct of an election, within the meaning of s. 28 of the Corrupt and Illegal Practices Prevention Act, 1883. *Packard* v. *Collings*, 4 O'M. & H. 70; 54 L. T. 619.

—— **Subscription to Registration Expenses—Starting a Newspaper.**]—Expenses incurred by a candidate as a subscription to registration expenses need not be returned as election expenses. A candidate at the general election of 1885 established a newspaper in Aug., 1885, which ceased to appear in Jan., 1886:—Held, that losses incurred in connection there with need not be returned as election expenses. *Crossman* v. *Gent-Davis*, 4 O'M. & H. 93; 54 L. T. 628.

Prepayment of Expenses of Poll cannot be required from Candidate.]—See *Davies* v. *Kensington*, A. 2, *a.* v.

Cost of erecting Polling Booths.]—By 2 Will. 4, c. 45, s. 68, at every contested election the returning officer shall, if required thereto by or on behalf of any candidate, on the day fixed for the election, and if not so required may, if it shall appear to him expedient, cause to be erected, for taking the poll at such election, different booths. And by s. 71, all booths erected for the convenience of taking polls shall be erected at the joint and equal expense of the several candidates:—Held, that the "contested election" referred to in s. 68 is the poll, and the candidates referred to in s. 71 are candidates who go to or demand a poll. *Muntz* v. *Sturge*, 8 M. & W. 302.

Extra Expense caused by Riot—Action against Hundred.]—Where hustings, erected at the expense of the candidates at a contested election, were damaged by a riotous assembly, and were afterwards repaired at their expense:—Held, that no action could be maintained by the returning officer against the hundred, the hustings not being a building within 57 Geo. 3, c. 19, and the property in them not being in the mayor, who was the returning officer. *Allen* v. *Ayre*, 3 D. & R. 96; 1 L. J. (O.S.) K. B. 204.

Candidate's Liability for—Hustings.]—A person who was nominated and elected to serve in parliament for the city of Westminster, without being present at, or in any way interfering himself or by his agents with the election, or holding himself out, or authorising any one else to hold him out, as a candidate, but afterwards took his seat in the House of Commons, was not chargeable with the expenses under 51 Geo. 3, c. 126. *Morris* v. *Burdett*, 2 M. & S. 212; 14 R. R. 639; overruling *S. C.*, 1 Camp. 221; 10 R. R. 667.

A candidate is only liable for such expenses as are imposed by positive statute, or by his own consent, express, or implied, notwithstanding there may have been a long usage for the expenses being rateably defrayed by the candidates. *Ib.*

A candidate for the representation of a city or a borough is not liable for hustings erected without his own consent or that of his agent. *Ib.*

But if he makes use of such hustings for the accommodation of himself or of his agents, a promise to contribute to the expense of erecting them will be inferred. *Ib.*

By 51 Geo. 3, c. 126 (repealed) one of two candidates for the city of Westminster was only liable to the bailiffs for a moiety of the expenses of the hustings. *Morris* v. *Cochrane* (*Lord*), 1 M. & S. 283.

—— **Things expressly ordered—When Candidates jointly Liable.**]—If the candidates at a county election jointly desired the sheriff to erect hustings, provide poll clerks, and retain an assessor, promising to defray the expense so incurred, they were jointly liable to him, notwithstanding 18 Geo. 2, c. 18, s. 7 (repealed). *Wathen* v. *Sandys*, 2 Camp. 640.

But if they had not jointly promised they must have been separately sued under 18 Geo. 2, c. 18, s. 7. *Ib.*

A sheriff is not entitled to charge the candidates with any part of the expense necessarily incurred by him in executing the writ and making the return; and for those things expressly ordered by the candidates they are only bound to make him a fair remuneration, although he himself may have paid more in submitting to exorbitant charges usually made on such occasions. *Ib.* See also *Davies* v. *Kensington* (*Lord*), ante, col. 117.

Goods ordered by Candidate personally.]—The fact that all orders for election expenses are to be given by agents of the candidate appointed in writing, and all payments are to be made through the election auditor, does not prevent the candidate himself being liable for goods supplied for election purposes in pursuance of an order given by him personally. *Norton* v. *Dickson*, 5 H. & N. 637; 29 L. J., Ex. 337; 6 Jur. (N.S.) 708; 8 W. R. 530.

No Action for Illegal Expenses.]—Where a statute prohibits, under a penalty, any person from agreeing to pay certain expenses, an agreement to pay such expenses is invalid, and no action is maintainable upon it, although the statute does not expressly prohibit the other party to the agreement from receiving such expenses, or impose a penalty on him for so doing. *O'Brien* v. *Dillon*, 9 Ir. C. L. R. 318.

Price of Rosettes for Voters innocently supplied.]—A mercer furnishing ribbons to a person who was a candidate for the representation of a city, the ribbons being partly used as presents for voters, and the mercer being himself a voter, and receiving orders for some of the ribbons from the candidate himself, in his committee-room, but not being told for what purpose they were wanted, was entitled to recover the price of the ribbons from the candidate notwithstanding 7 & 8 Will. 3, c. 4. *Richardson* v. *Webster*, 3 Car. & P. 128.

Action for Refreshments supplied to Voters.]—See *Ward* v. *Nunney*, *Ribbans* v. *Crickett*, and *Hughes* v. *Marshall*, col. 148.

Personal Liability of Agent.]—See *Longbottom* v. *Rodgers*, col. 116.

Liability of Member of Committee for Price of Refreshments supplied to Voters.]—See *Thomas* v. *Edwards*, col. 115.

Person ordering Refreshments for Voters liable to pay unless known to be an Agent.]—See *Thomas* v. *Harries*, col. 115.

Payment of Canvassers by Agent other than Expense Agent.]—See *Parker*, *In re*, col. 116.

Taxation of Bill, where Agent a Solicitor.]—See *Osborne*, *In re*, and *Oliver*, *In re*, col. 116.

Taxation of Returning Officer's Charges available for Candidate not Party to Taxation.]—See *Martin* v. *Tomkinson*, col. 119.

Candidate's Personal Expenses.]—Personal expenses of a candidate, such as hotel bills, railway fares and the like, were not within 17 & 18 Vict. c. 102, s. 116 (repealed). *Grant* v. *Guinness*, 17 C. B. 190; 25 L. J., C. P. 66; 1 Jur (N.S.) 1217; 4 W. R. 198.

Trivial unauthorised Expenses.]—A trivial expense, not authorised by the schedule to the Corrupt and Illegal Practices Prevention Act, 1883, and returned amongst "election expenses" is not necessarily illegal. *Isaacson* v. *Durant*, 4 O'M. & H. 34; 54 L. T. 684.

Insufficient Return of—Relief.]—See *Buckrose Case*, col. 138.

—— **Costs of Recriminatory Case caused by.**]—See *Buckrose Case*, col. 139.

—— **Votes of Persons making Payments not included in Return struck off.**]—See *Buckrose Case*, col. 68.

Disputed Claims, Payment of—Notice of Application for Leave.]—An application on behalf of a candidate at a parliamentary election for an order of the high court for leave to pay a disputed claim within s. 29, sub-s. 7, of the Corrupt and Illegal Practices Prevention Act, 1883, will not be granted without due notice to the candidate on the other side, the returning officer, and the constituency at large, by advertisement or otherwise. *South Shropshire Election*, *In re*, 54 L. T. 129; 34 W. R. 352.

b. Petition.

See also B. 2, *k.*, post, col. 207.

i. *Parties.*

Petition presented after Death of Candidate Returned.]—At a parliamentary election, where there were two candidates for one seat, the candidate who had the majority of votes was returned and died, and after his death an elector, who then knew of his death, presented in due time a petition complaining of the return, and praying the seat for the other candidate. The court, on a motion for that purpose by an elector who had been admitted as a respondent, refused to set aside the petition. *Tipperary Election Petition*, *In re*, *Morton* v. *Galway*, Ir. R. 9 C. L. 173.

ii. *Abatement.*

Dissolution of Parliament after Petition presented.]—The effect of a dissolution of parliament while an election petition is pending, before the hearing of such petition, is that the petition drops, and the court will order the sum deposited by the petitioner, by way of security for costs to be returned to him. *Carter* v. *Mills*, 43 L. J., C. P. 111; L. R. 9 C. P. 117; 22 W. R. 318.

iii. *Grounds of.*

Personation.]—An election cannot at common law be avoided on the ground of widely spread personation irrespective of agency. *Belfast Case*, 4 O'M. & H. 105.

Bribery.]—See *Beale* v. *Smith*, infra.

That Successful Candidate Disqualified.]—See *Reg.* v. *Franklin*; *Trench* v. *Nolan*; and *Tipperary Election Petition*, *In re*, *Morton* v. *Scully*, col. 123.

iv. *Form of.*

Bribery alleged Generally.]—In a petition against the return of a member, it is sufficient to allege that the respondent by himself and his agents has been guilty of bribery. *Beale* v. *Smith*, 38 L. J., C. P. 145; L. R. 4 C. P. 145; 19 L. T. 565; 17 W. R. 317.

Objection not Specifically Raised.]—One class of voters objected to were non-resident freemen. The objection was not raised specifically in the

petition, but the facts relied on were included in the particulars:—Held, that the petitioner was not limited to the class of voters specifically objected to in the petition, and evidence upon the matter was permitted to be given. *Londonderry Case*, 4 O'M. & H. 96.

Amendment of, by alleging Illegal Payments and Employment.]—See *Buckrose Case*, col. 131.

v. *Time for Filing.*

Twenty-one Days for, how reckoned.] — The election of a member for Poole took place on the 3rd of February. On the morning of the 4th, the returning officer indorsed on the writ a certificate of the return of W., and delivered it to the postmaster at Poole, who forwarded it by the 12.30 p.m. mail, properly addressed and indorsed, to the General Post-office in London, where it arrived about 6 p.m. It was sent thence by special messenger to the office of the clerk of the Crown at Westminster, where it arrived between 8 and 9 the same evening. The office being closed, the document was left with a servant of the housekeeper, and consequently did not reach the clerk of the Crown or anyone connected with the office until the morning of the 5th:—Held, that the twenty-one days for the filing of a petition were to be reckoned from the 5th. *Poole Election Petition, In re, Hurdle* v. *Waring*, 43 L. J., C. P. 209; L. R. 9 C. P. 435; 30 L. T. 329; 22 W. R. 735.

The expression twenty-one days in clause 2 of 31 & 32 Vict. c. 125, s. 6, means twenty-one days exclusive of all Sundays. *Pegler* v. *Gurney and Hoare*, L. R., 4 C. P. 239; 19 L. T. 647; 17 W. R. 316.

vi. *Security for Costs.*

One Surety sufficient.] — Sect. 6, sub-s. 5, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), states that the security for costs to the amount of 1,000*l.* which is to be given at the time of presenting an election petition under that act, "shall be given either by recognizance to be entered into by any number of sureties not exceeding four, or by a deposit of money," &c. It is a sufficient compliance with this enactment that the recognizance be entered into by one surety only. *Hereford (City) Election Petition, In re, Preece* v. *Pulley*, 49 L. J., C. P. 686.

For same Amount, whether one or two Respondents.]—On a petition presented against the return or election of two or more members who are made respondents to the same petition, it is not necessary to give, on behalf of the petitioner, a separate security for costs in respect of each respondent, but one security for 1,000*l.* is sufficient, notwithstanding s. 22 of 31 & 32 Vict. c. 125, states that for all the purposes of the act such petition shall be deemed to be a separate petition against each respondent. *Hull Election Petition, In re, Pease* v. *Norwood*, 38 L. J., C. P. 161; L. R. 4 C. P. 235; 19 L. T. 648; 17 W. R. 320.

Petitioner must not be Surety.] — Where such security is given by recognizance, the latter must be entered into by other persons than the petitioner, in order to be a recognizance within the meaning of the act. *Ib.*

Insufficient Security amendable.] — An objection to the recognizance that some of the petitioners signed it as sureties is an objection to the sufficiency and not to the validity of the security, and is therefore amendable by a deposit of money. *Ib.*

Security returned, if Parliament dissolved before Petition heard.] — See *Carter* v. *Mills*, col. 128.

vii. *Service.*

See Parliamentary Elections Act, 1868, s. 8.

Service of Notice of Recriminatory Case against Petitioner.]—The notice served by a respondent of his intention to enter into a recriminatory case against the petitioner must be served six clear days prior to the trial of the election petition, exclusive of Sunday, and exclusive of the day of the trial and of the day of service of the list of objections. *Galway Borough Election Petition, In re, Joyce* v. *O'Donnell*, 22 W. R. 654.

viii. *Particulars.*

How far allowed.]—An order having been made by a judge for the delivery of particulars by the petitioner to the respondent, stating by whom, when and where persons alleged to have been bribed and treated had been so bribed and treated, and by whom, when and where canvassers had been employed and moneys paid for the conveyance of voters to the poll, the order was allowed by the court, with the addition of the words "so far as known." *Maude* v. *Lowley*, 43 L. J., C. P. 103; L. R. 9 C. P. 165; 30 L. T. 168; 22 W. R. 649.

Where a judge has ordered particulars to be given of the persons bribed, but refused to order particulars to be given of those who have bribed, the court will not interfere, unless the judge is manifestly wrong, as it is a matter of discretion. *Beale* v. *Smith*, 38 L. J., C. P. 145; L. R. 4 C. P. 145; 19 L. T. 565; 17 W. R. 317.

Scrutiny—Seat claimed.]—The respondent in a parliamentary election petition, in which the petitioner claims the seat upon a scrutiny, is not entitled to obtain particulars under rule 6 of the Parliamentary Election Petition Rules, 1868. Rule 7 applies exclusively to such a case. *Munro* v. *Balfour*, [1893] 1 Q. B. 113; 5 R. 23; 67 L. T. 526; 41 W. R. 143; 57 J. P. 789.

Extension of Time for Delivery of.]—The general rule of practice in election petitions, that particulars of corrupt and illegal practices will be ordered to be delivered seven days before trial of the petition, is not a hard-and-fast rule, and, in determining whether there are special circumstances upon which it will act in extending the time, the court will take into consideration the size and nature of the constituency, the population, and the number of voters, and also the number of witnesses whom it is proposed to call. *Lenham* v. *Barber* (10 Q. B. D. 293) distinguished. *Rushmere* v. *Isaacson*, [1893] 1 Q. B. 118; 5 R. 88; 41 W. R. 124; 57 J. P. 790.

Offences committed after Petition.] — An election petition charged that the respondent had, by himself or his agents, been guilty of bribery, treating, undue influence, "and of other

corrupt and illegal practices before, during and after the said election" :—Held, that the petitioner was not entitled to give particulars of charges of alleged illegal practices committed after the date of the presentation of the petition. *Haggerston Election Petition, In re, Cremer* v. *Lowles*, 65 L. J., Q. B. 289 ; [1896] 1 Q. B. 504 ; 74 L. T. 42 ; 44 W. R. 629 ; 60 J. P. 100—C. A.

Cases of Treating, Personation and Bribery not mentioned in.]—See *Spencer* v. *Harrison*, col. 135 ; and *Belfast Case*, col. 134.

Amendment of.]—See *Heywood* v. *Dodson*, 44 L. T. 285 ; and *Tomline* v. *Tyler*, 44 L. T. 187.

Evidence leading up to Facts stated in.]—See *Collins* v. *Price*, col. 134.

Where Facts stated in, but Objection founded on them not raised in, Petition.]—See *Londonderry Case*, col. 129.

See *Manchester Case*, 4 O'M. & H. 121.

ix. *Amendment.*

What allowed.]—A petitioner was allowed to amend his petition by adding allegations of illegal payment, employment and hiring when committed by persons other than the candidate or his agent. *Buckrose Case*, 4 O'M. & H. 110.

The court will not amend an election petition by striking out, after the lapse of the time limited by the act for presenting it, that part of the prayer of the petition which claims the seat for the petitioner (an unsuccessful candidate) and the allegations applying to a scrutiny which would be dependent thereon, inasmuch as this would affect the rights of the constituency. *Aldridge* v. *Hurst*, 45 L. J., C. P. 431 ; 1 C. P. D. 410 ; 35 L. T. 156 ; 24 W. R. 708.

Practice of election committees in this respect followed. *Ib.*

Semble, that it is competent to the court to amend an election petition at any time by striking out allegations therein, where it is satisfied no injurious result, or a beneficial one, will follow ; or by adding matters discovered after the filing of the petition. *Ib.*

Leave, by whom and how given.]—A judge who is not on the rota for the trial of election petitions has no jurisdiction to make an order under s. 40, sub-s. 2 of the Corrupt and Illegal Practices Prevention Act, 1883, giving leave to amend an election petition. Such an order ought not to be made ex parte. *Shaw* v. *Reckitt*, [1893] 1 Q. B. 779 ; 5 R. 384 ; 68 L. T. 688 ; 41 W. R. 497—D.

Appeal to Court of Appeal from Order settin aside Leave.]—An order under s. 40, sub-s. of the Corrupt and Illegal Practices Prevention Act, 1883, was made by a judge not on the rota for the trial of election petitions ; this order was discharged by a divisional court, the members of which were upon the rota, on the ground that the judge had no jurisdiction to make the order :—Held, that the question was one of law within s. 14 of the Judicature Act, 1881, and, therefore, no appeal lay to the Court of Appeal without leave. *Shaw* v. *Reckitt*, 62 L. J., Q. B. 375 ; [1893] 2 Q. B. 59 ; 4 R. 425 ; 69 L. T. 327 ; 41 W. R. 497 ; 57 J. P. 805—C. A.

Of Particulars.]—Amendment of particulars at the trial of election petitions, under what circumstances allowed. *Heywood* v. *Dodson*, 44 L. T. 285 ; and *Tomline* v. *Tyler*, 44 L. T. 187.

See *Manchester Case*, 4 O'M. & H. 120.

x. *Discovery.*

See also B. 2, *i.*, post, col. 207.

Jurisdiction as to.]—In a parliamentary election petition the court or a judge at chambers has no jurisdiction to make orders against a sitting member for inspection and discovery of documents. *Moore* v. *Kennard*, 52 L. J., Q. B. 285 ; 10 Q. B. D. 290 ; 48 L. T. 236 ; 31 W. R. 610 ; 47 J. P. 343.

Inspection of Ballot Papers.]—Liberty was given to the clerk of the Crown and hanaper to open the packet of rejected ballot papers, and to permit the petitioner and his agents to inspect certain ballot papers which had been rejected by the returning officer on the ground that there were upon them "writing or marks by which the voters could be identified," but so as not to permit any inspection of the numbers on the backs of the ballot papers corresponding with the numbers on the counterfoils. *Tyrone Election Petition, In re, Macartney* v. *Corry*, Ir. R. 7 C. L. 190 ; 21 W. R. 627. See *Stowe* v. *Jolliffe*, infra.

Inspection of Marked Register of Voters.]—Leave to inspect the marked register of voters will be granted under the Ballot Act, 1872 (35 & 36 Vict. c. 33), schedule 1, part 1, rule 42, whether the petition against the return of a candidate at a parliamentary election does or does not pray for a scrutiny. *James* v. *Henderson*, 43 L. J., C. P. 238 ; 30 L. T. 527.

A petition, praying a scrutiny, was presented against the return of the respondent at a parliamentary election for a borough. The petitioner applied for the leave of the court to inspect the marked register of voters, the rejected ballot-papers, and the counterfoils. The foregoing documents had been sealed up together, and the ground of the application was stated to be the saving of expense, for if it could be known who were the voters whose votes had been rejected, it would be unnecessary to incur costs by investigating their qualifications :—Held, that the petitioner ought to be allowed to inspect the marked register, but that he was not entitled to the production of the rejected ballot-papers and the counterfoils. *Stowe* v. *Jolliffe*, 43 L. J., C. P. 173 ; L. R. 9 C. P. 446 ; 30 L. T. 299 ; 22 W. R. 946.

Interrogatories.]—The court has no power to order interrogatories to be delivered to a respondent to a parliamentary election petition, under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for though s. 2 gives the court the same powers, with reference to such petition, as it would have if such petition were an ordinary cause, yet this is "subject to the provisions of the act," and s. 26 enacts, that until rules have been made (and none have been made as to interrogatories), the "principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions" are to be observed in the case of election petitions under the act. *Wallingford*

Election Petition, In re, Wells v. *Wren*, 49 L. J., C. P. 681; 5 C. P. D. 546.

Semble, that the power given to election judges on the rota by s. 25 of the Parliamentary Elections Act, 1868, does not enable them to make a rule for exhibiting interrogatories. *Ib.*

xi. *Withdrawal.*

Corrupt Agreement for.]—Pending a petition against the return of a member of parliament, containing charges against him for bribery, corruption and other illegal practices, and praying that the election and return might be declared null and void, the petitioners agreed, on receiving a pecuniary consideration, and on the sitting member consenting that his election should be declared null and void, to proceed no further with the petition:—Held, that such an agreement was illegal. *Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J., Ex. 9.

Application for Leave—Affidavits.]—In the affidavits used upon an application under s. 36 (repealed) of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), for leave to withdraw a petition against the return of a member, it is not enough for the petitioner and respondent to swear that "to the best of their knowledge, information and belief, the withdrawal of, or application to withdraw, the petition is not the result of any corrupt arrangement, or in consideration of the withdrawal of or application to withdraw any other petition." They must make a positive affidavit that they have not been parties to any corrupt arrangement, and deny, to the best of their knowledge, information and belief, that any such arrangement has been made by their agents. The existence of any such arrangement must also be denied by the agents themselves. *Leominster Election Petition, In re, Johnson* v. *Rankin; Nottingham Election Petition, In re, Isaac* v. *Seeley*, 5 C. P. D. 553.

Of Charges of Corruption.]—The court will not actively sanction the withdrawal of charges of corruption. *Buxton* v. *Garfit*, 44 L. T. 287.

What Costs allowed on.]—See *Pembroke Election Petition, In re, Hughes* v. *Meyrick*, col. 141.

No Order against Parties for Public Prosecutor's Costs when no Trial.]—See *Pascoe* v. *Puleston*, col. 139.

xii. *Trial.*

Since the Parliamentary Elections Act, 1868, *election petitions are tried by the judges instead of by parliamentary committees.*

Place of.]—The power to change the place of trial of an election petition under the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), can be exercised only by the court and not by an election judge. *Tewkesbury Election Petition, In re, Collins* v. *Price*, 49 L. J., C. P. 685; 5 C. P. D. 544.

Semble, the court will not exercise such power unless there are special circumstances more than mere inconvenience why the trial should not be had in the borough or county (as the case may be) to the election for which the petition relates. *Ib.*

The existence of "special circumstances" is under s. 11, sub-s. 11 of the Parliamentary Elections Act, 1868, a condition precedent to the exercise of the jurisdiction to order an election petition to be tried elsewhere than in the county or division where the election took place. The fact that a scrutiny is the only question to be tried, or that it would be less expensive to try elsewhere, are not "special circumstances." *Lawson* v. *Master*, 62 L. J., Q. B. 231; [1893] 1 Q. B. 245; 5 R. 152; 68 L. T. 60; 41 W. R. 221; 57 J. P. 806.

Where the allegations of fact in a parliamentary election petition are not in dispute but are specifically admitted by the respondent so as to render it unnecessary at the trial to call witnesses from the district in which the election took place, the court may order the petition to be tried in London on the ground that "special circumstances" exist within the meaning of s. 11, sub-s. 11, of the Parliamentary Elections Act, 1868 (31 & 32 Vict. c. 125), which render it desirable that the petition should be tried elsewhere than in the county or division where the election took place. *Arch* v. *Bentinck*, 56 L. J., Q. B. 458; 18 Q. B. D. 548; 56 L. T. 360; 35 W. R. 476.

Attendance of Witnesses.]—The court has no jurisdiction to apprehend persons who evade service of subpœnas. *Heywood* v. *Dodson*, 44 L. T. 285.

Evidence—Of Tampering with Petitioner.]—Evidence of an attempt to get a petitioner out of the way is not admissible. *Ib.*

—— **Oral, as to Contents of Postal Order.**]—A witness admitted having received a postal order from an agent of the respondent. The court allowed the witness to be asked what was the amount of the order, though no subpœna duces tecum had been served nor had the post-office authorities been ordered to produce it. *Londonderry Case*, 4 O'M. & H. 96.

—— **Telegrams.**]—The post-office authorities may be ordered to produce specified telegrams. *Tomline* v. *Tyler*, 44 L. T. 187.

—— **Of Personation and Bribery not mentioned in Particulars.**]—Leave was given to go into four cases of personation not mentioned in the particulars where agency was not alleged to shew that there had been an extensive system of personation. But leave was refused to go into a case of bribery by some person unknown which was not referred to in the particulars, as the case alleged was not very important or serious. *Belfast Case*, 4 O'M. & H. 105.

—— **Of Personation.**]—Evidence in cases of personation was allowed to be given before proof of agency. *Belfast Case*, supra.

On a charge of personation evidence of conversations with an agent after the poll were admitted. *Belfast Case*, supra.

—— **Of Bribery—Previous Promise.**]—The particulars alleged that A. bribed B. on certain days. Evidence of a promise made on an earlier day, not named in the particulars, to B. by A., that he should be bribed, was tendered:—Held, admissible as a link in the chain of proof. *Collins* v. *Price*, 44 L. T. 192.

—— **Of Treating not in Particulars.**]—Evidence of numerous cases of individual treating not specified in the particulars is not admissible to prove general treating. *Spencer* v. *Harrison*, 44 L. T. 283.

—— **Proof of Agency.**]—Where the petitioner makes out a primâ facie case of agency, it must be accepted unless rebutted by the respondent. *Birkbeck* v. *Bullard*, 54 L. T. 625; 4 O'M. & H. 84. See also *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

—— **Report of Court at Prior Election not conclusive as to what took place at that Election.**] — When an unsuccessful candidate petitions, a recriminatory case of bribery is gone into against him, and the judge certifies his opponent not duly elected, and reports a belief in the purity of the election on his part, on a petition against him as the successful candidate at a second election, cases of bribery by and for him at the previous election may be inquired into, at least if not known after the use of due diligence, and so not gone into on the recriminatory case in the previous petition. *Stevens* v. *Tillett*, 40 L. J., C. P. 58; L. R. 6 C. P. 147; 23 L. T. 622; 19 W. R. 182.

—— **Of Corruption at Previous Elections.**]—Evidence of corruption at previous elections by the political party to which the petitioners belong, is irrelevant. *Spencer* v. *Harrison*, 44 L. T. 283.

—— **Of Statements by Agent.**]—Statements made after an election by an agent are not evidence against the candidate. *Tomline* v. *Tyler*, 44 L. T. 187.

—— **Of Payments by Agent.**]—Evidence of corrupt payments made after the election by an agent is admissible. *Buxton* v. *Garfit*, 44 L. T. 287.

—— **Of Conversations.**]—Evidence of conversation after the polling day is not usually admissible. *Heywood* v. *Dodson*, 44 L. T. 285.

—— **Of Rioting.**]—What is sufficient evidence of rioting considered. *Heywood* v. *Dodson*. *Ib.*

—— **Person charged with Bribery not called.**]—When evidence of bribery by an active supporter of the respondent is given, the court will draw unfavourable conclusions from the neglect or refusal of the person so charged to explain his conduct in the witness box. *Collins* v. *Price*, 44 L. T. 192.

—— **Allowed-of Facts in Particulars, though Objection not specifically raised in Petition.**]—See *Londonderry Case*, A. 2, *b.* iv.

—— **Of Disqualification—Birth Certificate.**] In order to prove that a voter was a minor a certificate of birth was tendered in evidence which contained an incorrect statement as to the mother's name:—Held, that the certificate was primâ facie evidence of the date of the birth. *Londonderry Case*, 4 O'M. & H. 96.

Scrutiny—Vote of "Clerk" to Election Agent.]—A regular clerk to the election agent of one of the parties addressed envelopes and did other work in connection with the election, but no increase of salary or payment was made to him in respect of such employment:—Held, that his vote must be allowed and that he was not a "clerk," within schedule 1 of the Corrupt Practices Act, 1883. *Buckrose Case*, 4 O'M. & H. 110.

—— **Register when Conclusive as to Right to vote.**]—On a scrutiny there is no power to inquire whether or not certain inhabitant occupiers should have been rated under 30 & 31 Vict. c. 102, s. 3, in order to entitle them to vote, when their names were on the list of voters, and no objection was taken to them before the revising barrister, and no express decision was given by him as to their right to be registered. *Salisbury Election Petition, In re, Ryder* v. *Hamilton*, 38 L. J., C. P. 260; L. R. 4 C. P. 559; 20 L. T. 444; 17 W. R. 795.

Where a matter of fact has been fairly raised before the revising barrister, and he has heard it, and come to an express decision upon it, then his decision may be reviewed by an election judge—in order to see that injustice has not been done—under 6 & 7 Vict. c. 18, s. 98 (repealed). *Bewdley Borough*, 22 L. T. 202.

A revising barrister decided that a notice of objection was bad when it was good:—Held, that this was an express decision reviewable by the election judge, and giving him jurisdiction to inquire whether the vote of the person objected to was good or bad. *Ib.*

Under the Ballot Act (35 & 36 Vict. c. 33), s. 7, the register as settled by the revising barrister is conclusive, not only upon the presiding officer at the election, but also on the judge who tries an election petition, except in the case of persons who have an inherent incapacity to be electors, such as peers, certain persons disqualified by holding particular offices, and persons convicted of crime. *Stowe* v. *Jolliffe* 43 L. J., C. P. 265; L. R. 9 C. P. 734; 30 L. T. 795; 22 W. R. 911.

—— **Freeman on Register—Non-residence.**]—Non-residence of freemen who are upon the register is not a ground of objection to their exercise of the franchise. *Londonderry Case*, 4 O'M. & H. 96.

—— **Removal from Qualifying Premises between the Registration and the Election.**]—See *Reg.* v. *Ellis*, *Reg.* v. *Bowler*, and *Rex* v. *Harris*, col. 122.

—— **Party bound by his List.**]—See *Finsbury Case*, 4 O'M. & H. 173.

—— **Court may Inspect Voting Papers.**]—It is competent for the judges at the hearing of an election petition to examine a voting paper before the vote given thereupon is proved to have been bad. The provisions of the Ballot Act against inspecting voting papers do not apply to the court. *Isaacson* v. *Durant*, 54 L. T. 684; 4 O'M. & H. 34.

—— **Evidence of Voting.**]—The statement on oath of a voter that he had voted in two divisions of the same borough is evidence of the vote given in the latter division, without the further production of the voting paper. *Ib.*

—— **Voter called upon to Identify Ballot Paper.**]—See *Finsbury Case*, 4 O'M. & H. 176.

—— **Votes of Persons making Payments not included in Return of Election Expenses struck off.**]—See *Buckrose Case*, col. 68.

—— **Ballot Paper not void because of Absence of Official Mark.**]—See *Ackers* v. *Howard*, col. 121.

—— **Effect of voting twice—Personation.**]—See *St. Andrews Election*, and *Isaacson* v. *Durant*, col. 122.

——**Marked Register not conclusive as to whether Voter voted.**]—See *Sheil* v. *Ennis*, col. 123.

—— **Vote of Alien—Inquiry whether Voter the Person on Register.**]—See *Sheil* v. *Ennis*, col. 124.

—— **Ballot Papers—Validity.**]—See *Buckrose Case*, col. 124.

Refreshing Witness's Memory.]—A witness's previous written statement may be used to refresh his memory when exhausted. *Heywood* v. *Dodson*, 44 L. T. 285.

A previous written statement of a witness may be used to refresh his memory. *Buxton* v. *Garfit*, 44 L. T. 287.

A friendly witness may not be asked in examination in chief as to his previous written declaration, for the purpose of refreshing his memory, where he is being examined for the purpose of striking off the vote of another person on a scrutiny. *McLaren* v. *Milne Home*, 44 L. T. 289.

Witnesses ordered out of Court.]—See *Montgomery Case*, 4 O'M. & H. 167.

Witnesses called by Court.]—See *Montgomery Case*, 4 O'M. & H. 169.

Respondent called by Petitioner—Conduct of Case.]—To call the respondent and his agents as the sole witnesses in support of a petition, and to treat them as hostile witnesses, is not the proper way to conduct a petition. *Crossman* v. *Gent-Davis*, 4 O'M. & H. 93; 54 L. T. 628.

Privilege of Voter Witness.]—An elector may not be asked his political opinions unless he has previously avowed them. *Tomline* v. *Tyler*, 44 L. T. 187.

Locus Standi of Public Prosecutor.]—Counsel representing the public prosecutor are not entitled to cross-examine witnesses or address the court until proceedings are about to be taken against the offender. *Buckrose Case*, 4 O'M. & H. 110.

The public prosecutor is not entitled to administer a general cross-examination, without definite object, to every witness called in the course of the hearing of a petition. Cross-examination with the view of shewing that a mistake has been made in giving to one voter the paper intended for another is not admissible. *Isaacson* v. *Durant*, 54 L. T. 684; 4 O'M. & H. 34.

Intervention of Public Prosecutor.]—See *Walsall Case*, 4 O'M. & H. 123; *Hexham Case*, *Ib.* 143, 152; *Worcester Case*, *Ib.* 155; *Rochester Case*, *Ib.* 157, 161; *Montgomery Case*, *Ib.* 167.

Time to apply for Case.]—The court refused to state a case as to the validity of certain votes on the ground that the application should have been made before the court had given a decision upon the matter. *Londonderry Case*, 4 O'M. & H. 96.

Reserving Points of Law.]—See *Ackers* v. *Howard*, 4 O'M. & H. 65.

Decisions of Committees of House of Commons.]—Decisions of committees of the House of Commons in cases of election are no authority in courts of law. *Nash*, *Ex parte*, 1 Deac. & C. 449.

Recriminatory Charges—Claim to Seat abandoned.]—When the respondent's election is declared void, and the petitioner then abandons his claim to the seat upon a scrutiny, whether the respondent can proceed to prove his recriminatory charges, quære:—Per Lopes, J., if the petitioner were to be elected upon the vacancy caused by the avoidance of the respondent's election, these recriminatory charges of corruption at the first election would avail anyone petitioning against the return of the former petitioner at the second election. *Truscott* v. *Bevan*, 44 L. T. 64.

Application for Relief—Insufficient Return of Expenses.]—The court granted an application by the petitioner and his agent from the consequences of an insufficient return of election expenses by the election agent. *Buckrose Case*, 4 O'M. & H. 110.

Evidence after Election declared Void.]—No one but the sitting member can be examined after the election has been declared void. *Buxton* v. *Garfit*, 44 L. T. 287.

Petitioner cannot be petitioned against, when declared elected.]—When a petition claims the seat for one of the defeated candidates, and the judge on the trial of the petition decides that such candidate was duly elected, his decision is final, and a petition against the return of such candidate cannot subsequently be presented under 31 & 32 Vict. c. 125. *Taunton Election Petition*, *In re*, *Waygood* v. *James*, 38 L. J., C. P. 195; L. R. 4 C. P. 361; 21 L. T. 202; 17 W. R. 824.

Bribery—Report of Court.]—In a case where bribery is proved the court has no power to report, under s. 22 of the Corrupt and Illegal Practices Prevention Act, 1883, that the offence is of a trivial nature, and ought not to void the election. *Birkbeck* v. *Bullard*, 4 O'M. & H. 84; 54 L. T. 625.

Report of Judge as to Bribery by Candidate.]—See *Grant* v. *Pagham*, col. 68.

Prosecution of Persons reported.]—The initiative in cases of prosecution of persons reported by the court should be taken by the attorney-general. *Belfast Case*, 4 O'M. & H. 105.

xiii. *Costs.*

Judgment for, delivered on Day Parliament dissolved.]—The delivery of judgment upon an election petition upholding the return of the respondent thereto and awarding him costs, began at 10 a.m. and finished at 10.35 a.m. The report of the judge and his certificate was sent

by the post at noon to the speaker of the House of Commons. Upon the same day upon which the foregoing judgment was delivered parliament was dissolved by a royal proclamation, but the exact time when the proclamation was issued by the Queen was not ascertained. The judge's report and certificate did not reach the speaker before the dissolution:—Held, that the delivery of the judgment and the order for the payment of the costs being judicial acts, must be taken to have happened before the dissolution, and that by force thereof the respondent was entitled to his costs after the parliament had ceased to exist. *Taunton Election, In re, Marshall* v. *James*, 43 L. J., C. P. 281; L. R. 9 C. P. 702; 30 L. T. 559; 22 W. R. 738.

Overloaded Petition.]—An overloaded petition will be visited with costs, even if it is successful. *Birkbeck* v. *Bullard*, 54 L. T. 625; 4 O'M. & H. 84. See also *Ackers* v. *Howard*, 4 O'M. & H. 65.

Of recriminatory Case.]—Costs of the petition were ordered to follow the event, but the petitioner was ordered to pay the costs of the recriminatory case caused by an insufficient return of election expenses by the petitioner's election agent. *Buckrose Case*, 4 O'M. & H. 110.

When Petition caused by Returning Officer's Mistake.]—A returning officer, acting bonâ fide, put such an erroneous construction upon a section of the Ballot Act as rendered a petition necessary: the court declined to order him to pay any part of the costs. *Sheil* v. *Ennis*, Ir. R. 8 C. L. 240.

The returning officer having acted on his own mere motion, and without the interference of either candidate, the court decided that the petitioner and respondent should each bear his own costs. *Ib.*

Of Attorney-General or Public Prosecutor.]—Costs were ordered to follow the event; but the costs of the attorney-general were not allowed on the ground that they were incident to the administration of the law. *Londonderry Case*, 4 O'M. & H. 96. S. P., *Belfast Case*, 4 O'M. & H. 105.

Where a petition is utterly unfounded the costs of the public prosecutor will be ordered to be paid by the petitioner. *Crossman* v. *Gent-Davis*, 4 O'M. & H. 93; 54 L. T. 628.

The 43rd section of the Corrupt and Illegal Practices Prevention Act, 1883, applies only to the costs of the director of public prosecutions at the trial of the petition, and when the petition is withdrawn the court has no power, under the 41st section of the Parliamentary Elections Act, 1861, to order the preliminary costs of the director of public prosecutions, and the costs of the inquiries made by him to be paid by the parties. *Pascoe* v. *Puleston*, 54 L. T. 733; 50 J. P. 134.

On what Scale.]—Under the 44th section of the Corrupt and Illegal Practices Prevention Act, 1883, the cost of an election petition will usually be allowed on the higher scale, in accordance with the old practice under the 41st section of the Parliamentary Elections Act, 1868. *Ib.*

Taxation of.]—A petitioner being awarded the costs of a petition, (1) he is entitled to be recouped the sums actually paid by him for copies of the shorthand-writer's notes; (2) he is entitled to the expenses of the witnesses bonâ fide summoned, though they have not been produced; (3) the registrar's certificate is not necessary to entitle him to expenses of witnesses; (4) he is entitled to the cost of an illustrated map of the country; (5) he is entitled to a retainer of ten guineas paid to each of the two senior counsel; (6) he is entitled to the fee paid to junior counsel on the hearing of a case reserved; (7) he is entitled to the costs of proceedings to draw money out of court; and (8) the master, in exercising his discretion as to the number of counsel, the amount of their fees, the number of consultations, the amount of consultation fees and refreshers, and the expenses of subpœnas to witnesses, telegrams and messages, ought to have regard to the difficulty, magnitude and importance of the particular case. *Trench* v. *Nolan*, Ir. R. 7 C. L. 445; 21 W. R. 640.

Upon the taxation of the costs of a parliamentary election petition, it is within the discretion of the master to allow a lump sum for "Instructions for brief," provided the items making up the lump sum have been brought before him, so as to enable him to determine whether it represents reasonable and proper charges. *Barnstaple Election Petition, In re, Fleming* v. *Cave*, 44 L. J., C. P. 200; 32 L. T. 160.

On taxation of costs in a petition under an order directing the petitioner to pay the respondent's costs, there is no objection to the master adopting 100 guineas as the fee to be allowed for senior and 75 guineas as that for junior counsel as an average for ordinary cases, but he must exercise his discretion in each case, and not allow these fees as a uniform standard without reference to the particular case; he should allow consultations from time to time in addition to daily refreshers; and though, as to preliminary expenses and instructions for brief, the court will not interfere if the master has used his discretion, unless he is shewn to be wrong, yet the parties are entitled to have his judgment on the claims instead of an allowance for one sum in gross to cover them; and an unsuccessful appeal to the court by the sitting member against the decision of the judge at chambers is collateral, and the court having disposed of the costs on the motion, the respondent is not entitled to them. *Tamworth Election Petition, In re*, 39 L. J., C. P. 89; L. R. 5 C. P. 172; 22 L. T. 98; 18 W. R. 605.

On the taxation of the costs of a petition, the number of witnesses to be allowed, the length of the briefs and proofs, the number of counsel, and the amount of their fees, and the incidental expenses of the trial, are matters for the master's discretion, subject to the control of the court where a proper case is shewn for its interference. The master, on taxation of the petitioner's costs, disallowed fees for consultations during the trial; the court, in accordance with the *Tamworth Case* (supra), directed him to review his taxation in that respect. *Tillett* v. *Stracey*, 39 L. J., C. P. 93; L. R. 5 C. P. 185; 22 L. T. 101; 18 W. R. 631.

The master disallowed a moiety of the charges paid to the under-sheriff on the trial: the court declined to interfere. *Ib.*

Although the amount of the reasonable expenses to be paid to any witness in an election petition may, under 31 & 32 Vict. c. 125 (the Parliamentary Elections Act, 1868), s. 34, and r. 5 of its Additional General Rules, January, 1875, be ascertained and certified by the registrar, his

certificate is not conclusive of the amount as between the petitioner and respondent; but it is, as part of the general costs of the petition, subject under s. 41 to taxation by a master, who must exercise his discretion on the expenses certified. *McLaren* v. *Home*, 50 L. J., Q. B. 658; 7 Q. B. D. 477; 45 L. T. 350; 30 W. R. 85; 46 J. P. 85.

On taxation of the costs of a petition for bribery, treating and undue influence, when the petition is only withdrawn three days before the trial, and an order is made that the petitioner shall pay the respondent's costs, the respondent is entitled to all costs that could be reasonably incurred by an attorney for his client up to that time; and reasonable expenses incurred before delivery of particulars are to be allowed. *Pembroke Election Petition, In re, Hughes* v. *Meyrick*, 39 L. J., C. P. 249; L. R. 5 C. P. 407; 22 L. T. 482; 18 W. R. 806.

Fees to the respondent's counsel on their briefs are not to be disallowed, if they are delivered a reasonable time before the trial, even if that is before particulars are delivered. *Ib.*

c. Corrupt and Illegal Practices.

See also B. 2, *m.*, post, col. 214.

i. *Bribery.*

By Candidate.]—Charges of personal bribery by candidates ought not to be made recklessly, and when made without reasonable care and investigation, the making of them may be visited with the payment of the costs thereby occasioned in any event. Per Hawkins, J.:—The costs incurred in the time consumed in trying charges of corrupt practices, which fail in proof, are to be borne by the party so failing in proof of them, although he may succeed upon the general issue. *Rigden* v. *Passmore Edwards*, 44 L. T. 64.

By Agent.]—A single case of bribery by an agent renders an election void. A circular letter addressed by a candidate to his constituents must not be interpreted with the same strictness as a commercial document. *Birkbeck* v. *Bullard*, 54 L. T. 625; 4 O'M. & H. 84. See also *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

By Fellow-Candidate's Agent prior to Joint Candidature.]—When a candidate for election to parliament had been guilty of bribery through his agent, by reason of acts committed by such agent to procure votes for him at the election, and subsequently to such acts of bribery another candidate coalesced with him in ignorance of any previous corruption, and having no reason to suspect its existence:—Held, that such last-mentioned candidate was not liable by reason of the joint candidature to be unseated in respect of such acts of bribery. *Malcolm* v. *Parry*, 44 L. J., C. P. 121; L. R. 10 C. P. 168; 31 L. T. 845; 23 W. R. 322.

Travelling Expenses.]—To offer a voter his travelling expenses with the intention of inducing him to come and vote for a given candidate is bribery, and the Corrupt and Illegal Practices Prevention Act, 1883, has not altered the law in this particular. *Packard* v. *Collings*, 4 O'M. & H. 70; 54 L. T. 625.

Where two out-voters were requested by letter to come to vote for a particular candidate, and did so without any promise of payment of their travelling expenses, and after they had voted were paid a sum equal to the first-class railway fare from the place whence they came and back, although they had in fact travelled third-class, a fact which was unknown to the persons who paid them:—Held, the facts proved disclosed no corrupt payment by the person who requested them to come, or the person who paid them the first-class fare. *Rigden* v. *Passmore Edwards*, 44 L. T. 192.

Payment to voters by way of travelling expenses of more than the sums actually expended in travelling is bribery. The court views with suspicion payments which are illegal, although they do not necessarily avoid an election. *Tomline* v. *Tyler*, 44 L. T. 187.

Semble, that where the same sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so, though all the candidates agree in the payment of the same amount. *Bembridge* v. *Roberts*, 5 Car. & P. 186.

An election was about to take place at C. S. was one of the candidates. In the committee-room of S. the question was discussed whether the expense of bringing up out-voters was legal. S., after referring to a law book, said that it was, but limited it to the payment of expenses out of pocket. A circular had been previously prepared and printed, requesting out-voters to come up and vote for S. Upon S. making this declaration of his opinion a clerk to an agent of S. (without any express direction from S., or from the agent) wrote at the bottom of each circular, "Your railway expenses will be paid." A voter, who resided at H., received one of these circulars, with the added note. He came to C., voted for S. and afterwards received the sum of 8*s.*, the expenses to which he had bonâ fide been put by his journey:—Held, that the words added to the circular must be treated as written by the authority of S.; that the promise and payment were forbidden by 17 & 18 Vict. c. 102, s. 2, and that for the purposes of that act they must be treated as corruptly made. *Cooper* v. *Slade*, 6 H. L. Cas. 746; 27 L. J., Q. B. 449; 4 Jur. (N.S.) 791; 6 W. R. 461.

A letter was written to an out-voter requesting him to come to a borough, and record his vote for S. A postcript added, "Your railway expenses will be paid." The voter did come and vote as requested; his travelling expenses were paid:—Held, that the promise and payment constituted only one act of bribery within 17 & 18 Vict. c. 102, s. 2, and that consequently two counts, one for the promise to pay, and one for the actual payment, could not be supported. *Ib.*

Receipt of Money after Election.]—Where a voter at an election for members of parliament had received money after the election was over, but there was no proof of a prior agreement to accept it:—Held, that this was not an offence within 2 Geo. 2, c. 24, s. 7. *Huntingtower* v. *Gardiner*, 1 B. & C. 297; 2 D. & R. 450; 1 L. J. (O.S.) K. B. 120.

Landlord letting Tenants take Rabbits.]—Just before the poll, a candidate, who was sitting member, gave leave to his tenants to destroy and sell the rabbits on his estate, his tenants having on previous occasions complained without effect of their excessive quantity:—Held, that this was bribery. *Launceston Election, In re*, 2 O'M. & H. 122; 30 L. T. 823.

Offer of Valueless Thing.]—It is bribery to make a corrupt offer of a valueless thing in order to induce a voter to vote. *Spencer* v. *Harrison*, 44 L. T. 283.

Distribution of Coal Tickets.]—P. having been accepted by the Liberal party in a borough as a candidate at the next election, he afterwards distributed amongst the inhabitants coals by means of tickets bearing the signature of his political agent. Many of the inhabitants who accepted the coals were voters in the borough, and were not objects of charity. The coals were given corruptly. Parliament being soon after dissolved, P. was declared to be returned as member by a majority of votes over M., another candidate. A petition having been presented against the return of P., claiming the seat for M., P. was adjudged to be unseated on the ground of bribery. A scrutiny having been held, M. claimed to strike off the poll for P. one vote for every elector who had accepted the coals and had voted at the election, without ascertaining for whom he had in fact voted. The voters were not called to deny that they had received the coals corruptly:—Held, that the bribery contemplated in the Ballot Act, 1872, s. 25, was a corrupt bargain made with an elector by or on behalf of the candidate, and that under that enactment it was necessary to prove a guilty intent in the voter. *Boston Election, In re, Malcolm* v. *Ingram*, 43 L. J., C. P. 331; L. R. 9 C. P. 610; 31 L. T. 331.

Held, also, that a primâ facie case of corruption had been made out against the voters, which they were bound to displace; and that as they were not called to rebut the inference of corruption, one vote for every elector who received the coals and voted at the election must be struck off the poll of P. *Ib.*

Hiring Persons in the Constituency to preserve the Peace at an Election in another Town.]—Fifty persons, of whom the majority were poor voters in the borough of S., were hired by supporters of the respondents, who were candidates in S., to assist a candidate belonging to the same political party in the election for the borough of W.:—Held, upon the facts, that although the introduction of a foreign body of persons into a constituency upon an election is objectionable, the transaction did not amount to bribery. At an election private persons should not be hired to preserve the peace of the town. Persons who apprehend violence or disorder should apply to the authorities to take necessary precautions against a breach of the peace. *Rigden* v. *Passmore Edwards*, 44 L. T. 192.

Giving Workpeople Holiday.]—Where an agent of the respondent gave a holiday to the respondent's workpeople on the polling day, and they were paid their wages as usual, many of them being voters, who were supplied with colours, and some of whom were sent to the poll by such agent in carriages, and it appeared that on previous occasions, when the respondent was not a candidate, a holiday had been given, but wages withheld:—Held, the respondent's return was void for bribery by his agent. *Truscott* v. *Bevan*, 44 L. T. 64.

Taking up Voters' Freedom.]—Payment by a candidate, at an election for a member, of the expenses of taking up the freedom of his voters, is illegal. *Bayntun* v. *Cattle*, 1 M. & R. 265.

Wholesale Employment.]—The wholesale employment of voters to render valueless services avoids the election. *Buxton* v. *Garfit*, 44 L. T. 287.

At Test Ballot.]—There being a vacancy in the representation of a city, three Liberal candidates came forward; from the state of the register it appeared certain that if only one went to the poll he would be returned, and to secure this result it was agreed between the three candidates and their supporters that there should be a test-ballot to determine who should stand at the election. One of the three, who was at the head of the test-ballot, stood at the election, and was returned; but his agents gave money to voters to vote for him at the test-ballot, without, however, making any stipulation as to their votes at the election:—Held, that this was bribery within 17 & 18 Vict. c. 102, s. 2, sub-s. 3, and that he was not entitled to retain his seat. *Bristol Election Petition, Brett* v. *Robinson*, 39 L. J., C. P. 265; L. R. 5 C. P. 503; 23 L. T. 188; 18 W. R. 866.

Evidence of, not in Particulars.]—See *Belfast Case*, col. 134.

Effect of Voters' Knowledge of.]—Bribery by a candidate at a parliamentary election, though rendering his election void, and by 31 & 32 Vict. c. 125, making him incapable of being elected during seven years, does not so affect his capacity to be a candidate at that election as to make all votes given for him by voters, with knowledge of such bribery, the same as if they had not been given at all, and thus to seat an opposing candidate. *Drinkwater* v. *Deakin*, 43 L. J., C. P. 355; L. R. 9 C. P. 626; 30 L. T. 832.

General Bribery and Treating—Effect of.]—General bribery and treating will void an election if proved to have existed upon the side of a successful candidate. Semble, that if general bribery and treating are proved, it is the duty of the judges to report the prevalence of extensive corruption. *Packard* v. *Collings*, 4 O'M. & H. 70; 54 L. T. 619. And see *Aylesbury Division of Bucks*, 4 O'M. & H. 59.

Candidate Reported by Judge as Guilty of.]—See *Grant* v. *Pagham*, col. 68.

Cannot be Reported as Trivial.]—See *Birkbeck* v. *Bullard*, col. 138.

Indictment for "Corrupt Practices" too General.]—In an indictment for a "corrupt practice" within the meaning of s. 3 of the Corrupt and Illegal Practices Prevention Act, 1883, it is necessary to specify the particular offence with which the prisoner is charged. *Reg.* v. *Stroulger*, 55 L. J., M. C. 137; 17 Q. B. D. 327; 55 L. T. 122; 34 W. R. 719; 16 Cox, C. C. 85; 51 J. P. 278—C. C. R.

An indictment charged that at a parliamentary election the prisoner was "guilty of corrupt practices against the form of the statutes in that case made and provided." The jury found the prisoner guilty of corrupt practices by offering money for votes. After verdict it was objected that the indictment was bad, because it did not sufficiently describe the nature of the offence with which the prisoner was charged:—Held, per Lord Coleridge, C.J., and Mathew, J., that the indictment was bad for insufficient description

of the offence charged, but that the defect was cured by verdict; per Field, J., that the indictment was good, but that, if not, the defect was cured by verdict; per Denman, J., and Day, J., that the indictment was bad, and that the defect was not cured by verdict. *Ib.*

An indictment under the Corrupt and Illegal Practices Prevention Act, 1883, which merely charges the defendant with being guilty of a corrupt practice at an election, but does not specifically allege against him what that corrupt practice was, is bad for generality. *Reg.* v. *Norton*, 16 Cox, C. C. 59.

Trial of Information for Bribery—Refusal of Witness to criminate himself—Pardon.]—On the trial of an information for bribery at a parliamentary election, filed by the attorney-general, in pursuance of a resolution of the House of Commons, a person alleged in the indictment to have been bribed, was called as a witness; he refused to answer any question, on the ground that the answer would tend to criminate him. A pardon under the great seal was handed to the witness, but he still refused to answer, upon which the judge compelled him to answer, and on his evidence the defendant was convicted:—Held, that the pardon took away the privilege of the witness so far as any risk of prosecution at the suit of the Crown was concerned, and that, though the witness might be liable for an impeachment by the House of Commons, notwithstanding the pardon, by reason of the 12 & 13 Will. 3, c. 2, yet that was so unlikely to happen that the witness could not be said to be in any real danger, and he was therefore rightly compelled to answer. *Reg.* v. *Boyes*, 30 L. J., Q. B. 301; 1 B. & S. 311; 7 Jur. (N.S.) 1158; 5 L. T. 147; 9 W. R. 690; 9 Cox, C. C. 32; 2 F. & F. 157.

Action for Penalties.]—On the 11th of June, 1880, the plaintiff commenced an action against the defendant for penalties for alleged bribery. A statement of claim was delivered on the 14th of July, 1880; on the 22nd of July the defendant obtained an order for particulars. No particulars were delivered, but the plaintiff's solicitor endeavoured to effect a compromise, to which the defendant, personally, was not a party, on the terms that he should be paid the costs of this and certain similar actions. In August, 1881, the defendant applied to have the action dismissed:—Held, that the facts shewed "wilful delay" on the part of the plaintiff within s. 14 of the Corrupt Practices Act, 1854 (repealed), and that the action must be dismissed. *Guest* v. *Caldicott*, 45 L. T. 609; 30 W. R. 122.

No damages are recoverable for detention of the debt in an action for penalties. *Cuming* v. *Sibly*, 4 Burr. 2489; 1 Term Rep. 239.

—— **Limitation of Time to Prosecute.**]—By 17 & 18 Vict. c. 102, s. 14, no person shall be liable to any penalty or forfeiture thereby enacted or imposed unless some prosecution action or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against the act shall be committed, and unless such person shall be summoned or otherwise served with a writ or process within the same space of time. Semble, that an information for a misdemeanor is not within this section. *Reg.* v. *Leatham*, 3 El. & El. 658; 30 L. J., Q. B. 205; 7 Jur. (N.S.) 674; 3 L. T. 504; 9 W. R. 33; 8 Cox, C. C. 498.

In an action for bribery against a member of parliament, alleged to have been committed in April, 1859, a writ of summons issued on the 15th March, 1860, and an appearance was entered on the 4th May. A declaration was delivered on the 17th April, 1861, and issue was joined on May 7th, but in June, 1862, the plaintiff had not proceeded to trial:—Held, a wilful delay within 17 & 18 Vict. c. 102, s. 14, and the court stayed the proceedings. *Taylor* v. *Vergette*, 7 H. & N. 143; 30 L. J., Ex. 400; 4 L. T. 523; 9 W. R. 791.

Held, also, that such delay could not be pleaded, but is only ground for an application to stay the proceedings. *Ib.*

—— **Defence.**]—A plea of non-delivery of a claim within a month, pursuant to the Corrupt Practices Prevention Acts, held good on demurrer. *Bradley* v. *Guinness*, Ir. R. 5 C. L. 95.

—— **Proof of the Election.**]—In an action for bribery, it is not enough to shew that an election was held de facto, and that the defendant bribed a person who voted as an elector on that occasion; a regular election should be proved. *Reed* v. *Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; 6 Jur. (N.S.) 828.

The offence being charged in regard to an election, and being such as would be complete before the return, the return is not requisite to prove the election. *Reg.* v. *Clark*, 1 F. & F. 654.

In an action for penalties under 17 & 18 Vict. c. 102, the plaintiff gave in evidence a copy of the writ and return from the office of the clerk of the Crown, certified by a clerk in the office to be a true copy of the original writ, and examined therewith. The defendant's counsel having allowed it to be given in evidence as a certified copy:—Held, that, assuming it was not, there was no ground for granting a new trial. *Reed* v. *Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; 6 Jur. (N.S.) 828.

—— **Proof of the Bribery.**]—A declaration for bribery at an election alleged that the defendant did corrupt one A. to vote, by corruptly giving him 10*l.* as and for a reward for his vote. The proof was that A. saw the defendant in an outer room of a house; that the defendant said to him, "I suppose you vote with us, we give 10*l.*"; and then wrote down his name on a ticket, which A. took to a man, in an inner room, who gave the 10*l.*:—Held, that the evidence supported the declaration. *Webb* v. *Smith*, 4 Bing. (N.C.) 373; 6 Scott, 147; 1 Arn. 145; 7 L. J., C. P. 191; 2 Jur. 304.

Held, also, that evidence might be given that other persons not mentioned in the declaration received from the defendant similar tickets, which were honoured by the stranger in the inner room in a similar manner. *Ib.*

Where in an action for penalties the bribery imputed is a promise of money for a vote, or to abstain from voting, evidence of actual payment of money is admissible. *Magee* v. *Mark*, 11 Ir. C. L. R. 449.

The evidence for a plaintiff, in support of the bribery, rested solely upon the evidence of accomplices:—Held, that the jury was rightly directed that they might find for the plaintiff upon such testimony, though uncorroborated *Ib.* S. P., *M'Clory* v. *Wright*, 10 Ir. C. L. R. 514.

Held, also, that the judge was not bound to tell the jury, by analogy to the practice in

criminal cases, that the defendant was entitled to the benefit of a doubt in the evidence. *Ib.*

Uncontradicted evidence of an act of bribery committed by a person in a respectable position goes very far to prove bribery and agency. *Spencer* v. *Harrison*, 44 L. T. 283.

A note given by a voter, who has been bribed, for repayment of the sum given to him in order to secure his vote, in an action for the bribery, may be given in evidence, though not stamped, to prove the fact of bribery. *Dover* v. *Maestaer*, 5 Esp. 92. S. P., *Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J., Ex. 9.

In an action for bribery, it is immaterial whether the party corrupted had a right to vote or not, if he claimed a right to vote, and the corrupter thought he had such right. *Lilley* v. *Corne*, 1 Selw. N. P. 650, n.

An action for a parliamentary bribery will lie, though the party bribed does not vote according to the bribe. *Sulston* v. *Norton*, 3 Burr. 1235; 1 W. Bl. 317.

—— **What a Variance.**] — In an action for bribery, on 2 Geo. 2, c. 24 (repealed), it was not a material variance if the declaration stated the precept to have issued to the bailiffs of the borough, but the precept produced in evidence was directed to the bailiff. *Warre* v. *Harbin*, 2 H. Bl. 113.

—— **Delay in going to Trial.**]—If delay in going to trial is created by the prosecutor, the court, after verdict in his favour, will stay the proceedings on motion, and he will not be allowed his costs. *Petrie* v. *White*, 3 Term Rep. 5. And see *Petrie* v. *Benfield*, 3 Term Rep. 476.

—— **Discovery of Bribery by Defendant.**]—An offender who made a discovery of bribery might formerly have pleaded nil debet, and given his excuse in evidence. *Davy* v. *Baker*, 4 Burr. 2471.

A defendant, having a verdict against him for bribery at an election, moved that judgment upon the verdict might be stayed, he having made a discovery of another person offending against 2 Geo. 2, c. 24, s. 8 (repealed), who had been convicted on his (the defendant's) evidence, at the then last assizes: but the court refused to interpose, upon a motion, and said, if the law was on his side, he must take his remedy in some other way. *Pugh* v. *Curgenven*, 3 Wils. 35.

ii. *Treating.*

What is.]—Treating is not the entertainment of equals by equals, but of an inferior by a superior with the object of securing the goodwill of the inferior (per Cave, J.). *Birkbeck* v. *Bullard*, 4 O'M. & H. 84; 54 L. T. 625.

Before Seat vacant.]—A candidate is disqualified, under 17 & 18 Vict. c. 102, s. 36 (repealed), for acts amounting to corrupt treating, though the acts were not committed after the dissolution of parliament which caused the vacancy in the borough for which he was such candidate. *Youghal Election Petition*, Ir. R. 3 C. L. 530; 11 W. R. 590.

By Agent—Funds supplied by Candidate spent in.]—See *Truscott* v. *Bevan*, col. 115.

Evidence of, not in Particulars.]—See *Spencer* v. *Harrison*, col. 135.

Action for Refreshments supplied to Voters.]—It being illegal for a candidate to furnish provisions to any voters after the teste of the writ, an innkeeper could not recover against a candidate for provisions so furnished at his request. *Ribbans* v. *Crickett*, 1 Bos. & P. 264. S. P., *Lofthouse* v. *Wharton*, 1 Camp. 550, n.

At a general election A. was returned, after a contest, to serve in parliament, but died before the next meeting of parliament:—Held, that, immediately on his death, the representation of that place became vacant within 7 & 8 Will. 3, c. 4; and that if B., being neither a candidate nor the agent of a candidate, canvassed for C., and ordered beer for the voters, after such vacancy, this came within the act, even though it was not proved that C. either knew of the canvass or of the treating; and therefore an innkeeper could not recover against B. for beer supplied to those voters by his order. The statute extended to an unsuccessful candidate who did not come to the poll. *Ward* v. *Nanney*, 3 Car. & P. 399.

To come within 7 & 8 Will. 3, c. 4, s. 1, the acts mentioned in that statute must have been done by the candidate, or some person acting for him and on his behalf, in order to be elected. *Hughes* v. *Marshall*, 2 C. & J. 118; 2 Tyr. 134; 5 Car. & P. 150; Price, P. C. 173; 1 L. J., Ex. 16.

Where supporters of a candidate gave orders to the landlord of a public-house, opened by the committee of the candidate, to supply others with refreshments, which were supplied on the credit of those who gave the orders:—Held, that it was not within that act. *Ib.*

Action for Ribbon used for Rosettes for Voters.]—See *Richardson* v. *Webster*, col. 127.

Effect of General Bribery and Treating.]—See *Packard* v. *Collings*, col. 144.

iii. *Undue Influence.*

Threat to withdraw Custom.]—Under s. 5 of the Corrupt Practices Prevention Act, 1854, a person is guilty of the offence of undue influence who threatens to withdraw his custom from a voter in order to induce him to vote or to abstain from voting. *Reg.* v. *Bramwell*, 5 W. R. 557.

Spiritual.]—See *Meath Case*, 4 O'M. & H. 130, 188.

Intimidation by rioting.]—See *Ackers* v. *Howard*, 4 O'M. & H. 65.

iv. *Illegal Practices.*

Illegal Employment.]—D. and his agents gave gratuitous refreshments to certain persons styled "workers" at a parliamentary election at which D. was a candidate:—Held, that this was an illegal employment within s. 17 of the Corrupt and Illegal Practices Prevention Act, 1883, and rendered the election of D. void. *Schneider* v. *Duncan*, 4 O'M. & H. 76; 54 L. T. 618.

The employment of persons to keep order at meetings connected with an election is an illegal employment within the meaning of s. 17 of the Corrupt and Illegal Practices Prevention Act, 1883. *Packard* v. *Collings*, 4 O'M. & H. 70.

Illegal Hiring.]—See *Manchester Case*, 4 O'M. & H. 120; *Finsbury Case*, *Ib.* 176, 177.

Voter driven to Poll in Cab.]—A voter had been driven to the poll in a cab paying nothing to the driver; no proof was given that the voter knew that the use of the cab was prohibited by law:—Held, that no breach of s. 14 of the Corrupt Practices Act, 1883, had been committed. *Buckrose Case*, 4 O'M. & H. 110.

Prohibited Committee Room—"Premises of a Public Elementary School"—Liability to Penalty.]—The user, as a committee room, of part of a schoolmaster's dwelling-house within the curtilage of a school purchased under the Education Act, 1870, is contrary to the provisions of s. 20 of the Corrupt Practices Act, 1883; but where the schoolmaster's dwelling-house was provided rent free by a subscriber to the school it does not come within the words "premises of a public elementary school" in that section mentioned.

The penalty is incurred not only by the persons letting and hiring a prohibited committee room, but also by the members of the committee using it. *Buckrose Case*, supra.

Personation.]—If at a parliamentary election a man applies to the presiding officer for a ballot paper in a name other than his name of origin, or in the name by which he is generally known, but in a name which appears on the register of voters, and which was inserted therein by the overseers in the belief that it was the name of the applicant, and for the purpose of putting him on the register, he is entitled to vote, and is not a person who "applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person," so as to be guilty of the offence of personation within the meaning of s. 24 of the Parliamentary and Municipal Elections Act, 1872, or the Corrupt and Illegal Practices Prevention Act, 1883. *Reg.* v. *Fox*, 16 Cox, C. C. 166.

—— **Voting twice.**]—See *St. Andrews Election*, and *Isaacson* v. *Durant*, col. 122.

—— **Election not avoided by, apart from Agency.**]—See *Belfast Case*, col. 128.

—— **Evidence.**]—In order to sustain a conviction for personation it is not necessary to state in the indictment, or to prove at the trial, that the presiding officer at the booth where the offence was committed was duly appointed. *Reg.* v. *Garvey*, 16 Cox, C. C. 252. See *Belfast Case*, col. 134.

Violation of Secrecy of Ballot—Evidence.]—Upon a charge of violation of the secrecy of the ballot, the information communicated by the accused is, of itself, sufficient evidence to convict him of the offence. *Reg.* v. *Unkles*, Ir. R. 8 C. L. 50.

Candidate's Liability for Acts of Members of Political Associations.]—See *Haywood* v. *Dodson*, and *Spencer* v. *Harrison*, col. 115.

Associations taking part in Elections.]—See *Walsall Case*, 4 O'M. & H. 123; *Hexham Case*, *Ib.* 145; *Worcester Case*, *Ib.* 153; *Rochester Case*, *Ib.* 158.

—— **Payments to, by Candidates.**]—See *Hexham Case*, 4 O'M. & H. 146; *Rochester Case*, *Ib.* 156; *Montgomery Case*, *Ib.* 168.

Cards used—Banners, Payments for.]—See *Walsall Case*, 4 O'M. & H. 123; *Clare Case*, *Ib.* 162; *Stepney Case*, *Ib.* 179; *Pontefract Case*, *Ib.* 200.

Votes of Persons making Payments not included in Return of Election Expenses struck off.]—See *Buckrose Case*, col. 68.

Payment of Canvassers by Agent other than Expense Agent.]—See *Parker, In re*, col. 116.

Trivial unauthorised Expenses.]—See *Isaacson* v. *Durant*, col. 127.

What are Election Expenses—Persons paid to Keep Order at Meetings.]—See *Packard* v. *Collings*, col. 125.

Illegal Acts by Persons not Agents—Amendment of Petition.]—See *Buckrose Case*, col. 131.

Relief from Penalties.]—See *Walsall Case*, 4 O'M. & H. 123; *Hexham Case*, *Ib.* 144; *Rochester Case*, *Ib.* 160; *Stepney Case*, *Ib.* 181.

What Notice to be given of Application for Leave to pay disputed Claims.]—See *South Shropshire Election, In re*, col. 128.

v. *Election Commissioners.*

Procedure — Formal Adjournments unnecessary.]—Commissioners appointed under 15 & 16 Vict. c. 57 (repealed) for the purpose of an inquiry into corrupt practices at an election have power to hold separate and independent meetings for the purposes of such inquiry, and are not obliged to adjourn at the close of each meeting in order to keep their powers alive. *Beverley Commissioners, In re, Fitzgerald and Flint, Ex parte*, 10 B. & S. 813; 39 L. J., Ex. 17; L. R. 5 Ex. 21; 21 L. T. 464; 18 W. R. 172.

Semble, that such meetings cannot be intermitted for more than one week without the consent of the secretary of state. *Ib.*

Whether Refusal by, of Certificate of Indemnity to Witness can be questioned.]—By 26 & 27 Vict. c. 29, s. 7 (repealed), when any witness shall answer every question relating to corrupt practices at a parliamentary election which he shall be required to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the commissioners appointed to investigate corrupt practices a certificate, stating that such witness was upon his examination required by the commissioners to answer questions the answers to which criminated or tended to criminate him, and had answered all such questions, and if any proceedings be at any time pending against such witness for corrupt practices, such proceedings, on production of such certificate, shall be stayed:—Held, that if a witness has in point of fact answered all such questions he is entitled to a certificate; and if the commissioners refuse to grant a certificate to the witness on the ground that they are of opinion that he has not answered the questions, their decision is not final and conclusive, and may be reviewed by mandamus. *Reg.* v. *Price*, L. R. 6 Q. B. 411; 24 L. T. 387. (Demurrer to return to mandamus.) *Reg.* v. *Price, Lovibond, Ex parte*, 22 L. T. 12. (Rule for mandamus.) But see *Reg.* v. *Holl*, infra.

Where commissioners appointed to inquire into corrupt practices alleged to have taken place at elections, refuse to give a certificate of indemnity to a witness examined by them, in connection with such corrupt practices, on the ground of his answers being unsatisfactory, the decision of the commissioners, refusing such certificate, is conclusive, and cannot be reviewed by mandamus. *Reg.* v. *Price* (L. R. 6 Q. B. 411) dissented from. *Reg.* v. *Holl*, 50 L. J., Q. B. 763; 7 Q. B. D. 575—C. A. Affirming 45 L. T. 69; 46 J. P. 53.

Certificate of, that Witness had answered, but not truly.]—A person was examined as a witness before the commissioners appointed to inquire into the existence of corrupt practices at an election for a city, and received from the commissioners a certificate that he was sworn and examined on oath before the commissioners, "and upon such examination was required by us to answer questions which criminated or tended to criminate him, and answered all such questions; but divers of his answers to the questions were unsatisfactory to us, and we believe were false, and false to his knowledge." He was afterwards convicted on a prosecution for bribery:—Held, that in order to entitle him to a certificate he must make true answers to all questions: that the commissioners had in effect refused to certify that his answers were true, and that the certificate was not such as, under 26 & 27 Vict. c. 29, s. 7, required, and did not operate as, a stay of proceedings. *Reg.* v. *Hulme*, 39 L. J., Q. B. 149; L. R. 5 Q. B. 377; 22 L. T. 673; 18 W. R. 830.

Answers of Witnesses before, not admissible on Information for Perjury.]—By s. 7 of the Corrupt Practices Prevention Act, 1863 (26 & 27 Vict. c. 29), no person summoned as a witness before any commissioners appointed under the Corrupt Practices Acts shall be excused from answering any question relating to corrupt practices forming the subject of inquiry on the ground that the answer would tend to criminate himself, "provided that no statement made by any person in answer to any question put by or before such commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal":—Held, that the exception in the proviso did not apply to an ex-officio information by the attorney-general for perjury. *Reg.* v. *Slator*, 51 L. J., Q. B. 246; 8 Q. B. D. 267; 30 W. R. 410; 46 J. P. 694.

Nor on Indictment for Perjury, except for Perjury before the Commissioners.]—The proviso in s. 7 of 26 & 27 Vict. c. 29, was restricted to indictments for perjury committed before the election committee or commissioners, and true answers before such commissioners could not be used against the witness to support an indictment for perjury committed before another tribunal, such as an inquiry into the validity of an election before a judge. *Reg.* v. *Buttle*, 39 L. J., M. C. 115; L. R. 1 C. C. 248; 22 L. T. 728; 18 W. R. 956.

Answers of Witnesses before, as to Documents, do not protect Documents in other Proceedings.]—By the proviso to s. 8 of 15 & 16 Vict. c. 57, no statement made by any person, in answer to any question put by the commissioner, shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding, civil or criminal. On an inquiry before commissioners, in pursuance of 15 & 16 Vict. c. 57, into the existence of corrupt practices at an election for a member of parliament, the defendant, being asked as to a letter written by his agent to him, stated the substance of it, and of his letter in answer to it. The letter of the defendant was afterwards sent by the agent to the secretary to the commissioners, and, on the trial of an information, was produced by the secretary. The letter of the agent not being produced by the defendant, secondary evidence of it was given:—Held, that the proviso in s. 8 of 15 & 16 Vict. c. 57, did not apply to documents, though referred to in the examination of the defendant; and therefore the letters were not privileged. *Reg.* v. *Leatham*, 3 El. & El. 658; 30 L. J., Q. B. 205; 7 Jur. (N. S.) 674; 3 L. T. 777; 9 W. R. 334; 8 Cox, C. C. 498.

Held, also, that secondary evidence of the contents of the letter of the agent was admissible, even if the letter was privileged. *Ib.*

B. MUNICIPAL.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 9, 11, 12, 14, 15, 25, 29, 31-33, 44-104; Third Schedule; and Eighth Schedule, Part II. *See also* Parliamentary and Municipal Registration Act, 1878. The M. C. Act, 1882, repeals, but in part re-enacts, the act of 1835 (5 & 6 Will. 4, c. 76), and the acts amending it.

1. Burgesses.

See Municipal Corporations Act, 1882, s. 9.

a. Occupation.

See also A. 1, *a.* i. (col. 3); A. 1, *a.* ii. (col. 14); and A. 1, *b.* v. (col. 50), ante.

See Municipal Corporations Act, 1882, ss. 9, 31, 33.

Joint.]—D. occupied a house in Exeter jointly with his partner, and carried on his business there. He had the exclusive use of a furnished bed-room and sitting-room. He resided more than seven miles from Exeter. He visited Exeter every day except Sundays, to attend to his business, which he always transacted at this house, and he sometimes took his meals there: his affidavit stated that he sometimes slept there:—Held, that a joint occupation was a sufficient occupation under 5 & 6 Will. 4, c. 76, to entitle a man to be placed on the list of burgesses. *Reg.* v. *Exeter Corporation, Dipstale, Ex parte*, L. R. 4 Q. B. 114, 19 L. T. 432.

Held, also, that D. did not inhabit the house in Exeter so as to constitute him an inhabitant householder under that section. *Ib.*

Of Part of House.]—Occupation of part of a dwelling-house, for the purposes of a private dwelling only, constitutes occupation of a "house" within ss. 9 and 31 of the Municipal Corporations Act, 1882, so as to confer the municipal franchise upon the occupier. *Greenway* v. *Bachelor, Aldridge's Case*, 53 L. J., Q. B. 180; 12 Q. B. D. 381; 50 L. T. 272; 32 W. R. 319; Colt. 317; 47 J. P. 792.

A. occupied two rooms only in a house in which there were four other residents. The landlord did not live on the premises, but paid the poor and borough rates:—Held, that A. was entitled to the municipal as well as the parliamentary franchise. *Ib.*

Letting One Room.]—A person rated for the whole of a house, which he occupies, with the exception of one room, underlet by the week, has a sufficient occupation to entitle him to be on the burgess roll. *Reg.* v. *Eye Corporation*, 2 P. & D. 348; 9 A. & E. 670; 8 L. J., Q. B. 142.

Separate Outer Doors with Common Passage and Staircase.] — So, also, where one house adjoins another, both being under the same roof, and having a common entrance passage, into which the outer door of each opens, with a common staircase leading to the bedrooms, each house is distinct, and may be the subject of a sufficient occupation. *Ib.*

Where part of House let and Tenant rated for it.]—But where a person let a cellar under the house for which he was rated, to a person who occupied it as a warehouse, and was rated for it, there being an internal communication between the house and the cellar, the occupier of the house was not qualified to be on the burgess roll. *Ib.*

Of Office.]—Occupation of an attorney's office entitles a person to be a burgess, within 5 & 6 Will. 4, c. 76, s. 9, which requires occupation of a "house, warehouse, counting-house, or shop," and he is therefore qualified to be elected councillor of a borough. *Creek, In re*, 3 B. & S. 459; 32 L. J., Q. B. 89; 9 Jur. (N.S.) 646; 7 L. T. 596; 11 W. R. 234.

"House" or "Shop"—Stall in Market.]—C. and others held as weekly tenants, from the Cork corporation, and subject to the corporation regulations, stalls in the public market. The market building was closed and locked from 10 p.m. to 9 a.m., the keys being kept by, and a night watchman employed and paid by, the corporation. These stalls were open in front, and were fitted with movable benches:—Held, that such stall-holders were not occupiers within the meaning of s. 30 of the Municipal Corporations (Ireland) Act, 1840, and that such stalls were not shops within the same section. *Lovell* v. *Callaghan*, [1894] 2 Ir. R. 346.

Not affected by Assignment of Stock-in-Trade.]—The occupier of a house who has assigned all his stock-in-trade and book-debts to a creditor is nevertheless qualified to be on the burgess roll. *Reg.* v. *Eye Corporation*, supra.

Of Cottages on Farm by Labourers at reduced Rent—Rates paid by Farmer.]—The County Electors Act, 1888 (51 Vict. c. 10), s. 2, extends to counties, for the purpose of the election of county authorities in England, the burgess qualification enacted by s. 9 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), by which it is provided that no person shall be entitled to be enrolled as a burgess unless he has been rated and paid all poor-rates in respect of the qualifying property up to the 5th of January preceding. And by s. 32 of the same act, if an occupier of any qualifying property, whether the landlord is or is not liable to be rated to the poor-rate in respect thereof, claims to be rated, and pays or tenders to the overseers the full amount of the poor-rate, the overseers shall put his name on the rate-book; and if they fail to do so, he shall nevertheless for the purposes of the act be deemed rated to that rate. Agricultural labourers were employed by farmers on a verbal hiring at a weekly wage, by the terms of which they were permitted, but not required, to occupy cottages on the farms during the term of their employment at a lower rent than was paid for the cottages by labourers not in such employment, and the rent was deducted from the wage; the farmers paid the rates in respect of the cottages. The labourers occupied the cottages for the full qualifying period, their names being entered on the rate-books as occupiers, but all rates being paid by the farmers:—Held, that s. 32 of the act of 1882 did not apply, and also that the claimants' occupation was not by virtue of service, and that, therefore, they were entitled to be registered on the occupiers' list, division 1, both as county electors and parliamentary voters. *Marsh* v. *Estcourt*, 59 L. J., Q. B. 100; 24 Q. B. D. 147; 38 W. R. 495; Fox, 157; 54 J. P. 294.

Service Franchise.]—Occupation of a dwelling-house by virtue of an office, service, or employment within the meaning of the Representation of the People Act, 1884 (48 Vict. c. 3), s. 3, is no qualification for the municipal franchise. *M'Clean* v. *Pritchard*, 20 Q. B. D. 285; 58 L. T. 337; 36 W. R. 508; Fox, 94; 52 J. P. 519.

A person who occupies premises as a servant is only entitled to be on division 2 of the occupiers' list. *Kent* v. *Fraser*, 61 J. P. 359.

Transfer of Premises — Continuing in, as Tenant.]—G. & T. carried on business in premises jointly occupied by them till the 24th of May, 1894, upon which date they transferred the business and the whole of the premises to a limited company, and took a demise of a portion of the premises, and continued in occupation of that portion:—Held, that there had been continuous occupation of the demised portion of the premises within the meaning of s. 9, sub-s. 2, of the Municipal Corporations Act, 1882. *Timmis* v. *Albiston*, 64 L. J., Q. B. 564; [1895] 2 Q. B. 58; 15 R. 422; Fox, 426; 59 J. P. 663.

Cesser of, between Parliamentary and Municipal Revision.]—W. was, for the year ending December 1st, 1873, on the municipal list in respect of premises in the ward of Cheap, and also upon the parliamentary register for the city of London for 1873–4, in respect of the same premises. He ceased to occupy the premises on the 17th October, 1873, and on the revision of the municipal list by the aldermen and common councilmen, on the 3rd December, 1873, his name was struck off the list, on the ground that he had ceased to occupy the premises in the ward:—Held, that he was qualified to vote under s. 3 (by which every person on the parliamentary register for the city, in force for the time being, in respect of the occupation of premises, is entitled to vote in municipal elections), notwithstanding that he had ceased to occupy before the 3rd December, 1873, when the municipal list was revised. A mandamus therefore issued to command the aldermen and common councilmen to restore his name to the list. *Reg.* v. *Ward of Cheap (Aldermen, &c.)*, 29 L. T. 842; 22 W. R. 328.

b. Residence.

See also A. 1, *a.* vii. (col. 34); and A. 1, *b.* v. (col. 50), ante. *See* Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 9.

What sufficient Inhabiting to constitute.]—W., after carrying on business at Exeter for many years, went to live in London. He continued his business, which compelled him often to visit Exeter, and he kept some offices and rooms there. He was in Exeter about twenty times since Michaelmas, 1867, staying each time from four to ten days. On these occasions he always transacted his business, slept, and took some of his meals in his own rooms :—Held, that the question whether a person was an inhabitant householder within 5 & 6 Will. 4, c. 76, s. 9, is a question of fact, and depends upon whether there has been such a degree of inhabitance as to be in substance and in common sense a residence, and that W. was an inhabitant householder in Exeter, as there was sufficient evidence to shew that he had a residence there as well as in London. *Reg.* v. *Exeter Corporation, Westcombe, Ex parte*, L. R. 4 Q. B. 110 ; 19 L. T. 397.

C. had, within the city of Cork, a store, to which was attached a room in which he had a bed, and occasionally slept and took his meals —Held, that he did not reside in a house so as to constitute him an "inhabitant householder" under 3 & 4 Vict. c. 108 (Ir.), s. 30. *M'Dougal* v. *Creedon*, Ir. R. 7 C. L. 165. See *Reg.* v. *Exeter Corporation, Dipstale, Ex parte*, col. 152, and *Rex* v. *Sargent*, col. 183.

Not by itself a Qualification.]—An inhabitant of a borough was not, merely by force of his inhabitancy, without any inchoate right, entitled to be a corporator. *Rex* v. *West Looe*, 5 D. & R. 590 ; 3 B. & C. 677.

c. Rates.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 9, 32, 33.

See also A. 1, *a.* vi., ante, col. 24.

Person not on Rate-book, who has Paid Rates and claimed to be rated, deemed to be rated.]—The assistant overseer of a borough, although requested to do so in July, 1889, failed to insert the name of the respondent in the rate-book as joint occupier of the "Blue Bell" Inn, 18, King-street, and consequently his name did not appear on the burgess roll of the 1st of August, 1889. From October, 1883, the respondent had occupied the inn jointly with his mother, and although the licence and brewer's lease were still held in her name, and the demand notes and receipts for the rates were made out in her name, yet the respondent in fact paid all outgoings and rates from the profits of the inn. On the burgess roll of the 1st of August, 1890, his name appeared as joint occupier of a "dwelling-house," and his abode stated to be 18, King-street, whilst his mother's name appeared as joint occupier of a "house," and her abode stated to be the "Blue Bell" Inn, 18, King-street. On the 1st of November, 1890, the respondent was elected a town councillor :—Held, upon the question as to whether the respondent was qualified to be enrolled as a burgess for the year 1890-91, that he had qualified himself under s. 9 (*e*) of the act of 1882 by payment of rates, and having claimed to be rated under s. 32, was entitled to be deemed to be rated under the 2nd clause of that section. *Unwin* v. *McMullen*, 60 L. J., Q. B. 400 ; [1891] 1 Q. B. 694 ; 39 W. R. 712

Where Rated in Two Wards.] — A burgess who is rated in two wards is not bound to select in which he will be inrolled, and, if his name appears on the roll for both, may vote in either. *Reg.* v. *Tugwell*, 9 B. & S. 367 ; 37 L. J., Q. B. 275 ; L. R. 3 Q. B. 704 ; 16 W. R. 1039. See *Reg.* v. *Harrald*, col. 203.

Mistake in Name on Rate. — To entitle a ratepayer to be upon the burgess roll, it is sufficient if it can be shewn that he was intended to be rated to the relief of the poor, although there may be a mistake in his name as entered upon the rate. *Reg.* v. *Gregory*, 17 Jur. 439.

A son, whose name was C. B. G., succeeded his father, whose name was C. G., in the occupation of a house situated in a borough, and paid the rent and rates. The overseer intending to rate the son, and not knowing that his name was C. B. G., described him in the rate as C. G. Upon an application for a quo warranto :—Held, that C. B. G. was rated to the relief of the poor and qualified to be on the burgess roll. *Aldborough Town Council, In re*, 1 W. R. 329.

One Person Paying for Another.]—The payment of rates in order to qualify a person to be inrolled as a burgess, must be a bonâ fide payment by such person himself. A payment by and at the expense of a third party, though by the authority and with the knowledge of such person, is not sufficient. *Rex* v. *Bridgenorth Corporation*, 2 P. & D. 317 ; 10 A. & E. 66 ; 8 L. J., M. C. 86 ; 3 Jur. 384.

Owner of Small Tenements Rated instead of Occupiers — Occupiers Treated as Rated for Purpose of Franchise — Mistake in Assessing Owner's Composition—Borough Rate paid out of Poor Rate.] — By a local act, owners of dwelling-houses within a borough of a less yearly rent than 10*l.* were to be rated to the poor, instead of the occupiers. The owners were empowered to compound with the overseers at one-third the rate where the annual rent and value did not amount to 7*l.*, and at one-half the rate where the annual rent or value amounted to 7*l.*, but did not amount to 10*l.* The act also provided that nothing was to prejudice or affect any municipal or parochial franchises of the occupiers, but that they might claim to be put on the burgess roll as if that act had not passed, and the occupiers had been rated and assessed to the poor in their own names. M. claimed to be put on the burgess roll, in respect of a house which he occupied as tenant at a yearly rent of 7*l.* The house was stated in the poor rate to be of the gross estimated value of 6*l.* 19*s.* and of the ratable value of 5*l.* 4*s.* His landlord had compounded with the overseers at one-third the poor rate, and had duly paid his composition. The borough rates were paid out of the poor rates :—Held, that under the local act, the criterion for composition was the rent which could fairly be obtained when the premises were let, or the value for which they could be let when they were vacant ; but that the title of the occupier to be put upon the burgess roll would not be affected by any mistake in the amount of the composition between the owner and overseers, that the overseers were entitled to include the borough rate in the composition as part of the poor rate, and that payment of the composition was equivalent to the payment of the borough rate. *Reg.* v. *Kidderminster Corporation*, 2 L. M. & P. 201 ; 20 L. J., Q. B. 281.

Payment of, by Landlord.]—See *Greenway* v. *Batchelor*, col. 152.

Of Labourers' Cottages Paid by Farmer.]—See *Marsh* v. *Estcourt*, col. 154.

Local Rate not Extending over whole Borough, Nonpayment of.]—An act for paving and lighting the city of Lichfield, passed before the Municipal Corporations Act, did not extend over certain parts of the borough. By virtue of 5 & 6 Will. 4, c. 76, s. 75, the trustees appointed under the local act had transferred the powers vested in them to the council of the borough, but the council had not made an order under s. 87, that such parts of the borough should be taken to be within the local act:—Held, that a rate made and levied by the council under the local act was not a borough rate, the nonpayment of which disqualified a person from being inrolled as a burgess. *Reg.* v. *Lichfield Corporation*, 2 G. & D. 10; 2 Q. B. 693; 11 L. J., Q. B. 122; 6 Jur. 624.

Refusal to Pay Invalid Rate.]—A writ of mandamus to a mayor and assessors to inrol B.'s name, recited that B., being duly qualified and entitled to be inrolled in the burgess roll of the borough in respect of property within the parish and borough, was omitted. The return certified that B. was not a person qualified or entitled to be inrolled in the burgess roll of the borough in respect of property within the parish, and it also certified the making and assessing of a rate which was invalid, and B.'s refusal to pay, and that, because of such refusal and for other the causes aforesaid, B. was not qualified to be inrolled:—Held, that the latter part of the return was bad by reason of the objection to the rate; but that the former part might be separated from the latter, and was a sufficient answer to the writ. *Reg.* v. *New Windsor Corporation*, 7 Q. B. 908; 13 L. J., Q. B. 337.

Mandamus to Insert Name in Burgess List—Return traversing Allegation as to Payment of Rates.]—See *Rex* v. *Dover*, col. 166.

Where Occupier of all but One Room Rated for Whole House.]—See *Reg.* v. *Eye Corporation*, col. 153.

Where Cellar let, and Tenant Rated for it.]—*Ib.*

d. Under Special Charters and Customs.

Qualification — Estate for Life — Estate in Right of Wife for her Life.]—A charter ordained that no person should be admitted a burgess, except he had for three years before been seised and possessed of an estate of freehold for the term of his life, or some greater estate in land of a certain value, with an exception of such as should be seised of such estate of such yearly value, which had come to him by descent or marriage:—Held, that one who by virtue of his marriage became seised of an estate in right of his wife for her life, was not within the exception, and therefore not qualified. *Rex* v. *Powell*, 8 Term Rep. 639.

Charter prescribing Mode of Election abrogates Usage.]—The acceptance of a charter, whereby the election of burgesses is directed in a manner different from what had obtained by ancient usage, which is inconsistent with the charter, abrogates the usage, which is determined by the acceptance of the charter; and that must afterwards be the only measure by which the election of burgesses is to be governed. *Powell* v. *Rex* (*in error*), 2 Bro. P. C. 298.

Power to Elect, Delegation of, by Corporation.]—The general body of a corporation may lawfully delegate the power to elect burgesses to a select body of the corporation. *Rex* v. *Westwood*, 2 Dow & Cl. 21; 4 Bligh (N.S.) 213; 7 Bing. 1; 7 D. & R. 267; 4 B. & C. 781.

Whether a power of making voluntary elections is incidental to the corporation at large, or exists in them by prescription, it is competent for them to delegate it to a select part of themselves; but they cannot delegate such power to any stranger. *Rex* v. *Bird*, 13 East, 367.

Where a power of creating freemen is shewn to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by a charter under other names of incorporation; there being no express grant of such a power to the select body by any such charters, nor even any by-law to that effect, even supposing such a power could be transferred by a by-law from the whole to a part of the same corporation. *Rex* v. *Holland*, 2 East, 70.

Swearing in, subsequently to Election, at Meeting held for another purpose.]—A charter empowered the mayor, a justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them convenient and necessary, to elect as many free burgesses as shall please them, and to the same free burgesses, so elected, to administer an oath. The defendant was elected a free burgess in October, 1804, and in December, 1806, at a meeting of six out of the seven aldermen, in consequence of a mandamus to them to fill up the vacant place of alderman, and which meeting the mayor said was held for that sole purpose, the defendant tendered himself to be sworn in; against which three aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant:—Held, first, that the swearing in of the burgess might well be at a time subsequent to the election, he having had a present legal capacity to be sworn in at the time of his election, and therefore not like the case of an infant elected; secondly, that the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen, by whom such act was required to be done, whensoever and howsoever assembled, and without any previous summons for this purpose, there being no dissent by the majority at the time when the oath was so administered; and, thirdly, though three, an equal number of those first assembled, protested against the defendant's being sworn in, when he first tendered himself to take the oath; yet one of the protestors having withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part at first assembled to preclude the body from

doing the act at the meeting. *Rex* v. *Courtenay*, 9 East, 246. And see *Rex* v. *Ellis*, 9 East, 252, n.

Notice unnecessary, where Day of Election fixed by Custom or Charter.]—See *Rex* v. *Hill*, col. 168.

Right to be admitted a Burgess—By reason of Apprenticeship.]—By the constitution of a corporation, a person having served a seven years' apprenticeship to a freeman residing in the town, was entitled to his freedom:—Held, that an apprentice who was bound to a freeman, resident only occasionally and whose business was carried on elsewhere, was not so entitled. *Rex* v. *Marshall*, 2 Term Rep. 2.

By a custom in a corporate town, all persons having served an apprenticeship for seven years to a free burgess, carrying on trade there, were entitled to be admitted to the office of a free burgess:—Held, that a person who had served under articles of clerkship to an attorney (a free burgess of the borough, and residing within the same), was not entitled to be admitted to his freedom. *Rex* v. *Doncaster Corporation*, 7 B. & C. 630; 1 M. & Ry. 545; 6 L. J. (O.S.) M. C. 57.

A prescriptive right in the eldest son of every burgess born in N., and in the younger sons of every burgess born there, and having served a seven years' apprenticeship to any trade, and in every person having served a seven years' apprenticeship in N., to any burgess of N., to be admitted a burgess of N. on his attaining twenty-one, does not exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession, by voluntary elections of burgesses ad libitum; and this, though it was averred that N. had always been and is a populous town, containing numerous resident and trading burgesses; and that, by the prescriptive modes of supply by birth and servitude, the succession of a sufficient and large number of burgesses is fully secured: for non constat that these sources had at all times been sufficient during the existence of the corporation, without occasional supplies of burgesses by election. *Rex* v. *Bird*, 13 East, 367.

—— **By Birth.**]—Where the custom of a corporation was that "every freeman's son, born in the town after his father was a freeman, should be admitted a freeman on attaining his age of twenty-one years"; and no instance appeared, since the time of Queen Elizabeth, of more than one son of a freeman having been admitted in right of his father:—Held, that the expression, "every freeman's son," when construed by the usage, did not mean "every son of a freeman," and that the custom was satisfied by one son only being admitted. *Rex* v. *Rye Corporation*, 7 L. J. (O.S.) K. B. 107.

—— **By Payment—Invalid By-law.**]—A by-law, that any person should be admitted to the freedom of the corporation, upon payment of money, together with the fees, is bad. *Rex* v. *Northampton*, 4 Burr. 2260.

—— **Corporation Officer.**]—The nomination of a corporation officer in a modern charter, by necessary intendment makes him a free burgess of the borough, if he was not so before. *Rex* v. *Downes*, 7 D. & R. 775; 5 B. & C. 182; 29 R. R. 213. S. P., *Rex* v. *Perkins*, 4 D. & R. 427.

Defect in Title of Officer who admits.]—The title of a person having an inchoate right to be admitted a free burgess of a borough, cannot be impeached on the ground of a defect of title in the officer by whom he was admitted. *Rex* v. *Slythe*, 9 D. & R. 226; 6 B. & C. 240; 5 L. J. (O.S.) M. C. 41; 30 R. R. 312.

Alderman, though Election void, not a Burgess.]—By the charter of a corporation, aldermen were to be nominated out of the burgesses. A burgess having accepted the office of alderman under a void election, it was held to operate as a surrender of the former office, and that, therefore, upon being ousted, he could not be deemed a burgess. *Rex* v. *Hughes*, 5 B. & C. 886; 8 D. & R. 708; 5 L. J. (O.S.) M. C. 20; 29 R. R. 458. *Rex* v. *Hubbald*, 6 B. & C. 139; 9 D. & R. 145; 5 L. J. (O.S.) M. C. 24.

e. Particular Disqualifications.

See also A. 1, *c.*, ante, col. 63.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 9, 33, 63.

Parochial Relief or other Alms.]—The occupier of a borough, whose father has received parochial relief, is entitled to be enrolled on the burgess list and elected a councillor, as he cannot be said to have received parochial relief or other alms within 5 & 6 Will. 4, c. 76, s. 9. *Reg.* v. *Ireland*, 9 B. & S. 19; 37 L. J., Q. B. 73; L. R. 3 Q. B. 130; 17 L. T. 466; 16 W. R. 358.

The receipt of alms from a public charitable institution for the benefit of poor householders not receiving parochial relief does not disqualify a person from being inrolled. *Reg.* v. *Lichfield Corporation*, 2 G. & D. 10; 2 Q. B. 693; 11 L. J., Q. B. 122; 6 Jur. 624.

Infant.]—An infant could not be elected a burgess of a corporation, nor could a person so elected act as a burgess on being sworn in on attaining the age of twenty-one. *Rex* v. *Carter*, Lofft. 516; Cowp. 58, 220.

Married Women.]—A married woman, though qualified by occupation and payment of rates and put on the burgess list, cannot vote at the election of town councillors. *Reg.* v. *Harrald*, 41 L. J., Q. B. 173; L. R. 7 Q. B. 361; 26 L. T. 616; 20 W. R. 328.

Aliens.]—*See* 45 & 46 Vict. c. 50, s. 9, sub-s. 3 (*a*).

f. Making out Lists.

See also A. 1, *d.*, ante, col. 69.

See Municipal Corporations Act, 1882, ss. 44—46, 48, 49, 64, 71, 75.

Neglecting to make out.]—The penalty imposed by 5 & 6 Will. 4, c. 76, s. 48, on an overseer who neglects to make out, sign, and deliver a burgess list, is not taken away by 20 & 21 Vict. c. 50. *Hunt* v. *Hibbs*, 5 H. & N. 123; 29 L. J., Ex. 222; 6 Jur. (N.S.) 78; 1 L. T. 379; 8 W. R. 238.

In an action under 5 & 6 Will. 4, c. 76, and 20 & 21 Vict. c. 50, against an overseer for neglecting to make out, sign and deliver a burgess list, it is

no defence, that, although he did not make out the list, a majority of the other overseers did so. *Ib.*

Neither is it a defence that he did make out the list after the 1st September, the time fixed by the statute, and before or on the 5th September. *Ib.*

The list made out ought to be in alphabetical order. *Ib.*

A party who neglects to make out a burgess list is only liable for one penalty in respect thereof, and cannot be sued for a second penalty in refusing a sight of a burgess list. *Gregory* v. *Fell*, 6 Jur. 422.

Signature by Overseers.]—The mere omission, whether wilful or not, to sign the burgess list, under 5 & 6 Will. 4, c. 76, s. 15, subjects each overseer so neglecting to the penalty under s. 48. *King* v. *Burrell*, 4 P. & D. 207; 12 A. & E. 460; 9 L. J., Q. B. 337; 4 Jur. 1109. S. P., *King* v. *Share*, 2 G. & D. 453; 3 Q. B. 31; 11 L. J., Q. B. 163; 6 Jur. 730.

Before the commencement of an action for penalties against an overseer, for neglecting to do so, a previous notice of action under s. 133 need not be given. *Ib.*

Where a parish in a borough consists of several wards, and overseers are annually appointed, one to act for each ward, a signature by one overseer of a list of the persons entitled to be on the burgess list, for his own ward only, is not a sufficient compliance with the statute to exempt him from the penalty for not signing the list for the parish. *Ib.*

All the overseers, whether churchwardens or not, must have signed the burgess list. *Clarke* v. *Gaut*, 8 Ex. 252; 22 L. J., Ex. 67; 17 Jur. 239; 1 W. R. 83—Ex. Ch.

Signature by Churchwardens.]—See *Reg.* v. *Harwich*, col. 163; and *Reg.* v. *Dover*, col. 166.

Publication of Erroneous List.]—The names of several burgesses having been by mistake inserted in the wrong ward-rolls, and that fact not having been in any way brought to the notice of the revising barrister, nor the attention of the town clerk having been called to it until some days after the burgess lists had been published, a mandamus to compel the town clerk to make the requisite alterations in the burgess roll refused. *Keay, Ex parte, Eastbourne Town Clerk, In re*, 66 L. T. 323; 56 J. P. 470.

Provisions of Municipal Corporations Act, 1835, as to Burgess Lists only to be followed cy-près in case of New Corporations.]—The provisions of the 5 & 6 Will. 4, c. 76, as to the machinery for the formation and revision of the burgess lists, being applicable only to then existing corporations, and to the particular period at which that act took effect, need not be precisely followed in the case of new corporations, created by charter under the powers conferred on the Crown by 7 Will. 4 & 1 Vict. c. 78, s. 49, but may be followed cy-près. *Rutter* v. *Chapman*, 10 L. J., Ex. 495; 8 M. & W. 1—Ex. Ch.

Alterations in List of no Effect till November 1st.]—See *Reg.* v. *Harvey*, col. 166.

Name appearing on Lists of different Wards—To be inrolled as Voting in one only.]—See *Reg.* v. *Cambridge*, col. 164.

Counting-house described in List as "House"—No power to amend on Revision—Power to insert Name for another Qualification.]—See *Reg.* v. *Chipping Wycombe*, col. 164.

No Power to make out fresh List on Revision.]—See *Seal* v. *Reg.*, col. 164.

Whether List of Claimants can be revised, or Claimant's Name inserted on Roll, when Burgess List void, or none delivered.]—See *Norwich, In re, Reg.* v. *Harwich*, and *Reg.* v. *Lichfield*, col. 163.

g. Claims.

See also A. 1, *e.*, ante, col. 73.

Must state Parish where Qualification is.]—A notice of claim made under 5 & 6 Will. 4, c. 76, s. 17, to be inserted on the burgess roll, must state the parish in which the property is situated in respect of which the claim is made. *Reg.* v. *Kidderminster Corporation*, 2 L., M. & P. 201; 20 L. J., Q. B. 281.

Not signing Name in full—Sufficient Information.]—A person whose name had been omitted by mistake from the list of burgesses sent in a claim to be inserted on the burgess list. He signed the claim with the initials of his christian names and with his surname in full. He did not attend before the mayor and assessors to support his claim; but the overseer, who had omitted the name by an oversight, stated that the claim was good, and showed to the court of revision the poor-rate book containing the names of the claimant. There was no other person of the same name in the borough, and the court of revision was well acquainted with the person and handwriting of the claimant. The court, however, rejected the claim on the ground that the signature by initials of the christian names was insufficient:—Held, that the mayor and assessors had sufficient information as to the meaning of the initials to have warranted them in inserting the name of the claimant on the burgess list, and granted a mandamus to the mayor, commanding him to insert the name on the burgess roll. *Reg.* v. *Hartlepool Corporation*, 2 L., M. & P. 666; 21 L. J., Q. B. 71; 15 Jur. 1158.

Whether List of Claimants can be revised, when Burgess List void or none delivered.]—See *Norwich, In re, Reg.* v. *Harwich*, and *Reg.* v. *Lichfield*, col. 163.

h. Notice of Objections.

See also A. 1, *f.*, ante, col. 76.

Form of.]—A notice of objection to a person on the burgess list for a borough as follows:—"To J. B. I hereby give you notice, that I object to your name being retained on the burgess list for the borough of H.," is a notice to the like effect with the form No. 3, schedule (D.), to 5 & 6 Will. 4, c. 76, notwithstanding the omission of J. B.'s description in the list; and therefore the objection ought to be heard. *Reg.* v. *Harwich Corporation*, 1 El. & Bl. 617; 22 L. J., Q. B. 216; 17 Jur. 914. But see *Reg.* v. *Harwich Corporation, Butcher, In re*, 22 L. J., Q. B. 81; 16 Jur. 995; 1 W. R. 37, contra.

A notice of objection to the name of a person

being retained upon the burgess list, is not bad by reason of the parish, in which the property for which the objector is rated is situate, being omitted, the property being described as in the burgess list; nor is such a notice bad by reason of the nature of the property, in respect of which the person objected to is rated, not being specified. *Reg.* v. *Monmouth Corporation*, *Reg.* v. *Bolton Corporation*, 39 L. J., Q. B. 77; L. R. 5 Q. B. 251; 21 L. T. 748.

Erroneously held Invalid at Revision Court—Mandamus.]—See *Reg.* v. *Monmouth*, col. 165.

Absence of Notice, not of itself sufficient Ground for Mandamus to replace Name.]—See *Reg.* v. *Harwich*, col. 165.

Disqualified Person allowing his Name to remain on the Roll after Notice.]—See *Reg.* v. *Armstrong*, col. 167.

i. Revision of Lists.

See also A. 1, *g.*, col. 93; *and* A. 1, *h.*, col. 105, ante.

See Municipal Corporations Act, 1882, ss. 44—49, 71, 75.

Of Claimants, whose Burgess List void or none delivered.]—If the burgess lists are defective and null, and the mayor and assessors decline to revise them, they are not bound to revise the list of claimants who claim to be inserted on the burgess lists. *Harwich Corporation*, *In re*, 21 L. J., Q. B. 193.

The burgess list being signed only by the overseers of the two parishes of which the borough was composed, and not by the churchwardens, the mayor and assessors refused to revise them. A list of claimants properly prepared by the town clerk, was then tendered for revision, but this was also refused:—Held, on an application for a mandamus to compel the mayor and assessors to revise the list of claimants, that such list was not a substantive list, and capable of revision by itself; and as, therefore, there was no subsisting burgess list, the list of claimants could not be revised. *Reg.* v. *Harwich Corporation*, 1 B. C. C. 13; 16 Jur. 291.

In a borough comprising several districts, an inhabitant of one district, qualified to be a burgess, sent in to the town clerk, before the annual revision, his notice of claim to be placed on the burgess list for his district. The overseers negligently omitted sending any burgess list for that district to the revision court; the mayor, consequently, decided (against the opinion of the assessors) that the applicant's name could not be placed on any list, though he proved his qualification; and the burgess roll was made up, omitting his name. On motion the court granted a mandamus to the mayor to insert the name in the burgess roll. *Reg.* v. *Lichfield Corporation*, 1 Q. B. 453; 1 G. & D. 28; 10 L. J., Q. B. 171; 5 Jur. 889.

Name not to be retained on List for more than one Ward.]—On the revision of the burgess lists of a borough, divided into wards, the mayor may call upon a burgess who occupies distinct premises, conferring a vote, in more than one ward, and whose name appears under each in the burgess lists, to select the ward in which he will be inrolled in the burgess roll as voting, and, in default, of his selecting, may retain his name on the list of any of the wards in which he so occupies, and expunge his name from the others. *Reg.* v. *Cambridge Corporation*, 1 Ell. & Bl. 210; 28 L. J., Q. B. 10; 5 Jur. (N.S.) 436.

Appeal from Refusal to asterisk Name entered twice.]—An appeal does not lie from the refusal of a revising barrister to place a mark against a name entered more than once in the list of voters in the same electoral division for the county council. *Arnold* v. *Sharpe*, 65 L. T. 618; 1 Fox, 252.

Counting-house described in List as "House"—No Power to amend—Power to register Voter for another Qualification in the Borough.]—A. was the occupier of a counting-house for business purposes, and also of a private residence in the same borough. In the burgess list the premises he occupied as a counting-house were set down as his qualification, but they were set down under the denomination "house":—Held, that the mayor was right in expunging A.'s name from the list of burgesses, and that he had no power to amend it by altering the qualification. *Reg.* v. *Chipping Wycombe Corporation*, 44 L. J., Q. B. 82; 32 L. T. 204; 23 W. R. 347.

Held, also, that although the mayor had no power to alter the qualification on the list, he might have treated it as a nullity, and registered the voter for his other qualification. *Ib.*

No Power to make out New List.]—The mayor and assessors have no power to make out a new burgess list, their duty under 5 & 6 Will. 4, c. 76, s. 18, being only to revise the lists sent in by the overseers. *Seal* v. *Reg.* 8 El. & Bl. 22; 27 L. J., Q. B. 139; 3 Jur. (N.S.) 1244—Ex. Ch.

The mayor and assessors at the revision of the burgess lists, erroneously treated the burgess list, de facto made out for one of the parishes, as a nullity. They then made out a fresh burgess list for that parish and inserted in it the name of a person in the original parish burgess list, who proved his title to their satisfaction; and the name thus inserted was transferred to the burgess roll:—Held, that such person, though qualified in all respects to be on the burgess list, acquired by the act of the mayor and assessors no title to be a burgess. *Ib.*

Cesser of Occupation between Revision of Parliamentary and Municipal Lists.]—See *Reg.* v. *Ward of Cheap*, col. 154.

Error in List not brought to Notice of Revising Barrister.]—See *Keay*, *Ex parte*, *Eastbourne Town Clerk*, *In re*, col. 161.

Mandamus to Mayor to revise List or to insert Name—Time for Revision expired.]—If for any insufficient reason the mayor and assessors have refused to revise the burgess list or to adjudicate upon any claim or objection, they or their successors may be compelled by mandamus to do so, although the period fixed by statute within which such revision is to take place has expired. *Reg.* v. *Rochester Corporation*, 7 E. & B. 910; 27 L. J., Q. B. 45; 3 Jur. (N.S.) 1097.

—— **To existing Mayor to revise List of past Year.**]—A mandamus was directed to the mayor

and assessors of a borough comprising several parishes. It contained suggestions that at the court holden in October, 1856, before the mayor and assessors for the revision of the burgess list of that year, the mayor and assessors refused, for insufficient reasons, to revise the list. The writ commanded the mayor and assessors to hold a court and revise the list for the parish. There was an insufficient return. The court having awarded a peremptory mandamus:—Held, that the mandamus was properly directed to the existing mayor and assessors to hold the court, and revise the list of the past year. *Rochester Corporation* v. *Reg.*, El., Bl. & El. 1024; 27 L. J., Q. B. 434; 4 Jur. (N.S.) 1227; 6 W. R. 838—Ex. Ch.

—— **Refusal to entertain Objections.**]—The mayor and assessors of a borough, at a court for the revision of the burgess lists holden between the 1st and 15th of October, the time limited by 5 & 6 Will. 4, c. 76, s. 18, erroneously determined that certain notices of objection were invalid, and refused to inquire into the qualifications of the persons objected to:—Held, that they had declined jurisdiction; and the court granted a mandamus commanding them to hold a court to revise the list, although the time limited had elapsed. *Reg.* v. *Monmouth Corporation*, *Reg.* v. *Bolton Corporation*, 39 L. J., Q. B. 77; L. R. 5 Q. B. 251; 21 L. T. 748.

—— **Refusal of.**]—Where the names of certain burgesses qualified in other respects were objected to and expunged from the burgess lists by the mayor and assessors, on revision, on account of the non-payment of the shilling required by 2 Will. 4, c. 45, s. 56, the court considered that they had not the power to grant a mandamus to insert the names. *Rex* v. *Hythe Corporation*, 1 N. & P. 239; 2 H. & W. 455; 5 A. & E. 832.

—— **Locus standi of objecting Burgess to show cause against.**]—W., having been struck off the burgess list of a borough on objection at the revision, obtained a rule calling on the mayor to show cause why a mandamus should not issue commanding him to admit W. to the office of burgess of the borough. The rule was directed to the mayor only, and he did not appear to show cause:—Held, that the burgess on whose objection W.'s name had been struck off had a locus standi, and might be heard to show cause. *Reg.* v. *Exeter Corporation*, *Wescombe*, *Ex parte*, L. R. 4 Q. B. 110; 19 L. T. 397.

—— **Applicant must show Title.**]—Where a party, whose name has been expunged from the burgess roll by the mayor on revision, applies to the court under 7 Will. 4 & 1 Vict. c. 78, s. 24, for a mandamus to replace it, the court is bound to inquire into his title. It is not, therefore, sufficient for him to show that his name was inserted by the overseers, and was expunged by the mayor, on an objection which, for want of legal notice under 5 & 6 Will. 4, c. 76, s. 17 (as the party alleges), ought not to have been heard. *Reg* v. *Harwich Corporation*, 8 A. & E. 919; 1 P. & D. 134; 1 W., W. & H. 611; 8 L. J., Q. B. 13.

—— **Rule Nisi.**]—A rule calling upon a mayor to show cause why a mandamus should not issue, commanding him to insert the name of a person on the burgess roll, is nisi only. *Reg.* v. *Hartlepool Corporation*, 2 L., M. & P. 666, n.

—— **No Answer that List not signed, after acting on it.**]—A householder of a borough had his name inserted by the overseers of a parish, within the borough, on the burgess list of the parish, which was signed by the overseers. The mayor struck off his name, without any objection having been made to it, but did not reject the list. A mandamus having issued, commanding the mayor to insert the name on the burgess roll, the return alleged that the burgess list was not signed by the churchwardens, or either of them:—Held, that the mayor having acted on the list, this was no answer to the writ. *Reg.* v. *Dover Corporation*, 16 L. J., M. C. 97; 11 Jur. 710.

—— **Traverse of Allegation that all Rates paid.**]—A mandamus stated that L. was an inhabitant householder, and had paid all rates, including all such borough rates directed to be paid under 5 & 6 Will. 4, c. 76, as had become payable by him, except such as had become payable within six months next before the 31st of August; that the overseers inserted his name in the burgess list, and that at the revision of the list, the mayor expunged it. Return traversed the allegation as to payment of rates, and alleged non-payment of a certain borough rate:—Held, that the title set up in the writ was answered, and that a general traverse of the allegation in the writ as to payment of rates was sufficient. *Reg.* v. *Dover Corporation*, 16 L. J., M. C. 97; 11 Jur. 710. Affirmed, 11 Q. B. 260; 17 L. J., M. C. 75; 12 Jur. 334—Ex. Ch.

—— **As to the Sufficiency of the Return by the Mayor.**]—See *Reg.* v. *New Windsor*, col. 157.

Quo Warranto against Burgess—Lapse of Time since Revision.]—See *Reg.* v. *Anderson*, col. 167.

Power of Revising Barrister to Transfer Voter's Name from one Division to another.]—See *Greenway* v. *Bachelor*, and *Lord* v. *Fox*, col. 101.

Defect in Title of Revising Authority not to affect Validity of Burgess Roll.]—*See* Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 42 (3).

k. Burgess Roll.

See Municipal Corporations Act, 1882, ss. 45—49, 51, 71, 233.

Date of Commencement of.]—The proceedings which take place with respect to the burgess list in a borough, under 5 & 6 Will. 4, c. 76, between September 5th and November 1st, are only for the preparation of that which is to be the burgess list or roll for the year, beginning on November 1st; and, until that day, the placing of a name upon such list or roll gives no qualification under the statute, the list or roll of the former year being the burgess list or roll till November 1st. *Reg.* v. *Harvey*, 4 Q. B. 475; 3 G. & D. 246; 11 L. J., Q. B. 282.

Conclusive as to Persons entitled to vote.]—The burgess roll, formed under 5 & 6 Will. 4, c. 76, s. 22, is conclusive as to the persons entitled to vote, and a qualification of a voter on the roll cannot be questioned in a quo warranto

against the person elected. *Reg.* v. *Tugwell*, 9 B. & S. 367; 37 L. J., Q. B. 275; L. R. 3 Q. B. 704; 16 W. R. 1039.

A burgess who is rated in two wards is not bound to select in which he will be inrolled, and if his name appears on the roll for both may vote in either. *Ib.*

After a burgess roll has been made up in the manner provided by 5 & 6 Will. 4, c. 76, s. 9, the persons whose names are upon that roll are entitled to vote at the election of councillors, and upon the trial of an information their right cannot be questioned. *Ib.*

Quo Warranto against Person on.]—A quo warranto will not issue with the view of removing a disqualified person from the burgess roll, unless it is shown that the person has done something more than merely allow his name to be retained on the roll after a notice of objection to his qualification. *Armstrong, In re*, 25 L. J., Q. B. 238; 2 Jur. (N.S.) 211.

Information in nature of quo warranto does not lie against a burgess, who, though elected, has not been admitted. *Rex* v. *Ponsonby*, 1 Ves. 1; 5 Bro. P. C. 287.

Circumstances under which the court will not entertain an application for an information in the nature of a quo warranto against a person on the burgess roll of a borough, when a considerable time has elapsed between the revision of the burgess roll and the application. *Reg.* v. *Anderson*, 2 G. & D. 113; 11 L. J., Q. B. 233.

Mandamus.]—Mandamus to a corporation to alter the situation of applicant's name in their books, which would have the effect of giving him an additional vote to which he was entitled, refused. *Rex* v. *Yarmouth Corporation, Reynolds, Ex parte*, 5 L. J. (O.S.) K. B. 69.

Person transferred from void Burgess List to Roll, not a Burgess.]—See *Seal* v. *Reg.*, col. 164.

Burgess on Lists for two Wards must select for which he will be inrolled.]—See *Reg.* v. *Cambridge*, col. 164.

Burgess on the Roll for two Wards voting in both—First Vote good.]—See *Reg.* v. *Harrald*, col. 203, and *Reg.* v. *Tugwell*, supra.

Mandamus to Town Clerk to correct Mistakes in Roll.]—See *Keay, Ex parte, Eastbourne Town Clerk, In re*, col. 161.

Mandamus to Mayor and Assessors to insert Name in Roll.]—See *Reg.* v. *New Windsor*, col. 157; *Reg.* v. *Lichfield*, col. 163; *Reg.* v. *Harwich*, col. 165; *Reg.* v. *Dover*, and *Rex* v. *Dover*, col. 166.

Qualification for Councillor — Enrolment between Nomination and Election.] — See *Budge* v. *Andrews*, col. 174.

—— **"Entitled to be on the Roll" — Unqualified Person on the Roll.**]—See *Reg.* v. *Thwaites, Flintham* v. *Roxburgh, Middleton* v. *Simpson*, and *Hindmarch, Ex parte*, cols. 174, 175.

—— **Qualified Person not on the Roll.**]—See *Whalley* v. *Bramwell*, col. 175.

Nomination Paper—Sufficient Statement of Surname of Candidate in, if spelt as in Roll.]—See *Miller* v. *Everton*, col. 191.

—— **"Junior" added in, to Nominator's Name on Roll—Not Invalid.**]—See *Gledhill* v. *Crowther*, col. 190.

—— **Correct Christian Name of Assenting Burgess in—Whether Invalid because differing from incorrect Name in Roll.**]—See *Harding* v. *Cornwell*, and *Moorhouse* v. *Linney*, col. 190.

—— **Not Invalid because Initials of Assenting Burgess, though Christian Name in full in Roll.**]—See *Bowden* v. *Besley*, col. 190.

—— **Description of Nominator's Property need not be identical with that in Roll, but must be sufficient for him to be identified there.**]—See *Henry* v. *Armitage*, and *Soper* v. *Basingstoke*, col. 189.

—— **Invalid, if Nominator's Number on Roll not correctly stated.**]—See *Gothard* v. *Clarke*, col. 189.

Voting Paper—Signed with wrong Christian Name valid, if as on Roll.]—See *Reg.* v. *Thwaites*, col. 197.

—— **Description of Voter's Property in, if correct, may vary from that on Roll.**]—See *Reg.* v. *Gregory*, and *Reg.* v. *Avery*, col. 197.

Not liable to be questioned for Want of Title in Revising Authority.]—*See* Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 42 (3).

2. Election to Corporate Offices.

a. Notice of Election.

See Municipal Corporations Act, 1882, ss. 54, 65, 66, 70.

Where no Special Day for Election, Notice necessary.]—Where by custom or charter a particular day is fixed for the election of burgesses of a corporation, it is the duty of the burgesses to take notice that the election will take place on such particular day, and attend to exercise their elective franchise, if they be so minded; but where no specific day is fixed by custom or charter, and the business of electing burgesses, as well as other business, may be many days in the year, notice must be given to the resident burgesses of a corporate meeting for such purpose, and in such reasonable time as to give them all an opportunity of attending and voting at the election. *Rex* v. *Hill*, 6 D. & R. 593; 4 B. & C. 426.

If all Members present, Notice unnecessary.]—It is not a general proposition of law, that there cannot be any lawful assembly for the purpose of election, without previous notice of the purpose of the meeting having been given to every member of a select definite body, who are the electors; for if all such members were present at, and concurred in any particular election, such notice would be unnecessary. *Rex* v. *Chetwynd*, 7 B. & C. 695; 1 M. & Ry. 534; 6 L. J. (O.S.) M. C. 49; 31 R. R. 282.

All must be Summoned or be present—Accidentally omitting to Summon—Not Summoning Burgess at his own Request.]—A public

body, as the burgesses of a borough, entrusted with the performance of a public duty, cannot hold an extraordinary meeting unless all the burgesses are summoned who can be summoned, or the unsummoned members are actually present at such meeting. *Rex* v. *Langhorne*, 6 N. & M. 203; 4 A. & E. 538.

A custom to hold such meeting upon a summons of all the burgesses, subject to a qualification that the accidental omission of service of the summons should not vitiate the meeting, is bad at law. *Ib.*

A general dispensation by one of the body, with service upon himself, is void. *Ib.*

The proceedings of a meeting at which any burgess is not present who might have been summoned are void, though the omission is accidental, or though the burgess has given a general notice that he wishes not to be summoned. *Ib.*

Purpose of Meeting not specified in Summons.]—Where certain powers are vested in a select body, appointed to be aiding and assisting the mayor of a city, touching matters concerning the same, a notice by the mayor to the members of that body to attend a corporate meeting, need not specify the purpose for which the meeting is convened; and an election at such meeting is valid. *Rex* v. *Pulsford*, 2 M. & Ry. 384; 8 B. & C. 350; 6 L. J. (O.S.) K. B. 336.

Where the whole corporation is summoned for a particular purpose (e.g. to receive the resignation of a common councilman), a select body, who are all present and consenting, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman, in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons. *Rex* v. *Theodorick*, 8 East, 543; 9 R. R. 494.

Not without Notice on a Bye-Day.]—No elections in corporations made by surprise on a bye-day can be valid. *Rex* v. *May*, 5 Burr. 2681.

Full notice should be given of corporation elections, particularly when held upon bye-days, and anything like surprise vitiates the election. *Page* v. *Rex*, 2 Ridgw. P. C. 445.

Election within Ten Days after Notice of Vacancy.]—Where a party has been elected a town councillor, and he resigns his office, the election to supply his place is well held, if it takes place within ten days after notice is given of the vacancy by two burgesses, as provided for by 16 & 17 Vict. c. 79, s. 11. *Reg.* v. *Bester*, 7 Jur. (N.S.) 262; 3 L. T. 667; 9 W. R. 277.

After Meeting dissolved by Mayor, Electors remaining and proceeding with Election without Notice of their Intention.]—Assuming that under 11 Geo. 1, c. 4, an election, begun at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet, where a question arose upon the right of a voter, on which the mayor, as presiding officer, decided by rejecting the vote; and thereupon the remaining votes being equal, he declared the same, and that no election could be made, and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present, that any of them intended to proceed in the election, notwithstanding the decision (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart without notice, the rest who remained together proceeded to complete the election:—Held, that such election was void even under the statute, as a surprise and fraud on the other electors. *Rex* v. *Gaborian*, 11 East, 77.

Two Vacancies announced, when only One.]—See *Reg.* v. *Leeds*, col. 203.

b. Aldermen and Councillors.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 11, 12, 13, 14, 50, 52, 60, 67, 68.

Qualification—Residence.]—To qualify under 5 & 6 Will. 4, c. 76, ss. 9, 28, it was sufficient if a municipal officer had bonâ fide a place of residence within the borough, even although, from fortuitous circumstances, he did not sleep there. *Reg.* v. *Boycott*, 14 L. T. 599.

—— **Inhabitancy—Usage contrary to Charter void.**]—Where a charter directed that certain officers should be elected out of the burgesses and inhabitants, a usage to elect non-inhabitant burgesses was void: nor was such usage rendered valid by a charter of restoration, granting "all elections and rights of election previously enjoyed by virtue or pretence (virtu vel prætextu) of any charter, or by any other lawful manner or title." *Rex* v. *Salway*, 4 M. & Ry. 314; 9 B. & C. 424; 7 L. J. (O.S.) K. B. 277.

—— **Not to be changed by By-law.**]—The number of electors may be narrowed by a by-law, but not the number of the eligible. *Rex* v. *Spencer*, 3 Burr. 1827. S. P., *Rex* v. *Tunwell*, 3 Dougl. 207.

Nor can the number and description of persons declared eligible to an office by the royal charter of a corporation be changed by a by-law. *Lee* v. *Wallis*, 1 Ld. Ken. 292.

Disqualification—Candidate a Woman.]—A woman is incapable of being elected a member of a county council. *Beresford-Hope* v. *Sandhurst (Lady)*, 58 L. J., Q. B. 316; 23 Q. B. D. 79; 61 L. T. 150; 37 W. R. 548; 53 J. P. 805—C. A. See *De Souza* v. *Cobden*, col. 179.

—— **Interest in Contract with Council.**]—The disqualification, under 5 & 6 Will. 4, c. 76, s. 28, of any person who has any interest in a contract with the council of the borough, to be elected or be an alderman or councillor of the borough, applies only during the continuance of the contract. So that by becoming interested in such a contract an alderman or a councillor does not cease to be qualified or become disqualified within s. 53, so as to incur penalties for acting after the termination of the contract. *Lewis* v. *Carr*, 46 L. J., Ex. 314; 1 Ex. D. 484; 36 L. T. 44; 24 W. R. 940—C. A.

A person who had entered into a contract with the corporation of Dublin, held disqualified to be elected a member of that corporation, even though he had, before the election (but without the privity of the corporation), purported to assign his contract to a third person. *Reg.* v. *Franklin*, Ir. R. 6 C. L. 239.

See *Reg.* v. *Harvey*, col. 171, and *Reg.* v. *York*, col. 178.

—— **Conviction for Bribery.**]—See *Wray, In re*, col. 215.

Custom for Leet Jury of Borough to elect.]—A custom in a borough for the leet jury of the borough, being also the leet jury of a manor, to elect the members of the corporation in whom the government of the borough is vested, is a reasonable and legal custom, although the manor and borough are not shown to be co-extensive. *Rex* v. *Beaufort (Duke)*, 2 N. & M. 815; 5 B. & Ad. 442; 2 L. J., M. C. 104.

Where supposed Vacancy non-existent.]—An election of A. to a corporate office, in place of a supposed vacancy, created by B., cannot be referred to an existing vacancy created by C. *Rex* v. *Smith*, 2 M. & S. 406.

Swearing in.]—A party becomes a corporate officer when he is sworn in, and not when he is elected. *Rex* v. *Swyer*, 10 B. & C. 486; 8 L. J. (o.s.) K. B. 221.

A corporate officer elected under a mandamus must be sworn in before the officer presiding at such election. *Rex* v. *Malden*, 4 Burr. 2130.

The neglect to be sworn into an office for a great length of time, as above twenty years after the party is elected, may be deemed a waiver or a refusal to accept the election by the party elected; but does not vitiate the election itself. *Rex* v. *Jordan*, 9 East, 263, n.

Refusing to serve Office.]—On a conviction under 5 & 6 Will. 4, c. 76, s. 51, upon a by-law for not serving an office, there need not be express or actual evidence, but there must be some evidence of qualification; and if, in fact, the party was not qualified, he is not liable to the penalty, and a conviction will be invalid. *Reg.* v. *Richmond JJ.*, 11 W. R. 65.

Payment of a fine, imposed by the by-laws of a corporation for refusing to accept a corporate office, does not exempt the party elected from serving the office, and he may be compelled to do so by mandamus. *Rex* v. *Bower*, 2 D. & R. 842; 1 B. & C. 585; 1 L. J. (o.s.) K. B. 110.

Alderman — Qualification — Residence.]—An alderman is not bound to reside within the borough, unless that is necessary to the discharge of the duties of his office, or he is so required by the charter. *Rex* v. *Portsmouth*, 4 D. & R. 767; 3 B. & C. 152.

—— **Extraordinary Vacancy.**]—To be qualified to be elected an alderman, on an extraordinary vacancy, within the meaning of 5 & 6 Will. 4, c. 76, ss. 27, 28, a corporator must be either a councillor or a person qualified to be a councillor by being entitled to be on the burgess list of the borough. *Reg.* v. *Harvey*, 3 G. & D. 246; 4 Q. B. 175; 11 L. J., Q. B. 282; 6 Jur. 847.

—— **Disqualification — Interest in Contract with Council.**]—An alderman who lets a building for a polling station to the council is entitled to vote, this being a contract within the exception in s. 12, sub-s. 2 (*a*). *Ib.*

See *Lewis* v. *Carr*, col. 170; and *Reg.* v. *York*, col. 178.

—— **Injunction to restrain Election of.**]—Where an alderman had not compounded with his creditors in such a manner as to cease to hold office, an injunction was granted to restrain the town council from electing a successor. *Aslatt* v. *Southampton Corporation*, 16 Ch. D. 143; 50 L. J., Ch. 31; 43 L. T. 464; 29 W. R. 117.

—— **Mayor presiding at Election and voting for himself—Quo Warranto.**] — See *Reg.* v. *Morton*, col. 195.

—— **Right to vote at Election of — "Outgoing Alderman"—"Mayor Elect."**]—By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 60 (2), the election of aldermen shall be held immediately after the election of the mayor; "(3) an outgoing alderman, although mayor elect, shall not vote." On the day appointed for the election of mayor and aldermen, an alderman was elected mayor, and thereupon made and subscribed a declaration in the form contained in the 8th schedule of the act. He then voted in the election of aldermen:—Held, that his vote was invalid, for at the time when he voted he had not ceased to be an "outgoing alderman" within s. 60 (sub-s. 3) of the act. *Hounsell* v. *Suttill*, 56 L. J., Q. B. 502; 19 Q. B. D. 498; 57 L. T. 102; 36 W. R. 127; 51 J. P. 44.

—— **By-law limiting Number of Electors.**]—Where a charter gave the right of electing an alderman to the mayor and burgesses at large from themselves; a by-law, stated to be made in 1577, by the mayor and burgesses, but not extant in writing, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, viz., the recorder, aldermen, coroners, common councilmen, and such of the burgesses of the town as had served or did serve the office of chamberlain or sheriff of the town, and called the livery or clothing burgesses for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor to be one, or the major part of them," is a reasonable and valid by-law; and the office of chamberlain of the town, as stated in such by-law, was taken to be a corporate office as well as the other offices, the serving of which was made the qualification of the electing burgesses. *Rex* v. *Ashwell*, 12 East, 22.

—— **Who may vote.**]—An outgoing alderman has no original vote in the election of aldermen. *Reg.* v. *Stanley*, 3 P. & D. 561; 9 L. J., Q. B. 248.

—— **Mode of Election prescribed by Charter —"Commonalty."**]—Where a charter granted to a mayor and commonalty that "any alderman being wanted, the rest of the aldermen might nominate two burgesses, for the choosing of one of them as alderman by the commonalty":—Held, that commonalty included the whole corporation, and that an alderman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. *Rex* v. *Osbourne*, 4 East, 327.

—— **Provision in Charter for Annual Election only directory.**]—A clause in a charter, which directed that the aldermen should be chosen annually, was held to be only directory, and not to determine the office at the end of the year after election; but that the person legally elected and sworn into the office should continue until his death or removal, in the same manner as a person elected into the office of mayor. *Prowse* v. *Foot*, 2 Bro. P. C. 289. S. P., *Pender* v. *Rex*, 2 Bro. P. C. 294.

—— **Election by a Minority of Council.**]—At a meeting of the town council a minority of the councillors present delivered voting papers to the mayor for certain persons to be elected aldermen. The mayor and the majority of the town councillors had been advised that the day was not the proper one for the election. The mayor consequently declined to proceed with the election, and no election was declared. It was, in fact, the duty of the council to have proceeded to the election of aldermen on that day had they known the law:—Held, that the act of the minority was not the act of the town council, that the election had not been partly held, but that there had been no election, and that consequently a mandamus might issue calling upon the council to proceed to elect aldermen. *Reg.* v. *Bradford Corporation*, 2 L., M. & P. 35; 20 L. J., Q. B. 226.

—— **Full Number not elected.**]—An election of less than the required number of aldermen, at the first election under 5 & 6 Vict. c. 76, was rendered valid by 7 Will. 4 & 1 Vict. c. 78, s. 2, even if it was not valid under the former act. *Reg.* v. *Roberts*, 3 N. & P. 295; 7 L. J., Q. B. 154; 1 W., W. & H. 160; 7 A. & E. 433; 2 Jur. 372.

—— **Election by Lists.**]—An election of aldermen by lists, under 5 & 6 Will. 4, c. 76, where each elector has the opportunity of objecting to any of the lists proposed, or of proposing and voting for any other candidate, is good. *Reg.* v. *Brightwell*, 2 P. & D. 413; 10 A. & E. 171; 9 L. J., Q. B. 224.

—— **Voting against Candidate.**]—Where a person is proposed for election as an alderman, the corporation may vote against him without voting for another. *Rex* v. *Monday*, Cowp. 530.

—— **In the City of London.**]—Custom of the city of London as to the election of aldermen. *Rex* v. *Johnson*, 6 Cl. & F. 41; 1 Rob. 1. Affirming *S. C.*, 5 A. & E. 488; 6 N. & M. 870; 5 L. J., Ex. 282.

Where the return to a mandamus to admit an alderman of the city of London stated an immemorial custom for the court of the mayor and aldermen to determine whether a person elected alderman was, according to their discretion and conscience, a fit and proper person duly qualified; on traverse of the custom, the jury found that the custom had existed from time immemorial down to 1689:—Held, that this finding amounted to a verdict that the custom still existed. *Scales* v. *Key*, 3 P. & D. 505; 11 A. & E. 819.

—— **Election of, before Mayor elected, void.**]—The election of mayor on the 9th November in each year must be the first business done by the town council, and an election of aldermen on that day previously to the election of mayor is void. *Reg.* v. *Macgowan*, 11 A. & E. 869; 3 P. & D. 557; 9 L. J., Q. B. 244; 4 Jur. 913.

—— **Declaration required by 9 Geo. 4, c. 17.**]—By 9 Geo. 4, c. 17, ss. 2, 3, every person who shall be placed, elected or chosen in or to the office of alderman, shall, within one calendar month next before or upon his admission into such office, make and subscribe a certain declaration, before certain parties; and by s. 4, if he shall omit or neglect to make and subscribe the declaration in manner above mentioned, such placing, election or choice shall be void:—Held, that the statute does not give the party elected a month, at all events, for deciding whether he will make the declaration or not, but only excuses him from making it at the time of his admission, if he has made it within a month before. *Humphrey* v. *Reg.*, 10 A. & E. 335; 3 P. & D. 691—Ex. Ch. Reversing 3 N. & P. 681; 1 W., W. & H. 470; 7 L. J., Q. B. 202; 2 Jur. 1084.

The words "upon his admission" mean at the time, and not within a reasonable time after; and the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place. *Ib.*

If the party offers himself to the proper court to be admitted, not having made the declaration within a month before, and being asked whether he will make it or not, declines to say, but requires the court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election. *Ib.*

—— **Questioning Election of, in City of London.**]—See *Rex* v. *Johnson*, and *Rex* v. *London*, col. 214.

—— **Delay in fixing Turn for going out of Office.**]—Where the councillors of a borough did not, immediately after the first election of aldermen, appoint who should go out of office in 1838, as required by 5 & 6 Will. 4, c. 76, s. 25, but delayed such appointment until the 29th October, 1838:—Held, that such delay vitiated the election of the alderman chosen to succeed the alderman so appointed to go out of office. *Reg.* v. *Alderson*, 1 G. & D. 429; 1 Q. B. 878; 10 L. J., Q. B. 277; 6 Jur. 321.

—— **Casting Vote at Election of Mayor.**]—See *Hall* v. *Walker*, col. 184.

—— **Acceptance of Office under void Election—Ceasing to be a Burgess.**]—See *Rex* v. *Hughes*, and *Rex* v. *Hubball*, col. 160.

Councillor—Qualification—Burgess.]—The Municipal Corporations Act, 1882, s. 11, sub-s. 3, provides that every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor:—Held, that a person who, though not qualified to be a burgess, had been inrolled on the burgess roll and was therefore entitled to vote under s. 51 of the act, was not thereby qualified to be elected a councillor under s. 11, sub-s. 3. *Flintham* v. *Roxburgh*, 55 L. J., Q. B. 472; 17 Q. B. D. 44; 54 L. T. 797; 34 W. R. 543; 50 J. P. 311.

It is sufficient to entitle a person to be nominated for the office of councillor for a municipal borough that, if otherwise duly qualified, he is inrolled on the burgess roll in force at the time of the election, although his name may not be on the burgess roll which was in force at the time of the nomination. *Budge* v. *Andrews*, 47 L. J., C. P. 586; 3 C. P. D. 510; 39 L. T. 166.

Therefore, where one of several candidates for the office of councillor was nominated on the 23rd of October, 1877, who was not inrolled on the burgess roll for the year beginning the 1st of November, 1876, but was inrolled on the burgess roll for the year beginning the 1st of November, 1877, when the election was held, and was in all other respects qualified to be elected councillor:—Held, that he was rightly nominated. *Ib.*

The Court of Common Pleas has jurisdiction, on a petition questioning the election, to review the decision of the mayor, who had allowed an objection to such nomination, on the ground that the name of such candidate was not on such previous burgess roll. *Ib.*

By 5 & 6 Will. 4, c. 76, s. 28, no person shall be qualified to be a councillor who shall not be entitled to be on the burgess list:—Held, that a person whose name was on the burgess roll was qualified within that section. *Reg.* v. *Thwaites*, 1 El. & Bl. 704; 22 L. J., Q. B. 238; 17 Jur. 712.

To be eligible for the office of town councillor, a candidate must be "entitled to be on" the burgess roll within 5 & 6 Will. 4, c. 76, s. 28, as well as "on" the roll within 38 & 39 Vict. c. 40, s. 1, sub-s. 2, and the burgess roll containing his name is not conclusive evidence that he is "entitled to be on" the roll. *Middleton* v. *Simpson*, 49 L. J., C. P. 312; 5 C. P. D. 183; 28 W. R. 629; 44 J. P. 251.

The defendant, in an action for penalties under 5 & 6 Will. 4, c. 76, s. 53, for acting as a councillor after he had ceased to be qualified, had been an inhabitant householder in the borough during the whole time required by the act. He had also, during the whole time, been rated for premises by name, by the name of a public-house, but which premises consisted of the house, with a warehouse and yard attached. In the middle of the required time the defendant let the public-house, and removed to another dwelling, but retained the warehouse in his own occupation. The defendant gave notice to the parish officers of his change of residence, and required to be newly rated, but no change was made in time in the entry in the rate-book. The defendant had paid all the rates which were due. At the registration court, before the mayor and assessors, after the change of residence of the defendant, there was an objection taken to his name on the burgess list, for that his qualifying property was wrongly described; and the objection was allowed, and his name struck off the burgess roll. Afterwards the defendant acted as a councillor:—Held, that nevertheless the defendant was not liable to a penalty, since he was at the time he acted as councillor a person so qualified within the borough as to be entitled to be upon a burgess list; and in an action for penalties under the statute, the question is not whether at the time he acted he was or was not a burgess, or was or was not inserted in the burgess roll or in a burgess list, but whether at the time he acted he was or was not a person so qualified within the borough as to be entitled to be upon a burgess list of it. *Whalley* v. *Bramwell*, 15 Q. B. 775; 20 L. J., Q. B. 53; 15 Jur. 313.

Where a person, though not duly qualified, is on the burgess roll, and his title to be there has not been questioned at the revision of the burgess list, in pursuance of 5 & 6 Will. 4, c. 76, s. 18, and he is afterwards elected a councillor, the court, in the exercise of its discretion, will refuse a rule nisi for a quo warranto upon the ground that he was not entitled to be on the burgess roll within s. 28. *Hindmarch, Ex parte*, 8 B. & S. 642; 37 L. J., Q. B. 58; L. R. 3 Q. B. 12; 17 L. T. 176; 16 W. R. 125.

—— **Disqualification—Bankruptcy and Composition.**]—S. served as town councillor for the St. T. Ward from 1877 to July 21, 1880, when he left at the office of the town clerk a notice of resignation, addressed to the mayor and council. No action was taken thereon by the council, and no fine paid or tendered by S.; S. did not sit in council or vote after the date of the notice. On the following day S. filed a petition for liquidation. In August a composition was accepted by his creditors. S. did not pay his debts in full. At an election of town councillor for the St. T. Ward in November, 1884, S. was returned. The objection was then taken that S. was disqualified, he having been in liquidation when he was a member of the council, and not having paid 20*s.* in the pound:—Held, that the objection was valid. *Futcher* v. *Saunders*, 49 J. P. 424.

A bankrupt uncertificated at the time of election is not disqualified from being elected a councillor. The disqualification exists only where the bankruptcy occurs during the holding of the office. *Rex* v. *Chitty*, 1 N. & P. 78; 5 A. & E. 609; 2 H. & W. 399; 6 L. J., K. B. 12.

J., a town councillor of a borough, whose term of office would expire by lapse of time on the 1st November, 1876, on the 29th June in that year filed a petition for liquidation of his affairs by arrangement. On the 29th July a statutory majority of his creditors by special resolution declared that his affairs should be liquidated by arrangement, and his discharge was granted to him on the 29th September. No declaration was made by the council under 5 & 6 Will. 4, c. 76, s. 52, that the office held by him was void under that section, but he did not, in fact, act as town councillor after the institution of these proceedings with his creditors until after the 1st November. On the 1st November the offices of three other councillors besides that of J. would become vacant by lapse of time, and for these four vacancies seven candidates presented themselves for election. In consequence of all the candidates being nominated by one and the same person, contrary to the provisions of the act regulating the elections, the mayor declared no one to be duly nominated. Thereupon the returning officer, under 22 Vict. c. 35, s. 8, sub-s. 4, declared that the retiring councillors, among whom he included J., had been re-elected to their offices. Upon a rule for a mandamus calling upon the mayor to declare the office of councillor lately held by J. void, as required by 5 & 6 Will. 4, c. 76, s. 52, and to proceed to the election of another person to supply such vacancy:—Held, that the office "lately held by J." was in fact filled up, and that the time had therefore passed when it could be declared void. *Reg.* v. *Welchpool Corporation*, 35 L. T. 594.

Held, also, that a mandamus would not lie for a fresh election, for inasmuch as the council had not declared J.'s office void under s. 52, the office was still full on the 1st November: that J. was therefore a retiring councillor within 22 Vict. c. 35, s. 8, sub-s. 4, and under that section was properly declared to be re-elected to his office. *Ib.* See also *Reg.* v. *Leeds Corporation*, col. 203.

Held, also, that if there was any remedy, it would have been under 35 & 36 Vict. c. 60, the Corrupt Practices (Municipal Elections) Act, s. 12, by petition and not by mandamus. *Ib.*

—— **Qualification—Rating—Annual Value.**]—By 5 & 6 Will. 4, c. 76, s. 28, no person shall be qualified to be a councillor in certain boroughs, unless he is rated to the relief of the poor in such borough upon the annual value of not less than 15*l.*:—Held, that the annual value was the

rateable value and not the gross estimated rental, in the form of rate prescribed by 6 & 7 Will. 4, c. 96. *Baker* v. *Marsh*, 4 El. & Bl. 144; 3 C. L. R. 343; 24 L. J., Q. B. 1; 1 Jur. (N.S.) 44; 3 W. R. 13.

—— **Resident Householder—Joint Occupation.**]—An attorney, in conjunction with his partner, occupied a house within the limits of a borough for which he was elected a town councillor, such occupation being for the purposes of business only, he residing out of the borough:—Held, that this was a sufficient qualification for the office under 5 & 6 Will. 4, c. 76, s. 9. *Creek, In re*, 3 B. & S. 459; 32 L. J., Q. B. 89; 9 Jur. (N.S.) 646; 7 L. T. 596; 11 W. R. 234.

On a rule for a quo warranto against a town councillor as not being a resident householder, it not appearing that he had taken the house, or that he paid the rent, though a joint occupant, the rule was made absolute. *Reg.* v. *Maxwell*, 11 W. R. 308.

—— **Disqualification — Mayor — Returning Officer.**]—A mayor of a borough, who by 5 & 6 Will. 4, c. 76, s. 35, with two assessors, declares the result of an election of town councillors, is disqualified, as returning officer, from being elected a town councillor; and s. 28, which disqualifies any person "during such time as he shall hold any office or place of profit, other than that of mayor, in the gift or disposal of the council," does not qualify the mayor as returning officer; and therefore, if returned, the election is void. *Reg.* v. *Owens*, 2 El. & El. 86; 28 L. J., Q. B. 316; 5 Jur. (N.S.) 764; 7 W. R. 566.

Under s. 28, which enacts that no person shall be eligible as councillor "during such time as he shall hold any office or place of profit, other than that of mayor," in the disposal of the council of the borough, the mayor is eligible as town councillor, if the borough is divided into wards, for a ward in which he is not acting as returning officer. *Ib.*

In a borough not divided into wards, the mayor, being returning officer, offered himself for re-election as a town councillor, and the council elected one of the aldermen to act at the election in the place of the mayor; the mayor was re-elected a town councillor:—Held, that the mayor was not disqualified as a candidate, but he could not act as returning officer; that he was incapable of acting within 5 & 6 Will. 4, c. 76, s. 36; and, consequently, that the appointment of the alderman as substitute and the election were valid. *Reg.* v. *White*, 8 B. & S. 587; 36 L. J., Q. B. 267; L. R. 2 Q. B. 557; 16 L. T. 828; 15 W. R. 988.

The disqualification of a candidate acting as returning officer cannot be raised by quo warranto. *Reg.* v. *Morton*, 61 L. J., Q. B. 39; [1892] 1 Q. B. 39; post, col. 195.

Votes for returning officer not thrown away so as to entitle candidate in minority to be admitted, if electors do not know that he is by law disqualified. *Reg.* v. *Tewkesbury Corporation*, 37 L. J., Q. B. 288; L. R. 3 Q. B. 629; post, col. 201.

—— **Interest in Contracts with Council.**]—A lease by the mayor, aldermen and burgesses, whether made before or after the passing of the 5 & 6 Will. 4, c. 76, was a contract by or with the council, within s. 28; and before the 5 & 6 Vict. c. 104, disqualified the lessee for the office of a town councillor. *Reg.* v. *York*, 2 G. & D. 105; 11 L. J., Q. B. 127; 6 Jur. 797. S. P., *Simpson* v. *Ready*, 1 D. & L. 1024; 12 M. & W. 736; 13 L. J., Ex. 193.

A person who has entered into a contract with the council, and has been employed by them in respect of such contract, is disqualified from holding the office of councillor, though such contract required the corporation seal, and is not sealed. *Reg.* v. *Francis*, 18 Q. B. 526; 21 L. J., Q. B. 304; 16 Jur. 1046.

While such contract continues, the disqualification caused by it arises de die in diem; and during that time a relator is not precluded, under 7 Will. 4 & 1 Vict. c. 78, s. 23, from applying for a quo warranto, though twelve calendar months have elapsed from the election of the party disqualified, or from the commencement of his disqualification. *Ib.*

Sect. 12 of the Municipal Corporations Act, 1882, provides, inter alia, that "a person shall be disqualified for being elected, and for being a councillor if and while he . . . . (*c*) has directly or indirectly by himself or partner any share or interest in any contract or employment with, by, or on behalf of the council." The respondent was a member of a firm interested in certain contracts with a corporation of a borough that had not expired at the time of a municipal election for that borough. Before offering himself as a candidate at the election the respondent dissolved partnership, and assigned all his interest in the said contracts to the other partner, remaining liable, however, on bonds securing the due performance of the contracts. The corporation was not a party to the assignment, and gave no assent thereto, nor did they release the respondent from the contracts. The respondent's connection with the said contracts, and the fact that his candidature was objected to on that ground, were matters of notoriety in the ward for which he was a candidate. On a petition against his return as councillor:—Held, that the respondent was not qualified to be elected within the meaning of the above section, and that votes given for him were thrown away. *Cox* v. *Ambrose*, 60 L. J., Q. B. 114; 55 J. P. 23.

The vote of a person who was chemist to the council prior to his election as councillor, and who had not resigned that appointment before his election, is bad, on the ground that at the time of his election he held a place of profit in the gift of the council, and had an interest in a contract or employment with, by, or on behalf of the council within s. 12, sub-s. 1 (*a*) (*c*). *Louth Municipal Election, In re, Nell* v. *Longbottom*, 63 L. J., Q. B. 490; [1894] 1 Q. B. 767; 10 R. 193; 70 L. T. 499.

—— **Alderman.**]—A person is not by reason of his being an alderman disqualified for election to the office of councillor, and by accepting the latter office he vacates the former. *Reg.* v. *Bangor Corporation*, 56 L. J., Q. B. 326; 18 Q. B. D. 349; 35 W. R. 158; 51 J., P. 51—C. A. See *S. C.* in H. L., sub nom. *Pritchard* v. *Bangor Corporation*, col. 196.

—— **Assessor elected—No Notice of Ineligibility—Candidate in Minority admitted—Quo Warranto.**]—At an annual election of councillors in one of the wards of a borough divided into two wards, a majority of votes was declared in favour of a candidate who was

an assessor for the other ward. No notice of the ineligibility of this candidate had been given, but the mayor rejected his name from the list published by him, pursuant to 5 & 6 Will. 4, c. 76, s. 35, and inserted the name of a candidate having a minority of votes, who accepted the office. The court granted a quo warranto against the latter candidate. *Reg.* v. *Hiorns*, 3 N. & P. 148; 7 A. & E. 960; 2 Jur. 108.

—— **Assessors.**]—The 7 Will. 4 & 1 Vict. c. 78, s. 15, by which no burgess is eligible to be elected a member of the council of a borough while holding the office of assessor, applies only to assessors elected under 5 & 6 Will. 4, c. 76, s. 37, and does not apply to an assessor for revising the burgess list appointed under 7 Will. 4 & 1 Vict. c. 78, s. 4. *Molesworth, Ex parte*, 41 L. J., Q. B. 12; L. R. 7 Q. B. 209; 20 W. R. 241.

—— **Person in Holy Orders.**]—By 5 & 6 Will. 4, c. 76, no person being in holy orders, or being the regular minister of a dissenting congregation, shall be qualified to be a councillor of any borough:—Held, that a minister appointed to officiate occasionally or temporarily to a dissenting congregation is not disqualified. *Reg.* v. *Oldham*, 10 B. & S. 193; 38 L. J., Q. B. 125; L. R. 4 Q. B. 290.

The regular minister of a dissenting congregation de facto, though not de jure, is disqualified. *Ib.*

—— **County Councillor — Disqualification — Woman—Election not questioned within Twelve Months—Liability to Penalty.**]—A woman who has been elected a member of a county council, and whose election has not been questioned within twelve months after the election, is, nevertheless, liable to the penalties imposed by s. 41 of the Municipal Corporations Act, 1882, if she acts as a member of the county council after the expiration of the twelve months, even if the effect of s. 73 of that act is to make the election to all intents a valid election. *De Souza* v. *Cobden*, 60 L. J., Q. B. 533; [1891] 1 Q. B. 687; 65 L. T. 130; 39 W. R. 454; 55 J. P. 565—C. A. See *Beresford-Hope* v. *Sandhurst*, col. 170.

—— **Elector registered in more than one Division—Right of Voting.**]—In elections of county councillors under the Local Government Act, 1888, an elector although registered under the County Electors Act, 1888, in more than one electoral division of the same county, is not entitled to vote in more than one electoral division of the same county at the same election. *Knill* v. *Towse*, 59 L. J., Q. B. 455; 24 Q. B. D. 697; 63 L. T. 47; 38 W. R. 521; 54 J. P. 789—C. A.

—— **Election without Consent—Quo Warranto—Costs.**]—M. was elected a town councillor without his knowledge or consent, but being informed that he would be liable to a fine if he refused to serve, he on that ground agreed to accept the office, and made the necessary declaration. No application was made to him to resign the office. A rule nisi for a quo warranto to show by what authority he held the office having been obtained, he, as soon as he heard of it, expressed his willingness to resign, and allowed the rule to be made absolute without supporting the validity of his election:—Held, that he was not to be liable for costs, if within a week he made a valid resignation, or if a quo warranto was filed at the expense of the prosecutor, if M. at his own expense, within a week after the filing of the information, put in a valid disclaimer, but that, failing these alternatives the rule was to be made absolute with costs. *Reg.* v. *May*, 2 L., M. & P. 144; 20 L. J., Q. B. 268.

—— **No Jurisdiction in Returning Officer to determine Question of Disqualification.**]—See *Pritchard* v. *Bangor Corporation*, col. 196.

—— **Vacancy, if Mayor's turn to go out of Office, though Mayor remains.**]—Where the mayor is one of the councillors who go out of office on the 1st November, he causes a vacancy in the number of councillors, though as mayor, he continues a member of the council till the 9th November. *Reg.* v. *Owens*, 2 El. & El. 86; 28 L. J., Q. B. 316; 5 Jur. (N.S.) 764; 7 W. R. 566.

—— **Separate Election for Occasional Vacancy.**]—A councillor to fill up an occasional vacancy under 5 & 6 Will. 4, c. 76, s. 47, and councillors to replace the third part of the council annually going out of office, ought not be chosen at one and the same election. *Rowley* v. *Reg.*, 6 Q. B. 668; 14 L. J., Q. B. 62; 8 Jur. 1170—Ex. Ch.

The 7 Will. 4 & 1 Vict. c. 78, s. 11, does not prospectively sanction such a proceeding. *Ib.*

—— **Special Summons for Election unnecessary.**]—See *Rex* v. *Theodorick*, col. 169.

—— **Election within Ten Days after Notice of Vacancy by Resignation.**]—See *Reg.* v. *Bester*, col. 169.

—— **Right to Nominate.**]—See *Reg.* v. *Parkinson*, col. 189.

—— **Nominator's Number on Burgess Roll not in Nomination Paper.**]—See *Gothard* v. *Clarke*, col. 189.

—— **Nomination not signed by Assenting Burgess with Name as on Roll.**]—See *Bowden* v. *Besley*, col. 190.

—— **Description in Nomination Paper of Property of Burgess Subscribing.**]—See *Soper* v. *Basingstoke*, col. 189, and *Henry* v. *Armitage*, col. 190.

—— **Misnomer of Candidate in Nomination Paper.**]—See *Mather* v. *Brown*, col. 192.

—— **Delivery of Nomination Paper.**]—See *Monks* v. *Jackson*, col. 193, and *Reg.* v. *Glover*, col. 192.

—— **Election of—Returning Officer.**]—See *Harmon* v. *Park*, col. 195.

—— **Declaration required by 5 & 6 Will. 4, c. 76, s. 50.**]—Where a person has been declared duly elected a councillor, and has made the declaration prescribed by this statute, and has been admitted into the council, the court will not grant a mandamus to two town councillors, to administer the declaration to another person who claims to have been duly elected instead of the former. *Reg.* v. *Derby Councillors*, 2 N. & P. 589; W., W. & D. 671.

On an election of councillors for a ward in a borough, there were three candidates, A., B. and C.

On the 3rd November, 1851, A. and B. were declared duly elected, but B. was disqualified, and the electors had notice thereof. Upon a quo warranto, judgment of ouster was given against B. on the 30th June, 1852; and on the 26th October, C. gave notice, claiming to be admitted to the office of councillor, and requiring the declaration mentioned in 5 & 6 Will. 4, c. 76, s. 50, to be administered to him. On the 8th November he made the declaration required, and on the 9th November he tendered his vote as a councillor upon the election of mayor, which was rejected, and the candidate for whom he voted was thereby in a minority:—Held, that C. was duly elected a councillor, and had a right to be admitted without a mandamus or a new election; and that s. 51, which requires that every person elected to be a councillor shall accept such office by making and subscribing the declaration mentioned in s. 50 within five days after notice of his election, did not apply, and therefore C. had a right to vote at the election of mayor. *Reg.* v. *Cooks*, 3 El. & Bl. 249; 2 C. L. R. 947; 23 L. J., Q. B. 133; 18 Jur. 378.

—— **Remedy for Wrongful Election—Quo Warranto or Mandamus.**]—Mandamus to a corporation stating that, on 1st November, 1854, C. and S., two councillors of a ward, being a third part of the number assigned for the ward, were in turn to go out of office, and an election ought to have been held for the election of two councillors for the ward, but that an election was held on the 1st November for one councillor only, whereby the office of one councillor was vacant, and the writ commanded the mayor to proceed to the election of a councillor. Return that on the 9th November, 1853, S. being a councillor for the ward, was elected mayor for a year, and until his successor should have accepted office, and S. then accepted the office of mayor, and held it till 9th November, 1854, when his successor was elected mayor and accepted the office, and S. ceased to hold the office of mayor, and by reason thereof, S. was not, on the 1st November, 1854, in turn to go out of office as councillor, and the election ought not then to have been held for two councillors, and that on the 30th November, 1854, S. was duly elected councillor, and afterwards accepted that office, made and subscribed the declaration, and thence, continually, held and continued to hold, and did still hold and continue in that office, and the same during all the time had been and still was full of S.:—Held, that the election of S. as councillor on the 9th November, 1854, was, at any rate, not colourable, and there was therefore a plenarty, and mandamus did not lie, the proper mode of questioning the election being by quo warranto. *Frost* v. *Chester Corporation*, 5 El. & Bl. 531; 25 L. J., Q. B. 61; 2 Jur. (N.S.) 114; 4 W. R. 14.

A councillor having ceased to be registered on the burgess roll for non-payment of poor-rates, certain electors required the returning officer to hold a new election to fill up the vacancy which it was alleged had happened under 5 & 6 Will. 4, c. 76, s. 28, and on his refusal to do so, a mandamus was applied for:—Held, that a mandamus could not be granted, but that the proper mode of proceeding was by a quo warranto. *Reg.* v. *Bristol Corporation*, 1 W., W. & H. 93.

On a contested election for the office of councillor of a borough, the mayor and assessors examined the votes to ascertain which candidate was elected; and, pursuant to 5 & 6 Will. 4, c. 76, s. 35, the mayor, before two of the clock of the day next but one following the election, published the name of the candidate elected. After that time a further examination was made, and the mayor published the name of another candidate as the one elected:—Held, that the act done after two o'clock by the mayor and assessors was a nullity, and the tender of his vote as a councillor by the candidate first named having been rejected, that he was entitled to a mandamus to compel the council to receive it, and that in such a case a mandamus is the proper remedy, and not a quo warranto. *Reg.* v. *Leeds Corporation*, 4 P. & D. 632; 11 A. & E. 512; 10 L. J., Q. B. 112.

—— **Costs.**]—Where a defendant had been elected to the office of town councillor by a majority of votes, some of which were personated, and upon a rule being obtained for a quo warranto declined to defend his election, and offered to disclaim, the court made the rule absolute, without imposing any terms upon the relator as to costs, the defendant having been a candidate for the office, and having made no previous attempt to resign. *Reg.* v. *Sidney*, 2 L., M. & P. 149; 20 L. J., Q. B. 269.

—— **Return of Expenses required, though none incurred — Extension of Time.**]—See *Robson, Ex parte*, col. 217.

—— **Information against Town Clerk for Misconduct at Election.**]—See *Rex* v. *Nicholetts*, col. 207.

—— **Inspection of Voting Papers after Election.**]—*Ib.*

—— **Candidate claiming to be elected, and acting, properly joined as Respondent to Petition.**]—See *Yates* v. *Leach*, col. 208.

—— **Questioning Election of, in City of London.**]—See *Bolton* v. *Jeffes*, col. 213.

Bailiffs—Election of Senior Bailiff.]—A charter constituted a corporation to consist of two bailiffs (senior and junior), twelve aldermen and an indefinite number of burgesses; and after nominating the two first bailiffs, and directing the election of the first twelve aldermen, provided that on a certain day in the year, the senior bailiff should be chosen by the bailiffs and aldermen, or the major part of them, out of the aldermen, for one year, and until another of the aldermen to that office in due manner should be elected, perfected, and sworn; and also provided for the election of the junior bailiff on the same day, by a different mode of election, for one year, and until, &c. (as before):—Held, that the two bailiffs do not thereby constitute but one officer, and that the senior and junior bailiffs of different years last legally appointed (their respective successors de facto for several years having been ousted by quo warranto) might coalesce, and preside at a corporate meeting of the bailiffs and aldermen for the election of a senior bailiff; and that the charter having directed the future election of a senior bailiff to be made one of the aldermen, must be taken to mean that there should be only eleven acting efficient aldermen, apart from the senior bailiff, who was also an alderman; and consequently that six aldermen were a majority of that

integral part, capable of making, together with the two last legal bailiffs, an elective assembly for the purpose of choosing a senior bailiff. *Rex* v. *Thornton*, 4 East, 294.

—— **Qualification by Residence.**]—When a person having prior connections with a borough town previously to his election to the office of bailiff, for which residence was a necessary qualification, took a house at first for four years, but afterwards, at his landlord's request, for one, and slept there one night before the election, and did not return again for near a month afterwards, when he stayed two days, but retained possession of his house under his lease the whole time; the taking of the house appearing to the court to be bonâ fide, was a sufficient legal residence to satisfy the qualification required. *Rex* v. *Sargent*, 5 Term Rep. 466.

Jurats—Qualification—Construction of Charter.]—Where by a charter it was granted that the mayor, bailiffs and burgesses should thereafter be a body corporate by the name of mayor, jurats, bailiffs and burgesses, that there should be one of the more honest and discreet burgesses or inhabitants, called mayor, to be elected as therein mentioned; and four honest and discreet burgesses or inhabitants called jurats, and two other honest and discreet burgesses or inhabitants called bailiffs; that the jurats and bailiffs should hold their offices for life, unless removed for reasonable cause; and when it should happen that either or any of the jurats or bailiffs for the time being should die, or be removed, or withdrawn from his or their office or offices, it should be lawful for the surviving and remaining jurats and bailiffs for the time being, or the greater part of them (of whom the mayor should be one), within a convenient time, to nominate another or others of the burgesses or inhabitants of the borough for the time to be jurat or jurats, bailiff or bailiffs of the borough:—Held, that it was competent to the corporation to elect the jurats from the inhabitants of the borough, or from the burgesses. *Rex* v. *Greet*, 8 B. & C. 363; 2 M. & Ry. 391; 7 L. J. (O.S.) K. B. 92.

As to voting at election of aldermen and councillors, *see cases*, post, B. 2, *h.* (col. 196).

c. Mayor.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 15, 16, 61, 66, 67.

Qualification—Residence.]—A charter which required that the mayor should be an inhabitant resiant within the borough, on pain of forfeiting such sum as should be imposed by the mayor, recorder and major part of the common council, not exceeding 100*l.*, did not require resiancy as a qualification for holding the office, but only under a penalty. *Rex* v. *Williams*, 2 M. & S. 141.

Who may be elected.]—Under the 5 & 6 Will. 4, c. 76, an outgoing alderman may be elected mayor. *Reg.* v. *Stanley*, 3 P. & D. 561; 11 A. & E. 869; 9 L. J., Q. B. 248.

Disqualification — Dealer in Spirituous Liquors.]—Where a charter of incorporation ordained that the mayor should yearly be chosen justice within the borough, and that the justice should not permit any one to retail ale or beer within the borough, without a licence under the hands of two of the said justices, whereof the mayor to be one:—Held, that a dealer in spirituous liquors, and by that means disqualified by 26 Geo. 2, c. 13, from concurring in granting licences, was not disqualified from being elected mayor. *Rex* v. *Smith*, 2 M. & S. 583.

No Notice of Ineligibility of Candidate.]—See *Rex* v. *Bridge*, col. 201.

Election of Lord Mayor of London to have precedence on appointed Day.]—On the appointed charter day for the special purpose of the election of lord mayor of the city of London, the business of such election must have precedence of all other business; therefore, it is illegal, after the lord mayor and aldermen have retired from the hustings (having assembled for that purpose), to propose any other business inconsistent with such election, the discussion of which might have the effect of preventing the election altogether. *Rex* v. *Parkyns*, 3 B. & Ald. 668; 22 R. R. 519.

Election of, must be First Business.]—See *Reg.* v. *Macgowan*, col. 173.

Election of—Casting Vote.]—At an election for a mayor under 3 & 4 Vict. c. 108 (Ir.), in case of an equality of votes, the casting vote is to be given, not by the mayor, but by the alderman who shall have been elected by the greatest number of votes recorded in his favour on a contest; and an alderman elected after a contest is to be considered as elected by a greater number of votes than one returned by a larger constituency without a contest. *Hall* v. *Walker*, Ir. R. 9 C. L. 66.

—— **Who may vote.**]—Outgoing aldermen, on the 9th November in each year, may vote for the mayor to be elected on that day. *Reg.* v. *Maddy*, 3 P. & D. 563. S. P., *Reg.* v. *Macgowan*, 11 A. & E. 869; 3 P. & D. 557; 9 L. J., Q. B. 244; 4 Jur. 913; *Reg.* v. *M'Dowall*, 10 Jur. 1087.

—— **Candidate voting for himself.**]—At an election for the office of mayor, to which office a salary is attached, the vote of a candidate for himself is bad, on the ground that he has a pecuniary interest within s. 22, sub-s. 3 of the Municipal Corporations Act, 1882. *Louth Municipal Election, In re, Nell* v. *Longbottom*, 63 L. J., Q. B. 490; [1894] 1 Q. B. 767; 10 R. 193; 70 L. T. 499.

Defect in Title of Presiding Officer.]—Where the mayor who presides at the election of a new mayor is only mayor de facto and not de jure, and is subsequently removed by judgment of ouster, the election of the mayor is void. *Rex* v. *Bridgewater*, 3 Dougl. 379. See *Rex* v. *Slythe*, 5 L. J. (O.S.) M. C. 41; 6 B. & C. 240. *But see now* 45 & 46 Vict. c. 50, s. 42, sub-s. 2.

Construction of Charter—To be Chosen from Burgesses.]—Where a charter directed the mayor to be annually chosen out of four of the burgesses or inhabitants, and a by-law ordained that all these four should be aldermen:—Held, that it was void, as being repugnant to the charter. *Tucker* v. *Rex*, 2 Bro. P. C. 304.

A charter granted to the mayor, bailiffs and burgesses, or the greater part of them, to choose one of themselves to be mayor; but the same charter appointed the first mayor to continue for a year and until some other burgess should be

elected and sworn, and the two first bailiffs to continue until two other burgesses should be elected and sworn; and it also directed the new mayor to be sworn in before the last mayor his predecessor and the bailiffs for the time being and the burgesses present; and in like manner the new bailiffs to be sworn in before the mayor and the last bailiffs and the burgesses present. These latter provisions explain the first, and show that the mayor must be chosen out of the burgesses at large, and not out of the bailiffs; and this avoids any question as to the validity of a swearing in an officer before himself, by his name of office. *Rex* v. *Harper*, 5 East, 208.

—— **Vacancy by Death.**]—Where a charter authorised the election of mayor on the charter-day, with power to the mayor to hold over, and on the mayor's death within the year after his election and swearing in, and in the meantime, the alderman next in order to officiate as mayor:—Held, that in the case of a mayor's holding over and dying more than a year after his election and swearing in, the charter did not authorise a new election of mayor, nor the alderman next in order to officiate as mayor; but it was casus omissus. *Rex* v. *Smith*, 2 M. & S. 583.

—— **Who are to Elect.**]—By a charter there were to be in a borough a mayor, alderman and twenty-four capital burgesses; on the death or removal of an alderman, the mayor and aldermen, or the greater part of them, were to elect a capital burgess to supply his place; when a capital burgess died, &c., the mayor, aldermen and capital burgesses, or the greater part of them, were to elect a successor from among the inhabitants and burgesses; and the mayor was to be annually elected on a certain day "by the burgesses of the borough, or the greater number of them," with the consent of twenty-four freeholders and inhabitants, to be chosen as directed by the charter; in practice, the mayor had always been elected by the capital burgesses only. At the election of mayor on a charter-day, there was not a majority of the number of twenty-four capital burgesses present, and no other burgesses attended:—Held, that this did not avoid the election, for that the word "burgesses" in the charter (where it treated of the election of mayor) could not be construed to mean only capital burgesses; that the right of election did not devolve upon the body of capital burgesses by the mere forbearance of the other burgesses to interfere; and that the capital burgesses, in electing the mayor, acted in the capacity of burgesses merely. *Rex* v. *Goldsmith*, 4 B. & Ad. 835.

A charter empowered the mayor and aldermen for the time being, or the greater part of them, to choose and name four of the burgesses or inhabitants, out of which four so to be named and chosen, the mayor, aldermen, bailiffs, principal burgesses, and other burgesses, and inhabitants of the borough, for the time being (they being also for that purpose upon the same day congregated and assembled together), or the greater part of them as should be so congregated and assembled, might have power and authority, by the greater part of the voices of them so assembled together, to choose and make one to be the mayor:—Held, that the election of a mayor by the majority of the whole elective body taken collectively was invalid, it appearing that there was not a majority of each definite body of principal burgesses present at the time of the election. *Rex* v. *Bower*, 2 D. & R. 761; 1 B. & C. 492; 1 L. J. (o.s.) K. B. 174. See *Rex* v. *Headley*, 6 L. J. (o.s.) K. B. 53; 7 B. & C. 496; 1 M. & Ry. 345; post, col. 205.

—— **To be Sworn before Acting.**]—Where a charter directs that the mayor shall continue in office until another is duly elected and sworn, the successor, although duly elected, cannot act until sworn, and, if he does, judgment of ouster may be given against him. *Prowse* v. *Foot*, 2 Bro. P. C. 289.

—— **Re-Election.**]—By a charter the capital burgesses and common council of a borough were authorised every year, on Monday next before Michaelmas, to elect and nominate one of the capital burgesses to be mayor for one whole year thence next ensuing; and he, before he was admitted to execute that office, or in any way to intermeddle in the office, was on Friday next after the feast of St. Michael next ensuing such nomination and election, not only to take his corporal oath well and faithfully to execute the office, but also all the oaths appointed to be taken by a mayor; and after such oath so taken, he might execute the office of mayor of the borough for one whole year then and next ensuing. It was then provided, that none who should have once borne the office of mayor should be again elected and preferred to be mayor within the space of three years next ensuing the end and determination of his office of mayoralty:—Held, that the words "three years," mentioned in the prohibitory clause, imported years of office, and not calendar years; and therefore a person who had once served the office of mayor might be again promoted to the same office as soon as three mayoralties had intervened:—Held, also, that a party became mayor, not when he was elected, but when he was sworn in; and that it was sufficient if three mayoralties intervened between the time when he ceased to be mayor and the time when he was sworn into office a second time. *Rex* v. *Swyer*, 10 B. & C. 486; 8 L. J. (o.s.) K. B. 221.

Oath or Declaration.]—No oath is necessary as a qualification for eligibility for a mayoralty, but a declaration to the effect required by 31 & 32 Vict. c. 72, s. 12, is sufficient. *Hall* v. *Walker*, Ir. R. 9 C. L. 66.

Making Declaration on Acceptance of Office—Notice of Election.]—The notice of his election, within five days of which the mayor elect is required, by 6 & 7 Will. 4, c. 76, s. 51, to accept such office, by making and subscribing the declaration, means notice received either by being present at the election, or by official notification. *Reg.* v. *Preece*, 5 Q. B. 94; D. & M. 156; 12 L. J., Q. B. 335; 7 Jur. 896.

A mayor was elected on the 9th November, being then absent from the borough, to which he did not return until the 23rd November. He had in the meantime casual information of his election, but did not receive any official notice of it until his return. Within five days after his return, he made the requisite declaration and took upon him the office:—Held, a sufficient acceptance of the office within five days after notice. *Ib.*

Obligation to Serve.]—Under a charter of Will. 3, the mayor of a corporation was appointed to be elected out of the forty-one common councilmen, and every mayor was appointed an

alderman:—Held, that a common councilman, who had once served the office of mayor, and acted as justice for the town, but had since quitted the town, and resided four miles distant, having only a bank there, and was an acting magistrate for the county, was not entitled to refuse to stand at a subsequent election of a mayor, though the serving that office would compel him to remove his residence to the town, and prevent his acting as magistrate for the county. *Rex* v. *Leyland*, 3 M. & S. 184.

Where a corporator is duly elected mayor he may be compelled to take office either by mandamus or indictment, but when the election has been a pretence the court will grant a mandamus for another election. *Rex* v. *Colchester*, 4 Dougl. 14.

Mandamus for a New Election.]—Where an election to the office of mayor becomes void within the year, the court has power, under 7 Will. 4 & 1 Vict. c. 78, to issue a mandamus commanding a new election. *Reg.* v. *Pembroke Corporation*, 8 D. P. C. 302; 4 Jur. 317.

Where there is a statutable incapacity in a person being twice elected to the office of mayor, the court will consider the election as void ab initio, and will thereupon issue a mandamus commanding a new election; and such mandamus must be addressed to the mayor and burgesses, though there is legally no mayor. *Ib.*

Quo Warranto.]—A quo warranto will not be granted to try by what title a party exercises the office of mayor of a borough, where the ground of such application is a defect in the title of those who have elected him mayor. *Reg.* v. *M'Carthy*, 10 Ir. C. L. R. 312.

On a quo warranto information for exercising the office of mayor, it is no objection to the title that the party who was councillor when elected mayor is not shown to have been on the burgess roll at that time, it being admitted that he was de facto councillor when elected mayor, and that he was on the burgess roll when elected councillor. *Reg.* v. *Dixon*, 15 Q. B. 33; 19 L. J., Q. B. 363; 14 Jur. 811.

—— **Sufficiency of Statement in Plea of Custom as to Mode of Appointment.**]—A plea to a quo warranto stated, that by an immemorial usage under a by-law, a court-leet had been in part holden in the morning, and in part in the evening, and that the custom had been to elect a mayor at the morning court, and that the burgess (such mayor elect) had been accustomed to be sworn into office at the evening court by the steward of the lordship, or his deputy. At the trial, the allegation in the plea was proved, but it appeared, in addition to the custom there set out, that it had been usual for the leet jury to present in writing the candidate who had the majority of votes at the morning court to be sworn in by the steward at the evening court, and that the jury had done so in the present instance:—Held, that this was a mere ministerial act on the part of the jury, and that such presentment was no essential part of the appointment, and need not be alleged in the plea; and consequently that there was no variance between the statement in the plea and the proof adduced at the trial. *Rex* v. *Rowland*, 3 B. & A. 130.

Absence of, at Election of Successor.]—The voluntary absence of a chief officer of a corporation upon the charter day of election of his successor, is not indictable upon the 11 Geo. 1, c. 4, s. 6, unless his presence as such chief officer is necessary by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex* v. *Corry*, 5 East, 372; 1 Smith, 358.

When a Casting Vote.]—See *Anon*, col. 204.

Rejection by, of Vote of Person entitled to be admitted Councillor.]—See *Reg.* v. *Coaks*, col. 181.

Eligible as Councillor—Alderman Substituted to act as Returning Officer.]—See *Reg.* v. *White*, col. 177.

Not Eligible as Councillor when Returning Officer.]—See *Reg.* v. *Owens*, col. 177.

Turn to go out of Office as Councillor falling during Mayoralty.]—See *Frost* v. *Chester*, col. 181, and *Reg.* v. *Owens*, col. 180.

d. Elective Auditors.

See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 25, 62, 65.

e. Revising Assessors.

See Municipal Corporations Act, 1882, ss. 29, 62, 65; *and* County Electors Act, 1888, s. 4 (1), (a).

Election of.]—Mandamus to the mayor, aldermen and burgesses of a borough, named in schedule (A.) of the 5 & 6 Will. 4, c. 76, and divided into wards, recited that no election of assessors to revise the burgess lists with the mayor in place of the last assessors had been made on or since 1st March, 1844, by reason whereof the offices were still vacant; and the writ commanded the mayor, aldermen and burgesses to meet and elect such assessors. Return, that they did meet, and were ready to elect and to deliver and receive voting papers, but there was not, at the time of such meeting, nor has there been thence hitherto any assessor of the borough, wherefore they could not elect. On demurrer to the return, for not stating how and under what circumstances it happened that there was no assessor for the borough:—Held, first, that the return was bad for that reason. *Reg.* v. *Weymouth Corporation*, 7 Q. B. 46; 14 L. J., Q. B. 353; 10 Jur. 67.

Held, secondly, that the mandamus did not in itself show that the election could not be proceeded with. *Ib.*

Held, thirdly, that any omission to appoint assessors might be remedied by an election under 7 Will. 4 & 1 Vict. c. 78, s. 26, which extends to officers eligible under that act and the 5 & 6 Will. 4, c. 76, the provisions of the 11 Geo. 1, c. 4, ss. 1, 2. *Ib.*

Eligible as Councillor.]—See *Molesworth, Ex parte*, col. 179.

Election of Assessor as Councillor — If no Notice of Ineligibility, Candidate in Minority not Entitled to be Returned.] — See *Reg.* v. *Hiorns*, col. 179.

f. Nomination.

See also A. 2, *a.* v., ante (col. 117).

See Municipal Corporations Act, 1882, ss. 51, 55, 56, 74.

Of Councillor—Nominator.]—At an election of town councillors for a ward in a borough under 22 Vict. c. 35, ss. 6, 7, no person is entitled to nominate who is not a member of the ward. *Reg.* v. *Parkinson*, 8 B. & S. 769; 37 L. J., Q. B. 52; L. R. 3 Q. B. 11; 17 L. T. 169; 16 W. R. 78.

—— **Misstatement of Roll Number.**] — The number on the burgess roll of a burgess nominating a candidate at a municipal election for the office of town councillor, must, in order to satisfy the requirements of 38 & 39 Vict. c. 40 (The Municipal Elections Act, 1875), s. 1, sub-s. 2, sched. I., form 2, and note, be stated in the nomination paper. Therefore, where, instead of the right number 695, the number 704 appeared in such paper, and an objection taken thereto was allowed by the returning officer, although no one had been or could be misled by the mistake: —Held, that the decision of the returning officer was correct, and that the effect of the mistake was not remedied by and could not be amended under the provisions of 41 & 42 Vict. c. 26, s. 41, and 35 & 36 Vict. c. 33, s. 13. *Gothard* v. *Clarke*, 49 L. J., C. P. 474; 5 C. P. D. 253; 42 L. T. 776; 29 W. R. 102; 44 J. P. 587.

—— **Description of Qualifying Property.**]—The nomination paper of a candidate is not rendered invalid by reason that the description of "the situation of the property in respect of which" a burgess subscribing "is inrolled on the burgess roll" is not identical with the description on the burgess roll. *Soper* v. *Basingstoke Corporation*, 46 L. J., C. P. 422; 2 C. P. D. 440; 36 L. T. 468; 25 W. R. 693.

It is sufficient if the description be true and do not mislead. *Ib.*

S. was nominated a candidate for the office of councillor in a borough; in his nomination paper his seconder was described as of High-street. The situation of the property of the seconder was described on the burgess roll as being in Winton-street. The street was generally known as High-street, and its name had been only recently changed to Winton-street; no one had been or could be misled by the description thereof as High-street. The mayor having declared the nomination paper to be void on the ground that the seconder of S. had improperly described the situation of the property in respect of which he was inrolled on the burgess roll:—Held, that the situation of the property of the seconder was sufficiently described, and that the decision of the mayor was wrong. *Ib.*

The provision of s. 1, sub-s. 2, of the Municipal Elections Act, 1875 (repealed by 45 & 46 Vict. c. 50), that "the nomination paper . . . shall be in the form No. 2 set forth in the schedule to the act, or to the like effect," is mandatory, and not directory; but a nomination paper signed by an inrolled burgess, which contains such a description of the property occupied by him at the time of subscribing such nomination paper as will enable a person to refer to the burgess roll to see whether the candidate is nominated by duly inrolled burgesses, is a sufficient compliance with the words of the section "to the like effect," even though the qualification of the burgess is in respect of a successive occupation. *Henry* v. *Armitage*, 53 L. J., Q. B. 111; 12 Q. B. D. 257; 50 L. T. 4; 32 W. R. 192; 48 J. P. 424—C. A.

Of County Councillor — Nominator's Signature.]—A nomination paper at a county council election was subscribed by one of the nominators, "James Sykes, junior." Upon the register this nominator's name was entered simply as "James Sykes":— Held, that the nomination paper had been duly subscribed, and that the nomination was not invalidated by the addition of the word "junior" to the nominator's name, it being his ordinary mode of signing it. *Gledhill* v. *Crowther*, 58 L. J., Q. B. 327; 23 Q. B. D. 136; 60 L. T. 866; 53 J. P. 677.

Of County Councillor — Name of Electoral Division Omitted.]—The nomination paper of a candidate for election as county councillor was complete and regular in every respect, with the exception that a blank in the heading of the form, which had been left for the insertion of the name of the electoral division, had not been filled in with the name of the division:—Held, that this omission did not invalidate the nomination of the candidate, being a mistake which fell within the scope of, and was cured by, the 72nd section of the Municipal Corporations Act, 1882. *Marton* v. *Gorrill*, 58 L. J., Q. B. 329; 23 Q. B. D. 139; 60 L. T. 867.

Of Councillor—Signature of Assenting Burgess.]— By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), third schedule, Elections, part ii., rules as to nomination in election of councillors: 1. Every candidate for the office of councillor must be nominated in writing; 2. The writing must be subscribed in the case of a ward election by two burgesses of the ward as proposer and seconder, and by eight other burgesses of the ward as assenting to the nomination. A nomination paper at a ward election was subscribed "Edwin J. Hooper," "W. E. Waller," "R. Turner," by three of the assenting burgesses. Upon the burgess roll were entered the names "Edwin John Hooper," "William E. Waller," and "Robert Turner," the numbers opposite these names on the burgess roll being the same as those appearing opposite the signature of the assenting burgesses on the nomination paper:— Held, that the nomination paper had been duly subscribed by the assenting burgesses. *Bowden* v. *Besley*, 57 L. J., Q. B. 473; 21 Q. B. D. 309; 59 L. T. 219; 36 W. R. 889; 52 J. P. 536.

A nomination paper at a ward election was subscribed with the correct name of Henry D. Davenport, as an assenting burgess, but his name was erroneously entered on the burgess roll as Davenport, Henry D., Evereux:—Held, that the nomination paper was not invalid. *Harding* v. *Cornwell*, 60 L. T. 959.

A nomination paper at an election of town councillors was subscribed with the full and correct name of "Charles Arthur Burman," as an assenting burgess; but his name was erroneously entered upon the burgess roll as "Charles Burman" only:—Held, that the defect was not such as was remedied by 45 & 46 Vict. c. 50, s. 241, enacting that "no misnomer or inaccurate description of any person . . . named in any roll

. . . required by this act shall hinder the full operation of this act with respect to that person . . . provided the description of that person . . . be such as to be commonly understood."—The words "commonly understood" in this proviso mean "commonly understood by any person comparing the nomination paper and the burgess roll." *Moorhouse* v. *Linney*, 15 Q. B. D. 273; 53 L. T. 343; 33 W. R. 704; 49 J. P. 471.

Same Burgess Assenting to Nominations in Excess of Vacancies.]—Sect. 1, sub-s. 2, of the Municipal Elections Act, 1875, provides that every candidate at a municipal election shall be nominated in writing subscribed by two burgesses as proposer and seconder, and by eight others as assenting to the nomination, and that "each candidate shall be nominated by a separate nomination paper, but the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, but no more." At a municipal election where there were four vacancies to be filled a burgess subscribed four nomination papers, which were delivered in due time, and subsequently he subscribed a fifth nomination paper, which was also delivered in due time. In each case he subscribed as one of the eight assenting burgesses required by the act:—Held, that the first four nomination papers were valid, and that the fifth was invalid. *Burgoyne* v. *Collins*, 51 L. J., Q. B. 335; 8 Q. B. D. 450; 30 W. R. 923; 46 J. P. 390.

Several Candidates Nominated by Same Person.]—See *Reg.* v. *Welchpool*, col. 176.

Of Councillor — Surname of Candidate Misspelt.]—In four nomination papers at an election for a council of a ward of a borough under the Municipal Corporations Act, 1882, the name of a candidate, which was Timothy Miller, was inserted thus: "Timothy Millar," in accordance with the entry in the burgess and ward roll:—Held, that there was a sufficient statement of "the surname . . . of the candidate" to satisfy the requirements of ss. 72 and 241, and rule 5 in part ii. of the third schedule to the act. *Miller* v. *Everton*, 64 L. J., Q. B. 692; 72 L. T. 838; 59 J. P. 358.

—— **Christian Name of Candidate Abbreviated.**]—The provisions of sub-s. 2 of s. 1 of the Municipal Elections Act, 1875 (repealed by 45 & 46 Vict. c. 50), that "the nomination paper shall state the surname and other names of the person nominated," are satisfied if such paper contains an abbreviation of a christian name which is universally understood as meaning that name and none other; so that a nomination paper which contains the abbreviation "Wm." as meaning "William," is a sufficient statement of the christian name of the person nominated within the meaning of the sub-section. *Henry* v. *Armitage*, 52 L. J., Q. B. 165; 48 L. T. 576; 31 W. R. 244. Reversed on another point, in C. A., supra, col. 190.

In a nomination paper at an election for town councillors of a borough under 38 & 39 Vict. c. 40, the name of a candidate, which was Robert Vicars Mather, was inserted thus,—"Robert V. Mather":—Held, not such a statement of "the surname and other names of the person nominated" as to satisfy the requirements of s. 1 and the form given in schedule 2; and that the inaccuracy was not cured by 6 & 7 Will. 4, c. 76, s. 142. *Mather* v. *Brown*, 45 L. J., C. P. 547; 1 C. P. D. 596; 34 L. T. 869; 24 W. R. 736.

—— **Candidate Abroad.**]—A., when absent from the United Kingdom, was nominated town councillor. No written consent by him to his nomination was produced at the time of the delivery of the nomination paper:—Held, that A.'s election was void, and that the other candidate, who had been duly nominated, was entitled to the seat. *Brown* v. *Benn*, 53 J. P. 167.

Name of Candidate not on Burgess Roll when nominated as Councillor.]—See *Budge* v. *Andrews*, col. 174.

Nomination Papers—Time for Delivery.]—A town clerk has no discretion to require the delivery of nomination papers for town councillors at an earlier period than two days before the election, the words of 22 & 23 Vict. c. 35, s. 6, "at least two whole days," not giving him the discretion to require that the papers be transmitted to him more than two days before the day appointed for the election. *Reg.* v. *Glover*, 15 L. T. 289.

Prior to a municipal election, the town clerk is, by 38 & 39 Vict. c. 40, s. 1, sub-s. 1, to issue a notice stating the last day on which nomination papers are to be delivered. By sub-s. 3, nomination papers are to be delivered seven days at least before the day of election, and the mayor is to sit at the town hall on a subsequent day to decide on the validity of objections made to nomination papers. In accordance with these enactments, the town clerk issued a notice for a forthcoming municipal election, stating that the 23rd of October was the last day on which nomination papers were to be delivered. The 23rd of October only allowed six days (exclusive of Sundays and the days of nomination and election) to intervene between the nomination day and the day of election:—Held, that seven days mean seven clear days, exclusive of the nomination day and the day of election as well as of Sundays. *Howes* v. *Turner*, 45 L. J., C. P. 550; 1 C. P. D. 670; 35 L. T. 58.

T., one of the candidates, delivered his nomination paper on the 23rd of October. W., another candidate, delivered his paper on the 22nd of October, but took it back for the purpose of making an immaterial alteration, and returned it on the 23rd of October. Objections to the nomination papers of T. & W., on the ground that they had been delivered on the wrong day, were duly made, but disallowed by the mayor. T. and W. obtained a majority of votes and were returned as elected:—Held, that the mayor had no power to decide such an objection, as his jurisdiction was confined to the form of the nomination papers, but that such question could be raised by petition to the Court of Common Pleas. *Ib.*

Held, also, that T.'s paper was not delivered in time, but that as W.'s was good at the time of delivery and was not taken back with the intention of withdrawal, it was delivered in time; but that as the notice of the town clerk was so defective as to mislead one of the candidates and probably the constituency, and as consequently there could be no free election, such election was void. *Ib.*

—— **Delivery by Agent — Jurisdiction on Petition.**]—A petition was presented, under

35 & 36 Vict. c. 60, by an unsuccessful candidate at an election of councillors for a borough, questioning the election of a councillor but not claiming the seat. The nomination paper of the petitioner was delivered to the town clerk by an agent of the petitioner, and was not otherwise delivered by the candidate himself or his proposer or seconder, as required by 38 & 39 Vict. c. 4, s. 1, sub-s. 3; the nomination paper was objected to on this ground; the mayor disallowed this ground of objection, but allowed others; and the petitioner was the only candidate competing with the successful candidates:—Held, first that the delivery of the nomination paper by an agent invalidated the nomination. *Monks* v. *Jackson*, 46 L. J., C. P. 162; 1 C. P. D. 683; 35 L. T. 95.

Held, secondly, that notwithstanding the disallowance of this ground of objection by the mayor, the fact was cognisable by the court, and that the respondent must be declared to have been duly elected. *Ib.*

Complaint of Mayor's Decision as to Validity of, not a "Complaint of the Conduct" of the Mayor.]—See *Harmon* v. *Park* (No. 1), col. 208.

Substitution of Different Proposer after Delivery of Paper.]—By the Municipal Elections Act, 1875 (38 & 39 Vict. c. 40), s. 1, sub-s. 2, at any municipal election (of councillors) every candidate shall be nominated in writing: the writing shall be subscribed by two inrolled burgesses of such borough or ward as proposer and seconder, and by eight other inrolled burgesses of such borough or ward as assenting to the nomination. At an election of a ward councillor, a burgess was nominated in a paper signed by B. and H. as proposer and seconder, and by eight other burgesses as assenting to the nomination. After the nomination paper had been delivered to the town clerk it was altered in the absence of the seconder and assenting burgesses by striking out the name of B. as proposer and substituting that of G., another duly-inrolled burgess:—Held, that the nomination was invalid. *Harmon* v. *Park* (No. 2), 50 L. J., Q. B. 775; 7 Q. B. D. 369; 45 L. T. 174; 45 J. P. 714.

Good Nomination not vitiated by Another that is Bad.]—See *Northcote* v. *Pulsford*, col. 203.

Rules in Ballot Act not applicable.]—Held, that a defect in a bad nomination was not cured by the 12th and 13th rules of the 1st schedule of the Ballot Act, inasmuch as those rules do not apply to the nomination at a municipal election. *Northcote* v. *Pulsford*, 44 L. J., C. P. 217; L. R. 10 C. P. 476; 32 L. T. 602; 23 W. R. 700.

Statutory Provision for Election of Commissioners by Town Council—Resolution of Council restricting Power of Nomination—Ultra Vires.]—By the 1 Geo. 4, c. 52 (one of the acts regulating the port and harbour of Cork), s. 21, it was enacted that on the second Tuesday in June, or on some other day not more than ten days from the second Tuesday in June in each year, the four senior commissioners appointed under the act, not being members of the common council of Cork, should go out of office as such commissioners, and four other commissioners should be chosen to supply their places by the mayor, sheriffs and commonalty of the city of Cork, or the major part of them, in their open court duly assembled, and which court the mayor of the said city for the time being should, from time to time, cause to be held for such purpose, giving six days' notice, at the least, of the time and place of holding the same, by advertisement in one or more of the public newspapers of the said city of Cork. The council of the city of Cork, on the 7th July, 1882, passed the following resolution:—That the standing order be adopted—"That on electing gentlemen to membership of public boards, or other honorary positions, all nominations thereto shall be made in writing, signed by two members of the council (as proposer and seconder), and delivered to the town clerk seven clear days before the day of election; that each nomination shall be confined to one candidate, and that no nomination shall be announced until all shall have been received and recorded, the names being then read out in the order in which the town clerk shall receive them." On a motion for a writ of quo warranto, to set aside the election of three persons as commissioners under the 1 Geo. 4, c. 52, s. 4, on the ground that they had not been nominated seven clear days before the day of election, as required by the resolution of the 7th of July, 1882:—Held, that such resolution was ultra vires and invalid, as imposing upon the candidates for election a qualification not prescribed by the statute, and thus unduly restricting the class of persons eligible. *Reg.* v. *Downing*, 16 L. R., Ir. 501.

g. Presiding and Returning Officers.

See also A. 2, *a.* vi., ante, col. 117.

See Municipal Corporations Act, 1882, ss. 42, 53, 57–61, 67, 75.

Presiding Officer—First Vote and Casting Vote.]—The right of a chairman of a municipal meeting, not otherwise disqualified, to have a first vote, besides a casting vote, is not interfered with by s. 61, sub-s. 4, of the Municipal Corporations Act, 1882. *Louth Municipal Election, In re*, *Nell* v. *Longbottom*, 63 L. J., Q. B. 490; [1894] 1 Q. B. 767; 10 R. 193; 70 L. T. 499.

—— **Casting Vote—By-law contrary to Charter.**]—Where a charter directed the election of senior bailiff to be made by a majority of a select body, a by-law giving a casting vote to the presiding officer in case of an equality of votes, was bad. *Rex* v. *Ginever*, 6 Term Rep. 732.

—— **Appointment of, in Charter.**]—The king was not bound by 9 Anne, c. 20, s. 8, and, therefore, in granting a new charter to an old corporation, he might appoint a person as presiding officer who had presided at the election of members of parliament, though he had previously held that situation. *Rex* v. *Hughes*, 7 B. & C. 708; 1 M. & Ry. 625; 6 L. J. (o.s.) K. B. 190; 31 R. R. 288.

—— **Election in Absence of, void.**]—It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed; and the election cannot be proceeded in during his absence, although he should improperly absent himself. *Rex* v. *Williams*, 2 M. & S. 141.

If a presiding officer, who, by the constitution of the borough, forms an integral part of an

elective assembly, departs from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after its departure is void. *Rex* v. *Buller*, 8 East, 389.

—— **Proceeding with Election after Meeting dissolved by.**]—See *Rex* v. *Gaborian*, col. 170.

—— **No Authority to exclude Candidate from Polling Station.**]—See *Clementson* v. *Mason*, col. 206.

—— **Election not avoided by Errors of, as to Marking Voting Papers, &c.**]—See *Woodward* v. *Sarsons*, col. 200.

—— **Defect in Title of, avoids Election of Mayor.**]—See *Rex* v. *Bridgewater*, col. 184. *But see now* Municipal Corporations Act, 1882, s. 42 (2).

Returning Officer—Who is.]—At the election of a councillor for a ward in a borough, the mayor is not the returning-officer within the meaning of s. 20 of the Ballot Act, unless he also happens to be alderman of such ward, or unless the office of alderman in such ward be vacant. *Harmon* v. *Park* (No. 1), 50 L. J., Q. B. 227; 6 Q. B. D. 323; 44 L. T. 81; 29 W. R. 750; 45 J. P. 436.

—— **Where Mayor a Candidate, Alderman substituted to act as.**]—See *Reg.* v. *White*, col. 177.

—— **Candidate acting as — Disqualification —Remedy.**]—The defendant, the mayor of a borough, was candidate for the office of alderman in the borough. At the election he presided and voted for himself, and, the votes being equal, gave a casting vote for himself, and declared himself duly elected:—Held, that this disqualification fell within s. 87, sub-s. 1 (*d*) or (*e*), of the Municipal Corporations Act, 1882, and could not be questioned except by an election petition, and consequently quo warranto would not lie. *Reg.* v. *Morton*, 61 L. J., Q. B. 39; [1892] 1 Q. B. 39; 65 L. T. 611; 40 W. R. 109; 56 J. P. 105.

—— **Knowledge of Voters that Candidate is— No Knowledge that he is disqualified.**]—See *Reg.* v. *Tewkesbury Corporation*, col. 201.

—— **Not eligible as Councillor.**]—See *Reg.* v. *Owens*, col. 177.

—— **Duties and Jurisdiction of—Declaration of Election.**]—Two candidates, R. and P., were nominated for the vacant office of councillor of one of the wards of a borough. P. objected to R.'s nomination on the ground that R. was disqualified, being an alderman of the borough whose term of office had not expired, but the mayor disallowed the objection. Throughout the election P. insisted upon his objection, and claimed to be elected whatever the result of the poll might be. The votes having been counted shewed a majority for R., and the returning officer read out the names and numbers to the mayor, who announced them in public. Having taken time to consider the objection, the returning officer on the following day issued a public notice stating the number of votes given to each candidate, and the objection, and declaring P. to be duly elected. P. thereupon made and subscribed the declaration of acceptance of the office required by the Municipal Corporations Act, 1882, ss. 34, 35. R. subsequently made and subscribed a similar declaration:—Held, but without deciding whether an alderman is disqualified for election as councillor, that the returning officer had no jurisdiction to determine the question of disqualification, the proper method for determining that question being an election petition as provided by the Municipal Corporations Act, 1882, s. 87, and the duty of the returning officer being to count the votes and "forthwith to declare to be elected the candidate to whom the majority of votes have been given," as provided by s. 2 of the Ballot Act, 1872; that P. had not been declared to be elected; that the office was not full; and that he was not entitled to a mandamus to compel the mayor and corporation to receive his votes at their corporate meetings. *Reg.* v. *Coaks* (3 E. & B. 249; ante, col. 181) discussed. *Pritchard* v. *Bangor Corporation*, 57 L. J., Q. B. 313; 13 App. Cas. 241; 58 L. T. 502; 37 W. R. 103; 52 J. P. 564—H. L. (E.)

—— **Liability for Costs.**]—Returning officers have no general immunity from liability to pay costs for their negligence in connection with elections—per Day, J. *Wilson* v. *Ingham*, 64, L. J., Q. B. 775; 15 R. 488; 72 L. T. 796.

—— **Effect of Declaration that Bankrupt Councillor re-elected owing to void Nomination.**]—See *Reg.* v. *Welchpool*, col. 176.

—— **Publication of Candidate's Name as elected — Subsequent Publication of another Name after Statutory Time.**]—See *Reg.* v. *Leeds*, col. 182.

—— **Neglect to insert Voter's Number in Counterfoil of his Voting Paper—Tendered Ballot Papers counted—Amendment of Petition.**]—See *Pickering* v. *Startin*, col. 209.

—— **Decision of, as to Validity of Nomination, not conclusive, on Petition.**]—See *Budge* v. *Andrews*, col. 175; and *Monks* v. *Jackson*, col. 193.

—— **No Jurisdiction to decide Objection as to Time of Delivery of Nomination Papers.**]—See *Howes* v. *Turner*, col. 192.

—— **Complaint of Decision of Mayor as to Validity of Nomination Paper, not a Complaint of his "Conduct."**]—See *Harmon* v. *Park* (No. 1), col. 208.

h. The Poll.

See also A. 2, *a.* vii., ante, col. 120.

See Municipal Corporation Act, 1882, ss. 51, 52, 56, 58—64, 69, 70, 72.

Voting Papers.]—Voting papers at municipal elections are not chargeable with duty by 33 & 34 Vict. c. 97, and need no stamp. *Reg.* v. *Strachan*, 41 L. J., Q. B. 210; L. R. 7 Q. B. 463; 26 L. T. 835; 20 W. R. 629.

—— **Signature of Voter.**]—The burgess's usual signature is sufficient; and it is no valid objection that the christian name is denoted only by an initial letter. *Reg.* v. *Avery*, 18 Q. B. 576; 21 L. J., Q. B. 428; 17 Jur. 194.

Joseph C., who was entitled to vote at the election of councillors, was on the burgess roll as James C. He signed the voting paper with the name of James C. On a motion for quo warranto, the grounds of objection stated in the rule being "the reception of votes from persons who were not entitled to vote, or who fraudulently personated persons who were entitled to vote": —Held, that the objections were not sustained. *Reg.* v. *Thwaites*, 1 El. & Bl. 704; 22 L. J., Q. B. 238; 17 Jur. 712.

Held, also, that the objection that C. had voted by a wrong name, if formally raised, could not have been sustained, inasmuch as it was the name on the burgess roll, and the misnomer would be cured by 5 & 6 Will. 4, c. 76, s. 142. *Ib.*

The name of the burgess voting must so appear upon the face of the voting paper as to shew clearly that the name is intended as a signature; and also, the name must be connected with the name of the street in which the property is situate. *Reg.* v. *Tart*, 1 El. & El. 618; 28 L. J., Q. B. 173; 5 Jur. (N.S.) 679.

—— **Commencing "I, A. B," delivered by Mistake to, and signed by, "C. D."**]—By the Municipal Corporations Act, 1882, s. 60, sub-s. 4, any person entitled to vote at an election of aldermen may vote "by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." A voting paper was delivered, commencing "I, the undersigned, A. B.," and ending with the signature "C. D."; and upon a petition against the return of the persons elected, the commissioner received evidence shewing that the town clerk had inserted A. B.'s name, in order that the voting paper might be used by him, but by inadvertence it was handed to C. D., who signed and personally delivered it to the chairman without discovering the mistake:—Held, that the vote was valid, and that the commissioner was right in receiving evidence of the circumstances under which it was given. *Summers* v. *Moorhouse*, 53 L. J., Q. B. 564; 13 Q. B. D. 388; 51 L. T. 290; 32 W. R. 826; 48 J. P. 424.

—— **Description of Voter's Qualifying Property.**]—At an election, a voting ticket, "W. I., of K. Street," was rejected on the ground that the qualification of W. I. on the burgess roll was described as "house in M. Street." It was shewn by affidavits that K. Street and M. Street intersect; that the house in question was a corner house; that it was one house with a street door in each street, consisting of what had formerly been two distinct houses, one in each street, and one of them being the house in M. Street:—Held, that the description was such as to be commonly understood, and that the vote was improperly rejected. *Reg.* v. *Gregory*, 1 El. & Bl. 600; 22 L. J., Q. B. 120; 17 Jur. 272; 1 W. R. 148.

A voting paper is correct if the place in respect of which the party voted, and for which he appears to be rated on the burgess roll, is described according to its actual situation, though the description may vary in terms from that on the burgess roll. *Reg.* v. *Avery*, 18 Q. B. 576; 21 L. J., Q. B. 428; 17 Jur. 194.

A voting paper described the property for which the voter voted as "situate in the parish of C.," which formed part of the borough. The description of the place was such as to be commonly understood:—Semble, by Lord Campbell, C.J., and Crompton, J. (Coleridge, J., dissenting), that the description was sufficient, and if not sufficient, it was an inaccurate description cured by s. 142. *Reg.* v. *Spratley*, 6 El. & Bl. 363; 25 L. J., Q. B. 257; 2 Jur. (N.S.) 735; 4 W. R. 527.

—— **Candidate's Place of Abode.**]—A shop and part of a house were used by A. B. and C. D. for carrying on the trade of booksellers in copartnership. It was entered on the burgess list and burgess roll opposite the name of A. B., as "house, Trinity Street." A. B. occupied a house, and resided and inhabited therein, within seven miles of the borough. At an election for the office of alderman, the voting papers of the members of the council for A. B. described his place of abode as Trinity Street:—Held, that this description of the place of abode was insufficient to satisfy the above section; that this defect was not cured by 5 & 6 Will. 4, c. 76, s. 142; and that A. B. was not duly elected alderman. *Reg.* v. *Deighton*, D. & M. 683; 5 Q. B. 896; 13 L. J., Q. B. 241; 8 Jur. 686.

On the election of an alderman, if the voting papers do not contain an accurate description of the place of abode of the party voted for, the votes are bad, though the inaccuracy is without fraud, and the description in the voting paper is commonly understood to be that of the party. *Ib.*

Quo warranto for exercising the office of councillor. Plea, that the defendant was elected one of the councillors of the borough. Replication, that in the voting papers his place of abode was stated to be Gonville Place, whereas his place of abode at the time of the election was at Newmarket Road, and not at Gonville Place. Rejoinder, that Gonville Place had been his place of abode until a short time before the election, and that Gonville Place, at the time of the election, was commonly understood, in and throughout the borough, to be his place of abode, and that his descriptions in the voting papers by the christian name and surname, with the place of abode and description of the defendant at the time of the election, were respectively such descriptions of the defendant by the christian name and surname, with the place of abode and description of the defendant, as to be commonly understood, in and throughout the borough, as descriptions of the defendant by his christian name and surname, with his place of abode and description:—Held, that the replication was good, and the rejoinder bad; because s. 32 of the 5 & 6 Will. 4, c. 76, requires that the voting paper shall contain the christian names and surnames of the persons for whom the burgess votes, with their respective places of abode and descriptions: and the voting papers contained an accurate description of a wrong place of abode, and not an inaccurate description of the right place of abode of the defendant, and therefore were not within s. 142, which cures an inaccurate description of any person or place in any voting paper, provided that the description of such person or place be such as to be commonly understood. *Reg.* v. *Coward*, 16 Q. B. 819; 20 L. J., Q. B. 359; 15 Jur. 726.

The voting papers must state the candidate's place of residence; his place of business, if he does not reside there, is not a place of abode; although the business is extensive and the premises where it is carried on are in the same ward as the residence, and although the proprietor is

better known by his place of business than by his place of residence. And an election by means of voting papers stating only the place of business will be no answer to a quo warranto information. *Reg. v. Hammond*, 17 Q. B. 772; 21 L. J., Q. B. 153; 16 Jur. 194.

—— **Description of Candidate.**]—A voting paper contained the christian name and surname of the candidate and his place of abode, and nothing more:—Held, that this was not an inaccurate description, but a total omission of the description of the candidate, and was not cured by 5 & 6 Will. 4, c. 76, s. 142; and the vote was therefore invalid. *Reg.* v. *Tugwell*, 9 B. & S. 367; 37 L. J., Q. B. 275; L. R. 3 Q. B. 704; 16 W. R. 1039.

—— **Misnomer of Candidate.**]—At an election of councillors, voting papers designated the person voted for by the initial of his christian name:—Held misnomers, and therefore cured by s. 142. *Reg.* v. *Plenty*, 9 B. & S. 386; 38 L. J., Q. B. 205; L. R. 4 Q. B. 346; 20 L. T. 521; 17 W. R. 792.

—— **Contraction of Christian Name of Candidate.**]—The 7 Will. 4 & 1 Vict. c. 78, s. 14, is satisfied if the voting paper for the election of alderman contains a contraction of a christian name which is well known, and in ordinary use as representing that name, and in such a case the name need not be written in full; and therefore the contractions "Wm." and "Willm." may be used in a voting paper as equivalent to "William." *Reg.* v. *Bradley*, 3 El. & El. 634; 30 L. J., Q. B. 180; 7 Jur. (N.S.) 757; 3 L. T. 753; 9 W. R. 372.

Name of Candidate who had withdrawn printed by Inadvertence.]—Where the name of a person who had withdrawn his candidature was inadvertently put on the ballot papers, and thirty-four votes were recorded in his favour, an election was declared invalid, as not having been conducted in accordance with the principles laid down in the body of the Ballot Act, 1872, and as the result was probably affected by such non-compliance. *Wilson* v. *Ingham*, 64 L. J., Q. B. 775; 15 R. 488; 72 L. T. 796; 43 W. R. 621; 59 J. P. 614.

—— **Invalid in every Particular—Mandamus—Rule absolute in first Instance.**]—In a case where the voting papers were not signed or personally delivered to the chairman, and did not contain the surnames and names of and the places of abode and descriptions of the persons for whom the votes were given, the court, in the exercise of the discretion given by s. 225 of the Municipal Corporations Act, 1882, granted a rule absolute in the first instance for a mandamus to hold a fresh election. *Reg.* v. *Wilton Corporation*, 34 W. R. 273.

—— **Personal Delivery to Chairman.**]—By the Municipal Corporations Act, 1882, s. 60, sub-s. 4, "Every person entitled to vote may vote . . . by . . . personally delivering at the meeting, to the chairman, a voting paper . . ." At an election of aldermen for a borough, the chairman requested the town clerk to collect the voting papers and hand the same to him. The town clerk accordingly left his seat, walked round the members of the town council present, and received from the hands of each of certain of them a voting paper, and immediately handed such voting papers into the hands of the chairman, who could see, and in fact did see, that each of such members was a person entitled to vote at the election:—Held, that there was a personal delivery of the voting papers to the chairman within the meaning of the section. *Baxter* v. *Spencer*, 64 L. J., Q. B. 644; 72 L. T. 838; 59 J. P. 376.

—— **On Occasion of Extraordinary Vacancies.**]—Upon an election of four councillors on the 1st November, 1841, to fill three ordinary vacancies, and one extraordinary vacancy for a shorter period than three years, the voting papers contained the names of four candidates, without distinguishing which was intended to fill the extraordinary vacancy. Upon the trial of a quo warranto, the judge told the jury that the alderman and assessor ought to have obtained the information which enabled them to declare whether a candidate was elected to fill an ordinary or the extraordinary vacancy from the voting papers alone:—Held, that this direction was right. *Rowley* v. *Reg.* 6 Q. B. 668; 14 L. J., Q. B. 62; 8 Jur. 1170—Ex. Ch. *S. C.*, in court below, *Reg.* v. *Rowley*, 3 Q. B. 143; 11 L. J., Q. B. 198; 6 Jur. 872.

Where an election was held to fill three ordinary vacancies and one extraordinary vacancy, and the voting papers contained the names of four candidates, but did not specify the person intended to fill the latter vacancy, such voting papers are void. *Ib.*

—— **Omission to Insert in Counterfoil Number of Burgess on Roll—Tendered Papers Counted—Amending Petition.**]—See *Pickering* v. *Startin*, col. 209.

—— **Marking on Face of, Number of Burgess on Roll—Wrapping in Declaration of Inability to Read.**]—At a municipal election, held under the Ballot Act, 1872, the presiding officer at one of the polling stations marked upon the face of every ballot paper which he gave out to each elector at such station the number of the voter appearing on the burgess roll. The number so marked was not in fact seen so as to be identified, but it could have been seen at the counting. At another of the polling stations, the presiding officer placed each of the ballot papers which he had marked by the direction of voters unable to read, in the ballot box, wrapped up in the declaration of inability to read made by the voter for whom the vote was marked, and each such vote could have been, but was not in fact, identified at the counting. No voter had been prevented from voting, and these errors of the presiding officers did not affect the result of the election, the majority of electors not being thereby prevented from effectually exercising their votes in favour of the candidate they preferred:—Held, that the election was therefore not void either by the common law of parliament or under the Ballot Act, 1872. *Woodward* v. *Sarsons*, 44 L. J., C. P. 293; L. R. 10 C. P. 733; 32 L. T. 867.

Held, also, that the ballot papers which had been so marked on their face by the presiding officer with the number of the voter, were void and ought not to be counted; but that the ballot papers which had been wrapped in the declarations of inability to read were not on that account to be rejected, but ought properly to be counted. *Ib.*

—— **Signed by Voter—Writing Name of Candidate instead of a Cross.**]—A ballot paper which bears the voter's signature is void, and must be disallowed; so also a ballot paper must be disallowed which has the name of the candidate written by the voter instead of a cross opposite to the printed name of the candidate. *Ib.*

—— **Two Crosses instead of One—Mark other than Cross—Cross in Wrong Place.**]—The mere fact of two crosses being put, or of the cross being of a peculiar form, or of there being another mark with the cross, or of there being a straight line instead of a cross, or of the cross being put on the left-hand side of the candidate's name instead of on the right-hand side, will not vitiate the ballot paper, and the same should not be rejected on that account, unless there be evidence of an arrangement that such peculiar marks were to be indications of identity. *Ib.*

—— **Proof of.**]—Voting papers given in at an election of councillors are not such public documents as to prove themselves on production from the proper custody; to make them evidence, their identity must be traced by witnesses. *Reg.* v. *Ledgard*, 8 Ad. & E. 535; 7 L. J., Q. B. 237.

When Votes for Ineligible Candidate null and void—Notice of Disqualification.]—At the election of town councillors in a borough not divided into wards, there were four vacancies and five candidates. B., one of the four who had a majority of votes, was the mayor, and acted as returning officer, and was therefore incapable of being elected:—Held, that the mere knowledge on the part of the electors who voted for B. that he was mayor and returning officer did not amount to knowledge that he was disqualified in point of law as a candidate; and therefore their votes were not thrown away, so as to make the election fall on the fifth candidate. *Reg.* v. *Tewkesbury Corporation*, 37 L. J., Q. B. 288; L. R. 3 Q. B. 629; 18 L. T. 851; 16 W. R. 1200; 9 B. & S. 683.

Semble, the votes given at a municipal election for a candidate rendered ineligible by the express words of an act of parliament, in consequence of his holding another office in the same corporation, are not thrown away, unless express notice of the ineligibility has been given to the voters upon or at the time of the election. *Reg.* v. *Hiorns*, 3 N. & P. 148; 7 A. & E. 960; 2 Jur. 108.

Upon the nomination of two aldermen of a borough, in order that one of them might afterwards be elected mayor, pursuant to charter:—Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year, were not thrown away, so as to authorise the returning officer to return another candidate, who was in a minority. *Rex* v. *Bridge*, 1 M. & S. 76; 14 R. R. 395.

One who had not taken the sacrament according to the rites of the Church of England, within a year before his election in fact to a corporate office, was disqualified by 13 Car. 2, stat. 2, c. 1, s. 12, from being elected; and if such disqualification was notified to the electors at the time of election, votes afterwards given to such person were then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, was duly elected and entitled to be sworn in; but until he was sworn in, the office was not legally filled up and enjoyed by him, within the exception of the Annual Indemnity Act; and therefore, if the disqualified person who had the greatest number of votes was sworn into the office, and afterwards qualified himself by taking the sacrament, within the time allowed by the Indemnity Act, he was thereby recapacitated and freed from all disability, and his title to the office thereby protected, such office not having been then already vacated by judgment, or legally filled up and enjoyed by another person. *Rex* v. *Parry*, 14 East, 550.

At a meeting duly held for the election of an alderman for a borough, A. and B. were candidates. Two votes were given for each, when they were interrogated whether they had qualified by taking the sacrament within the year before the election, pursuant to 13 Car. 2, stat. 2, c. 1, s. 12. A. admitted he had not, B. answered that he had. Public notice was then given of A.'s disqualification; but the poll proceeded, and after the notice twenty voted for A. and sixteen for B.: the mayor swore in A.; two of the aldermen (as they might by the constitution of the borough) swore in B.; A. took the sacrament within the time limited by the Annual Indemnity Act:—Held, first, that though notice of the disqualification of A. was not given till after the commencement of the election, all the votes for him after such notice were thrown away; secondly, that B. having the greatest number of legal votes, was duly elected, and having been sworn in by the proper officers, the office was legally filled up by him, so as to exclude the operation of the Annual Indemnity Act in favour of A.; thirdly, that B. must be presumed to have been qualified according to his own declaration, there being no evidence to the contrary. And the court appeared to have considered it of great weight that the majority (thirty-six out of forty) was unpolled at the time of the notice, though not prepared to say that it would have made any difference, though the notice had not been given till a more advanced period of the poll, if the votes for B. had exceeded the number given for A. before notice. And this judgment was affirmed by the House of Lords, the Lord Chancellor thinking that those who had voted for a disqualified person without notice, might, if they chose to demand permission, vote again for another person, but that no one was bound to call upon them to do so. *Hawkins* v. *Rex*, 2 Dow. 124; 10 East, 211; 14 R. R. 129.

The votes of electors given for a candidate, when it is publicly known that such candidate is a woman, are thrown away, even though the electors may not have been aware that this fact actually constituted a disqualification. *Beresford Hope* v. *Sandhurst* (*Lady*), 58 L. J., Q. B. 316; 23 Q. B. D. 79; 61 L. T. 150; 37 W. R. 548; 53 J. P. 805—C. A.

Candidate known to be Disqualified elected Councillor—Right of Qualified Candidate in Minority to vote at Election of Mayor.]—See *Reg.* v. *Coaks*, col. 181.

Votes given for Candidate, known to be objected to as having an Interest in Contracts with Council, thrown away.]—See *Cox* v. *Ambrose*, col. 178.

Vote of Councillor, who was Chemist to Council when elected, bad.]—See *Louth Municipal Election, In re, Nell* v. *Longbottom*, col. 178.

Vote of Alderman, who let Building for Polling Station, good.]—*Ib.*

Voting for two Candidates jointly when only one Vacancy—Votes void—Third Candidate in Minority elected.]—Previously to the annual election of councillors in November, in a borough divided into wards, the mayor published a notice purporting to be made with the concurrence of the aldermen and assessors, to the effect that two vacancies were to be filled up, one in the room of A. going out by rotation, and one in the room of B. who had been declared a bankrupt. The council had not declared the office of B. to be void, or given any notice thereof. At the election, 250 burgesses voted for two candidates jointly, and 120 voted for the third singly:—Held, that the votes given for the two candidates were thrown away, and that the third candidate, to whom the 120 votes were given, was duly elected. *Reg.* v. *Leeds Corporation*, 3 N. & P. 145; 7 A. & E. 963; 1 W., W. & H. 23; 7 L. J., Q. B. 80; 2 Jur. 545.

Votes for Candidate twice nominated.]—A candidate at a municipal election was twice nominated, one nomination being good, but the other being bad. His name appeared in the ballot papers twice, once in respect of each nomination. Seventy-one voters appended their marks to his name under one nomination, and 301 under the other. All the voters so voting intended to vote for the candidate, and if both classes of voters could be added together, he had a majority, and was entitled to be returned:—Held, that having been duly nominated, and having a majority of votes, he was entitled to be returned. *Northcote* v. *Pulsford*, 44 L. J., C. P. 217; L. R. 10 C. P. 476; 32 L. T. 602; 23 W. R. 700.

Bad Votes must affect Result in order to impeach Election.]—To impeach the election of a party returned as elected, it is not sufficient to allege that many votes were bad and fictitious, without shewing that some other candidate had a majority of legal votes. *Rex* v. *Jefferson*, 2 N. & M. 487.

Voting in two Wards.]—By the Municipal Corporations Act (5 & 6 Will. 4, c. 76), s. 44, if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be inrolled and to vote in such one of the wards as he shall select, but not in more than one. At an election of councillors for a borough which was divided into wards a burgess who was on the roll for two wards voted in one ward and immediately afterwards voted in the other ward:—Held, that the vote was good, and that the voter having voted in one ward, had irrevocably made his selection, which was not affected by what took place afterwards. *Reg.* v. *Harrald*, 42 L. J., Q. B. 211; L. R. 8 Q. B. 418; 28 L. T. 767; 21 W. R. 910.

Burgess Roll conclusive as to Right to Vote.]—See *Reg.* v. *Tugwell*, col. 167.

Elector registered in more than one Division can only vote in one for County Councillor.]—See *Knill* v. *Towse*, col. 180.

Candidate declared to be duly elected Councillor — Subsequent rejection of Vote as Councillor — Mandamus.]—See *Reg.* v. *Leeds*, col. 182.

Outgoing Alderman may vote for Mayor.]—See *Reg.* v. *Maddy*, col. 184.

Erroneous Rejection of Vote by Mayor—Consequent Equality of Votes.]—See *Rex* v. *Gaborian*, col. 170.

Mayor—Casting Vote.]—A mayor has no casting vote by common right, but must support a claim thereto either by charter or usage. *Anon.*, Lofft. 315.

Casting Vote at Election of Mayor.]—See *Hall* v. *Walker*, col. 184.

Returning Officer giving Casting Vote for himself.]—See *Reg.* v. *Morton*, col. 195.

Electors specified in Charter.]—A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. *Rex* v. *Hoyte*, 6 Term Rep. 430.

—— **Majority of each specified integral Part of Corporation must attend.**]—Where an integral part of a corporation, composed of a definite number, is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly, although other parts of the corporation also join in such election, and a majority of the whole existing body actually attends, but a majority of those present, when legally assembled, will bind the rest. *Rex* v. *Miller*, 6 Term Rep. 268; 3 R. R. 172.

Where it is granted by charter that a corporation shall have so many aldermen and so many capital burgesses, and that when one of the latter shall die, depart or be removed, another shall be elected in his place by "the mayor and aldermen and other capital burgesses then surviving or remaining, or the greater part of them," the election must be made by a majority of the full members of aldermen and of capital burgesses; a mere majority of the members of both bodies who happen to survive is not sufficient. *Rex* v. *May*, 4 B. & Ad. 843.

A charter directed that a borough should consist of a mayor, four jurats and two bailiffs; and that when any bailiff or jurat should die, the remaining jurats and bailiffs, or the greater part of them, of whom the mayor should be one, should elect another or others of the burgesses or inhabitants to be a jurat; one vacancy occurred in the office of jurat, and an inhabitant was elected a jurat by a meeting at which the mayor, two jurats and two bailiffs were present:—Held, a good election: the rule requiring the presence of a majority of each definite part of the elective body not applying, where in cases of one vacancy, viz. in the office of bailiff, it would be impossible for a majority of the bailiffs to be present. *Rex* v. *Greet*, 2 M. & Ry. 391; 8 B. & C. 363; 6 L. J. (o.s.) K. B. 331.

Where a charter required that a mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect, and the common council was a definite body consisting of thirty-six:—Held, that a majority of the whole number must meet to form an elective assembly; and that if the corporation be so reduced as that so many do not remain, no election could be had at all. *Rex* v. *Bellringer*, 4 Term Rep. 810.

So, where the charter of a corporation, consisting of a mayor and twenty-four capital burgesses, granted that when and so often as it should happen that any one or more of the offices of these capital burgesses should be vacant, it should be lawful to the other capital burgesses "at that time surviving or remaining, or the greater part of the same, of whom the mayor for the time being should be one, to elect another or others of the burgesses of the said borough into the place or places of the capital burgess or burgesses so happening," &c.: and a burgess having been elected to fill up a vacancy by twelve capital burgesses only, who were alleged to be the capital burgesses at that time surviving and remaining:—Held, that the election was void, it not being made by a majority of the whole definite body of capital burgesses, to which the words, "or the greater part of the same," were referable. *Rex* v. *Wyllyams*, 3 D. & R. 75; 25 R. R. 523. S. P., *Rex* v. *Devonshire*, 3 D. & R. 83; 1 B. & C. 609; 25 R. R. 523.

—— **Specified Electors not forming an Integral Part of Corporation.**]—A corporation consisted of a mayor, recorder and thirty-six chief burgesses, of whom twelve were also called councillors. A charter recognising that constitution, directed that "mayor, recorder and chief burgesses (of which chief burgesses some were called chief burgesses councillors), or the greatest part of them, should have power to elect any of such chief burgesses and councillors to be mayor," and also to elect other officers and burgesses. The charter also gave powers to the mayor, recorder and twelve chief burgesses alone:—Held, in the absence of evidence of any other usage, that, by these charters, the twelve burgesses councillors did not form an integral part of this corporation for the purpose of election, and that therefore, to made a good election, it was sufficient that there were present the mayor, recorder and a majority of the whole thirty-six chief burgesses. *Rex* v. *Headley*, 7 B. & C. 496; 1 M. & Ry. 345; 6 L. J. (O.S.) K. B. 53.

Under Special Charter—Election of Mayor by Burgesses.]—See *Rex* v. *Goldsmith*, and *Rex* v. *Bowyer*, col. 185.

Charter directing Election by Majority of Burgesses.]—A charter provided for the election of fifteen chief burgesses, and supplying the vacancies from time to time by the votes of a majority: a return to a mandamus, that there was not a sufficient number, of such as had been themselves legally elected, to form a majority, held bad, for there might be a competent number of burgesses whose titles, though not originally legal, might yet be unimpeachable by lapse of time. *Rex* v. *Monmouth Corporation*, 4 B. & Ald. 496.

Where a charter directs an election to be by a majority of the whole number of subsisting burgesses, an election by a minor part of them is void. *Rex* v. *Grimes*, 5 Burr. 2598.

Dissent of Minority ineffectual.]—If a majority dissents from an election, but votes for nobody else, the election by the minority is good. *Oldknow* v. *Wainwright*, or *Rex* v. *Foxcroft*, 2 Burr. 1017; 1 W. Bl. 229.

Voting against proposed Alderman without voting for Another.]—See *Rex* v. *Monday*, col. 173.

Shew of Hands—Refusal of Poll—Mandamus.]—Where a statute directs an election by poll, semble, that the poll may be taken from the holding up of electors' hands; but if the tellers appointed to take the number differ, and a poll is demanded and refused, the court will grant a mandamus to enter an adjournment of the election meeting, and to proceed to complete the election. *Rex* v. *St. Luke's*, 2 N. & M. 464.

By-Laws to regulate Election.]—Where the mode of electing officers is not regulated by charter or prescription, the corporation may make by-laws to regulate the election. *Newling* v. *Francis*, 3 Term Rep. 189; 1 R. R. 687.

Where a charter expressly gave the power of election to the mayor and commonalty, together with the aldermen, a subsequent by-law which gave it to the mayor and aldermen only, was illegal and void. *Hoblyn* v. *Rex*, 2 Bro. P. C. 329.

Illegal Mode of Election.]—In the case of an occasional vacancy occurring in a town council, the commissioners elected a candidate to fill it, by placing their votes written on slips of paper in a hat, and subsequently drawing the slips out, and allowing them to be lost, so that no scrutiny could be had:—Semble, such a mode of election cannot be sustained. *Reg.* v. *Hazley*, Ir. R. 11 C. L. 360.

List of proposed Freemen voted on collectively.]—Where, at a corporation meeting, for the purpose of electing honorary freemen, a list of names was proposed upon the whole of whom the vote was taken collectively, instead of individually:—Held, that such election was void, even where the corporation consisted of an indefinite number. *Rex* v. *Player*, 2 B. & Ald. 707; 21 R. R. 459.

Custom for Mayor and Aldermen to elect, when Electors persist in electing unfit Person, valid.]—See *Rex* v. *Johnson*, col. 213.

Presence of Candidate in the Polling Station.]—A candidate at a municipal election under the Ballot Act, 1872 (35 & 36 Vict. c. 33), has a right as such candidate to be present in the polling station during the polling, although he does not either himself undertake the duties of an agent, or assist his agent in the performance of such duties; and therefore the presiding officer at the station has no authority to exclude such candidate therefrom, if he does not interfere with the polling or in any other way misconduct himself. *Clementson* v. *Mason*, 44 L. J., C. P. 171; L. R. 10 C. P. 209; 32 L. T. 325; 23 W. R. 620.

Personating Agent charged with Breach of Secrecy of Ballot—No Proof that Information as to Votes actually communicated.]—See *Stannanought* v. *Hazeldine*, col. 216.

Suspension of Voting.]—A suspension of the voting at an election of councillors, by the mayor, does not vitiate the election, if no persons were prevented from exercising their right to vote. *Reg.* v. *Thwaites*, 1 El. & Bl. 704; 22 L. J., Q. B. 238; 17 Jur. 712.

Closing Poll.]—A municipal election held under the Municipal Corporations Act (3 & 4 Vict. c. 108), (Ir.), and the Ballot Act of 1872

(35 & 36 Vict. c. 33), declared void, on the ground that votes were received after four o'clock, p.m., though the outer door of the house in which the poll took place was closed at the proper hour, and no votes were afterwards received except from electors who were inside before the door was closed. *Gribbin* v. *Kirker*, Ir. R. 7 C. L. 30.

i. Production and Inspection of Burgess List and Voting Papers.

See also A. 2, *b.* x., ante, col. 132.

See Municipal Corporations Act, 1882, ss. 75, 233.

Where a burgess was refused permission to compare the voting papers with a private list of his own, but was furnished with a copy of the burgess roll for that purpose, and afterwards applied for a mandamus to the town clerk to allow him to inspect the burgess roll:—Held, that the application must be refused, as he was substantially furnished at the time with what he demanded. *Reg.* v. *Blagge*, 10 Jur. 983.

Production of Voting Papers.]—The court will not order a town clerk, against whom a criminal information has been filed for misconduct in his office relating to an election of councillors of the borough, to produce the election papers which are in his official custody, in order that they may be impounded, to be forthcoming at the trial as evidence against him; though it is suggested, that the six months during which the clerk is required to keep the papers (by 5 & 6 Will. 4, c. 76, s. 35) will expire before the trial. *Rex* v. *Nicholetts*, 5 A. & E. 376; 6 N. & M. 827.

Inspection of Voting Papers.]—Semble, that a town clerk is not bound to allow inspection of the voting papers delivered at the election of councillors, under 5 & 6 Will. 4, c. 76, s. 35, to more than one burgess at a time. *Rex* v. *Arnold*, 6 N. & M. 152; 4 A. & E. 657; 5 L. J., M. C. 54.

Nor to allow any burgess to have more than one of such voting papers in his hand at the same time. *Ib.*

But he is bound to allow any burgess, who brings with him a list of the burgesses, to make marks upon such list denoting how each voter appears by the voting paper to have given his vote. *Ib.*

Overseers neglecting to make out List cannot be also sued for refusing Inspection.]—See *Gregory* v. *Fell*, col. 161.

k. Election Petition.

See also A. 2, *b.*, ante, col. 128.

See Municipal Corporations Act, 1882, ss. 73, 87—104.

Decision of Mayor as to Validity of Nomination may be questioned on.]—See *Budge* v. *Andrews*, col. 174; and *Monks* v. *Jackson*, col. 193.

Where Disqualified Person declared to be elected Remedy by, not by Mandamus.]—See *Reg.* v. *Welchpool*, col. 176.

Against Return of Member of Firm interested in Contract with Council.]—See *Cox* v. *Ambrose*, col. 178.

Disqualification of Returning Officer, Ground for, not for Quo Warranto.]—See *Reg.* v. *Morton*, col. 195.

Against some only of the Successful Candidates on Ground affecting Validity of whole Election.]—An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; and the court can on such petition declare the persons so petitioned against not to have been duly elected. *Line* v. *Warren*, 54 L. J., Q. B. 291; 14 Q. B. D. 548; 53 L. T. 446; 49 J. P. 516—C. A.

Taking off File.]—Where it is clearly shewn on the face of an election petition that no relief can be granted under it, the court has power, under the act of 1884, to take it off the file. *Ib.*

Respondent, who may be.]—A person who assumes to be elected, though not in fact elected, may be made a respondent to a municipal election petition presented under 35 & 36 Vict. c. 60, against his election. *Yates* v. *Leach*, 43 L. J., C. P. 377; L. R. 9 C. P. 605; 30 L. T. 790.

There were two candidates, M. and L., for the office of councillor at a municipal election. M. had the majority of votes and was declared elected, but being disqualified he did not accept the office; upon which L. claimed to be elected, made the declaration of acceptance of office prescribed by 5 & 6 Will. 4, c. 76, s. 50, and sat and acted as councillor. Both M. and L. were thereupon made respondents to a petition against the election presented under 35 & 36 Vict. c. 60. They each gave notice under s. 18 that they did not intend to oppose the petition. The court held that L. was properly made respondent, and refused an application made by him to have his name struck out as respondent. *Ib.*

An unsuccessful candidate at an election cannot be made a respondent to a petition complaining of the election, although he had coalesced for the purposes of the election with two successful candidates, so as to be responsible equally with them for any acts done by any of the three in furtherance of the common purpose. *Lovering* v. *Dawson*, 44 L. J., C. P. 321; L. R. 10 C. P. 726; 32 L. T. 819.

Where a mayor has bonâ fide given a decision under 38 & 39 Vict. c. 40, s. 1, sub-s. 3, on the validity of an objection made to a nomination paper, a complaint of such decision as erroneous is not a "complaint of the conduct" of such mayor within the meaning of 35 & 36 Vict. c. 60, s. 13, sub-s. 6, so as to make him a proper respondent to a petition. *Harmon* v. *Park* (No. 1), 50 L. J., Q. B. 227; 6 Q. B. D. 323; 44 L. T. 81; 29 W. R. 750; 45 J. P. 436—C. A.

Service of Notice of.]—It is a condition precedent to the trial of a municipal election petition that, within five days after the presentation of it, the petitioner should in the prescribed manner serve on the respondent a notice of the presentation, and of the nature of the proposed security, and a copy of the petition as required by 35 & 36 Vict. c. 60, s. 13, sub-s. 4. *Williams* v. *Tenby Corporation*, 49 L. J., C. P. 325; 5 C. P. D. 135; 42 L. T. 187; 28 W. R. 616; 44 J. P. 348.

Time for Delivery of Particulars.]—In a municipal election petition the respondent applied for an order for delivery of particulars of the alleged corrupt practices:—Held, that, in the absence of exceptional circumstances, the petitioners should not be ordered to deliver particulars more than seven clear days before the hearing of the petition. *Lenham* v. *Barber*, 52 L. J., Q. B. 312; 10 Q. B. D. 293; 31 W. R. 428; 48 J. P. 23. S. P., *Clark* v. *Wallond*, infra.

Amendment of, when allowed.]—By the 4th sub-section of the 88th section of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), a municipal election petition shall be presented, except in the case of matters arising after the election, within twenty-one days after the day on which the election was held; and by the 89th section other times are prescribed depending on the date of the presentation of the petition. By the 4th sub-section of the 100th section "the High Court shall, subject to this act, have the same powers, jurisdiction and authority with respect to a municipal election petition, and the proceedings thereon, as if the petition were an ordinary action within its jurisdiction":—Held, that by reason of the words "subject to this act," the 4th sub-section of the 100th section gives no jurisdiction to the High Court to allow more than twenty-one days after the election, an amendment in a municipal election petition adding the words "and treating" to the grounds on which the petition questions the election, inasmuch as the petition would thereby be made a new petition, which would thus be presented after the time prescribed by the 4th sub-section of the 88th section. *Clark* v. *Wallond*, 52 L. J., Q. B. 321; 48 L. T. 762; 31 W. R. 551; 47 J. P. 551.

A petition against a municipal election having been filed on the grounds of treating, bribery, and intimidation, the petitioner found on inspection that the returning officer had neglected to insert in the counterfoils of twenty-nine of the voting papers used at the election the number of the voters appearing on the burgess-roll, and that certain tendered ballot papers were used as ballot papers, and were put into the ballot box and afterwards counted in favour of the respondent. Thereupon the petitioner desired to amend his petition by adding two paragraphs alleging these facts in contravention of the Ballot Act, 1872, rendering the election void. On motion for a rule enabling him to make such amendments, and cause shewn:—Held, that as the questions intended to be raised by the paragraphs were of importance, and might seriously affect the election, the amendments should be allowed. *Pickering* v. *Startin*, 28 L. T. 111.

A petition against the election of a town councillor cannot, after the expiration of the twenty-one days limited for its presentation, be amended by the introduction of a substantially new charge. *Maude* v. *Lowley*, 43 L. J., C. P. 105; L. R. 9 C. P. 165; 29 L. T. 925.

A petition as originally framed complained of the employment, contrary to the prohibition contained in 35 & 36 Vict. c. 60, s. 7, as paid canvassers at an election for the north ward of the borough, of persons who were on the register of burgesses for that ward. The petitioners after the expiration of the twenty-one days sought to amend the petition by adding "and other wards":—Held, that the court or a judge had no power to allow the proposed amendment. *Ib.*

A petitioner having omitted to deliver a list of objections six days before the time of trial, he applied to the court for leave to give evidence against the validity of certain votes recorded at the municipal election, and to file a list of objections nunc pro tunc:—Held, that the court had no jurisdiction to grant the application; for the power of amendment conferred by the seventh rule of the general rules related only to petitions presented in due time, and did not relate to petitions delivered after the prescribed period. *Nield* v. *Batty*, 43 L. J., C. P. 73; L. R. 9 C. P. 104; 29 L. T. 747; 22 W. R. 407.

Application for Relief from Consequences of Illegal Practice not entertained, pending Petition.]—See *Wilks, Ex parte*, col. 218.

Appeal on Interlocutory Matter.]—From an order of a divisional court upon an interlocutory matter arising in an election petition, an appeal lies to the Court of Appeal. *Harmon* v. *Park* (No. 1), 50 L. J., Q. B. 227; 6 Q. B. D. 323; 44 L. T. 81; 29 W. R. 750; 45 J. P. 436.

Leave to Withdraw—Reference to Arbitration.]—After a municipal election of aldermen at H., a petition was presented by an unsuccessful candidate, claiming that he was returned by a majority of lawful votes. The mayor of H., to save expense, induced the petitioner and the returned candidate to submit the question to arbitration. On the award being against the petitioner he asked leave to withdraw the petition, which the court allowed him to do. *Mallam* v. *Bean*, 51 J. P. 231.

Adjournment of Court.]—An election commissioner has power to adjourn his court by order from time to time by notice to the proper authority without going down to the borough, formally opening his court, and then adjourning it. *Reg.* v. *Shellard*, 58 L. J., M. C. 142; 23 Q. B. D. 273; 61 L. T. 120; 37 W. R. 706; 53 J. P. 821.

Non-Appearance of Respondent — Statement of Special Case.]—A petition against a municipal election having been duly brought to the notice of a respondent, but he having taken no steps with reference thereto, the petitioners obtained an order from a judge at chambers under the Corrupt Practices (Municipal Elections) Act, 1872, s. 15, sub-s. 6, directing a special case to be stated, and that if the parties differed the case was to be settled by a certain arbitrator. The respondent had been served with the summons upon which that order was obtained but did not appear at the hearing, and the order was made without the petitioners being required to verify the facts in the petition by affidavit. A special case was stated by the arbitrator in the absence of the respondents, and set down for hearing, notice thereof being put up in the master's office. The court, after hearing the petitioners, in the absence of the respondents, remitted the case to be re-stated. Notice of the re-hearing was put in the master's office, but at the hearing the respondents again did not appear, and the court gave judgment in favour of the petitioners. Upon a rule to set aside the proceedings as irregular:—Held, that the applicant had had sufficient notice of the proceedings;

that the judge had full power to make the order directing the statement of a special case; and that the special case had been properly stated, and the court had full power to adjudicate upon it. *Burgoyne* v. *Collins* (No. 2), 46 J. P. 710.

Right of Audience "by himself" of any Person before being reported by Election Commissioner as Guilty of Corrupt Practices.]—The Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 23, incorporated so much of s. 38 of the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51) as provides that "before a person not being a party to an election petition, nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election court to have been guilty, at an election, of any corrupt or illegal practice, the court shall cause notice to be given to such person, and if he appears in pursuance of the notice shall give him an opportunity of being heard by himself, and of calling evidence in his defence to show why he should not be so reported." Upon the hearing of a municipal election petition evidence was given as to alleged acts of bribery by G., who was not a party to the petition nor a candidate on behalf of whom the seat was claimed by the petition. At the first hearing counsel appeared on behalf of G., but subsequently his instructions were withdrawn. The solicitor of G. then appeared on his behalf, and applied to the commissioner before whom the petition was being heard to be allowed to examine the witnesses and to address the court on behalf of G. The commissioner decided that he could not hear the solicitor, and that counsel only had the right of audience before him:—Held, that the commissioner was wrong in deciding that counsel had the right of audience before him on behalf of G., as it was intended by the act that G. should be "heard by himself" and not be represented by either counsel or solicitor in these proceedings. *Reg.* v. *Mansel Jones*, 23 Q. B. D. 29; 60 L. T. 860; 37 W. R. 508; 53 J. P. 739.

Order for Prosecution by Commissioner.]—The commissioner for the trial of municipal election petitions ordered certain persons, prosecuted before him for a corrupt practice committed at a municipal election in Nottingham, to be prosecuted on an indictment for the offence at the ensuing assizes at Derby:—Held, that the commissioner had jurisdiction to order the trial at Derby; that his order was sufficient without describing the corrupt practice; that the Derbyshire grand jury could find, and the judge of assize had jurisdiction to try, the indictment; that "Derbyshire to wit" in the margin of the indictment was sufficient, although the body of it disclosed offences in Nottingham only; that the words "a corrupt practice" in the commissioner's order were reasonably interpreted some "corrupt practice," and that the prosecution were not precluded from preferring a number of charges of bribery in the indictment. *Reg.* v. *Riley*, 59 L. J., M. C. 122; 63 L. T. 119; 17 Cox, C. C. 120; 55 J. P. 21—C. C. R.

Report of Commissioner — Jurisdiction of High Court to deal with.]—When, after the trial of a municipal election petition, the commissioner has reported persons as having been guilty of corrupt practices, the High Court has no jurisdiction to set aside or amend his report upon the ground that the notice prescribed by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, had not been given to the persons so reported. *Preece* v. *Harding*, 59 L. J., Q. B. 82; 24 Q. B. D. 110; 61 L. T. 837; 38 W. R. 350.

Costs.]—Upon the trial of a petition against the return of a borough councillor under the Corrupt Practices (Municipal Elections) Act, 1872, the barrister in delivering judgment said that he found the councillor guilty of personal bribery, and that all the costs of the inquiry were to be borne by him, and made an order in writing for the payment by the councillor of certain costs under s. 19 of the act. The written order made no provision for the remuneration and allowances to the barrister and other persons under s. 22. The Lords Commissioners of the Treasury paid the amount of such remuneration and allowances and certified the payment to the borough treasurer, and required him to repay them the amount out of the borough fund or rates as provided by s. 22. A rate was accordingly made and levied. The commissioners, afterwards, on receiving from the barrister a letter that he had always intended to visit all the costs upon the councillor, and had said so in giving judgment, cancelled their certificate, and the borough corporation abandoned their rate and returned the sums levied to the ratepayers. Afterwards the commissioner, finding that the barrister had made no written order for the payment of the remuneration and allowances under s. 22, issued a fresh certificate requiring the borough treasurer to repay them out of the borough fund or rates the amount of such remuneration and allowances. These facts being raised upon the return to a mandamus commanding the treasurer to repay the commissioners out of the borough fund or rate, and the corporation to cause such payment:—Held, that no valid order was made by the barrister for the payment of such allowances and remuneration under s. 22; that the election court for the trial of petitions under the act was by virtue of s. 14, sub-s. 5, a court of record, and that neither the Queen's Bench Division nor the Court of Appeal on the return to the mandamus could amend the barrister's order so as to make it include the payment of such remuneration and allowances; that the act of the commissioners in certifying was not a judicial act, and that they had the power to make the second certificate; and were entitled to a peremptory mandamus compelling the treasurer to repay to them the amount of such remuneration and allowances out of the borough fund or rate, and compelling the corporation to order such amount to be levied by a borough rate. *Reg.* v. *Maidenhead Corporation*, 51 L. J., Q. B. 444; 9 Q. B. D. 494; 46 J. P. 724—C. A.

The barrister appointed under the Corrupt Practices (Municipal Elections) Act, 1872, has absolute discretion over the costs under s. 19. *Lovering* v. *Dawson*, 44 L. J., C. P. 321; L. R. 10 C. P. 726; 32 L. T. 823.

The 19th section says that all costs, &c., shall be defrayed by the parties to the petition, in such a manner and in such proportions as the court by which the petition is tried may determine:—

Held, that in a case where the petitioners had improperly made an unsuccessful candidate a respondent, they could not object that he was not a party to the petition, so as to deprive the barrister who tried the petition of jurisdiction to make an order upon them for his costs. *Ib.*

To obtain costs ordered to be paid by a commissioner, under the Corrupt Practices at Municipal Elections Act, 35 & 36 Vict. c. 60, and to take proceedings under r. 55, the order of the commissioner should first be made a rule of court. *Pare* v. *Hartshorn*, 31 L. T. 486; 23 W. R. 138.

The entry of the order by the registrar is sufficient; such order need not be actually indorsed on the petition by the commissioner. *Ib.*

The barrister who tried a municipal election petition duly certified his decision under 35 & 36 Vict. c. 60, s. 15, par. 4, in writing, and he also orally determined that the petitioner's costs were to be paid by one respondent. The registrar indorsed on the petition, "Election void, petitioner's costs to be paid by the respondent, R. A. S.":—Held, that such indorsement was to be treated as the certificate of the barrister, and could be made a rule of court in the ordinary way so as to enable the petitioner to issue execution upon it as "the rule of court ordering them to be paid" in the manner provided by r. 55, Michaelmas Term, 1872. *Ib.*

Appeal.]—At an election of members of a county council under the Local Government Act, 1888, the respondent obtained a majority of votes over the petitioner and was declared to be elected. On a petition claiming the seat on the ground that the respondent, being a woman, was disqualified:—Held, that an appeal lies in such case, by special leave, from the divisional court to the Court of Appeal. *Beresford-Hope* v. *Sandhurst (Lady)*, 58 L. J., Q. B. 316; 23 Q. B. D. 79; 61 L. T. 150; 37 W. R. 548; 53 J. P. 805—C. A.

l. Questioning Election in City of London.

Jurisdiction.]—The common council of London has not any jurisdiction to inquire concerning the election of any person to be one of the common councilmen of the city, for, by the immemorial custom of the city, the cognisance and examination of such elections belong to the court of record, held before the lord mayor and aldermen. *Bolton* v. *Jeffes*, 2 Bro. P. C. 463.

A custom of the city of London for the court of mayor and aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the court as such alderman, is, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom. *Rex* v. *Johnson*, 5 A. & E. 488; 6 N. & M. 870; 5 L. J., Ex. 282. *S. C.*, in the House of Lords, affirming judgment, 1 Rob. 1; 6 Cl. & F. 41.

So a custom, that when the inhabitants of any ward shall three times return to the court the same person to be alderman, who shall be by the court, according to the former custom, adjudged on such three returns, according to the discretion and sound consciences of the mayor and aldermen, not a fit person to support the dignity and discharge the duties of the office, the mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward. *Ib.*

The latter custom is not abrogated by 11 Geo. 1, c. 18, s. 7; nor by the by-law of the city, 13 Anne. *Ib.* See also *Scales* v. *Key*, 3 P. & D. 505; 11 A. & E. 819; and *Rex* v. *Parkyns*, 3 B. & Ald. 668; 22 R. R. 519.

Validity of Election.]—Where, at an election of aldermen in London, three poll clerks were first appointed, and two of them afterwards dismissed, and it appeared that, upon a scrutiny being demanded, the wardmote was adjourned to meet again on a fresh summons; that the mayor then went out of office, and the new mayor assembled a wardmote by a fresh summons, took the scrutiny, and declared A. duly elected, and that upon a return thereof being made to the court of mayor and aldermen, they upon petition declared the election void:—Held, that the dismissal of the poll clerks, and the change of the mayor, were no objections to the validity of the election; and that the mode of adjourning the wardmote was not a dissolution, and did not affect the proceedings at the scrutiny. *Rex* v. *London Corporation*, 3 B. & Ad. 255; 2 N. & M. 126; 1 L. J., K. B. 216.

m. Corrupt and Illegal Practices.

See Municipal Corporations Act, 1882, ss. 77-86. *See also* I. 2, *c.*, col. 141, ante.

Evidence on which Election Commissioner can order Prosecution for—Order not sealed.]—Where, in a municipal election inquiry, evidence is given that a person has been guilty of corrupt or illegal practices under the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, and on the termination of the inquiry application is made by the representative of the Director of Public Prosecution to prosecute the person so charged, it is not necessary for the commissioner, if satisfied that sufficient evidence has been given during the inquiry to put the person charged on his trial, to rehear the evidence before ordering his prosecution. The non-attachment of a seal to the order for prosecution by such election commissioner does not invalidate such order. *Reg.* v. *Shellard*, 58 L. J., M. C. 142; 23 Q. B. D. 273; 61 L. T. 120; 37 W. R. 706; 53 J. P. 821.

Persons reported as guilty of—No Notice.]—See *Preece* v. *Harding*, col. 212.

Order for Prosecution for, by Election Commissioner—Indictment preferred in adjoining County—Jurisdiction—Order need not Specify Corrupt Practice.]—See *Reg.* v. *Riley*, col. 211.

Bribery—Employment—Corrupt Bargain.]—A declaration for bribing a voter in the election of councillors, by corruptly promising to give him employment in hauling stones at certain hire, as and for a reward to give his vote for particular candidates, is good; for an employment is a reward within the latter as well as the former branch of the section; and whether the employment in the particular case was given by way of corrupt bargain, was a question for the

jury; but the court must assume that such was the case, a corrupt agreement being sufficiently alleged in the declaration. *Harding* v. *Stokes*, 1 M. & W. 354; 1 Tyr. & G. 599; 2 Gale, 41; 5 L. J., Ex. 178. *And see* 2 M. & W. 233; M. & H. 6; 6 L. J., Ex. 76; 1 Jur. 206.

—— **Completion of Offence—Offering to Corrupt.**]—The offence of corrupting a voter is complete where the bribe is offered and accepted, and the voter promises to vote in pursuance of the corrupt contract, although he may break his promise, or may never have intended to perform it; but when a bribe is offered, but not accepted, the offence is that of offering to corrupt; and it is for the jury to say whether there was a complete agreement or not. *Ib.*

—— **Evidence of Corrupt Bargain.**]—Giving money to a person, after having voted, is evidence of a previous agreement "for gift or reward," for the purpose of corrupting him to give his vote, within 5 & 6 Will. 4, c. 76, s. 34. *Reg.* v. *Thwaites*, 1 El. & Bl. 704; 22 L. J., Q. B. 238; 17 Jur. 712.

—— **Promise of Remuneration for Loss of Time.**]—In an action on the 22 Vict. c. 35, s. 11, for a penalty for bribery, it appeared that the defendant, while soliciting a vote at an election of councillors for a city, told the voter that he would be remunerated for loss of time. The judge of the county court gave judgment for the defendant, but submitted the question whether the transaction was bribery within the Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 2, sub-s. 1, which by 22 Vict. c. 35, s. 12, applied to municipal elections:—Held, that it was so, inasmuch as it amounted to an offer or a promise to procure or endeavour to procure money or valuable consideration for a vote in order to induce him to vote at the election. *Simpson* v. *Yeend*, 10 B. & S. 752; 38 L. J., Q. B. 313; L. R. 4 Q. B. 626; 21 L. T. 56; 17 W. R. 1100.

—— **Promise of Travelling Expenses, if conditional on voting.**]—The 17 & 18 Vict. c. 102, s. 2, enacts in clause 1, that to promise money to a voter in order to induce him to vote, and corruptly to give money to a voter on account of his having voted, are severally matters which subject to a penalty the person so promising or giving:—Held, that a promise to a voter of his travelling expenses conditionally on his coming and voting for the promisor or for a particular candidate is within the first part of the enactment, but that a promise of travelling expenses is not. *Cooper* v. *Slade*, 6 El. & Bl. 447; 25 L. J., Q. B. 324; 2 Jur. (N.S.) 1016.

—— **Separate Penalty for each Act.**]—A person guilty of bribery at an election, may under 17 & 18 Vict. c. 102, and 35 & 36 Vict. c. 60, be sued for the penalty for every act of bribery, and not merely once for bribery at the election. *Milnes* v. *Bale*, 44 L. J., C. P. 336; L. R. 10 C. P. 591; 33 L. T. 174; 23 W. R. 660.

—— **Effect of Conviction.**]—A person who has been convicted of bribery at a municipal election, and fined 40*s.* in a county court for that offence, is not disqualified for six years from serving a municipal office. *Wray, In re*, 12 L. T. 270; 13 W. R. 633.

Treating—Refreshment to Voters.]—By the Corrupt Practices (Municipal Elections) Act, 1872, the provisions of s. 23 of 17 & 18 Vict. c. 102, by which giving refreshments to voters at parliamentary elections is made illegal under a penalty of 40*s.*, are rendered applicable in the case of municipal elections. *Hargreaves* v. *Simpson*, 48 L. J., Q. B. 607; 4 Q. B. D. 403; 41 L. T. 216; 27 W. R. 885.

Indictment for giving False Answer on voting.]—An indictment upon s. 34 of 5 & 6 Will. 4, c. 76 for giving a false answer on voting for a town councillor, is bad, if it does not allege that the defendant wilfully gave the false answer. *Reg.* v. *Bent* or *Bent*, 2 Car. & K. 179; 1 Den. C. C. 157.

Charging that he gave the false answer falsely and fraudulently is not sufficient. *Ib.*

—— **Evidence.**]—The son of a burgess, of the same name as his father, living in the house in respect of which the father had been qualified, but the father having for some time been absent, and the son paying the rates, is not indictable for untruly answering the questions put to voters upon his voting. *Reg.* v. *Goodman*, 1 F. & F. 502.

Personation—Inducing another to personate—Proof of Election.]—*See* CRIMINAL LAW (PERSONATION), Vol. IV., col. 1440.

Charge of communicating Information as to Votes before Close of Poll—Evidence.]—An information was laid against the respondent, charging that he, being a personating agent duly appointed and in attendance at a certain polling station in connection with a municipal election for a town councillor, did not then and there maintain and aid in maintaining the secrecy of the voting in such station, but did then and there communicate before the poll was closed to a certain person or persons certain information as to the names and numbers on the register of voters of certain electors who had and had not applied for ballot papers or voted at that election. It appeared that the respondent, having been appointed personating agent, as stated in the information, attended at the polling booth with a copy of the burgess-roll, and remained there some hours placing a mark against the name of each voter who obtained a ballot paper, and then before the close of the poll left the station, taking with him his copy of the burgess-roll, which he left in the committee-room of the candidate by whom he was employed. There was no proof that the copy of the burgess-roll was seen by any person while in the room:—Held, that there was not sufficient evidence to warrant a conviction under the Ballot Act, 1872 (35 & 36 Vict. c. 33), s. 4, as there was no proof that the information as to the voters was actually communicated to any person, and it was not enough that the means of acquiring such information were afforded to any one. *Stannaught* v. *Hazeldine*, 48 L. J., M. C. 89; 4 C. P. D. 191; 40 L. T. 589; 27 W. R. 620.

Charge of fraudulently placing Ballot Papers in Ballot Box—Inspection of Ballot Papers.]—On the trial of an indictment for fraudulently placing ballot papers in a ballot box at a municipal election, contrary to 35 & 36 Vict. c. 33, s. 3, a sealed packet was produced under the

order of a county court judge, obtained under 35 & 36 Vict. c. 33, sched. I. rr. 40, 41, Part I., r. 64, and the counterfoils and marked register and voting papers produced therefrom were given in evidence, and the face of the voting papers was inspected:—Held, that the evidence was properly admitted. *Reg.* v. *Beardsall*, 45 L. J., M. C. 157; 1 Q. B. D. 452; 34 L. T. 660; 13 Cox, C. C. 193.

Return of Expenses required, though none incurred—Extension of Time.]—The return of expenses and the accompanying declaration which, under the Municipal Elections Act, 1884, every candidate is required to send to the town clerk within twenty-eight days of the election of a town councillor must be sent although no expenses may have been actually incurred by the candidate in and about the election. The court will, upon satisfactory proof that the omission happened under such circumstances as to amount to an authorised excuse under the act, make an order that the return and declaration be made by the candidate notwithstanding the lapse of the prescribed statutory period for making them. *Robson, Ex parte*, 18 Q. B. D. 336; 55 L. T. 813; 35 W. R. 290; 51 J. P. 199.

Charge of "Printing or causing to be Printed" Bills without Name of Printer—Evidence.]—Upon an information against the appellant under s. 14 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it was proved that the appellant was a candidate for a seat in the local board of Willesden: that the respondent received from his own servant at his residence a printed address and letter having reference to the election, and purporting to be signed by the appellant, but without the printer's name and address thereon; that this document was printed for publication by instructions conveyed to the printer in a letter from the appellant's brother, who resided with him; and that the printer had debited the appellant with the cost of printing, but had not been paid:—Held, no evidence that the appellant "printed or caused to be printed" the document in question, within s. 14. *Bettesworth* v. *Allingham*, 16 Q. B. D. 44; 34 W. R. 296; 50 J. P. 55.

Placards or posters (also without the printer's name or address), printed by the instructions of one Ellis (who was advertised in a local newspaper as the chairman of a committee for promoting the election of the appellant, and who sent the "copy" to the printer), were proved to have been posted about the district at Ellis's expense:—Whether this was evidence of the printing and posting by an agent of the appellant, quære; but, the justices having convicted the appellant in one penalty for both the alleged offences, and the conviction being bad as to one of them:—Held, that it was bad altogether. *Ib.*

Application for Relief.]—In order to support an application under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, it will not be sufficient that notice of intention to make the application has been advertised in local papers, but such notice should be published in such a manner as will insure a reasonable certainty that persons interested had notice; and it will also be insufficient in the affidavits upon which the application is made merely to state that the act in respect of which relief is sought arose from inadvertence, and not from any want of good faith, without shewing some reasonable excuse for such inadvertence. *Perry, Ex parte*, 48 J. P. 824.

—— **Publishing Posters without Printer's Name.**]—Four persons stood as candidates for election at the municipal election in the borough of Huntingdon, held on the 1st November, 1884. These persons employed a printer to print their bills and posters. A fortnight before the election Clark, one of the candidates, went to the printer, Wm. Goggs, and particularly drew his attention to s. 14 of the Municipal Elections Act, 1884. Goggs in his turn gave instructions to his workmen in accordance with the instructions received by him from Clark. On the 28th October Goggs printed, published, and posted certain posters on behalf of the four candidates (the applicants) which did not bear his name and address. When the omission was discovered he took steps to rectify it. A prosecution under the act was commenced against Clark and his colleagues, and Goggs the printer of the posters, but by consent the hearing of the summons before the magistrates was adjourned until an application was made to the court for an order excusing the applicants from the consequences of the omission. The applicants made their application under s. 20, and filed affidavits to the effect that the issuing of the posters, without the printer's name and address being on them, was due to inadvertence and not to the want of good faith:—Held, that, under the circumstances, the applicants were entitled to an order excusing them from the consequences of the omission under s. 20. *Clark, Ex parte, Huntingdon Election, In re*, 52 L. T. 260.

—— **Omission to make a Return of Expenses.**]—Where a candidate who, at a borough municipal election, had omitted to make a return of expenses, applied to the court for relief on an affidavit, which stated certain facts in an uncandid way, and merely alleged, but without any corroboration, that the omission was due to inadvertence, the court refused the application. *Haseldine, Ex parte*, 59 J. P. 71.

—— **Petition pending.**]—Where a candidate at a municipal election applied, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for relief against the consequences of an illegal practice, and it appeared that the applicant had been elected, and that a petition had been presented and was pending against his election, the court refused to entertain his application for relief, which was ordered to stand over until after the trial of the election petition. *Wilks, Ex parte*, 55 L. J., Q. B. 576; 16 Q. B. D. 114; 34 W. R. 273; 50 J. P. 487.

—— **Appeal from Refusal of.**]—An appeal lies to the Court of Appeal from the refusal by a Divisional Court of an application, under s. 20 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, for relief from penalties incurred through inadvertence by a candidate at an election of county councillors, such refusal not being a judgment in a criminal cause or matter within s. 47 of the Judicature Act, 1873. *Walker, Ex parte*, 58 L. J., Q. B. 190; 22 Q. B. D. 384; 60 L. T. 581; 37 W. R. 293.

A. H. B.

ELECTRIC LIGHTING.

Nuisance—Noise and Vibration.]—Where an electric lighting company is formed under a provisional order which is subsequently confirmed by act of parliament, such order must be read together with the provisions of the Electric Lighting Act, 1882, and the company are not thereby exempted from liability to an action for a nuisance. The powers given by s. 10 of the act of 1882, as read with s. 32, are applicable only to the construction of the authorised works as distinguished from the user of them when constructed, and s. 17 is confined to the payment for damages caused by the execution of such works, and does not apply to damages caused by their user. *Shelfer* v. *City of London Electric Lighting Co.*, 64 L. J., Ch. 216; [1895] 1 Ch. 287; 12 R. 112; 72 L. T. 34; 43 W. R. 238—C. A.

Lessee — Reversioner — Injunction.]—An injunction was granted at the suit of a lessee and a reversioner respectively of a public-house to restrain an electric lighting company from carrying on their works so as by noise and vibration to interfere with the enjoyment of the lessee, and to cause injury to the structure of the premises. *Ib.*

ELEGIT.

See EXECUTION.

EMBEZZLEMENT.

See CRIMINAL LAW.

EMBLEMENTS.

See LANDLORD AND TENANT.

EMPLOYERS' LIABILITY.

See MASTER AND SERVANT.

ENFRANCHISEMENT.

See COPYHOLD.

ENGINEER.

See WORK AND LABOUR.

ENGRAVINGS.

See COPYRIGHT.

ENTAIL.

See ESTATE.

ENTRIES.

See EVIDENCE.

EPPING FOREST.

See FOREST.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITABLE MORTGAGE.

See MORTGAGE.

EQUITABLE WASTE.

See WASTE.

EQUITY TO A SETTLEMENT.

See HUSBAND AND WIFE.

ERROR.

See CRIMINAL LAW.

ESCAPE.

Liability for.]—*See* SHERIFF.

In Criminal Cases.]—*See* CRIMINAL LAW.

ESCHEAT AND FORFEITURE.

See CRIMINAL LAW (FELONY)—PARLIAMENT.

ESCROW.

See DEED AND BOND.

ESTATE.

[BY A. E. RANDALL.]

A. ESTATE IN FEE SIMPLE.

1. *Limitation of, in Deed*, 222.
   Limitation of, in Will—*See* WILL.
2. *Charges*, 225.
3. *Descent*, 225.

B. ESTATE TAIL.

1. *Property within the Statute De Donis*, 233.
2. *Limitation of, in Deed*, 233.
   Limitation of, in Will—*See* WILL.
3. *After Possibility of Issue Extinct*, 234.
4. *Descent*, 235.
5. *Barring Estates Tail.*
   i. Restrictions on Power to Bar, 235.
   ii. Contract to Bar, 237.
   iii. Of Lunatic — *See* LUNATIC.
   iv. By Fine and Recovery — *See* FINES AND RECOVERIES.
   v. Under Fines and Recoveries Act — *See* FINES AND RECOVERIES.
   vi. Equitable Estates Tail, 238.
   vii. Quasi Estates Tail, 238.
6. *Leases*, 240.
7. *Mortgages*, 240.
8. *Other Charges and Incumbrances*, 241.
9. *Keeping down Interest*, 242.
10. *Right to Deeds—See* DEED AND BOND.
11. *Decrees against Tenant in Tail*, 243.
12. *Other Matters*, 245.

C. ESTATE FOR LIFE.

1. *Limitation of, in Deed*, 247.
   Limitation of, in Will—*See* WILL.
2. *In renewable Leaseholds*, 248.
3. *Rights, Duties, and Liabilities of Tenant for Life.*
   a. Inventory and Right to Possession or Income, 259.
   b. Right to Deeds—*See* DEED AND BOND.
   c. Outgoings.
      i. Rent, 291.
      ii. Dilapidations and Repairs, 292.
      iii. Other Outgoings, 296.
   d. Improvements, 299.
   e. Charges and Incumbrances, 301.
   Merger of Charges and Incumbrances—*See* MERGER.
   f. Apportionment.
      i. Of Charges and Incumbrances—*See* col. 301, ante.
      ii. Under the Apportionment Act —*See* APPORTIONMENT.
      iii. In other Cases, 312.
   g. Other Matters, 317.

D. ESTATE PUR AUTRE VIE.

1. *In General*, 318.
2. *Production of the Cestui que vie*, 321.

E. ESTATE AT WILL, 323.

F. CUSTOMARY ESTATES.

1. *Gavelkind.*
   a. General Incidents, 323.
   b. Descent, 324.
   c. Law and Custom, 324.
2. *Borough English*, 326.
3. *Copyholds—See* COPYHOLD.

G. COPARCENERS, JOINT TENANTS, AND TENANTS IN COMMON.

1. *Coparceners*, 327.
2. *Joint Tenants*, 328.
3. *Tenants in Common*, 334.

H. TENANCY BY THE CURTESY—*See* HUSBAND AND WIFE.

I. SEISIN AND DISSEISIN, 344.

J. DISCLAIMER, 347.

K. EXCHANGE, 347.

L. ESTATE PASSING BY DEED.

1. *Freeholds*, 348.
2. *In Reversion*, 351.
3. *In Remainder*, 355.
4. *Other Matters*, 361.

A. ESTATE IN FEE SIMPLE.

1. LIMITATION OF, IN DEED.

Legal Estate.]—Where lands were settled to the use of the husband for life, with remainder to the use of the wife, remainder to the use of the heir female of the bodies of the husband and wife begotten and now living, and in default of such issue to the use of the heir male in like manner begotten, and in default thereof to the right heirs of the settlor, the husband; and there was issue several sons and daughters:—Held, that such limitation to the heir female was not void, but good words of description of a purchaser, although such daughter was not heir-at-law, and that the daughters took by purchase, but for life only, and that, upon the death of the survivor, the son of the settlor's second son (the eldest dying without issue) became entitled. *Chambers* v. *Taylor*, 2 Myl. & C. 376; 6 L. J., Ch. 193.

A father conveyed lands by lease and re-lease to his son in consideration of natural love, and

to entitle him to a wife and fortune now in contemplation, "to hold" to the use of the son, his heirs and assigns for ever. It was not proved that any particular marriage was in contemplation at the date of the deed. The son survived the father, but died unmarried:—Held, that the fee simple was vested in him absolutely by the deed. *Alleyne* v. *Alleyne*, 8 Ir. Eq. R. 493; 2 Jo. & Lat. 544.

Limitation in a deed declaring the uses of a copyhold to the use of the first male issue lawfully begotten by settlor, which should attain twenty-one, and to the heirs and assigns of such male issue for ever, and for default of such male issue, to use of all and every the daughters and daughter of the settlor, lawfully begotten, and to their several heirs and assigns for ever, to hold as tenants in common discharged of any further limitation over; and for default of such issue, then over:—Held, to vest in fee in three daughters of settlor, his only children, and who died unmarried in his lifetime, and that plaintiff was entitled as heir-at-law to them in exclusion of devisees of settlor. *Hampson* v. *Brandwood*, 1 Madd. 381.

A widow, erroneously believing that certain lands, of which she was seised in fee, were subject to the trusts of her marriage settlement, in which case she would only have been entitled to an estate for her life, released all her estates (except to her and her assigns during her life the lands in question, the mines and minerals) to a releasee to uses and his heirs, to the use of trustees for a term, and subject thereto to the use that she might receive an annuity, and subject thereto to the use of her son, his heirs and assigns:—Held, that the lands passed to the son in fee subject to the term, and that the exception of her life estate was repugnant and void. *Youde* v. *Jones*, 13 M. & W. 534; 14 L. J., Ex. 70.

Upon the hearing, on further directions:—Held, in equity, that the son took, at the least, an estate in fee in remainder expectant on the mother's death. *S. C.*, 14 Sim. 131.

The Court of Queen's Bench had held that the son did not take any estate in the property. *S. C.*, *Ib.*; 8 Jur. 547.

Under a deed executed by father and son, the son, in consideration of the release by his father of a sum of 1,000*l.*, part of an alleged debt, purported to assign to his father absolutely all his "estate and interest whatsoever of and in the property, estate, and effects devised and bequeathed" by a certain will. The property subject to the will consisted partly of realty and partly of money in court, paid in as the result of compulsory sales. To all of this property the son was absolutely entitled, subject to the life interest therein of his father. On the death of the father the effect of the assignment was disputed:—Held, that, in the absence of the proper words of limitation, or of any words of reference which might supply the defect, the deed failed to pass both the fee simple in the realty (whether the estate was legal or equitable), and also the money in court, which must be treated and conveyed as land. *Dearberg* v. *Letchford*, 72 L. T. 489.

Equitable Estate.]—An equitable estate in fee could not be created by a deed executed before the Conveyancing and Law of Property Amendment Act, 1881 (44 & 45 Vict. c. 41) without words of inheritance. *Meyler* v. *Meyler*, 11 L. R. Ir. 522. *Whiston's Estate, In re, Lovatt* v. *Whiston*, 63 L. J., Ch. 273; [1894] 1 Ch. 661; 8 R. 175; 70 L. T. 681; 42 W. R. 327; *Dearberg* v. *Letchford*, 72 L. T. 489.

By a settlement made in 1817, freehold and leasehold property was conveyed to trustees upon trust to apply the rents and profits in the maintenance and education of the two children of M., deceased, until the youngest of them should attain twenty-one, and from and after that event to pay the rents unto and equally between the two children of M., their heirs, executors, administrators, and assigns respectively, "provided nevertheless that in case either of the children should die without leaving lawful issue," then on trust to pay the share or shares of him, her, or them so dying, unto and equally between persons named. M. had two children, one of whom, B., died intestate and unmarried; the other, C., intestate as to his share, but leaving a daughter, D.:—Held, that the interest taken by D. under the settlement was an interest in fee simple, and that an estate tail was not created by the proviso as to failure of issue. *Olivant* v. *Wright*, 47 L. J., Ch. 664; 9 Ch. D. 646; 38 L. T. 677; 27 W. R. 284.

—— **By Implication.**]—If the intention of a deed is clear to pass an equitable estate in fee simple, it is not necessary that the proper words of inheritance should be used for the purpose. *Pugh* v. *Drew*, 17 W. R. 988.

By a deed of settlement, on the 7th March, 1818, leaseholds were settled, as to a third share, in trust, in the events which happened, for A. and B. absolutely in equal shares. In 1819 freeholds were settled "upon such and the same trusts, and for such and the same ends, intents, and purposes, and subject to such and the same powers, provisoes, and declarations as in the indenture of the 7th day of March, 1818, are expressed, declared, and contained of and concerning the premises therein mentioned and described, or as near thereto as the difference of the respective estates of A. M., M. J., and A. J." (the trustees) and their respective heirs, executors, and administrators, therein respectively would admit, to the intent that the rents, issues, and profits of the hereditaments and premises might be had, received, and taken, and the hereditaments and premises held, sold, conveyed, and assigned, and the produce paid and applied unto such person or persons, and in such manner, and at such time and times, in every respect as in the indenture of the 7th March, 1818, is expressed and declared of and concerning the premises therein particularly mentioned and described":—Held, that the want of proper words of inheritance was not fatal, but that A. and B. took equitable estates in fee simple, and not for life only, in one-third share of the freeholds. *Ib.*

By a deed of settlement, the lands of A., which were freehold, were settled by T. on J. and his issue in strict settlement, with an ultimate remainder to "H., his heirs and assigns"; and the lands of B., which were partly freehold and partly chattel, were settled on T. for life, "and from and after the decease of the said T. to several uses, intents, and purposes, as are hereinbefore expressed and declared, respecting the said lands of A." The deed then went on to recapitulate shortly the previous limitations to the family of J., after his own life estate, and gave the ultimate remainder "to and for the use and benefit of the said H., subject to the

provisions hereinbefore made for the issue of the said marriage" :—Held, that H. took an absolute interest in the lands of B., notwithstanding there were no words of limitation. *Garde* v. *Garde*, 2 Con. & L. 175 ; 3 Dr. & War. 435.

2. CHARGES.

Keeping down Interest.]—By a settlement made in 1862, property, subject to a prior mortgage, was settled upon A. in fee, with a contingent charge in favour of B. upon his attaining twenty-one :—Held, that A., during his life, and his estate after his death, was bound to keep down the interest on the mortgage, so that the property might remain a security intact for the benefit of B. *Wilson, In re, Butcher* v. *Simmonds*, 35 L. T. 304 ; 24 W. R. 781.

3. DESCENT.

Heir—Definition.]—*See* HEIR-AT-LAW.

—— **Disinheriting.**]—*See* HEIR-AT-LAW.

Before the Inheritance Act—Title by Purchase.]—The rule that a man cannot make his right heir a purchaser is confined to the estate of which he is seised. *Robinson* v. *Knight*, 1 Eden, 159.

Where lands were devised to the heir, subject to the payment of an annuity :—Held, that notwithstanding he would take by descent, the devise to him could not be treated as a mere nullity, nor deprive him of any benefit intended by the testator, and as between him and other devisees, the estates devised to him were not to be applied in payment of debts in priority of the estate devised to the latter. *Biederman* v. *Seymour*, 3 Beav. 368 ; 10 L. J., Ch. 177.

If creditors resort to estates devised to the heir in priority of other devisees, he is entitled to contribution from them to the extent to which his estate may be exhausted by defendants. *Ib.*

The general rule is, that a person who claims as heir male to another by purchase must be complete heir male ; but in the case of a devise there may be exceptions to this rule from manifest intention of the testator. *Newcoman* v. *Bethlem Hospital*, Ambl. 8.

Devise of his estates to his wife for life, and after her decease to his son (his heir-at-law), charged with a yearly payment of 100*l.* to his daughter for her life, and at her decease with 1,500*l.*, to be divided among the children ; or if no child, to be disposed of as she should direct ; and in default of payment of either of these sums within the time appointed to T., his heirs, administrators, and assigns, in trust, to raise the 100*l.* out of the rents and profits, and the 1,500*l.* by sale or mortgage of a sufficient part of the lands, and subject to the charges and trust to his son, his heirs, executors, administrators, and assigns :—Held, that the son took by descent, and not by purchase. *Chaplin* v. *Leroux*, 5 M. & S. 14.

Where a man granted to A., with remainder to his own heirs male, his heirs male took by descent. *Wills* v. *Palmer*, 2 W. Bl. 687 ; 5 Burr. 2615.

If such limitation was made by will, or by a third person in a deed, the heir male took by purchase. *Ib.*

Devise to the heir-at-law, in fee, with an executory devise over, in case he did not attain twenty-one :—Held, not to alter the quality of the estate, which he would otherwise have taken as heir ; that he took by descent and not by purchase. *Doe* d. *Pratt* v. *Timins*, 1 B. & Ald. 530. S. P., *Langley* v. *Sneyd*, 3 Br. & B. 243 ; 7 Moore, 165.

—— **Stock of Descent.**]—Whoever claims as heir by descent must make himself heir to the person last actually seised and in possession of the inheritance. *Jenkins* v. *Pritchard*, 2 Wils. 45.

Real estate stood limited to A. B. for life, with remainder to C. D. in fee simple. C. D. died, living A. B., leaving two aunts, a cousin, the son and heir of another aunt, and two cousins, the daughters and co-heiresses of another aunt, her co-heirs at law. The property became thus divisible in eighths, two to one aunt, two to another, two to the son of another, and one-eighth to each daughter of the other aunt. One of the daughters, E. F., died in 1824, living A. B., the tenant for life, leaving I. K., her son and heir-at-law ; the other, G. H., died in 1832, living A. B., the tenant for life, leaving I. K., her nephew and heir. None of these persons had in any way dealt with the property. In 1839 A. B., the tenant for life, died :—Held, that as to the one-eighth which had belonged to his mother, it was not necessary to trace the descent afresh from C. D., to whom the remainder in fee was limited, but that he ought to be considered as standing in his mother's place in respect of that share. *Paterson* v. *Mills*, 19 L. J., Ch. 310 ; 15 Jur. 1.

Real estate descended on a lunatic, subject to a mortgage, afterwards exonerated by the lunatic's personalty, not in any way derived from, or connected with, the descended estate :—Held, that the order and course of succession was not thereby changed, for the next of kin were entitled, on the death of the lunatic, to have so much of the personalty as had been applied in discharge of the mortgage, considered as a lien on the real estate, and raised accordingly. *Weld* v. *Tew*, Beat. 266.

Devise (previously to 3 & 4 Will. 4, c. 106) to the testator's heir-at-law and others, as trustees, upon certain trusts, and after the termination thereof, upon other trusts, void for remoteness : —Held, that the reversionary equitable estate undisposed of resulted, as part of the old use, to the testator, and descended to the heir quâ heir, who was consequently not made a fresh stock for the tracing of a descent. *Buchanan* v. *Harrison*, 1 John & H. 662 ; 31 L. J., Ch. 74 ; 8 Jur. (N.S.) 965 ; 10 W. R. 118.

—— **Paternal or Maternal Line.**]—A. being seised in fee, ex parte paternâ, conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c., and for no other use, intent, or purpose whatsoever. A. dying without appointment and without heirs ex parte paternâ :—Held, per Ld. K. and M. R., 1st, that the maternal heir was not entitled ; 2ndly, that there being a terre tenant, the Crown, claiming by escheat, had not a title, by subpœna, to compel a conveyance from the trustee, the trust being absolutely determined ; no opinion being given upon the right of the trustee ; per Ld. Mansfield, C. J., 1st, that the heir ex parte maternâ was not entitled ; 2ndly, that from the analogy between trusts and legal estates, the Crown was entitled by escheat ; but that if the conveyance had barred the Crown of its right, as between the maternal heir and the trustee, the former was

entitled. *Burgess* v. *Wheate*, 1 Eden, 177; 1 W. Bl. 121.

Where person seised of estate by descent ex parte maternâ dies without issue, descendants of his maternal grandfather must all be extinct before any descendant of a remote maternal ancestor can inherit, however nearly related to the propositus ex parte paternâ. *Hawkins* v. *Shewen*, 1 Sim. & S. 257; 1 L. J. (O.S.) Ch. 148.

The heir on the part of the great-grandfather has a prior claim to the heir on the part of the maternal grandfather. *Davies* v. *Lowndes*, 5 Bing. (N.C.) 161; 7 Scott, 22; 8 L. J., C. P. 73.

If the legal interest in lands descended in fee simple is ex parte maternâ, and the equitable interest in fee simple ex parte paternâ, or vice versâ, the equitable estate merges in the legal, and both follow the line through which the legal estate descended. *Goodright* d. *Alston* v. *Wells*, 2 Dougl. 771.

One seised in fee of a copyhold of inheritance by descent ex parte maternâ surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who, upon repayment of the principal and interest, surrendered again to the mortgagor:—Held, that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Doe* d. *Harman* v. *Morgan*, 7 Term Rep. 103.

Devise of all the testator's real and personal estate and effects to B. V., his wife, in trust for the education of his daughter, M. V., till twenty-one, and in case of the death of his daughter before twenty-one, the whole of his said estate and effects to his wife; the testator died, leaving B. V., his wife, and M. V., his only child. B. V. died, leaving M. V., also her only child, and then M. V. died under age, and without issue:—Held, that the heir of M. V. ex parte maternâ was entitled to succeed. *Goodtitle* d. *Castle* v. *White*, 2 Bos. & P. (N.R.) 383; 13 R. R. 441, n. S. P., *Goodtitle* d. *Vincent* v. *White*, 15 East, 174; 13 R. R. 429.

Devise to trustees, their heirs, executors, administrators, and assigns, in trust, to let the freehold estates for any term they thought proper, at the best improved yearly rent, to pay one-third of the rents of the freehold estates to his wife for life, and one-third of the personalty to her absolutely, and then to lay out the other two-thirds of the personalty in the funds; and to pay the dividends of the rents of the two-thirds of the freehold estates, and, after the death of the wife, the other third of the rent of the freehold estate to his daughter for her own separate use, and after her death the freehold estates and the two-thirds of the personal estate to the daughter's children, to be equally divided amongst them, and to be paid them at their respective ages of twenty-one years; and if his daughter died without leaving issue, then his freehold estates to his wife for life, and after her death to his heir-at-law, as if he had died intestate:—Held, that the trustees took an estate in fee, and that upon the death of the widow, who was the surviving trustee, the legal estate descended to the daughter, and upon her death without issue vested in the heir ex parte maternâ. *Doe* d. *Tomkyns* v. *Willan*, 2 B. & Ald. 84; 20 R. R. 355.

Where a feme sole, after marriage, was admitted tenant of a manor of certain premises, to her and her heirs as of her own tenant right, according to the custom; and afterwards the lord executed a conveyance of the premises to the husband in fee, and enfranchised the same from all seigniory rights to which they were previously liable; it seems that this conveyance, after the death of the husband, had the effect of giving the wife an absolute estate in fee-simple of the premises, descendible only upon the heirs ex parte maternâ. *Doe* d. *Newby* v. *Jackson*, 2 D. & R. 514; 1 B. & C. 448.

—— **Equitable Considerations—Right to Call for Conveyance of Legal Estate.**]—Infant died seised of equitable estate descended ex parte maternâ, his incapacity to call for conveyance of legal estate (whereby course of descent might have been changed) is not sufficient reason for it to be considered as done actually, it being trustees' duty not to convey till called upon. *Langley* v. *Sneyd*, 1 Sim. & S. 45; 1 L. J. (O.S.) Ch. 14.

—— **Merger.**—Where the equitable and legal estates, equal and co-extensive, unite in the same person, the former merges; therefore, where the former descends ex parte paternâ, the latter ex parte maternâ, upon their union the paternal heir has no equity. *Selby* v. *Alston*, 3 Ves. 339; 4 R. R. 10.

—— **Cousins.**]—First cousins twice removed come under denomination of first and second cousins, as second cousins, they being related to propositus in same, viz. sixth degree. *Silcox* v. *Bell*, 1 Sim. & S. 301; 1 L. J. (O.S.) Ch. 137; 24 R. R. 173.

—— **Half-Blood.**]—Before 3 & 4 Will. 4, c. 106, there could be no heir of the half-blood. *Anon.*, Lofft, 396.

Under a devise, previously to the 3 & 4 Will. 4, c. 106, to trustees, one being the testator's heir-at-law, upon trust (subject to prior estates) for conversion, the trust for conversion being void for remoteness, the equitable reversionary interest thus left undisposed of results as part of the old use, and descends to the heir in his character of heir, and does not so merge in his legal interest, under the devise to him as a trustee, as to break the descent and constitute him a fresh stock, from which, on decease intestate, the descent is to be traced. *Buchanan* v. *Harrison*, 1 Johns. & H. 662; 31 L. J., Ch. 74; 8 Jur. (N.S.) 965; 10 W. R. 118.

Consequently, upon his decease intestate, before the expiration of the particular estate, reversionary interest descends to his brother of the half-blood, in preference to his sister of the whole blood, as heir to their common father. *Ib.*

A. devised all his lands to J. (his son by the first venter) when he should come to the age of twenty-one, but if he should die before twenty-one, and D. (testator's daughter by the second venter) should be then living, he gave the same to her when she should attain twenty-one. The testator died, and then J. died under age and without issue:—Held, that on the death of J. the inheritance vested in D., his sister of the half-blood, in preference to his uncle of the whole blood. *Doe* d. *Andrew* v. *Hutton*, 3 Bos. & P. 643.

—— **Coparcener.**]—Real estate was devised to A. for life, with remainder to B. in fee. B. died in 1821, in the lifetime of A., leaving C. and D.

her co-heiresses at law. C. died in 1824, in the lifetime of A., without having in any manner dealt with the property, leaving a son, E.:—Held, that it was not necessary to trace the descent, as to C.'s moiety, from B., but that E., for every purpose, ought to be taken as standing in C.'s place with reference to that moiety. *Paterson* v. *Mills*, 19 L. J., Ch. 310; 15 Jur. 1.

A. and B. being seised of land in coparcenary, B. conveyed his moiety to a purchaser, and A., the other parcener, made partition by lease and re-lease, and conveyed the whole to H. and his heirs, as to one portion, to the use of B. in fee, and as to the other portion to the use of A. in fee:—Held, that A.'s portion remained descendible to his heir ex parte maternâ. *Doe* d. *Crosthwaite* v. *Dixon*, 1 N. & P. 255; 5 A. & E. 834; 2 H. & W. 364; 6 L. J., K. B. 61.

—— **Possessio Fratris.**]—The rule of possessio fratris did not apply to estates tail; nor to inheritances in fee simple, without an actual possession of the brother of the whole blood. *Doe* d. *Gregory* v. *Whichelo*, 8 Term Rep. 211.

There may be a possessio fratris of a trust as well as of a legal estate, and, notwithstanding the heir was merely equitable tenant in fee of the reversion, he may, by some act of conveyance in his lifetime, have so dealt with his equitable interest as to constitute himself a fresh stock of descent, and to entitle his sister to claim as his heir, upon the principle that possessio fratris facit sororem esse hæredem. *Buchanan* v. *Harrison*, 1 Johns. & H. 662; 31 L. J., Ch. 74; 8 Jur. (N.S.) 965; 10 W. R. 118.

Being born in one house, and receiving rents of three others by his mother and guardian, was a sufficient seisin by a posthumous son, who died at five weeks old, to bar the descent to his sisters of the half-blood, and convey it to a collateral heir. *Goodtitle* d. *Newman* v. *Newman*, 2 W. Bl. 938; 3 Wils. 516.

A testator, being possessed of estates, which, by a deed of settlement on his marriage, had been settled on himself for life, remainder to his first and other sons in tail male, remainder to himself in fee, and having issue one son and two daughters by the marriage, devised all his lands, manors, &c., to his son, subject to the payment of his debts and legacies, with a proviso, that, in case his son should die without issue male, he bequeathed a certain sum to all his daughters who should be living at the time of his death, to be equally divided amongst them; and then charged his estates with the payment of these sums, and devised them to two trustees, their heirs and assigns, without impeachment of waste, by sale or mortgage, to raise a sufficient sum to pay those legacies, and as to the remainder of his land, &c., as should not be sold by the trustees, he devised it to his brother for life, with divers remainders over. His son having died under age, unmarried, and without issue:—Held, that the daughters took no estate by descent in the hereditaments devised. *Sanford* v. *Irby*, 3 B. & Ald. 654.

Since the Inheritance Act—Title by Purchase.]—The statute 3 & 4 Will. 4, c. 106, s. 3, which provides that land devised to the heir of the testator shall be considered to have been acquired by such heir as a devisee and not by descent, applies for all purposes; and therefore a demurrer by the heir, who was also devisee of the lands, to a bill by a legatee seeking to marshal the assets of the testator with reference to such land as against the heir, was allowed. *Strickland* v. *Strickland*, 10 Sim. 374; 9 L. J., Ch. 60.

—— **Stock of Descent.**]—C. died seised in fee of lands in New South Wales, which C. inherited from B., her father. C. had two sons, one died in her lifetime, unmarried, and the other survived his mother, but died before acquiring possession of the lands, leaving a son, the defendant. In an action against him, on a covenant of his mother, and as her heir, he pleaded that he took by descent, not from his mother, but from B., his great-grandfather. The question was whether by virtue of the 3 & 4 Will. 4, c. 106, adopted in the colony, the plea was established:—Held, that the lands descended to the defendant from C. and not from B., and that the plea was not established. *Badham* v. *Shiel*, 7 Jur. (N.S.) 509 of part 2.

—— **Tracing Descent—Paternal or Maternal Line.**]—By a marriage settlement real estate, of which the lady was seised as heir to her maternal grandfather, was conveyed to trustees, upon trust for the lady and her heirs until the marriage, and after the marriage, upon trust for the lady for life; with remainder, in default of issue of the marriage, in trust for the lady and her heirs, if she survived her husband; but if she predeceased him, then in trust for the person or persons who would at her death have become entitled to the property if she had died intestate, and without having been married. The lady died without issue in her husband's lifetime:—Held, that the ultimate trust, being for the benefit neither of the settlor nor of the heirs of the settlor, was unaffected by 3 & 4 Will. 4, c. 106, s. 3, and that the persons intended to take thereunder were those who would have been entitled if the settlement had never been executed; and, consequently, that the heir ex parte maternâ took the property, by purchase under the settlement. *Heywood* v. *Heywood*, 34 Beav. 317; 34 L. J., Ch. 317; 11 Jur. (N.S.) 633 12 L. T. 168; 13 W. R. 514.

B. conveyed customary freeholds, which he had inherited from his mother, to N. absolutely, and N., after surrender and admittance, executed on the same day a deed of declaration of trusts for such person as B. should by deed or will appoint, and in default for B. and his heirs, this process being necessary according to the custom to give B. the power of devising. B. died intestate:—Held, that the descent had not been broken, and that the heir of the testator ex parte maternâ was entitled. *Nanson* v. *Barnes*, L. R. 7 Eq. 250; 20 L. T. 154; 17 W. R. 429.

A., having inherited lands ex parte maternâ, devised them to trustees in fee, upon trust for his widow for life, and on her decease to convey the same to such person as should answer the description of his heir-at-law, and died, leaving only collateral heirs:—Held, that the heir general, and not the heir ex parte maternâ, was entitled. *Davis* v. *Kirk*, 2 Kay & J. 391; 2 Jur. (N.S.) 857.

Sect. 4 of the Inheritance Act (3 & 4 Will. 4, c. 106), is not merely declaratory of the old law; it introduces a new rule as to the tracing of the descent in the case of a limitation to the heirs general of a deceased person. By a marriage settlement executed in 1810, real estate of the

wife was limited to the use of the husband for life, remainder to the use of the wife for life, and, after limitations in favour of the issue of the marriage, the ultimate limitation was "to the use of the right heirs of J. W., deceased (the mother of the wife), for ever." At the date of the settlement the wife was seised of part of the real estate as the heiress-at-law of her deceased mother, and of the other part as one of the co-heiresses of her deceased maternal great-uncle. The wife died in 1846; the husband died in 1871. The limitations in favour of the issue all failed on the death in 1880 of the surviving son of the marriage:—Held, that, if under the ultimate limitation the wife took the estate as a purchaser, *Manderille's Case* (Co. Litt. 26 b.) did not apply, and that the descent from her would be traced in the ordinary way, and not ex parte maternâ. But held, that, under the ultimate limitation, the wife took the estate as part of the old estate which she had before the marriage, and that the descent was not broken by the settlement. *Moore* v. *Simkin*, 55 L. J., Ch. 305; 31 Ch. D. 95; 53 L. T. 815; 34 W. R. 254.

A testator who died in 1853, devised as his own an estate which had devolved on his late wife in fee as heiress-at-law of her mother. The devise was to trustees in fee, on trust to pay the rents to the testator's only son and to his two daughters in equal shares, and to the survivors or survivor of them, with remainder on trust for the children of the son and the daughters respectively in fee, with an ultimate remainder unto and to the use of the testator's own right heirs. The son and both the daughters survived the testator, but they all died without issue. The son survived the daughters, and died intestate. He was the heir-at-law of his father, and also of his mother. The testator had also devised real estate of his own to the son, who elected to confirm the will:—Held, that the equitable estate, which the son took under the will, and by virtue of his election, merged in the legal estate which descended to him from his mother, and that the descent was regulated by the legal estate, and that, consequently, on his death intestate and without issue, the property descended to the heir of his maternal grandmother, who was the last purchaser of the legal estate, and not to his own heir. *Douglas, In re, Wood* v. *Douglas*, 54 L. J., Ch. 421; 28 Ch. D. 327; 52 L. T. 131; 33 W. R. 390.

—— **Coparceners.**]—G. T., seised in fee of certain hereditaments, died intestate, leaving two daughters, Ellen and Sarah. Both daughters died intestate, leaving a son. It was held that the statute 3 & 4 Will. 4, c. 106, was not intended to apply to cases which were plain before it was passed; and that the moiety of each daughter descended upon her son. *Cooper* v. *France*, 19 L. J., Ch. 313; 14 Jur. 214.

The decision in *Cooper* v. *France* (19 L. J., Ch. 313) applies to a case which is not one of direct lineal descent. Where, therefore, a person has died intestate, unmarried, and entitled to real property by descent through his mother, who was one of two coparceners, but never became actually seised of her moiety, the whole interest of the intestate in the real property will pass to his nephew as heir-at-law; and the title is not to be traced back to the last purchaser so as to cause the real property to be divided between the nephew and those claiming descent through the other coparcener. *Matson, In re, James* v. *Dickinson*, 66 L. J., Ch. 695; [1897] 2 Ch. 509; 77 L. T. 69.

—— **Between Brothers.**]—The descent of property between brothers is immediate, and not through their father. *Kynnaird* v. *Leslie*, 35 L. J., C. P. 226; L. R. 1 C. P. 389; 12 Jur. (N.S.) 468; 14 L. T. 756; 14 W. R. 761.

—— **On Attainder.**]—The descendants of one child of an attainted person may trace a heritable descent to the descendants of another child of such attainted person, even though the marriage, of which such children were the issue, took place abroad after the attainder. *Ib.*

—— **Proof of Pedigree—Tracing Descent.**]—At the trial of an action for the recovery of land, in 1876, it was proved by the plaintiff that J. F. W. died seised in fee, without issue, and intestate, in 1868; that all the descendants of his paternal grandfather, W., were dead, and that the plaintiff was the heir-at-law of the paternal grandmother. On the death of the intestate in 1868 advertisements were published in the London and provincial newspapers, for the heir-at-law of J. F. W., describing his father and grandfather and the property. Several persons came forward, and, besides the plaintiff, no one was able to establish any relationship except the defendants, who were co-heiresses of the mother of J. F. W., and to whom the tenants of the property had attorned. Deeds, wills, and documents were put in evidence, in which no mention was made of any person who would have been of nearer kin than the plaintiff, beyond those whose deaths were proved. The defendants proved that the paternal great-grandfather had, besides W., another son, N., born in 1717, and also a sister, a Mrs. M., both of whom were alive in 1755, and that the paternal great-grandmother's maiden name was S. B. But no further evidence as to N., Mrs. M., or the B. family was given:—Held, that there was evidence on which the jury might properly find for the plaintiff. *Greares* v. *Greenwood*, 46 L. J., Ex. 252; 2 Ex. D. 289; 36 L. T. 1; 25 W. R. 639—C. A.

—— **Intermediate Rents—Posthumous Child.**]—A., being seised of real estate, died, leaving his sisters presumptive co-heiresses, his wife being enceinte of a son, born subsequently. The rents from the ancestor's death remaining unreceived by the co-heiresses:—Held, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. *Goodale* v. *Gawthorne*, 2 Sm. & G. 375; 23 L. J., Ch. 878; 2 W. R. 680.

A qualified heir is entitled to the rents and profits of realty of which the ancestor dies seised, in fee or in tail, which accrue due between the death of the ancestor and the birth of the ancestor's posthumous and only child, whether such rents be actually received or not. *Richards* v. *Richards*, Johns. 754; 29 L. J., Ch. 836; 6 Jur. (N.S.) 1145.

—— **Charity.**]—Upon a devise to trustees in favour of a corporation to be thereafter formed for a good charitable use, valid under the Statutes of Mortmain, the heir has no right to the rents and profits accrued before the devise is carried into effect. *Att.-Gen.* v. *Bowyer*, 3 Ves. 714; 4 R. R. 132.

B. ESTATE TAIL.

1. Property within the Statute De Donis.

Chattels Real.]—Leasehold estates bequeathed in trust to pay the rents and profits to the persons for the time being entitled under the limitations of real estate, devised in strict settlement, with power to the trustees at any time, with the consent of the persons so entitled, or, if minors, at their own discretion, to sell and invest the produce in real estate to the same uses. The leasehold estates vest absolutely in the tenant in tail upon his birth. *Ware* v. *Polhill*, 11 Ves. 257; 8 R. R. 144.

By articles relating to leases, pur autre vie, and for years and to money, it was agreed that said leases for lives and for years should be conveyed to trustees in trust (after successive life estates to D. and J.), "after the decease of J., to the issue of J. and A., in such shares and proportions as the said J. should appoint, and for want of such appointment, to go to such children equally, share and share alike, and for default of such issue, to the heirs, executors, and administrators of said J., during said leases; the money or the lands agreed to be purchased therewith to go to the issue of said J. and A., in such shares and proportions, &c., and for want of such appointment to be equally divided amongst such children, share and share alike; and if no children of said marriage, or all should die before twenty-one," then a power to dispose of said money:—Held, that issue is to be construed children, and that the issue of J. and A. took the absolute interest in the chattel property, and a quasi fee in the freehold property. *Campbell* v. *Sandys*, 1 Sch. & Lef. 281; 9 R. R. 33. And see *Murthwaite* v. *Jenkinson*, 2 B. & C. 357; 3 B. & C. 191; 3 D. & R. 764; 26 R. R. 384.

Copyholds.]—*See* COPYHOLD.

Personalty.]—Limitation which would create an estate tail as to freehold property, would give an absolute interest if applied to personal estate. *Sterne, Ex parte*, 6 Ves. 159. S. P., *Campbell* v. *Sandys*, supra; *Ward* v. *Bevil*, 1 Y. & J. 512; 30 R. R. 840.

Heirlooms.]—Heirlooms are personalty, and words which would limit an estate tail in freehold lands will give an absolute interest in heirlooms. *Warter* v. *Hutchinson*, 2 Br. & B. 349; 5 Moore, 143; 23 R. R. 457.

Estate pur autre vie.]—Estate pur autre vie may be limited in tail. *Sterne, Ex parte*, supra. And see *Campbell* v. *Sandys*, supra.

Title of Dignity or Honour.]—When a dignity is limited to the heirs of the body, then, although no place be named in the creation of the title, the dignity is within the statute De Donis, and descendible as an estate tail, and the patent does not create a fee simple conditional. There is no difference in these respects between a baronetcy and other descendible dignities. *Rivett-Carnac's Will, In re*, 54 L. J., Ch. 1074; 30 Ch. D. 136; 53 L. T. 81; 33 W. R. 837.

2. Limitation of, in Deed.

A settlement to S. for life, remainder to the heirs of S. on the body of his wife A. to be begotten, the male to be preferred before the female, is an estate tail in the first instance. *Den* d. *Creswick* v. *Hobson*, 2 W. Bl. 695.

A settlement before marriage on a husband and wife for life (of freehold), remainder to the heirs of the husband and wife; and of copyhold in borough English, on the husband and wife for life, remainder to the heirs of their two bodies, in like manner, and to the same uses as the freehold; the younger son will succeed as heir in tail to the copyhold. *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

A limitation in a deed, to the use of A. for life, with remainder to the use of the first son of the body of A. lawfully issuing, and for default of such issue to the second, third, and other sons of A., and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of A. *Owen* v. *Smith*, 2 H. Bl. 594; 3 R. R. 513. S. P., *Galley* v. *Barrington*, 2 Bing. 387; 10 Moore, 21; 27 R. R. 663.

A marriage settlement, purporting to be made in pursuance of articles recited in it, conveyed an estate to A. and his wife, and the heirs of their bodies:—Held, that they became tenants in tail special, and that a court of law could not construe the deed as rendering them tenants for life, with remainder to their issue in tail, even if that might have been the construction to be put upon the articles by a court of equity. *Doe* d. *Daniel* v. *Woodroffe*, 10 M. & W. 608; 12 L. J., Ex. 147. Affirmed, 15 M. & W. 769; 7 Jur. 959—Ex. Ch.; 2 H. L. Cas. 811; 13 Jur. 1013.

Under a limitation in a marriage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife takes an estate tail; and though it was recited in the deed that the husband's father conveyed, in consideration of the marriage, and "for settling and establishing the lands to the uses thereinafter expressed," and subsequent uses were added in the deed, the court would only take notice of the legal estate. *Alpass* v. *Watkins*, 8 Term Rep. 516.

Lands were settled by deed in tail male on such person as at the decease of T. H. should be the second son then living of T. H. and A. H.; and, for default of such issue to the third, fourth, and so on (other than and except the eldest), in like manner; for default of such issue, to the eldest or only son in tail male; and for default of such issue to T. H. in fee. T. H. died in 1766, leaving four sons, P., C., T., and J. P. died in 1770, an infant, without issue; C., in 1829, without issue; T., in 1783, without issue. Upon a suit instituted after the death of C.:—Held, that in the events which had happened, J. took an estate tail under the settlement. *Hawkins* v. *Hawkins*, 9 Bing. 765; 3 M. & Scott, 322; 2 L. J., C. P. 154.

Lands were limited to the use of the settlor for life, remainder to D., his heirs and assigns, but if D. should die without issue, then to T., his heirs and assigns; but if both D. and T. should die without issue, then to the issue male of the settlor:—Held, that D. and T. took estates tail. *Morgan* v. *Morgan*, 39 L. J., Ch. 493; L. R. 10 Eq. 99; 22 L. T. 595; 18 W. R. 744.

3. After Possibility of Issue Extinct.

Power to Commit Waste.]—By settlement before marriage, the husband's estate was conveyed to trustees, to the use of the husband for

life sans waste, remainder to trustees to preserve contingent remainders, remainder to the use of the wife for life, for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the first and other daughters in tail male, remainder to the heirs of the body of the husband and wife, remainder to the right heirs of the husband; the wife survived the husband and had no issue; and after possibility of issue by the husband extinct:—Held, that she was tenant in tail after possibility, &c., that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams* v. *Williams*, 12 East, 209; 15 Ves. 472; 11 R. R. 357.

4. Descent.

Heir Male.]—Whoever will take as heir male by purchase must be both heir and male. *Greynore* v. *Nooke*, 1 Wils. 30.

Quære, whether a person may take as heir male of the body, without being heir generally. *Wills* v. *Palmer*, 5 Burr. 2615; 2 W. Bl. 687.

5. Barring Estate Tail.

i. *Restriction on Power to Bar.*

By Act of Parliament.]—When lands are limited to a person and the heirs of his body by a statute which forbids the alienation of any portion of the lands therein mentioned by the donee or the heirs of his body, the estate thus created is nevertheless a tenancy in tail deprived of one of its ordinary incidents—namely, that the estate tail can be barred and the heirs in tail and the remainderman cut off. *Abergavenny (Earl)* v. *Brace*, 41 L. J., Ex. 120; L. R. 7 Ex. 145; 26 L. T. 514; 20 W. R. 462.

An estate granted by Charles the Second to one of his illegitimate children for love and affection may be well barred by bargain and sale under 3 & 4 Will. 4, c. 74, s. 15, notwithstanding 34 & 35 Hen. 8, c. 20. *Grafton (Duke)* v. *London and Birmingham Ry.*, 5 Bing. (N.C.) 27; 6 Scott, 719; 1 Arn. 363; 8 L. J., C. P. 47.

By Charge.]—Trust by deed creating estates tail after any contract for alienation to raise a sum of money for persons next in the course of limitation, declared void, as tending to a perpetuity, and inconsistent with the rights of the tenants in tail. *Mainwaring* v. *Baxter*, 5 Ves. 458.

Devise to J. for life; remainder to his issue male, and to his and their heirs, share and share alike; and for want of such issue, to his issue female, and her and their heirs; remainder to J. K., his heirs and assigns, with a proviso that if J. K. or his issue, or any of them, shall alienate, mortgage, or incumber, or do any act to defeat the bequests, he or they shall pay, and he charges the premises with 2,000*l.* to such persons who should or ought to take next under the above limitations. J. had two daughters and no son, and he and his daughter suffered a recovery. Bill to be paid the 2,000*l.*:—Held, J. K. took an estate tail, and that the proviso was repugnant to the estate. *King* v. *Burchell*, Ambl. 379; 1 Eden, 424.

By Condition.]—Condition, that tenants in fee shall not alien, or that tenant in tail shall not suffer a recovery, is void. *Bradley* v. *Peixoto*, 3 Ves. 324; 4 R. R. 7.

By Limitation Over.]—A testator, by will made in 1840, after directing the payment of annuities, and giving a life estate in his property to the benefit of his wife, to be reduced to an annuity of 500*l.* in the event of her second marriage, gave one moiety of his residuary estate to his son H. for life, with remainder to his four daughters; and the other moiety, subject to a trust for accumulation after the death or second marriage of his wife and the decease of H. and his four daughters, he gave to A. in tail, with remainder to H. in tail. The trust for accumulation he declared should continue until after the decease or second marriage of the wife, and the decease of the five children above referred to, or during so much of such time as the law will allow for accumulation; and after the expiration of that period the trustees were to retain so much as should be required for repairs, and subject thereto, the estate and interest of the tenant in tail under the antecedent limitations were to come at once into possession. The will contained the following clause: "That if any person for whom any rents and profits, annuity, or other income is provided by this my will (being persons now living), should become bankrupt or become insolvent, or should, either alone, or being a female, either alone or in conjunction with any husband, present or future, make any assignment, appointment, or other disposition of, or charge upon, the rents and profits, or share of rents and profits, annuity, or income, to the receipt of which such person shall be immediately or otherwise entitled under this my will, before the same shall actually accrue due, or should attempt so to do, by any writing, then and in such case not only shall the rents and profits, or shares of rents and profits, annuity, or income to which such person so becoming bankrupt or insolvent, or doing or attempting to do such act as aforesaid, was entitled, be forfeited, and be no longer payable to him or her, but the right which each such person might have had upon any future event to any other rents and profits, or share of rents and profits, annuity, or income, shall be forfeited and never accrue." A., by deed, after reciting the will, in consideration of two annuities, assigned all the real and personal estate to which he was entitled in possession, remainder, or contingency under the will:—Held, that the deed created no forfeiture, as the clause could not apply to either the estate tail or to the corpus of the accumulation, as such a clause prohibiting alienation in respect of those interests would be null and void. The clause could not apply to the income, as the right to the income was consequential upon the right to the corpus. *Chapman* v. *Brown*, 9 Jur. (N.S.) 995; 9 L. T. 6—L.JJ.

By a Trust.]—A testator devised his estates to his son and his heirs male "in the fullest trust and confidence" that he would not do, nor permit to be done, "any action in law or otherwise" to defeat the thereinafter declared trusts and limitations of the estates, but that, on the contrary, he would do all in his power to effectuate them. He then declared how the estates were to go if the son died without issue of his body lawfully begotten, specifically devising one-fourth portion to D. The son having entered into possession of the devised estates, suffered a recovery:—Held, that the words of the will did

not create a trust, and that the entail was barred by the recovery. *Dawkins* v. *Penrhyn* (*Lord*), 48 L. J., Ch. 304; 4 App. Cas. 51; 39 L. T. 583; 27 W. R. 173—H. L. (E.)

The right of a tenant in tail to enlarge his estate into a fee cannot be restricted by any expressions of a testator, the donor of the estate. *Ib.*, per Lord Penzance. S. P., *Foorde* v. *Foorde*, 2 W. Bl. 698.

ii. *Contract to Bar.*

When Specifically Performed.]—Specific performance decreed against an heir in tail in possession of an agreement, during the life of a tenant for life, to levy a fine. *Holles* v. *Carr*, 3 Swanst. 638.

On a sale by a tenant in tail in remainder who had disentailed without the concurrence of the tenant for life, the tenant in tail covenanted that he would execute every disentailing and other assurance for further or more perfectly assuring the premises as the purchaser should reasonably require:—Held, on the construction of the whole deed, that under this covenant the tenant in tail was bound to execute a disentailing deed after the death of the tenant for life. *Davis* v. *Tollemache* (2 Jur. (N.S.) 1181) observed upon. *Bankes* v. *Small*, 56 L. J., Ch. 832; 36 Ch. D. 716; 57 L. T. 292; 35 W. R. 765—C. A.

The 47th section of the Fines and Recoveries Act does not interfere with the jurisdiction of the court to decree against a tenant in tail specific performance of a contract to execute a disentailing assurance entered into by him, but only prevents the court from treating the contract as being in equity a disposition taking effect under the act so as to bind the issue in tail and remainderman. *Ib.*

Conveyance to trustees in trust to sell and purchase other estates, to be settled. Those entitled under the limitations directed of the estates to be purchased, have equitable interests coextensive until a sale. Therefore, a specific performance was decreed of an agreement for partition against an objection to a title, under a fine by a person, who would have been tenant in tail of the estates to be purchased, the effect being an election to keep the estate, binding the trustees; though it may be questionable whether they could take upon themselves to convey in fee to a person entitled to an estate tail only. *Pearson* v. *Lane*, 17 Ves. 101.

—— **In the Case of Mortgages.**]—*See* col. 240, post.

—— **Against Persons claiming under Tenant in Tail.**]—Where a tenant in tail has entered into a contract for the sale of his estates for value, and in order to convey them to the purchaser has suffered a recovery which turns out to be technically defective at law, the court will not allow persons claiming under him to take advantage of the flaw. *Howard* v. *Shrewsbury* (*Earl*), 36 L. J., Ch. 283; L. R. 3 Eq. 218; 15 W. R. 301. On appeal, 36 L. J., Ch. 908; L. R. 2 Ch. 760; 17 L. T. 358; 15 W. R. 1213.

In 1825 a person took the benefit of the Insolvent Debtors Act, and executed an assignment of all his real and personal property in possession, reversion, or expectancy, to the provisional assignee, in trust for his creditors. The insolvent was at the time tenant in tail in remainder of real estate, and in 1826 he became tenant in tail in possession by the death of his father. In 1831 he became bankrupt, and the commissioners executed a disentailing deed of his real estate. In 1844 he died, leaving issue inheritable under the entail. The assignee under the insolvency claimed the estate against the assignees under the bankruptcy, on the ground that the estate conveyed to him by the deed of 1825 was enlarged into a fee simple by the disentailing deed executed under the bankruptcy:—Held, that the deed of 1825 only passed such interest as the insolvent had power to convey without fine or recovery, and did not operate as a contract to convey the fee. *Sturgis* v. *Morse*, 3 De G. F. & J. 223; 29 L. J., Ch. 766; 6 Jur. (N.S.) 766; 2 L. T. 647; 8 W. R. 737.

Receiver.]—Where a tenant in tail in remainder had agreed to pay a sum of money after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery, to give effect to the mortgage, but coming into possession of the estate refused to perform this covenant, the court appointed a receiver of the rents. *Free* v. *Hinde*, 2 Sim. 7.

iii. *Of Lunatic.*—*See* LUNATIC.

iv. *By Fine and Recovery.*—*See* FINES AND RECOVERIES.

v. *Under Fines and Recoveries Act.*—*See* FINES AND RECOVERIES.

vi. *Equitable Estate Tail.*

Tenant in tail of a trust estate, with remainders over, cannot by will or settlement bar the remainders, or without a recovery, any more than tenant in tail of a legal estate. *Kirkham* v. *Smith*, Ambl. 518.

vii. *Quasi Estates Tail.*

By Deed.]—An interest in an estate pur autre vie, that would be an estate tail if applied to freehold lands of inheritance, may be disposed of by deed. *Sterne, Ex parte*, 6 Ves. 158.

Quasi estate tail in an estate for lives barred by release. *Moody* v. *Waters*, 16 Ves. 313.

A father, tenant for life of an estate pur autre vie, and his son tenant in quasi tail in remainder, under a marriage settlement of the year 1767, joined in executing a deed of the year 1792, the son being then under age, whereby the lands were conveyed to a trustee, upon trust for the father for life, remainder to the son, if he survived his father, absolutely, but if he died in the lifetime of his father, without issue, then to the father absolutely. This deed contained a power enabling the father and son to revoke the uses and declare new ones. The father, in three years after, executed a deed, by which he purported to convey all his interest to the son, but still remained in possession, and subsequently obtained a renewal to himself from the head landlord. The father and son subsequently joined in selling a part of the lands comprised in the original settlements creating the quasi entail, and exercised the power of revocation contained in the deed of 1792. The son, in 1815, executed a settlement upon the occasion of his marriage, his father being then alive, but not a party to the deed, by which settlement he conveyed the lands to trustees upon certain trusts for himself for life, for his intended wife and the issue of the marriage; and in default of issue for himself absolutely. The son survived the father, and died in

1832 :—Held, that by the operation of the deed of 1792, which was voidable only, and not void, the quasi entail had been effectually barred. *Allen* v. *Allen*, 2 Dr. & War. 307 ; 1 Con. & L. 427 ; 4 Ir. Eq. R. 472.

A tenant in quasi tail, in possession of an estate pur autre vie, may bar the quasi entail by any conveyance or disposition inter vivos, but not by will. *Ib.*

A tenant in quasi tail in remainder of an estate pur autre vie, can, with the concurrence of the tenant for life, by any act inter vivos, bar the quasi entail. *Ib.*

If tenant in quasi tail in remainder of an estate pur autre vie takes a renewal, with the concurrence of the tenant for life, or if tenant for life takes the renewal, and conveys to the tenant in quasi tail in remainder, the quasi entail will be barred. *Ib.*

Tenant in quasi tail in remainder cannot, without the concurrence of the tenant for life, affect the quasi entail. *Ib.*

A tenant in quasi tail in remainder cannot, without the concurrence of the tenant for life, bar the remainders, though semble he can bar his own issue ; but the tenant for life merely executing a deed by which the remainderman conveys, or vice versâ, will bar the subsequent remainders. *Ib.*

In this case a deed executed by a tenant for life, and his eldest son an infant tenant in quasi tail in remainder, was held to have been rendered a valid bar by subsequent dealings of the son with the property. *Ib.*

If a tenant quasi in tail in remainder executes a conveyance for valuable consideration, but without the concurrence of the tenant for life, and surviving tenant for life lives until a period at which he was clearly capable of barring the entail. Quære, whether such alienation shall operate to bar the remainders over. *Ib.*

By Surrender.]—Quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, and taking a new one to himself, bar the remainders over. *Grey* v. *Mannock*, 2 Eden, 339.

A., possessed of a church lease for three lives, devised it to trustees for certain purposes, till his son R. should attain twenty-one, and when his said son should attain that age, he directed his trustees to stand seised of it to the use of his said son, and the heirs of his body ; and by a codicil he directed that if his son R. should die without issue, his son P. should inherit the estate in the same manner as R. was to inherit it. R. being quasi tenant in tail, if he surrender this lease and take a new one to himself and his heirs for three new lives, there is no equity on behalf of P. to make R., or his devisees, trustees of the new lease for P. *Blake* v. *Blake*, 1 Cox, 266 ; 1 R. R. 35.

Quasi tenant in tail of a freehold lease for lives may, by surrendering the old lease, without the trustee's joining and taking a new lease to himself, bar the remainders over ; notwithstanding there were prior existing trusts at the time of such surrender. *Blake* v. *Luxton*, G. Coop. 178 ; 14 R. R. 235.

By Will.]—Tenants in quasi tail cannot bar the remainders over by will. *Dillon* v. *Dillon*, 1 Ball & B. 77. *See* 14 R. R. 241, n. S. P., *Allen* v. *Allen*, 2 Dr. & War. 307 ; 1 Con. & L. 427 ; 4 Ir. Eq. R. 472 ; *Campbell* v. *Sandys*, 1 Sch. & Lef. 281 ; 9 R. R. 33.

Consent of Tenant for Life.]—A leasehold for lives being settled on A. for life, with remainder to B., as quasi tenant in tail, with remainders over :—Held, that the quasi tenant in tail could not, by fine or otherwise, during the life of A., bar the subsequent remainders without the concurrence of A. *Slade* v. *Pattison*, 5 L. J., Ch. 51.

S. and J. being joint tenants of copyhold lands for life in remainder expectant upon determination of a previous life estate in M., with several inheritances in tail with cross remainders in tail, S. and her husband without the concurrence of M. surrendered their estate and interest to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint ; S. died in the lifetime of her husband and of J. ; the husband afterwards died, having by his will appointed the surrendered share to his executors :—Held, that the quasi estate tail of S. was not barred, and that whether the life estate of M. was under the same instrument as that under which S. and J. derived their title, or whether M.'s tenancy was under her paramount title of freebench, still her concurrence was necessary in order effectually to bar the estate tail in remainder :—Held, also, that there was, under the circumstances, no severance of the joint tenancy. *Edwards* v. *Champion*, 3 De G. M. & G. 202 ; 23 L. J., Ch. 123 ; 1 W. R. 497.

Whether the surrender by a joint tenant to the use of his will would per se effect a severance of the joint tenancy, quære. *Ib.*

6. Leases.

Agreement for—Specific Performance.]—If a tenant in tail makes an agreement, not under seal, to let land for fourteen years, and then dies, the issue in tail cannot be compelled specifically to perform the agreement by granting a lease under 32 Hen. 8, c. 28. *Osborn* v. *Marlborough* (*Duke*), 12 Jur. (N.S.) 559 ; 14 L. T. 789 ; 14 W. R. 886.

Semble, mere acceptance of rent by the issue in tail will not amount to a confirmation of a voidable lease granted by his predecessor. *Ib.*

See also Settled Land.

By Committee of Lunatic Tenant in Tail.]—*See* Lunatic.

7. Mortgages.

Covenant for further Assurance—Trustee in Bankruptcy—Specific Performance.]—Tenant in tail makes a mortgage with covenant for further assurance, and becomes bankrupt ; his assignees are bound by the covenant. *Pye* v. *Daubuz*, 3 Bro. C. C. 595.

A., in November, 1841, mortgaged estates of which he was tenant in tail in remainder, and the indenture contained the usual covenant for further assurance. In September, 1842, A. was adjudicated a bankrupt, and subsequently received his certificate. In July, 1855, an order was made which declared that A. was entitled to two parts of the estates in S., and that they were comprised in the mortgage deed. A disentailing assurance was in February, 1856, tendered by the mortgagee to A. for execution, but he refused to execute it ; and thereupon a bill was filed against A. and his assignees in bankruptcy, praying that it might be decreed, pursuant to his covenant for further assurance, to execute and deliver to the plaintiff a proper disentailing assurance, of all the hereditaments

in S., to which he was entitled for an estate in tail male. A demurrer to the bill by A. was allowed, and the bill was subsequently dismissed. *Davis* v. *Tollemache*, 2 Jur. (N.S.) 1181.

Semble, unless there be words in a conveyance to shew it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the court will not resort to its extraordinary jurisdiction for specific performance, to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made. *Ib.*

Purchase of Equity of Redemption.]—A mortgagee in fee who had been in possession for more than twenty years died in 1805, leaving a will by which he devised the property to his eldest son in tail, with divers remainders over, and appointed him executor and residuary legatee. In 1812 the persons claiming under the will of the mortgagor filed a bill against the son to redeem, and the suit was compromised in 1814 on the terms of his paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will:—Held, that his heir-at-law was entitled to the equitable fee, and that the remaindermen under his father's will had no title in equity. *Pendleton* v. *Booth*, 1 De G. F. & J. 81; 29 L. J., Ch. 265; 6 Jur. (N.S.) 182; 8 W. R. 101.

8. Other Charges and Incumbrances.

Act of Parliament—Power to Charge Estates.]—Tenant in tail, with remainder over, is enabled by act of parliament to pay debts, and charge the estate with a sum of money; but the saving clause does not except the right of the remainderman; yet he is barred. Secus, if he had been tenant for life only. *Westby* v. *Kierman*, Ambl. 697.

Power to Charge Portions.]—Power to charge portions not inconsistent with an estate tail. *Jervoise* v. *Northumberland* (*Duke*), 1 Jac. & Walk. 575; 21 R. R. 229.

Power to Jointure—Agreement for a Settlement.]—Father being tenant for life and son tenant in tail in remainder of an estate, a settlement was made, wherein was a power for the son, when in possession, to make a jointure. Father and son enter into a general covenant (without reciting or referring to the power) that the son within twelve months shall make a jointure on the then intended wife: the father dies within twelve months; the son takes possession, and dies without making any settlement: the estate is bound in the hands of the remainderman. *Jackson* v. *Jackson*, 4 Bro. C. C. 462.

Charge of a Sum in Gross.]—By a marriage settlement, an estate was limited to the husband for life, remainder to trustees for 500 years, for raising younger children's portions, remainder to the sons of the marriage in tail. By an agreement indorsed on the settlement before its execution, and signed by the husband and the father of the lady, it was agreed that if the lady should die without leaving issue of the marriage, the husband, after her death, should pay her father 600*l.*, and that, in default of payment, it should be raised by demise, &c., of the term. There was issue of the marriage, a son and a daughter, the latter died an infant in her mother's lifetime:—Held, that notwithstanding an estate tail had vested in the son before the 600*l.* was raisable, the recovery did not defeat that charge. *Eales* v. *Conn*, 4 Sim. 65.

Devise of separate estates to three younger sons for their lives, and after their death to the eldest son, W., with power to leave the estates to such of his sons as he thinks proper, "but in case he leaves no sons, or in case of failure of issue male from them, then to the heirs male of my other sons in succession." "And in case the whole of my estate come into possession of W. or his issue male by the death of all my younger sons, I then give to each of my younger sons' children 1,000*l.*, to be paid out of the estates which I give to my younger children for their lives":—Held, that W. took the estates in tail male in remainder, which vested in him on the deaths of the younger sons respectively, and that such estates tail were on vesting respectively charged with legacies to the children of such younger sons, but that such legacies were not payable until the whole of the estates had so vested, and that the legacies were not remainders or charges posterior to the estate tail, and so capable of being barred by a disentailing assurance. *Cholmeley* v. *Strickland*, 39 L. J., Ch. 814—H. L. (E.)

Judgment.]—In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to the plaintiff's charge. *Lewis* v. *Duncombe*, 20 Beav. 398.

Costs of Suit.]—Whether costs incurred in a suit, in which real estate is recovered for plaintiff, who was tenant in tail of the estate so recovered on his death without issue, and without barring the limitations over, are a lien as against other tenant in tail, taking in a new line of the limitations, quære. The principle in *Gifford* v. *Hart* (1 Sch. & Lef. 386) is not to be carried further in straining the effect of notice against a purchaser under a decree. *Lansdowne* v. *Beauman*, 1 Moll. 89.

Other Matters.]—No contribution to an incumbrance, in respect of an estate sold by a prior tenant in tail, in favour of a remainderman, who might have been barred; especially if the sale was under a decree. *Lloyd* v. *Johnes*, 9 Ves. 37; 7 R. R. 147.

9. Keeping down Interest.

Tenant in tail not obliged to keep down interest on a charge affecting the estate; if he does, his personal representative will not be allowed it out of the estate. *Redington* v. *Redington*, 1 Ball & B. 143; 12 R. R. 5.

An infant, tenant in tail, is bound to keep down the interest of debts charged upon the entailed estates. A tenant for life was also held to have been liable to keep down the interest of the debts although, having the ultimate remainder in fee, he had consented to an act of parliament by which the estates were vested in trustees for the payment of the debts. *Burgess* v. *Mawbey*, Turn. & R. 167; 24 R. R. 9.

On bill by infant tenant in tail, receiver was appointed, with order to keep down interest of incumbrances out of rents. He kept down

accordingly interest of all but one mortgage, the interest of which (belonging to infants) was never applied for, except a small portion for maintenance; residue of rents paid into court to credit of cause. Tenant in tail coming of age suffers a recovery, and resettles estate, and afterwards dies. Master by report having certified that deceased was not bound, while tenant in tail, to keep down interest of incumbrances, and consequently that rents paid into court, during time, belonged to his personal representatives, party claiming to be entitled to estate under settlement petitioned for leave to except to report, on following grounds:—1st, That, in case of infant tenant in tail, interest of incumbrances ought to be kept down out of rents; 2ndly, That direction to receiver to keep down interest, amounted to an appropriation of so much of rents to that purpose; and 3rdly, That deceased, by not claiming fund when of age, showed an intention that it should be appropriated. But it was held:—1st, That general question could only arise in favour of remainderman or reversioner, and all such rights were in this case barred by recovery; 2ndly, That order was not meant to vary rights of real and personal representatives, but to prevent incumbrancers from being prejudiced by court taking estate into its custody, and also to protect estate from hostile proceedings on part of creditors, and did not amount to appropriation; and, lastly, That there was nothing in circumstances to alter the character of property, which consisting of rents paid into court, and neither applied in payment of interest nor appropriated for such payment, was personal estate and to be dealt with as such. *Bertie* v. *Abingdon* (*Lord*), 3 Mer. 560; 17 R. R. 125.

10. Right to Deeds.—*See* Deed and Bond.

11. Decrees Against Tenant in Tail.

When Binding on the Heir in Tail.]—A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death is not binding on the succeeding issue in tail. *Frank* v. *Mainwaring*, 2 Beav. 115. *Fox* v. *Crane*, 2 Vern. 306. *Powell* v. *Powell*, Prec. Ch. 278.

The decree of a court of equity against an equitable tenant in tail for the specific execution of a contract relative to the lands entailed, and which was founded upon a personal equity against the tenant in tail, is not binding on the issue in tail, the tenant in tail having died without performing the decree. *Stoney* v. *Saunders*, Hay & J. 519.

When Binding on Remaindermen.]—If first tenant in tail be made party, remaindermen need not be joined, but will be bound by decree. *Reynoldson* v. *Perkins*, Dick. 427; Ambl. 564.

Tenant in tail claiming upon death of former tenant in tail without issue, not through or under him, but by a new limitation in remainder is entitled to continue suit of former tenant in tail, and to benefit of proceedings by supplemental bill. *Lloyd* v. *Johnes*, 9 Ves. 37; 7 R. R. 147.

Parties in remainder held not bound by the proceedings in a suit to which the prior tenant in tail was a party, he having no interest to protect, and not having protected the interests of such remaindermen. *Alsop* v. *Bell*, 24 Beav. 451.

The rule which allows the first tenant in tail to represent the fee in suits affecting the estate does not apply to heirs of entail under a Scotch deed of tailzie; and therefore a decree made in a suit framed upon that principle, for the administration of a fund which in a certain event was liable to be invested in the purchase of land in Scotland to the uses of a Scotch deed of tailzie, was opened at the instance of a subsequent heir of entail under that deed. *Fordyce* v. *Bridges*, 2 Ph. 497; 1 Coop. C. C. 326; 17 L. J., Ch. 185. Affirming 10 Beav. 90; 16 L. J., Ch. 81; 10 Jur. 1020.

A testator in 1815 devised an estate to A. for life, remainder to his sons successively in tail, remainder to B. in tail, and in 1818 made another will, devising the estate to A. for life, remainder to his sons successively in tail, remainder to C. in tail:—Held, that a decree establishing the will of 1818, made in a suit to which B. was not a party, but A. and his first son were parties, as representing the inheritance, was not binding between B. and C. *Arnold* v. *Bainbrigge*, 2 De G. F. & J. 92.

A person wrongly supposed to be the trustee under a will, sold in 1806 under a power for sale and reinvestment on certain trusts, with the usual receipt clause. He conveyed and signed the receipt, but allowed the purchase-money to be received by the tenant for life, who appropriated it. The interests in remainder accrued in 1845, and in 1851 ejectment was brought against the purchaser, who set up outstanding terms:—Held, that the remaindermen ought to take their remedy against the supposed trustee, whose estate appeared to be solvent, and were not entitled to the assistance of the court to remove the outstanding terms. *Hicks* v. *Sallitt* (3 De G. M. & G. 782) distinguished. The remaindermen having dealt with their interests in the proceeds of the sale, and a decree having been made in a former suit giving relief against the estate of the tenant for life for the sums received by him, a perpetual injunction was granted against proceedings at law to recover the land, though the estate of the tenant for life was insufficient to make good the purchase-money the said decree containing a clause "without prejudice to the right of resorting to the land":—Held, that this did not alter the effect of the decree so far as strangers to the suit were concerned. *Hope* v. *Liddell*, 25 L. J., Ch. 90; 2 Jur. (N.S.) 105; 4 W. R. 145.

The remainderman in tail is not bound by a decree against the tenant for life, for specific performance of an agreement for a lease, which was in violation of his leasing power, and is not, therefore, a necessary party to such suit; he may afterwards proceed at law to evict such lease. *Corry* v. *Corry*, Wall. Lyn. 278. See *Lowry* v. *Dufferin*, 1 Ir. Eq. R. 281.

The original defendant, in a bill to perpetuate testimony, having been tenant in tail when the examination was had, his eldest son, though claiming as remainderman, under a settlement subsequently executed, is bound by the proceedings. *M'Namara* v. *M'Namara*, Wall. Lyn. 258.

In a suit to raise a charge affecting the inheritance, the tenant in tail consented to an interlocutory order, referring it to the master to take the accounts prayed, and died after the report was made, but before certain objections taken to it by the tenant in tail were disposed of:—Held, that the proceedings had under the consent order were binding on the issue in tail; but that he was entitled to be placed in the position of the tenant in tail when he died; and liberty was

given to him to argue the objections. *Creagh* v. *Creagh*, 3 Jo. & Lat. 485.

Four tenants in common being entitled to the first estate tail in X., under a deed, were before the court in a suit instituted to establish a will devising Y., the validity of which depended on the deed; but in a cross-cause, impeaching the deed, only two of them were made parties. Both causes having been heard together, a decree was made on a compromise setting aside the deed as to X., and directing a reconveyance by all proper parties. A person who would have been entitled to a prior estate tail in X. under the deed was born. A conveyance was afterwards executed in pursuance of the decree, in which the four tenants in common joined:—Held, that the inheritance having been imperfectly represented in the cross-cause, a good title could not be made, derived through the decree. *Pasley* v. *Clanmorris* (*Lord*), 7 Ir. Eq. R. 442.

Other Matters.]—Depositions taken in a cause where a tenant in tail was defendant, are binding on another tenant in tail, who came in esse before a decree, and took as tenant in tail prior to the former tenant in tail, who had been made a defendant. *Westmeath* (*Lord*) v. *Westmeath* (*Lady*), 3 Madd. 436.

12. Other Matters.

Base Fee—Entry of Issue in Tail.]—A conveyance by lease and release by a tenant in tail, conveyed a base fee, voidable by the entry of the issue in tail. *Doe* d. *Neville* v. *Rivers*, 7 Term Rep. 276.

—— **Remitter to Original Title.**]—A tenant in special tail, deeming herself tenant for life, by deed-poll granted and surrendered certain manors and estates to her only son, to hold to him and his assigns. She died, leaving the son, a daughter and W., son of a deceased daughter, surviving. The son, in 1735, suffered a recovery, in the life-time of the mother, of the manors and estates in question, and of other lands, and devised all his manors and estates to W. W., the son of W., for life, with remainders over. The testator was seised of no other manors but those conveyed by the deed-poll. At his death, his sister and W. were co-heirs under the original entail. W. W. entered upon all the premises, and treated himself as tenant for life until 1814, when he discovered that he was tenant in tail of one moiety, and suffered a recovery. In 1818, person upon whom the other moiety had descended joined W. W. in suffering a recovery, and the entire estate was mortgaged by W. W. to the plaintiffs at law. Upon the death of W. W., the tenant in tail under the will entered into possession:—Held, that the deed-poll operated as a covenant to stand seised, and created a base fee in the son; that the recovery of 1735 was inoperative to bar the issue in tail under the original settlement, but that it estopped the son from claiming as issue in tail; that the entry of W. W., although he entered as tenant for life under the will, was to remit him to his better title as tenant in tail; that the issue in tail were not barred by lapse of time; and that the entry of W. W. was the entry of his coparcener, but that whether he had acquired a title against his coparcener by ouster or not, the plaintiffs were entitled to recover, as the coparcener had joined in the recovery of 1818. *Woodroffe* v. *Daniell*, 7 Jur. 959.

—— **Enlarging Defective Estate.**]—A. and B. took estates in tail; A. afterwards conveyed his moiety to B. in fee by lease and release, with a covenant to levy a fine; that created a base fee in B., which estate was afterwards confirmed by the fine, though that was not levied till after the death of the releasee. *Doe* d. *Gregory* v. *Whichelo*, 8 Term Rep. 211.

In 1825 a person took the benefit of the Insolvent Debtors Act, and executed an assignment of all his real and personal property in possession, reversion or expectancy, to the provisional assignee, in trust for his creditors. The insolvent was at the time tenant in tail in remainder of real estate, and in 1826 he became tenant in tail in possession by the death of his father. In 1831 he became bankrupt, and the commissioners executed a disentailing deed of his real estate. In 1844 he died, leaving issue inheritable under the entail. The assignee under the insolvency claimed the estate against the assignees under the bankruptcy, on the ground that the estate conveyed to him by the deed of 1825 was enlarged into a fee-simple by the disentailing deed executed under the bankruptcy:—Held, that the deed of 1825 only passed such interest as the insolvent had power to convey without fine or recovery, and did not operate as a contract to convey the fee. *Sturgis* v. *Morse*, 2 De G. F. & J. 223; 29 L. J., Ch. 766; 6 Jur. (N.S.) 766; 2 L. T. 647; 8 W. R. 737.

The rule that disentailing assurances will enlarge and confirm defective estates and titles, previously granted, rests on technical grounds, and does not apply to estates created by statutory powers, in the absence of some paramount equity overriding the power to bar the estate tail. *Ib.*

Barring Estate Tail—Acceleration of Interest.]—A testator bequeathed a sum of stock to trustees, upon trust, during sixty years from his death, if the law should allow, or, if not, then during the lives of his two sons and of the survivor, and twenty-one years after his death to lay out the dividends in repairing and insuring the houses, &c., on his farms called H. and S., and upon trust to pay the surplus, if any, of the said dividends equally among the persons for the time being in possession of the estates under his will, during the continuance of the said trust; and immediately after the expiration thereof, to transfer one moiety of the said stock to the person then in possession of the H. farm, such person being one of his sons, or a descendant of a son; but if not, then to the descendants of the testator's brothers and sisters, and to pay the other moiety in like manner to the person in possession of the S. farm. And the testator devised the H. farm to the same trustees in fee, upon trust for his son John, for ninety-nine years, if he should so long live, remainder to the use of his first and other sons in tail, with divers remainders over. And the testator devised the S. farm in like manner for the benefit of his son James and his issue. John and James, and their eldest sons, barred the entail in remainder in the said farms, and resettled the same, and the stock having been transferred into court under the Trustee Relief Act, petitioned for the payment out of the fund to them:—Held, that the fund being intended for the benefit of the sons and their issue, the period for the enjoyment of the capital had been accelerated by barring the entail. *Colson's Trusts, In re*, 1 Kay, 133.

Insurance Moneys.]—By an order of court the receiver of certain real estates was directed to pay certain fire insurances on them. By a subsequent decree it was declared that H. was tenant in tail in possession of the real estates, and the receiver was directed to pay the balances to the account of H. A fire having taken place, it was held that A. was entitled to the insurance money. *Seymour* v. *Vernon*, 21 L. J., Ch. 433; 16 Jur. 189.

A testator was possessed of leaseholds of tithes held for three lives, and renewable on the dropping of any of the lives. He was in the habit of effecting insurances on the lives, and out of the moneys payable at a death, he renewed the lease, and effected a fresh policy on the new life inserted. By his will he gave all his real and residuary personal estate to trustees to accumulate the same for twenty-one years, and authorised them thereout to keep up the policies, to renew the leases, and to effect fresh policies on the new lives "on the plan he himself had adopted," and subject thereto, he gave the estate and its accumulations to B. for life, with remainder to her sons and daughters successively in tail. B. married, and had two daughters only, the elder of whom died an infant in her mother's lifetime. One of the cestuis que vie died, and there was a large surplus of the sum assured after renewing the lease and effecting a new policy:—Held, that, although the will imported a power only to the trustees to renew the lease, &c., it was one which they were bound to exercise, and was consequently equivalent to a trust, and that therefore a competent part of the fund must be retained for those objects; but that, subject thereto, the policies, being part of the personal estate of the testator, vested absolutely in the first tenant in tail, subject to the life estate of the tenant for life under the will, and were payable to her legal personal representative. *Meller* v. *Stanley*, 10 L. T. 512.

Conveyance by Tenant in Tail—Confirmation.]—A., tenant for life, with remainder to B. in tail, commits a forfeiture; B., in consideration of an annuity for the life of A., releases; the release is not good against the heir of the body of B., and B. is therefore bound to make a good conveyance for the life of A., although the release contained no covenant for further assurance. *Lewis* v. *Rogers*, 2 Anstr. 579.

Merger.]—*See* MERGER.

C. ESTATE FOR LIFE.

1. LIMITATION OF, IN DEED.

Legal Estate.]—By a gift from father to son by deed-poll of lands, to hold to him and his assigns for ever, charged with 100*l.* to his younger brother, at the end of his apprenticeship, and warranty against all men, the son takes only the estate for life. *Wright* d. *Allingham* v. *Dowley*, 2 W. Bl. 1185.

R., being seised in fee, surrendered copyhold lands to A., whom he intended to marry, and the heirs of their two bodies; and, for default of such issue, to the use of the right heirs of R.:—Held, that A. took an estate for life, with a contingent remainder to the heirs of the body of her and her husband. *Throgmorton* d. *Robinson* v. *Wharrey*, 3 Wils. 125, 144; 2 W. Bl. 728.

Semble, that an estate for life, executed by the Statute of Uses, cannot unite with a legal remainder by the rules of common law. *Playford* v. *Hoare*, 3 Y. & J. 175; 32 R. R. 793.

By letters-patent of 38 Eliz., the trustees of an almshouse were empowered to appoint and remove twenty-four poor men as often as to them should seem fit:—Held, that the appointees under this power did not take an estate for life, their removal being at the discretion of the trustees. *Davis* v. *Waddington*, 1 Lutw. Reg. Cas. 159; 7 Man. & G. 50; 8 Scott (N.R.) 814; 14 L. J., C. P. 45.

On the 10th November, 1864, a tenant for life demised and leased to J., his executors, administrators and assigns, a public-house, to have and to hold the same to J., his executors, administrators and assigns, from the 13th November for the term of the aforesaid J. for the term of his natural life. J. afterwards leased to the defendant, which lease still was existing. On the 31st October, 1874, the tenant for life made another lease of the premises to the plaintiff:—Held, that the defendant had a good title to the premises, and that the deed of the 10th November, 1864, was not void on the ground that it purported to create a future estate of freehold, as there was in the premises an express grant of a life estate in præsenti, which was not controlled or overruled by the habendum. *Boddington* v. *Robinson*, 44 L. J., Ex. 223; L. R. 10 Ex. 270; 33 L. T. 364; 23 W. R. 925.

Equitable Estate.]—By a settlement made on the marriage of a widow, having children, real estate was conveyed by her to a trustee and his heirs upon trust for her separate use for life, with remainder in trust for her children as tenants in common:—Held, that they took life estates only. *Holliday* v. *Overton*, 15 Beav. 480; 21 L. J., Ch. 769; 16 Jur. 346. Affirmed, on appeal, 16 Jur. 751.

The rule that the estate of the cestuis que trustent is commensurate with that given to the trustee, is inapplicable to limitations in a deed; therefore where an estate was limited to trustees in fee, but the trust in favour of the cestius que trustent wanted the ordinary words of inheritance:—Held, that they took life estates only. *Ib.*

Land was conveyed to a trustee, his heirs and assigns, to certain uses; and after the determination of those uses, to the use of the trustee, his heirs and assigns, upon trust to receive the rents and profits and pay them to a married woman for her separate use, and after the determination of that estate to stand seised of the land, to such uses and upon such trusts as she should by will appoint, and in default of appointment to the use of her heirs and assigns:—Held, that (though the construction might be otherwise on a will) the trustee took the legal estate in fee, and that she took an equitable estate for life, with an equitable remainder to her heirs and assigns, which two estates united according to the rule in *Shelley's Case* (1 Rep. 93), and gave her the equitable estate in fee. *Cooper* v. *Kynock*, 41 L. J., Ch. 296; L. R. 7 Ch. 398; 26 L. T. 566; 20 W. R. 503.

2. IN RENEWABLE LEASEHOLDS.

Contribution and Apportionment.]—Contribution of tenant for life to fine on renewal, is in proportion to his enjoyment; not as formerly, one-third, nor as on mortgage, confined to keeping down interest. *Allan* v. *Backhouse*, 2 Ves.

& B. 65; 13 R. R. 23. Affirmed, 1 Jac. 631; 23 R. R. 167. S. P., *Nightingale* v. *Lawson*, 1 Bro. C. C. 440. *White* v. *White*, 4 Ves. 24; 9 Ves. 554; 4 R. R. 161. *Randall* v. *Russell*, 3 Mer. 190; 17 R. R. 56. *Reeves* v. *Creswick*, 3 Y. & C. Ex. 715. *Hudlestone* v. *Whelpdale*, 9 Hare, 775. *Ainslie* v. *Harcourt*, 28 Beav. 313; 30 L. J., Ch. 686. And see *Jones* v. *Jones*, 5 Hare, 440; 10 Jur. 516; col. 251, post.

Lands holden under a lease for four lives, and renewable upon payment of a fine, are devised to trustees in trust for the testator's wife for life, she keeping good the renewals and filling up the lives, and, subject to her life interest, in trust to let and set the same, and after paying the chief and other rents and land-tax, and keeping full the lives, to pay the residue thereof to W.; and after his decease, upon certain trusts, for the benefit of the testator's grandchildren. Upon the death of the testator, his widow enters; she afterwards dies insolvent, having neglected to substitute a life for that of C., one of the nominees for life, who died in her lifetime, W. then enters, and likewise omits to substitute a life for that of C.; and seven years after the commencement of his possession, Q., another nominee, dies:—Held, that two lives must be substituted for those of C. and Q., and that the cost of the renewal being, in the first instance, raised by a mortgage of the estate, W. must repay such part of the expenses as is incurred in renewing the second life, but that he is in no default for not having renewed the first life, and is exempt from such portion of the expenses as ought, on the death of C., to have been paid by the widow, together with the interest thereon, at the rate of 5 per cent. per annum, from the death of C. to the death of Q. *Wadley* v. *Wadley*, 2 Coll. 11.

Real estate consisting of freehold, copyhold and renewable leasehold, was devised upon trust for sale, the proceeds to go to A. for life, with remainder for her children. The children decreed to contribute to the renewal of the leaseholds previously to sales. *Keir* v. *Robins*, 2 Jur. 773. Compare *Garmstone* v. *Gaunt*, 1 Coll. 577; 14 L. J., Ch. 162; 9 Jur. 78.

Leasehold estate renewable, being bequeathed with limitations in nature of strict settlement, the custom being to renew annually, and to underlet, the decree declared that the fines upon the renewal ought to be paid out of the rents and profits; that the person entitled for life undertaking to pay those fines out of the rents and profits, was entitled to the fines of renewal of underlease, and a renewal to such under-tenants as should be desirous of it was directed. *Milles* v. *Milles*, 6 Ves. 761.

A leasehold for three lives was settled in the usual way, but there was no trust to renew. After two of the lives had dropped, the trustees renewed the lease by adding two new lives, and the tenant for life voluntarily advanced a portion of the fine:—Held, that he was not entitled to repayment out of the other trust funds, until the extent of his enjoyment could be ascertained. *Harris* v. *Harris*, 32 Beav. 333; 11 W. R. 451.

But the tenant for life having died in the life of the remaining cestui que vie:—Held, that his estate was then entitled to be repaid out of the trust funds. *Ib.*

—— **Where the Tenant for Life is one of the Lives.**]—Tenant for life of an estate for lives, being himself one of them, it is not competent to the remainderman to compel him to contribute to the expense of a renewal, if it is a legal estate. Sed quære, if a trust. *White* v. *White*, 4 Ves. 33; 4 R. R. 161.

—— **Where a Fund is set apart for Renewal.**]—Where a testator provides a fund for the payment of fines on admission to copyholds, and on renewals of leases, the manner of raising the fines, and the question of contribution between the tenant for life and remainderman must depend upon the intention of the testator, to be collected from the whole will. *Playters* v. *Abbott*, 2 Myl. & K. 97.

Bill by devisee in remainder to him and his heirs male of a lease for lives against tenant for life, also entitled in reversion to him and his heirs, to compel him to procure a renewal, one life having dropped; the construction of the will being, that the lease should be kept full, and that 500*l.* and no more should be charged thereon for that purpose upon the dropping of each life, decreed that if the plaintiff chose to pay the excess, the lease should be renewed, in trust to secure the 500*l.* and, subject thereto, for the defendant for life; after his decease to raise the further sum advanced by the plaintiff for renewal and the expense of the suit, with compound interest at 4 per cent. during the life of defendant; and subject thereto, for plaintiff in tail male; remainder to defendant and his heirs. Affirmed, on appeal, by Lord Eldon, L.C., who added an express direction that the tenant for life ought to have kept down the interest. *White* v. *White*, 4 Ves. 24; 9 Ves. 554; 4 R. R. 161.

A. having given his real, leasehold, and personal property, which leasehold was bishops' leases, renewable as a general fund charged with annuities, to trustees to pay rents and profits to B. for life, with remainder to the plaintiff, the fines for renewing the leases which he directed should be renewed, are to be paid out of the whole fund, not apportioned between the tenant for life and the remainderman. *Stone* v. *Theed*, 2 Bro. C. C. 243.

A. B. devised and bequeathed certain leasehold interests held by him under the see of Waterford and Lismore, and other property, to trustees upon trust for the sole use and behoof of his daughter, for and during her natural life, and from and after her decease to the use and behoof of the first son which might thereafter be lawfully begotten on the body of his daughter and her heirs for ever; these leasehold interests were renewed by the trustees until the testator's daughter reached her full age, and from that period, continued from time to time to be renewed by the tenant for life, and large fines were accordingly paid for that purpose. A bill having been filed by the husband of the tenant for life, after her decease, against the remainderman for contribution towards the fines so paid:—Held, that as upon the true construction of the will, the tenant for life was bound to keep these interests renewed, and was only entitled to the surplus rents and profits which remained after paying the head rent and renewal fines, such bill could not be sustained. *Trench* v. *St. George*, 1 Dr. & Wal. 417.

Where the first trust of leasehold property held for lives and years is to pay the fines on renewals out of the rents and profits, and the next trust is for the benefit of those who in strict settlement take freehold and copyhold property under the same will, the expenses of renewal are incidental to the leasehold property, and fall

upon those who from time to time are entitled to the possession of it under the will. *Shaftesbury* v. *Marlborough*, 3 Myl. & K. 111; 3 L. J., Ch. 30.

A testator being seised in fee of a farm in the parish of A., and being also possessed of a lease for lives of the rectorial tithes of that parish, devised the farms to his nephew in tail male, and the lease to his brother J., his executors, administrators and assigns, upon conditions that his said brother J., his executors, administrators, and assigns, owners or occupiers of the said parsonage, tithes and premises, should at all times after his decease, free and discharge his said farm from all manner of tithes, which should be payable out of the same to the said owner or occupier of the parsonage and tithes aforesaid. J. survived the testator, and devised his interest in the lease to his four sons, who took several renewals, and in 1782 assigned the existing lease, for a valuable consideration, to A. B., with notice of the trusts of the will:—Held, that a party to whom the tithes were bequeathed by the will of A. B., and who took a renewal of the lease in 1817, held a renewed lease upon the trusts of the will, consequently that he had no title to the tithes of the farm, and that the owner of the farm was not bound to contribute to the renewal fines. *Webb* v. *Lugar*, 2 Y. & Coll. 247; 6 L. J., Ex. Eq. 49.

On a devise of leaseholds to parties successively, the testator directing the leases to be from time to time renewed: the fines and expenses decreed to be borne by them respectively, according to their actual enjoyment, and not speculatively of probable interest; and the rule is the same whether the leases be for lives or for years. Where specific directions are given for raising such fines, the general rule is superseded, but the mode is left to the discretion of the trustees, which if they do not exercise, the court will act upon the general rule. And quære, whether there is any difference in the rule as to apportionment in the cases where the interests are created by will or deed of settlement; and where trustees are empowered to raise such fines out of the rents and profits, or by mortgage, as they may think fit, if they can so execute the power as to throw the burden on the parties in proportions different from those in which it would be distributed under the general rule. *Jones* v. *Jones*, 5 Hare, 440; 10 Jur. 516.

Testator bequeathed to his wife the interest of such stock as should be standing in his name at his decease during her life; and he directed that at her decease one moiety of such stock, "after deducting such premium or sum of money as should be necessary for the renewal of the Crown lease of the leasehold messuages which he purchased of Sir H. T., in case he should not have renewed such lease in his lifetime," should go to his five children. In a subsequent part of the will, he gave to his son G. all his leasehold houses, which he purchased of Sir H. T., to hold to his said son, and his executors, &c., for the then existing term or terms therein, and "all benefit of renewal aforesaid," for his and their own use and benefit. At the time of the widow's death, the lease was subsisting unrenewed:—Held, that there was a gift to the son out of the consols of a sum sufficient to effect the renewal of the lease, and that by the "renewal" of the lease was intended a grant at the widow's death of a reversionary lease to commence at the expiration of the former lease for the same term, at the same rent, and under the same covenants as were mentioned and comprised in the former lease, or as near thereto as the law, by which Crown leases are regulated, would allow. *Rickards* v. *Rickards*, 2 Y. & Coll. C. C. 419; 12 L. J., Ch. 460; 7 Jur. 715. Affirmed, 13 L. J., Ch. 344.

The Crown officers being bound by the act to renew leases upon certain terms in reference to the value of the property, and having, upon the death of the widow, declined to renew, except upon payment of the higher fines, rent and repairs:—Held, that G. was entitled to receive out of the fund such sum, by way of fine, as should be necessary for the renewal of the lease, and in calculating which the amount required for repairs might be considered. *Ib.*

Where trustees of a settlement, having power to raise a sum of given amount, out of the rents and profits, or by assignment, or other disposition of the settled estates, as a provision for the fines and expenses payable on the renewal of leases comprised in the settlement, exercised that power by mortgage, and also paid further sums for renewals out of the rents of the settled estates:—Held, that the tenant for life, under the settlement, was bound to keep down, out of the rents and profits, the interest only of the sum raised by mortgage, but that the further sums paid for renewals must be apportioned between the tenant for life and the remainderman, according to the ordinary rule of the Court of Chancery in such cases. *Plumtre* v. *Oxenden*, 25 L. J., Ch. 19; 1 Jur. (N.S.) 1037; 4 W. R. 29.

Where there is a trust to raise fines for the renewal of settled leasehold estates out of the rents or by a mortgage, the fines must be borne by the successive tenants for life of such estates in proportion to their actual enjoyment. *Ainslie*, v. *Harcourt*, 28 Beav. 313; 30 L. J., Ch. 686.

A trust by sale or mortgage of other estates, to raise fines for the renewal of the lease of a particular estate, imposes on the successive tenants for life the duty of keeping down the interest on the mortgages. *Ib.*

Under a trust to renew leases out of the rents, issues and profits, followed by a power, in case, from any cause, the money wanted to pay the fines should not be produced by the ways and means aforesaid, to mortgage:—Held, the rents being sufficient for that purpose, that the fines ought to be paid out of income. *Solley* v. *Wood*, 29 Beav. 482.

Trustees of a will held a renewable lease upon trust for successive life tenants, with remainders over, and the residuary personal estate of the testator upon trust out of the income to pay all the costs, charges and expenses of executing the trusts of the will, with divers trusts of the residue:—Held, that the trustees, and not the life tenants, were the persons liable to observe the covenants and to pay the rent and outgoings which, on the true construction of the will, should be paid by them out of income, and that the fine and expenses of renewal of the lease should be borne by the beneficiaries ratably, according to their enjoyment of the lease, to be ascertained by actuarial valuation. *Baring, In re, Jeune* v. *Baring*, 62 L. J., Ch. 50; [1893] 1 Ch. 61; 3 R. 57; 67 L. T. 702; 41 W. R. 87.

Retaining Interest of Tenant for Life.]—The court will not retain the income of the tenant for life, because he may become liable to give security for the payments on account of renewals

before the occasion for giving such security has arisen. *Hudleston* v. *Whelpdale*, 9 Hare, 775.

—— **By Tenant for Life's Estate to Remainderman.**]—Where testator, tenant for life, ought to have renewed lease, and it was, after testator's death, renewed by remainderman, reference was directed to apportion sum to be paid by executor. *Colegrave* v. *Manby*, 6 Madd. 72; 2 Russ. 238; 22 R. R. 245.

—— **To Tenant for Life's Estate by Remainderman.**]—When a tenant for life of renewable estates or leases for lives has renewed the lives, the proportions of the fines and expenses of the renewals payable as between his estate and that of the remainderman entitled to the property are to be estimated with regard to the actual enjoyment of the property; and compound interest at 4*l.* per cent. per annum, with annual rests on the amount payable by the remainderman, will be allowed to the estate of the tenant for life for the period between the renewal and his death; simple interest only after that event. *Bradford* v. *Brownjohn*, 38 L. J., Ch. 10; L. R. 3 Ch. 711; 19 L. T. 248; 16 W. R. 1178.

Compound interest allowed by court on sums paid by the tenant for life on renewals. *Nightingale* v. *Lawson*, 1 Bro. C. C. 440.

—— **Bankruptcy of Tenant for Life—Liability of Trustee in Bankruptcy.**]—T. devised certain freehold and leasehold property, upon trust, to permit his son E. to receive the rents during his life, subject to the payment of rents and performance of the covenants reserved and contained by and in the present and future leases, whereby the leasehold premises were and should be held, and also all taxes, fines and expenses attending the same; remainder upon trust for the sons of E. in fee, as tenants in common. The tenant for life became bankrupt, and afterwards died. His assignees received a sum of 2,000*l.* subsequent to the bankruptcy for rents:—Held, that these rents were liable to the fines for renewal. *Hulkes* v. *Barrow*, Taml. 264; 31 R. R. 93.

—— **Lien for Fines.**]—Money paid as a fine by the last life in a lease for a renewal, ordered to be a charge on the estate. *Adderley* v. *Clavering*, 2 Cox, 192; 2 Bro. C. C. 658.

A tenant for life paying the whole fines for renewal, if he has not the whole enjoyment, will have a lien on the estate for whatever ought to be paid by the remainderman, and if the remainderman renews, he is entitled to security from the tenant for life for his proportionate part, calculated on the assumed duration of the life interest. *Jones* v. *Jones*, 5 Hare, 440; 10 Jur. 516.

Where a leasehold estate for lives was settled upon the husband for life; remainder to the wife for life, with remainder to the children, the husband, having renewed by putting in the wife's life, is to be considered as a creditor upon the estate for the fine and charges of renewal. *Lawrence* v. *Maggs*, 1 Eden, 452.

Duty to Renew.]—G. F. being possessed of a chattel interest under a lessee of the see of Dublin, with a toties quoties covenant for renewal, bequeathed it to trustees to the use of E. O. for life, with divers limitations over, and with a power to the trustees to sell the same, and invest the produce in the purchase of freehold lands, to be settled to the same uses:—Held, that there was no obligation imposed on E. O., the tenant for life, to renew. *O'Ferrall* v. *O'Ferrall*, Ll. & G. t. Plunk. 79.

A testator gave his widow "the full and entire enjoyment" of his real and personal estates, which, after her death, he gave to other persons, and he empowered her to retain a portion of a sum of 150*l.* a year, given to other persons for renewing the leaseholds:—Held, she was entitled to enjoy the leasehold in specie; that it was not imperative on her to renew, but that she had acted wrong in surrendering a lease, of which she was the only cestui que vie, as she thereby deprived herself of the option of renewing for the benefit of the parties in remainder. *Harvey* v. *Harvey*, 5 Beav. 134.

A testator being possessed of a leasehold, subject to a nominal yearly rent, under an ecclesiastical corporation (who were not bound to renew, but were in the habit of renewing every fourteen years, upon the payment of fines, leases of houses held under them), bequeathed it to A. for life, subject to the payment of all fines and rents as they became due, yearly and for every year, and after the death of A., to B. absolutely:—Held, that A. was not bound to renew the lease during her life. *Capel* v. *Wood*, 4 Russ. 500: 3 L. J. (o.s.) Ch. 91; 28 R. R. 162.

A. B. devised and bequeathed certain leasehold interests, held by him under the see of Waterford and Lismore, and other property to trustees, upon trust, for the sole use and behoof of his daughter, for life; and after her decease, to the use of her first son, lawfully begotten, and her heirs for ever. These leasehold interests were renewed by the trustees, until the testator's daughter reached her full age, and from that period continued to be renewed by herself, as tenant for life, and large fines paid for that purpose. A bill having been filed by the husband of the tenant for life, after her decease, against the remainderman for contribution towards the fines so paid:—Held, that from the intention of the testator as upon the true construction of the will the tenant for life was bound to keep these interests renewed, and was only entitled to the surplus rents and profits which remained after paying the head rent and renewal fines; the bill could not be sustained. *Trench* v. *St. George*, 1 Dr. & Wal. 417.

Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fines for renewal of a lease, and the interest of a mortgage, paid, and be consulted as to the manner of raising the fines, that she may give her approbation as she may think proper; she is only to keep down the interest. *Buckeridge* v. *Ingram*, 2 Ves. J. 652.

A lessee of a bishop's lands in Ireland, with a custom of renewal, granted sub-leases with covenants to renew on payment of rents and fines. The sub-leases became vested in R., who charged the lands and other lands of which he was seised in fee with annuities, and conveyed both descriptions of lands to a trustee, to secure the annuities with power, if they should be in arrear, to raise payments by sale or other means. R.'s interest in the leasehold and freehold lands was assigned to H. in 1814, and the lease under the bishop had then become vested in him, and he obtained renewals of it. On a bill filed against him in 1815 by the annuitants, praying a sale for payment of arrears then due, orders and decrees

were made, appointing a receiver of the rents and profits of all the lands to pay the annuities thereout, and declaring them to be a first charge on both descriptions of lands, and ordering a sale of part to pay the arrears, unless H. should pay the same in six months. On a supplemental bill, by the annuitants, stating that they had discovered that the sub-leases had not been renewed, and praying that H. might be ordered to renew them, a decree was made ordering him to execute renewals on payment of the rents and fines due to him, the same to be a first charge on the lands in case of renewal; but if the annuitants should not pay the rents and fines, then their bill, as far as it prayed renewals of the sub-leases, to be dismissed with costs, and the freehold lands to be sold subject to the annuities for payment of the arrears. The annuitants declined to renew, finding the proceeds of the freehold lands which were sold a sufficient fund for their dividends:—Held, that the annuitants ought not to be compelled to renew the sub-leases. *Haig* v. *Homan*, 8 Cl. & F. 320—H. L. (Ir.). *And see* 4 Bli. (N.S.) 380—H. L. (Ir.)

A testator gave all his freehold, copyhold and leasehold hereditaments to one for life, with remainder over in fee; and he gave all the residue of his personal estate upon trust to pay debts, &c., and to keep his leasehold property in repair, and renew the leaseholds at the accustomed times; and subject thereto to pay to or permit the tenant for life to receive the annual proceeds. The testator had allowed the time for renewal of one part of his leaseholds to pass before the date of his will, and the time for renewal of the other part also passed before his death, and he took no steps to set right his omission to renew. Since his death his executor had endeavoured, but without success, to effect renewals:—Held, that the tenant for life was entitled to enjoy the leaseholds in specie, as if no direction to renew had been contained in the will. *Pinfold* v. *Shillingford*, 46 L. J., Ch. 491; 25 W. R. 425.

Insurance of Life of Cestui que vie.]—Where a tenant for life is directed to renew, with power to raise fine by mortgage, and court directs fine to be raised, by sale or mortgage, parties cannot be compelled to insure life of cestui que vie for the better security of mortgage, but if money cannot be raised on mortgage, must sell estate. *Grantley* v. *Garthwaite*, 6 Madd. 96.

Leaseholds for lives being devised in trust for parties in succession, with a direction to renew out of the rents or by mortgage, the court sanctioned a reference to the master, to inquire whether it would be for the benefit of all parties that the future fines for renewal should be provided by an insurance on the lives of the cestui que vies. Difficulties in arranging the proportions of the fines which the parties in succession ought to bear in such cases. *Greenwood* v. *Evans*, 4 Beav. 44.

Where leases which the testator had directed to be renewed were renewed by adding a cestui que vie, by means of a payment out of funds belonging to the testator's estate (not charged with such renewal), and it was referred to the master to inquire what security the tenant for life of the leases ought to give, and to what amount, for the contribution which he might be liable to make for the benefit he should derive from the renewal, the master found, and the court had confirmed the finding, that the payment for the renewal ought to be secured by a policy of life insurance for the amount paid, in the name of the trustees, on the life of the new cestui que vie, the costs and premiums in respect of which ought to be paid out of the rents and profits of the estate to which the tenant for life was entitled. The court subsequently declared the policy of life insurance to be a security for the benefit which the tenant for life had derived, or might derive, from the renewal, or might have derived therefrom if another proper life had been inserted in lieu of his own. But semble, the mode of providing the security adopted by the report is erroneous in principle; for the object of the court, in requiring security to be given by the tenant for life in respect of the benefit which he may derive from the renewal of the lease, is, that the sum paid out of the capital shall be borne by the parties in proportion to the benefits which they derive, and the security therefore is for the purpose of bringing back to the capital so much as the tenant for life has had the benefit of; and this sum (which would be payable on the death of the tenant for life) is not properly secured by a policy of insurance on the life of another person, inasmuch as it throws upon the remainderman not merely the interest of the capital provided, but the burthen of keeping up a policy of life insurance for the full amount; and it is mere speculation whether this burthen will be compensated by giving him the benefit of a policy at a less rate of premium, owing to an earlier insurance of the life. Although it may be that, when provision is made of a fund for renewal, the remainderman will not suffer, this is not the principle; for the principle is, that the remainderman ought to bear so much of the capital paid for renewal as may not be paid by the tenant for life under the security which he has given. *Hudlestone* v. *Whelpdale*, 9 Hare, 775.

Where Renewal becomes Impossible.]—By a settlement, the trustees were to use their utmost endeavours to renew an ecclesiastical lease upon reasonable terms, and to raise the fines out of the rents, or by mortgage. A renewal became impracticable:—Held, that the fund reserved by the trustees out of rents for the purpose of renewal belonged absolutely to the tenant for life. *Morris* v. *Hodges*, 27 Beav. 625.

When leaseholds renewable by custom have been settled, accompanied by an unqualified trust for renewal, which shews that the settlor intended to create, and thought he was creating, a perpetual estate, out of which he was carving successive interests, and the leaseholds so settled are taken by a railway company, and the purchase-money is paid into court, then, although the possibility of a renewal of such leases is destroyed before the time at which they could have been renewed arrives, the tenant for life under the settlement will only be allowed the income of the purchase-money, and the whole of the capital will be preserved for the remaindermen. *Wood's Settlement, In re*, 40 L. J., Ch. 59; L. R. 10 Eq. 572; 19 W. R. 59.

A testator gave to his trustees a tithe rent-charge held under an ecclesiastical lease for twenty-one years, which was in practice renewed every seven years on payment of a fine, upon trust to renew out of the proceeds, and to apply the surplus in a certain way during the life of his wife, and directed that after her death it should form part of his residuary estate. He

gave his trustees power at any time to sell the leasehold interest. The lease having ceased to be renewable :—Held, that the leasehold interest ought to be sold and the proceeds invested, and only the income of this fund and of the renewal fund applied as income. *Maddy* v. *Hale*, 45 L. J., Ch. 791 ; 3 Ch. D. 327 ; 35 L. T. 134 ; 24 W. R. 1005—C. A.

A testator gave all his freehold, copyhold, and leasehold hereditaments to one for life, with remainder over in fee ; and he gave all the residue of his personal estate upon trust to pay debts, &c., and to keep his leasehold property in repair, and renew the leaseholds at the accustomed times ; and subject thereto to pay to or permit the tenant for life to receive the annual proceeds. The testator had allowed the time for renewal of one part of his leaseholds to pass before the date of his will, and the time for renewal of the other part also passed before his death, and he took no steps to set right his omission to renew. Since his death his executor had endeavoured, but without success, to effect renewals :—Held, that the tenant for life was entitled to enjoy the leaseholds in specie, as if no direction to renew had been contained in the will. *Pinfold* v. *Shillingford*, 46 L. J., Ch. 491 ; 25 W. R. 425.

Leaseholds for lives in settlement subject to a trust for renewal were, after refusal of the lessor to renew, sold under the leases and sales of Settled Estates Acts :—Held, that the first taker was entitled only to the income of the purchase-money. *Barber's Settled Estates, In re*, 50 L. J., Ch. 769 ; 18 Ch. D. 624 ; 45 L. T. 433 ; 29 W. R. 909.

—— **Lapse of Time.**]—Testator bequeathed a church lease for twenty-one years to A. for life, remainder to his first and other sons, and directed the lease to be perpetually renewed by the persons in possession for the time being. A. neglected to renew, and the lease expired in 1798. His eldest son attained twenty-one in 1800. In 1830 A. died. In 1831 the eldest son filed his bill, praying to be compensated for the loss of the lease out of A.'s assets :—Held, that he was entitled to the relief, notwithstanding the lapse of time. *Bennet* v. *Colley*, 5 Sim. 181. Affirmed 2 Myl. & K. 225 ; Coop. t. Brough. 248.

If a tenant for life pays more than he ought towards the fines for renewing the leases of the settled estates, his executors and trustees cannot, nearly twenty years after his decease, claim an account with a view to the repayment of the excess beyond what he ought to have paid. *Ainslie* v. *Harcourt*, 28 Beav. 313 ; 30 L. J., Ch. 686.

Purchase of the Reversion.]—Renewable leaseholds were devised to A. for so much of the term as he should live, and after his decease during the continuance of the term to the children of A., share and share alike, as tenants in common. The lease was renewed twice by A., who then purchased the reversion :—Held, that the doctrine that a tenant for life can only renew a leasehold for the benefit of the remainderman applied where he had purchased the reversion, and that the children of A. became possessed of the fee-simple in the property subject to the trusts of the will. *Phillips* v. *Phillips*, 54 L. J., Ch. 943 ; 29 Ch. D. 673 ; 53 L. T. 403 ; 33 W. R. 863—C. A.

Testator seised in fee of a moiety of an estate at L., and in possession of the other moiety as tenant from year to year, to St. J. College (this lease from the college having expired), gives to his wife durante viduitate, all that his messuage or tenement, with the farm and lands at L., all his estate and interest therein, she paying the rent reserved to St. J. College, &c. The widow after his death obtains a new lease, and subsequently purchases the reversion of one to whom it had been conveyed by the college under an act of parliament :—Held, that the renewed lease was taken subject to the trusts of the will, and those in remainder to contribute to the fine paid by the widow, in proportions to be settled by the Master : that the purchase of the reversion not from the college but from the person to whom it had been conveyed by the college, was not, under the circumstances, to be taken subject to the trusts of the will. *Randall* v. *Russell*, 3 Mer. 190 ; 17 R. R. 56.

Devise of leaseholds for lives and 21 years after the death of the survivor to a daughter for all the testator's estate therein, with an executory gift over. The devisee enters, and renews the lease, and gives the same to J. J. "for all her estate and interest therein." On the death of the daughter, the person entitled under the gift over enters. J. J. brings ejectment, and recovers possession, and afterwards purchases the reversion in fee, for which an option is given him as tenant of the premises :—Held, that the renewed term was impressed with a trust, but that J. J. was a purchaser of the fee for his own benefit, there not being enough in the case to extend to it the principle upon which the renewed lease was held to be taken for the benefit of those in remainder. *Hardman* v. *Johnson*, 3 Mer. 347 ; 17 R. R. 95.

If a tenant for life of an under-lease for eighteen years, granted by a person who himself holds the premises so under-let along with other property, under a lease for twenty-one years, purchases the interest of his immediate lessor, and obtains from the superior lessor a renewal of the lease thus purchased, the renewed lease is subject, so far as regards the premises which were comprised in the under-lease, to the same trusts as would have affected the under-lease if it had not been merged, or had not expired by the effluxion of time. The same rule holds, though the lease at the time of the purchase was vested in a trustee upon trust, under which he could not have granted a renewal of the under-lease, and though the tenant for life outlived, by twenty-six years, the time at which the under-lease would have expired by effluxion of time. *Giddings* v. *Giddings*, 3 Russ. 241 ; 27 R. R. 78.

A father devised real estate to trustees upon trust for his son for life, with remainders in strict settlement in tail, and he devised and bequeathed all his copyhold and leasehold estates, whether for lives or years determinable on lives, to the same trustees and upon the same trusts, as far as might be, as his other real estate. And he directed his trustees to invest the proceeds of his residuary personal estate in the purchase of freehold, copyhold, and leasehold hereditaments, to be settled on similar trusts. And he directed his trustees, out of the annual profits, to renew leases for lives and pay expenses attendant on admissions to copyhold estates. The tenant for life, out of his own moneys, advanced considerable sums in the purchase by way of enfranchisement of the

reversion in fee of renewable leaseholds and in the enfranchisement of copyholds of inheritance. In some cases the conveyances were made to the uses of his father's will, in others not:—Held, that in the absence of declared intention that the purchases enured for the benefit of the inheritance, the tenant for life had a charge on the inheritance to the extent of the purchase-money; the rule in such case being, as between tenant for life and remaindermen, payment and apportionment of the fine with reference to actual enjoyment. *Isaac* v. *Wall*, 46 L. J., Ch. 576; 6 Ch. D. 706; 37 L. T. 227; 25 W. R. 844.

Held, also, that in the case of a renewable lease, of which the freehold had been purchased by enfranchisement and conveyed upon the trusts of the will, the legal personal representative of the first tenant in tail was entitled to such a term of years as would have subsisted if the reversion had not been purchased, and that subject thereto the property ought to go according to the limitations of the will. *Ib.*

3. Rights, Duties, and Liabilities of Tenant for Life.

a. Inventory and Right to Possession or Income.

Inventory, when required.]—A. was tenant for life, with remainder to his children, remainder to B. A. being unmarried, B. has a right to compel A. to set out a full description and particular of the settled estates. *Beynon* v. *Morris*, 10 L. T. 710; 12 W. R. 1023.

It is not now the practice, upon an order on further consideration in an administration action in ordinary cases, to require the tenant for life to give security before being let into possession of settled land and heirlooms, but he is only required to sign an inventory of the latter. *Temple* v. *Thring*, 56 L. T. 283.

Tenant for Life Executor—Fund in Court—Payment out.]—A sole executor, who is tenant for life of a fund, is not entitled to have the fund paid to him. *Marston* v. *Guillet*, 10 L. T. 292.

Possession—Since the Settled Land Acts.]—The power of the court to make an order allowing an equitable tenant for life to take possession of settled property is discretionary, and will only be made on proper undertakings. The circstances under which, and the terms upon which, the order will be made, depend upon the facts of each particular case. *Newen, In re, Newen* v. *Barnes*, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309; 70 L. T. 653; 43 W. R. 58.

The fact that a tenant for life has mortgaged his interest is not conclusive against giving him possession of the property. *Ib.*

And see *Bagot's Settlement, In re, Bagot* v. *Kittoe*, 63 L. J., Ch. 515; [1893] 2 Ch. 369; 3 R. 433; 68 L. T. 520; 41 W. R. 375; *Wythes, In re, West* v. *Wythes*, [1893] 2 Ch. 430; 3 R. 722; 69 L. T. 281; 42 W. R. 125.

—— **Before the Settled Land Acts.**]—It was not of course to let an equitable tenant for life into possession. It depended upon the intention of the testator. *Tidd* v. *Lister*, 5 Madd. 429; 21 R. R. 323.

Tenant for life subject to a trust term not let into possession before account, till the trust is executed, unless on paying into court a sum sufficient to answer it, or where the best way of performing the trust appears to be by letting him into possession. *Blake* v. *Bunbury*, 1 Ves. J. 194; 1 R. R. 111.

Tenant for life let into possession on consent, and giving security to pay charges payable out of rents and profits, and to keep down interest of the fund to answer contingent charges. *Blake* v. *Bunbury*, 1 Ves. J. 514; 4 Bro. C. C. 21; 1 R. R. 111.

Upon the construction of a devise of real property:—Held, that an equitable tenant for life was entitled to the personal enjoyment of the property upon giving security for the due fulfilment of the objects of testator's will. *Baylies* v. *Baylies*, 1 Coll. 537.

A testator died in 1844, having by his will directed his trustees, out of the rents and profits of his real estates, to pay all his debts, including 8,000*l.* charged on part of his realty. The testator also directed that "no person to whom any estate for life or in tail was given by the will should be entitled to the rents and profits of the estate, or any part of them, until they were totally disencumbered, and clear of debt." The trustees were to invest the moneys to come to their hands under the trusts of the will until applied by them in any payment under it. All the debts had been paid except the 8,000*l.*, and there was stock enough in court to meet that. The payment of the debts had been affected by a sale of part of the realty, under the orders of the court, and a receiver had been appointed. In 1874 a summons was taken out by the tenant for life to discharge the receiver, and to be let into possession of the estates:—Held, that the receiver must be discharged, and the tenant for life admitted to the estates. *Tewart* v. *Lawson*, 43 L. J., Ch. 673; L. R. 18 Eq. 490; 22 W. R. 822.

—— **Deaf Mute.**]—A party born deaf and dumb, attaining twenty-one, applies for possession of her real estate, and to have an assignment of her chattel estate; Lord Hardwicke, Ch., having put questions to the party in writing, and she having given sensible answers thereto in writing, the same was ordered. *Dickenson* v. *Blisset*, 1 Dick. 268.

At what Date Rights ascertained—Capital.]—Where a testator, who was possessed of shares in a company, bequeathed them to legatees for life, with remainders over, and dividends on such shares were declared after his death in respect of profits made by the company in his lifetime:—Held, that the dividends formed part of the income, and not of the corpus of the property, and belonged to the legatees for life. *Bates* v. *Mackinley*, 31 Beav. 280; 31 L. J., Ch. 389; 8 Jur. (N.S.) 299; 5 L. T. 783; 10 W. R. 241.

A testator bequeathed East and West Indian Dock stock to life tenants and others in succession. Some time after his death bonuses were declared upon the stock. On the 8th of February, 1865, by an order made in a suit for the administration of the estate, the bonuses were invested in 3*l.* per cent. annuities, and the dividends directed to be paid to the tenants for life. On the 12th of January, 1871, that investment order was discharged:—Held, that the bonuses were income, and not capital of the estate, and belonged to the life tenants. *Dale* v. *Hayes*, 40 L. J., Ch. 244; 24 L. T. 12; 19 W. R. 299.

Necklace Mortgaged—Who liable for Debt.]—A tenant for life under a settlement executed a deed, by which—reciting an agreement by O. to lend him 150*l.* on a bill of sale or transfer of a diamond necklace, and a desire to settle it as an heirloom—he assigned it in trust for O., subject to a proviso for cesser of the trust on repayment of the principal and interest, and, after repayment, in trust for himself for life, and, after his death, as an heirloom, with the estates limited by the settlement; and he covenanted to pay the money with interest, and that, in default of payment, O. should possess and sell the necklace, and pay the surplus proceeds to the donor:—Held, that, as between the remainderman and the personal representative of the donor, the necklace was primarily liable for the payment of the debt. *Owen* v. *Braddell*, Ir. R. 7 Eq. 358.

Rule in Howe *v.* Dartmouth (Earl).]—When a testator limits his residuary property to one for life, with remainders over, it is primâ facie to be intended that the testator means that the property which is given to the tenant for life is to pass to those entitled in remainder; and if any part of the property be of a wasting nature, as long annuities or leasehold, it must be immediately sold and converted into permanent property unless, upon the whole context of the will, it shall appear that the testator had not that intention. *Howe* v. *Dartmouth* (*Earl*), 7 Ves. 137; 6 R. R. 96.

Where leasehold or other perishable property is included in a gift of all the testator's estate, and effects to one person for life, with remainder over after his decease, the property is not to be converted into money at the testator's death, if the will contains indication of an intention that the tenant for life should enjoy the property in its existing state. *Pickering* v. *Pickering*, 4 Myl. & C. 289; 8 L. J., Ch. 336; 3 Jur. 743. Affirming 2 Beav. 31.

The rule laid down in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137), is, that where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person in succession the dividends of the fund. This rule prevails, unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, and which it is incumbent on those contesting the application of the rule to point out. *Morgan* v. *Morgan*, 14 Beav. 72.

Modern cases allow small indications of intention to prevent the application of the rule, but the mere absence of any direction to convert is insufficient. *Ib.*

An express direction by a testator for the conversion and for investment of his personal property, from time to time, as trustees may think fit, will not necessarily prevent the operation of the general rule, that where personal property is given in a series of limitations it shall be invested in such securities as are approved of by a court of equity, for the benefit of parties interested in remainder, after the death of the tenant for life. *Caldecott* v. *Caldecott*, 1 Y. & Coll. C. C. 312; 11 L. J., Ch. 158; 6 Jur. 232.

—— **Who is Tenant for Life.**]—A person having a charge for life on residue, has, to the extent of that charge, the rights of a residuary legatee, and is entitled to have the residue ascertained and secured within, if possible, one year after the death of the testator. It is the duty of the executor to do all in his power to effect that object. *Wightwick* v. *Lord*, 6 H. L. Cas. 217; 26 L. J., Ch. 825; 3 Jur. (N.S.) 699; 5 W. R. 713.

A testatrix gave A. B. an annuity for life, and after her "death the principal reverts to her father and his children." The investments were not to be altered without her consent, the overplus of the income to go to the father and his children:—Held, that this was a gift of an annuity for life, and a gift over of the property subject to the annuity; that the case was that of annuitant and residuary legatee, and not that of the tenant for life and remainderman. *Croly* v. *Weld*, 3 De G. M. & G. 993; 1 Eq. R. 134; 22 L. J., Ch. 916.

As a rule the legatee for life of a reversion is entitled to have it sold, though the legatee be tenant for life in possession of the fund out of which the reversion springs. The surplus of a fund appropriated to discharge an annuity is not a reversion within the above rule. *Johnson* v. *Routh* (27 L. J., Ch. 305), approved and distinguished. *Harrington* (*Countess*) v. *Atherton*, 4 N. R. 206.

Property within the Rule—Long Annuities.]—A testator gave an annuity of 40*l.* to M., for life, payable out of his long annuities, and at her death gave the principal out of which the annuity arose to his next of kin:—Held, that as the long annuities were not of a permanent character, they must be sold, and a sum of 3 per cent. stock sufficient to produce the annuity purchased with the produce. *Fryer* v. *Buttar*, 8 Sim. 442.

A testator, having long annuities and money in different funds, after giving several sums of stock, gave all the residue to A. for life, and gave other stock legacies after her death, and whatever there might remain, to B.:—Held, that the long annuities ought to be converted for the benefit of the parties in remainder, and the interest only paid to A. *Lichfield* v. *Baker*, 2 Beav. 481; 9 L. J., Ch. 291. Affirmed on this point, 13 Beav. 447.

Widow held entitled to enjoyment in specie of long annuities (in which she had a life interest) not required for payment of debts of testator. *Milne* v. *Parker*, 17 L. J., Ch. 194; 12 Jur. 191.

A testatrix, in terms sufficiently large to include "long annuities," directed her residuary estate to be converted, and, after payment of debts, to be invested in parliamentary stocks and funds; and she gave the income of such stocks and funds, and of such stocks as should be standing in her name at the time of her death, to A. for life:—Held, that A. was not entitled to the income of the long annuities in specie. *Sheppard* v. *Joynes*, 2 W. R. 26. And see *Skirving* v. *Williams*, 24 Beav. 275; 3 Jur. (N.S.) 927.

—— **Railway Shares.**]—Railway shares, although not a perishable property, must be converted into consols, as between the tenant for life and remainderman. *Thornton* v. *Ellis*, 15 Beav. 193; 21 L. J., Ch. 714; 16 Jur. 236.

—— **Turnpike Bonds.**]—Where a tenant for life is entitled in specie, the rule is, that investments may remain, but debts, as turnpike bonds, must be realised. *Holgate* v. *Jennings*, 24 Beav. 623.

—— **Property in India.**]—The general rule for the conversion of personal property bequeathed for life, with remainders over, into the 3 per cents., held not to attach upon property of a testator who died in India, under his will made there, invested by his executor in the company's security there; but on the arrival of the parties in this country, decree was made, that it should be remitted and invested accordingly. *Holland* v. *Hughes*, 16 Ves. 111.

A testator gave the residue of his personal estate to trustees, directing them to convert it into money, and invest the proceeds in government or real security, of which they were to stand possessed, upon trust for A., during her life, and after her death to B. The trustees permitted a share, which the testator had in an Indian loan, bearing interest at 10*l.* per cent., to remain for several years on that security, during which time they paid to A. the interest at 10*l.* per cent., which it yielded annually; and the loan being afterwards paid off, they invested the money in the 3 per cents. at a time when the funds were so low, that the amount of stock purchased was considerably greater than if the conversion had taken place at the end of a year from the testator's death:—Held, that the tenant for life was not entitled to the actual interest which the money yielded, while it remained on the Indian security; but only to the dividends of so much 3 per cent. stock as would have been purchased with it, at the end of a year from the testator's death; that the trustees ought to be charged with the whole of the stock actually purchased, and all the sums actually received in respect of the Indian rate of interest, and that they ought to be allowed in their discharge as payments for the tenant for life, not the sums which they had in fact paid her, but only a sum equal to what she would have received for dividends if the money had been transferred from the Indian security, and invested in the 3 per cent. stock at the end of a year from the testator's death. *Dimes* v. *Scott*, 4 Russ. 195; 28 R. R. 46.

—— **Property Abroad.**]—The testator directed his real and personal estate to be converted, got in, and invested in government or real securities, and the interest, dividends, and annual produce to be paid to his wife for her life. The greater part of the testator's property at his death, consisted of capital in a partnership business abroad, to be withdrawn by instalments in the course of three or five years at the discretion of his executors, and bearing interest at 5 per cent. in the meantime:—Held, that the tenant for life would be entitled to the income actually produced by such of the property of the testator as was invested according to his will from the time of such investment, but that she was not entitled during the first year after the testator's death to a larger income in respect of such part of the testator's property as was not so invested, than the property would have produced, if invested according to the will. *Taylor* v. *Clark*, 1 Hare, 161; 11 L. J., Ch. 189; 6 Jur. 76.

When Entitled in Specie—Where there is a Trust for Conversion.]—Testator, after devising lands to uses in strict settlement, gives the residue of his personalty to be invested in lands, to be settled to the same uses. The tenant for life is not entitled to the interest of the residue, till one year from the testator's death. The general rule, fixing the end of the first year as the period at which the enjoyment of the tenant for life is to commence, is not to be departed from, unless it appears that the testator's intention is incompatible with it. *Taylor* v. *Hibbert*, 1 Jac. & Walk. 308.

The tenant for life of a residue, which is directed to be laid out in certain securities, is entitled to the income accrued in the first year after the testator's decease, on such parts of the testator's estate as are invested at his death in the proper securities, and on such parts as are afterwards so invested within the same year, but the income before such investment forms part of the capital of the residue. *La Terriere* v. *Bulmer*, 2 Sim. 18.

Testator having devised lands to A. for life, remainder to his children in strict settlement, directs the residue of his personal estate, subject to the payment of debts and legacies, with all convenient speed to be laid out in the purchase of lands to be settled forthwith to the same uses, with a proviso, that the trust moneys, until they should be laid out, might be invested upon government or real securities, the dividends and interest of which were to go and be paid as the rents of the lands to be purchased would go and be payable; a large portion of the testator's personal estate, not required for the payment of debts and legacies, being invested on the funds, and upon securities carrying interest, the tenant for life was held entitled to the interest of that portion from the death of the testator. *Angerstein* v. *Martin*, Turn. & R. 232; 2 L. J. (o.s.) Ch. 88; 24 R. R. 32. S. P., *Hewitt* v. *Morris*, Turn. & R. 241; 2 L. J. (o.s.) Ch. 87; 24 R. R. 39.

Where the testator directs a sale with all convenient speed after his death, and directs the produce to be invested and the dividends to be paid to one for life, and the land remains unsold, the court considers twelve months as a reasonable time within which the estates ought to have been sold, and the produce invested, and will give to the tenant for life the rents of the unsold estate from that time. *Vickers* v. *Scott*, 3 Myl. & K. 500; 3 L. J., Ch. 223.

The testator devised and bequeathed the residue of his estate and effects, real and personal, to trustees, upon trust to convert the same into government securities in their own names, and to pay the interest and dividends thereof to M. S., for her life, and after her decease to pay and transfer such residue, in equal moieties, to the persons therein mentioned:—Held, that the tenant for life was entitled to the interest of the residue, making interest as it stood at the time of the testator's death, until the end of one year or so much of that year as should elapse before the conversion of the residue according to the direction of the will. *Douglas* v. *Congreve*, 1 Keen, 410; 6 L. J., Ch. 51.

General residuary bequest, including a leasehold farm, with the stock, to be converted into money, as soon as conveniently may be, upon trust to pay the interest, &c., for life, and as to the capital for the children. The stock being considerably increased between the death in April, and the sale at Michaelmas, it was decreed that the conversion was in a reasonable time, and the party entitled for life should have interest from the conversion, and as to the premises, that from a defect of title could not be sold, that being for the interest of all that they should not be sold, a value should be set upon them to carry interest at 4 per cent. from the death. *Gibson* v. *Bott*, 7 Ves. 89; 6 R. R. 87.

A testator gave 16,000*l.* in legacies payable within six months, and the remainder to his widow for life, with remainder over. He died possessed of a large sum in consols. The widow, who was executrix, received the first half-yearly dividends on the stock, and then sold sufficient to pay the legacies:—Held, that she was not entitled, as tenant for life, to the dividends on the stock producing the 16,000*l.*, but that it formed corpus. *Holgate* v. *Jennings*, 24 Beav. 623.

Where lands are vested in trustees upon trust for sale and investment of the proceeds, and payment of the income of the investments to a tenant for life, with remainders over, and without any power of postponement, the tenant for life is entitled to receive the net rents and profits until such conversion. *Hope* v. *D'Hédouville*, 62 L. J., Ch. 589; [1893] 2 Ch. 361; 3 R. 348; 68 L. T. 516; 41 W. R. 330.

A father specifically bequeathed to trustees certain railway and other shares upon trust to convert the same at their absolute discretion, and to pay the income arising from the proceeds to his daughter for life, with remainders over. The testator's property had become the subject of an administration suit, in which a decree had been made about two years previously. Some of the shares had not been converted, and the dividends thereon had, since the testator's death, been paid to the tenant for life:—Held, that the tenant for life was only entitled to the income that would have been derived from so much consols as the moneys arising from the sale of the shares one year after the testator's death would have purchased at that date, and that she must account for what moneys she had received in excess of that sum. *Anderson* v. *Read*, 22 W. R. 527.

—— **Directions concerning Time of Conversion.**]—Where the testator gave the residue of his estate real and personal to his executors upon trust, to permit his wife to receive the rents, profits, and annual proceeds thereof to her sole use during her life, and after her decease upon trust to sell his freehold house in Oxford Street, and also his leasehold houses, by auction; and the testator desired that E. A. should be employed as auctioneer, to convert the whole of his estate into money, for the purposes therein mentioned; it was held that the widow was entitled to enjoy for her life the income of the testator's long annuities. *Alcock* v. *Sloper*, 2 Myl. & K. 699.

A testator bequeathed his residuary personal estate, consisting partly of ships, to his own sister B. (a married woman), subject to the legacy thereinafter bequeathed to T., and the commission directed to be paid to him, and subject to the directions thereinafter contained as to conversion of ships. He appointed H. & T. his executors, and gave T. a legacy for his trouble, and directed his executors not to sell any of his ships for seven years from his death (unless the keeping them unsold should cause loss), and to work them, employing as much of his residuary estate as should be necessary for that purpose, and he gave T. an allowance of 500*l.* a year for his trouble while he should assist in managing them. By a codicil he stated that he still wished B. to have the residue, but directed that it should be invested in such manner as his executors should think fit, "in trust for her sole benefit during her lifetime," and that after her death it should be divided between her surviving children:—Held, that the direction to keep the ships unsold for seven years was not revoked by the codicil, and that while they remained unsold, B. took the actual income for her separate use. *Green* v. *Britten*, 1 De G. J. & S. 649.

Right of a tenant for life to enjoy a residue in specie inferred from a direction "to get in and convert the same into money and divide" after his death. *Rowe* v. *Rowe*, 29 Beav. 276.

Upon the construction of a will:—Held, that chattel leaseholds were to be enjoyed in specie by the tenant for life of the residuary real and personal estate. *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; 7 Jur. 462.

—— **Where the Exercise of the Trust or Power is Discretionary.**]—A discretionary power to convert, if and when the trustees shall think fit, entitles the tenant for life to the enjoyment of the leasehold property in specie in the meantime. Where a full discretion is by the will given to the trustees, the rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137), is not applicable, and the court will not interfere. *Leonard, In re, Theobald* v. *King*, 43 L. T. 664; 29 W. R. 234.

Where a testator gives an absolute discretion to his executors to postpone the sale and conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited company. Nor will they be liable in the absence of mala fides for loss arising to the estate for the non-conversion. *Norrington, In re, Brindley* v. *Partridge*, 13 Ch. D. 654; 28 W. R. 711—C. A.

Where trustees have a discretion as to what part of the testator's estate should be converted, the court will not interfere with such discretion, at all events if a considerable period has elapsed since it has been exercised. Tenants for life entitled to enjoy leaseholds in specie, where the trustees have such a discretion. *Sewell's Estate, In re*, 40 L. J., Ch. 135; L. R. 11 Eq. 80; 23 L. T. 835.

Devise and bequest of residuary, real, and personal estate to trustees, upon trust with all convenient speed to sell the real estate and such part of the personal estate as was in its nature saleable; but the mode and time of sale, and of settling and adjusting accounts, and of requiring payment of what should be due to the testator to be left entirely to the discretion of the trustees; and until such sale and the final adjustment of his co-partnership accounts, the rents and income of the real and personal estate remaining unsold, and the interest on any debt or debts owing to the testator, to be paid to the same persons, and in the manner, directed with respect to the income of the estate when invested. The testator gave the produce of his real and personal estate to his two daughters for their lives, with remainder over; and he recommended each of his two daughters to pay 25*l.* a year out of her moiety of the income of his estate for the education and maintenance of his nephew until the nephew attained twenty-one years:—Held, that there being no improper delay in the conversion of the estate, the daughters of the testator, as tenants for life, were entitled to the income actually produced by the residuary estate during the interval before the sale and realisation of the whole of such estate, and the investment thereof, according to the directions in the will; but

that they were not entitled during that interval to any interest upon such parts of the residuary property, or on the value of such parts thereof, as were unproductive; that the two sums of 25*l.* were only to be allowed by the daughters to the nephew yearly out of their income during their lives; and that such sums did not constitute a charge upon the life interest of the daughters for the whole period of the minority of the nephew. *Mackie* v. *Mackie*, 5 Hare, 70; 9 Jur. 753.

A tenant for life held, upon the terms of the will, entitled to the actual income arising from the personal estate of the testator until the time of conversion. *Sparling* v. *Parker*, 9 Beav. 525; 10 Jur. 448.

Testator bequeathed his residuary personal estate to trustees in trust, with all convenient speed after his death, to sell such part or parts as they or the survivor of them, or the executors or administrators of such survivor, or their or his assigns, should think proper, of any moneys in the funds, and also to call in, sell, and convert into money all such parts of the rest of his general personal estate as should not consist of money, and, out of his general personal estate and the moneys forming part thereof and to arise thereby, to pay his debts, &c., and to invest the residue of the moneys to arise from his general personal estate, which should remain after answering the purposes aforesaid, in the usual securities, and from time to time to alter, at their or his discretion, as well the same stocks, funds and securities, as also such of the stocks, funds, or securities, being part of his personal estate, which they or he should not think proper to sell and convert into money; and to stand possessed of all the trust moneys, stocks, funds, and securities which should be so purchased as aforesaid, and which should remain unconverted into money as aforesaid, in trust to pay the interest, dividends, and annual produce thereof, as and when the same should be received, to the plaintiff. The residue of the testator's estate, after payment of his debts, &c., consisted in part of sums of long annuities and bank and East India stock, which still remained unsold:—Held, that the plaintiff was entitled to the income accrued on those sums from the testator's death. *Wrey* v. *Smith*, 14 Sim. 202.

A testator devised a brickfield which had been worked by him, to trustees for sale when they should think desirable. They deferred the sale in the exercise of their discretion:—Held, that the tenant for life was entitled to the royalties as income. *Miller* v. *Miller*, 41 L. J., Ch. 291; L. R. 13 Eq. 263; 20 W. R. 324.

A. devised estates in trust for his wife for life, and he gave the trustees a discretionary power of sale. Part of his estate consisted of unproductive building ground, which remained unsold for some years:—Held, that the tenant for life was only entitled to the actual rents of the property until sold; but that she would have been entitled to interest on the value, if the trust for sale had been absolute. *Yates* v. *Yates*, 28 Beav. 637; 29 L. J., Ch. 872; 6 Jur. (N.S.) 1023; 3 L. T. 9.

A testator having, a few days before the date of his will, executed a deed of partnership, whereby certain annual sums, rents, and royalties were payable to him out of the partnership property, by his will gave all the residue of his real and personal estate to trustees to receive "the rents, dividends, interest, and annual proceeds," and pay the same to his wife for life. After the wife's death the residuary estate was to be sold, and there was a subsequent proviso giving the trustees a discretionary power of conversion in her lifetime:—Held, that the rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137) did not apply, but that the widow was entitled in specie to the annual income of the testator's estate as it existed at the time of his death. *Greaves* v. *Smith*, 29 L. T. 798; 22 W. R. 388.

—— **Power to Postpone Conversion.**]—Where there is a discretionary power to postpone conversion and retain property in existing investments, the tenant for life is entitled to the actual income of so much of the estate as is represented by investments retained so far as those investments are authorised by a will. But in so far as the investments retained are unauthorised, the tenant for life is only entitled to an income equal to the dividends on a sum of consols which would have been produced by a sale and investment in consols at a year from the death, and not to an income equal to interest at 4 per cent. on their value. *Brown* v. *Gellatly*, L. R. 2 Ch. 751; 17 L. T. 131; 15 W. R. 1188.

Testator bequeathed all his personal estate to trustees, and directed them to convert it into money, and to pay the interest to certain persons for their lives, then to invest the principal in the purchase of lands, it being also understood that, where his money or personal estate might be lying on undoubted real or personal security, such securities might be only renewed in the names of the trustees. The testator's personal estate consisted in part of long annuities:—Held, that the cestuis que trustent for life of the personalty were not entitled to receive the long annuities, but that they must be converted into consols. *Preston* v. *Melville*, 15 Sim. 35.

A. gave his real and personal estate to trustees, to permit his wife to receive "the income arising from one-third" for her life, with remainder to his children. And to facilitate the ultimate devise, he authorised them to convert his personal estate into money and to sell his real estate. And he authorised his trustees to permit any part of his personal estate to remain in the state of investment in which it might be at his death, and to invest his residuary personal estate in the public funds, &c., and, from time to time, to alter and vary the securities:—Held, that the widow was not entitled to enjoy leaseholds and perishable property in specie. *Llewellyn's Trust*, *In re*, 29 Beav. 171.

A testator directed his trustees to allow his estate to remain invested as it might be at his decease, if they should think fit, and, subject to such direction, to convert it and pay the income to his widow for her life, remainder over. The trustees proceeded to realise his estate as soon as possible after his death, but in the interval certain ships in which he was interested as partner earned freight, and dividends were paid on certain shares held by him in partnership; on the sale of these ships and shares a considerable profit was also realised:—Held, that the tenant for life was not entitled to the freight or dividends or to the profits on the sales as income, but that they formed part of the capital, and that she was entitled to interest thereon from the death of the testator. *Cooper* v. *Laroche*, 38 L. J., Ch. 591.

A husband gave his residue to trustees on trust to convert and invest on government or real securities, and to pay the income to his wife for

life, and after her death to distribute the corpus, and he also empowered them to continue invested any of his government stocks or real securities, and directed that his wife should be entitled to the interest, dividends, and annual proceeds of his residuary estate as from the day of his death:—Held, that the trustees were, under the will, empowered to retain such government securities only as were of a permanent character; that certain long annuities which formed part of the testator's estate, ought to have been sold and the proceeds invested on permanent securities, and that the widow's estate was after her death liable to recoup to the testator's estate the amount which would have been produced by the sale of the long annuities, she having received in her lifetime the whole proceeds till they expired. *Tickner* v. *Old*, L. R. 18 Eq. 422; 31 L. T. 29; 22 W. R. 871.

A testator devised his real estate in trust for sale, the proceeds to be held as a general fund in aid of his personal estate. Subject as aforesaid, the proceeds and the residuary personal estate were to be invested upon trust for A. for life with remainder over. Power was given to postpone the sale, the rents in the meantime to be applied as income of the proceeds. The personal estate was insufficient for the payment of debts; and more than a year after the testator's death the real estate was sold, and part of the proceeds applied in paying the remaining debts:—Held, in adjusting the accounts between the tenant for life and the remainderman, that the former was not entitled to the whole of the rents during the first year after the death of the testator. *Marshall* v. *Crowther*, 2 Ch. D. 199; 23 W. R. 210.

A testator gave several leasehold houses held upon short terms to trustees to pay the income to his wife for life, and then to his grandchildren, and he gave his trustees, one of whom was his wife, power to retain any portions of his property in the same estate in which it should be at his decease, or to sell and convert the same as they should in their absolute discretion think fit:—Held, that the special power to retain existing investments took the case out of the general rule as to conversion of perishable property, and that the trustees were at liberty to retain the short leaseholds and any other investments held by the testator for such period as they should think fit. *Gray* v. *Siggers*, 49 L. J., Ch. 819; 15 Ch. D. 74; 29 W. R. 13.

A testator, possessed of shares in several ships, bequeathed his personal estate to trustees, upon trust for sale and conversion, and to pay the income arising therefrom to his wife for life. The will contained a power for the trustees to postpone such sale and conversion for so long as they may think fit, and a direction that the income arising from his unconverted personal estate should be paid and applied in the same manner as the income of the moneys produced by such conversion would be payable or applicable. The ships were not sold until two years after the testator's death, and in the interval made several voyages, from which large profits resulted:—Held, that such profits must be treated as income and not capital, and were, therefore, payable to the tenant for life. *Lean* v. *Lean*, 32 L. T. 305; 23 W. R. 484.

H., by his will, gave his property to trustees upon trust, to convert, or, in their discretion, to retain present investments. The estate was administered by the court, and, acting on the chief clerk's certificate, some of the investments were retained, and, in particular, several shares in the West Middlesex Waterworks, which were shown to have paid a high dividend, and also to have increased in value since the death of the testator. On a question as to the apportionment of the dividends on these shares between a tenant for life and remaindermen:—Held, that the tenant for life was only entitled to interest at 4 per cent. per annum on the value of the shares at the death of the testator. *Furley* v. *Hyder*, 42 L. J., Ch. 626.

A testator empowered his trustees at their discretion to continue all or any part of his personal estate in the state or investment in or upon which the same should be at his death, or otherwise to convert the same and to invest the proceeds in the names of the trustees in certain specified securities. At the death of the testator part of his personal estate consisted of securities not of a wasting nature and not specifically authorised. In an action for the administration of the estate the chief clerk found that some of these securities were proper to be continued, and that others were proper to be called in:—Held, that the tenants for life under the will were entitled to receive in specie the income of those unauthorised securities which were retained, and which were not of a wasting nature. *Sheldon, In re, Nixon* v. *Sheldon*, 58 L. J., Ch. 25; 39 Ch. D. 50; 59 L. T. 133; 37 W. R. 26.

A testator directed his trustees to get in and convert all his residue with all convenient speed, and invest in permanent securities, and pay the income to one for life, with remainder over: and then gave power to his trustees to suspend the conversion and sale as long as they should think proper, and directed that in case of any such suspension, the income of his estate in its actual investment should go as he had directed concerning the income of the estate got in and held in trust. The trustees had not up to the time of filing the bill, a period of more than two years, sold any part of the testator's estate, which consisted in part of leaseholds and other terminable securities:—Held, that the tenant for life was entitled to the actual income produced, and not, as in *Dimes* v. *Scott* (4 Russ. 495), to the amount which the estate, if converted, would have produced, there being no suggestion of any fraudulent favour shown by the trustees to the tenant for life at the expense of the remainderman. *Morley* v. *Mendham*, 2 Jur. (N.S.) 998.

A testator leaving property invested in a variety of securities, giving large time to realise, and ample powers to his trustees:—Held, that he intended, as between tenants for life and remaindermen, that the tenants for life should at once have the income both of the converted and unconverted property, in specie, as to that which was unconverted, and the actual income of that which was converted. *Scholefield* v. *Redfern*, 2 Dr. & Sm. 173; 32 L. J., Ch. 627; 9 Jur. (N.S.) 485; 8 L. T. 487; 11 W. R. 453.

The court will not make any apportionment of income, as between tenants for life and remaindermen, with reference to the increase or decrease of price arising out of the nearness or remoteness of a period of investments to or from the day when dividends are payable. *Ib.*

A testator, by will, directed his trustees to collect and convert into money such part of his personal estate as should not consist of money and to invest the same, and permit his wife to

receive the annual income of the trust fund during her life, and he authorised his trustees to postpone from time to time the sale, calling in, collection, or conversion of any part of his personal estate, to such period or periods as they should in their judgment think fit, and to pay the rents, dividends, and produce of the same, or any part thereof not sold, called in, collected, or converted, to the same person or persons, and in the same manner as the income of the money to arise by such sale would be payable under the trusts thereinbefore declared. He, at the time of his death, was a partner in a mercantile firm, under articles of partnership, which provided that interest at 5*l.* per cent. should be allowed on the balances standing to the credit of the respective partners at the end of each year, before any division of the profits, and that, in the event of the decease of one or more of the partners during the term, the partnership should not cease, but the representatives of the deceased partners should be entitled to his share of the capital and profits up to the expiration of the term, and the survivors should pay to the representatives of the deceased partner the balance appearing to his credit at the expiration of the term, by three equal yearly instalments, with interest at 5*l.* per cent. in the meantime on the balance remaining unpaid. The trustees allowed the whole of the testator's capital to remain in the business until the expiration of the partnership by effluxion of time, and large profits were made after his death:—Held, that the widow was entitled to all the interest and profits arising from the testator's capital, as it stood at the first making up of the accounts after his death, together with a proportionate part of the interest on the balance standing to the testator's credit at the last previous making up of the accounts, for so much time as elapsed between his death and the next making up of the accounts. *Johnston* v. *Moore*, 27 L. J., Ch. 453; 4 Jur. (N.S.) 357; 6 W. R. 490.

A. bequeathed to his wife and three others 300,000*l.*, upon trust to invest in government or real securities, and to pay the interest to his wife for life, such legacy afterwards to fall into his residue. He bequeathed the residue of his real and personal estate to the same four persons, upon trust, with all convenient speed after his decease, to sell and convert, and invest the proceeds in parliamentary stocks or public funds, or in government or real securities, and to pay the income to his wife for life, and afterwards to transfer and assign the same over. He declared that it should be lawful for his trustees to permit and suffer all or any part of his residuary estate to remain in or upon the same securities or state of investment as they in their discretion should think proper. The testator appointed his wife sole executrix. Part of the residue having been suffered to continue in an investment which was unauthorised by the power, though not of a wasting kind, the tenant for life of the residue was nevertheless held entitled to the whole interest of such part of the residue as it stood, and not merely to interest from one year after the testator's death upon such a sum of consols as it would have purchased. *Bulkeley* v. *Stephens*, 3 N. R. 105; 10 L. T. 225.

That which has been stated as a rule in *Dimes* v. *Scott* (4 Russ. 209) is merely an adjustment of rights between tenant for life and remainderman, under special circumstances. *Ib.*

The legacy not having been appropriated, the tenant for life (who was also executrix and trustee) was held entitled to the income of the funds which represented it, in their actual state of investment, from the death of the testator. *Ib.*

Foreign stock, with the current dividend, having been sold by the trustees, with the consent of the tenant for life, and the proceeds of sale of the stock, exclusive of the dividend, having been invested in mortgage for her benefit, the tenant for life was held entitled to an apportioned part of the proceeds of the sale of the dividend. *Ib.*

Testator, by will, gave his residuary personal estate and effects to trustees, upon trust to convert the same and invest the proceed of sale as therein mentioned, with power in their absolute discretion to retain any existing securities or property at the time of his death unconverted for such period as they should think fit; and declared that his trustees should stand possessed of the "stocks, funds, shares, and securities for the time constituting or representing the residuary personal estate and effects hereinbefore bequeathed, and the income thereof," in trust to pay the income to certain tenants for life, with remainders over. At the testator's death part of his personal estate consisted of American railroad bonds repayable at par at a fixed date, but bearing a high rate of interest, and now commanding a considerable premium in the market. These were not authorised investments by the investment clause, but had been retained unconverted by the trustees under the power to retain existing securities:—Held, that the tenants for life were entitled to the net income of the unconverted property. *Thomas, In re, Wood* v. *Thomas*, 60 L. J., Ch. 781; [1891] 3 Ch. 482; 65 L. T. 142; 40 W. R. 75.

Where the trustees of a will held freehold and leasehold estates in trust for sale, with power to postpone at discretion:—Held, that the words of the will were insufficient to entitle the tenant for life to enjoy in specie the income arising from the leaseholds prior to the sale. *Carter, In re*, 41 W. R. 140.

—— **Where Consent is required to the Exercise of a Trust or Power to Sell.**]—Residuary gift of the whole income of the testator's property, which included leaseholds and long annuities, to his wife for her life, at her own disposal, but not to sell without the consent of all parties; remainder to the brothers of the testator equally:—Held, that construing the gift with reference to the other provisions of the will, the widow was entitled to the income of the property for her life in the state of investment in which it was left by the testator. Semble, in the application of the rule for converting into permanent investments at the death of the testator perishable property in which he has given interest for life, and other interests in succession, the inclination of the court in the latter cases, when the meaning was doubtful, has been in favour of that construction which would give to the tenant for life the enjoyment of the property in specie. *Hinves* v. *Hinves*, 3 Hare, 609.

Where a will gave no specific directions as to the payment of debts, the executor, who was also the ultimate residuary legatee, having taken on himself (after the trustees named in the will had renounced) to administer the estate, did not ascertain and secure the residue at the end of the year, but worked part of the property

(a coal mine), to a profit for several years, when it ceased to be of any value, on a bill, at the suit of the person having the charge on the residue, praying that the will might be established, and accounts taken:—Held, that the executor was not, after assuming to act as a trustee, entitled to postpone the sale of the property to the prejudice of the person having the charge on the residue; that, having postponed it, he was chargeable with the value of the mine at the end of a year from the testator's death, with interest thereon, and that that value must be calculated as constituted of the aggregate of the annual profits derived from the mine in all the subsequent years, till it became unproductive, such annual profits to be treated as deferred payments. *Wightwick* v. *Lord*, 6 H. L. Cas. 217; 26 L. J., Ch. 825; 3 Jur. (N.S.) 699; 5 W. R. 713.

L., by will, gave personal estate including his share in the business of a jeweller and gold and silversmith to executors with a direction to convert and invest and to vary investments, and with a discretion (the life-tenant consenting) to continue part of the estate in his business of jeweller and to increase the same:—Held, that the life-tenant was entitled to the profits of the business as the income of that part of the estate of the testator continued in the business with the life-tenant's consent. *Lambert* v. *Lambert*, 43 L. J., Ch. 106; L. R. 16 Eq. 320; 27 L. T. 59; 20 W. R. 943.

—— **Trust for Accumulation.**] — Testator directed residue of his personal estate subject to payment of legacies, &c., with all convenient speed to be laid out in real estate, to be strictly settled, and that interest should accumulate, and be laid out in lands, to be settled in like manner. Various circumstances having delayed the collection and investment of the personal estate, the tenant for life was held entitled to the interest from the end of a year after the death of testator. *Sitwell* v. *Bernard*, 6 Ves. 520; 5 R. R. 374. And see *Macpherson* v. *Macpherson*, 16 Jur. 847—H. L. (Sc.)

A testator directed his residuary personal estate to be invested in land from time to time, and at all convenient opportunities, and in the meantime to be accumulated:—Held, that the tenant for life of the land was entitled to the interest of the uninvested personalty, as from a year from the testator's death. *Tucker* v. *Boswell*, 5 Beav. 607.

Where residue directed to be laid out in land, and in meanwhile interest thereon to be accumulated, tenant for life held entitled to the interest from the end of the year after the testator's death, till residue laid out. *Kilvington* v. *Gray*, 2 Sim. & S. 396.

A testator directed his executors to get in his debts, and to invest the proceeds with the clear moneys he should die possessed of in consols, and to pay certain annuities out of the stocks standing in his name and those purchased by his executors, and out of the rents of the real estate if necessary; and to accumulate the surplus during the lives of the annuitants (a period which turned out to be more than twenty-one years). Part of the personal estate consisted of long annuities, which the executors did not convert, but accumulated with the other surplus income till the death of the annuitants. The income of the personal estate would have been more than sufficient to pay the annuitants if the long annuities had been converted:—Held, that the executors were not bound to convert the long annuities. *Hughes* v. *Perrens*, 1 Eq. Rep. 385.

—— **Directions respecting Intermediate Income.**] — Testator gave the residue of his personalty in trust to be converted by his executors from time to time, as they should think best, for payment of his debts and legacies, and subject thereto he directed them from time to time to invest the same, with the accumulated produce in the purchase of lands, to be conveyed to the same uses as other lands devised by the will, and he directed that the interest and produce of his said personal estate should be paid to the person who would under the will be entitled to the rents of the real estate:—Held, that the tenant for life was entitled to the income, from the testator's death, of such parts of the personal estate as were in a proper state of investment, and to the income of such parts only. *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 312; 11 L. J., Ch. 158; 6 Jur. 232.

A tenant for life held, upon the terms of the will, entitled to the actual income arising from the personal estate of the testator until the time of conversion. *Sparling* v. *Parker*, 9 Beav. 525; 10 Jur. 448.

—— **Directions concerning Possession or Enjoyment of the Property.**]—A testator gave to his widow "the full and entire enjoyment" of his real and personal estates, which, after her death, he gave to other persons; and he empowered her to retain a portion of a sum of 150*l.* a year given to other parties for renewing the leaseholds:—Held, she was entitled to enjoy the leaseholds in specie; that it was not imperative on her to renew, but that she had acted wrongly in surrendering a lease of which she was the only cestui que vie, as she thereby deprived herself of the option of renewing for the benefit of the parties in remainder. *Harvey* v. *Harvey*, 5 Beav. 134. And see 4 *id.* 215.

Testator after certain specific bequests gave to his wife all his property in the world for her life, and after his decease all his freehold and leasehold estates to his sister B., and her heirs, and the interest of his funded and other property between B. and S. for their respective lives, with remainders over. The testator then declared that his wife should hold peaceable possession of his house, furniture, plate, linen, and glass, and all his property at East House and elsewhere for her life; and that no distribution of any part of his property should take place until after the decease of his wife, except for payment of debts, &c.:—Held, that the widow was entitled to the enjoyment in specie of certain long annuities, part of the residue of the testator's estate. *House* v. *Way*, 18 L. J., Ch. 22; 12 Jur. 958.

A testator, by his will, charged all his real and personal estate with payment of his debts and legacies; he then devised all his real estates to trustees, to uses in strict settlement; he then bequeathed all his personal estate, charged as aforesaid, to the same trustees, "in trust, as far as the nature of such property will admit, for the persons who for the time being may have the ownership and be in possession of the said estates. And I hereby direct, that the said persons, under letters of attorney and powers from the said trustees, shall receive the yearly dividends which may arise out of the public funds, and the yearly interest which may arise from other parts of my personal property, under

the same restrictions and limitations and to the same extent on which they hold my said estates" :—Held, that long annuities and bank stock were to be enjoyed in specie by the tenant for life. *Neville* v. *Fortescue*, 16 Sim. 333 ; 12 Jur. 908.

—— **Directions concerning Rents, Profits, or other Annual Produce.**]—Testator gave a residue including leaseholds upon trust to permit the "rents" and annual proceeds to be received by A. for life, and after his decease to C. and D., with powers to the trustees to apply the "rents" towards their maintenance, until their shares should become vested :—Held, that the leaseholds were to be enjoyed in specie by the tenant for life, and not to be converted. *Goodenough* v. *Tremamondo*, 2 Beav. 512.

Testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life, and in case he should die without issue he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold and also of real property :—Held, that the widow was not entitled to the leasehold property in specie during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it. *Benn* v. *Dixon*, 10 Sim. 636 ; 9 L. J., Ch. 259 ; 4 Jur. 575.

Testator bequeathed to his widow, subject to such annuities and insurances as he was liable to pay, "all the interests, rents, dividends, annual produce and profits, use and enjoyment of all his, the testator's, real and personal estate," for life, and, after giving certain legacies, he proceeded to give all the rest and residue of his estate and effects to his son-in-law :—Held, that the widow was entitled to enjoy the property of the testator, including a leasehold and a determinable annuity, in specie. *Pickering* v. *Pickering*, 2 Beav. 31 ; 3 Jur. 331. Affirmed 4 Myl. & C. 289 ; 8 L. J., Ch. 336 ; 3 Jur. 743.

A testator, by his will, as to the rest and residue of his moneys, debts, stocks, funds, and securities for money, and all other his personal estate and effects, gave and bequeathed the same, and every part thereof, unto trustees, upon trust to permit and suffer A. to have, receive, and take the interest, dividends, and proceeds thereof, during her natural life, to her own use and benefit ; and after the death of A., for other persons. The residue of the testator's estate consisted only of long annuities :—Held, that A. was not entitled to enjoy the long annuities in specie, and that they ought to be sold, and the produce invested for the equal benefit of all parties interested in the residue. *James* v. *Gammon*, 15 L. J., Ch. 217.

Testatrix bequeathed the residue of her estate, goods, chattels, and effects, which she should be possessed of, interested, or entitled to at her decease, to trustees, with very special directions to apply the whole of the income thereof for the benefit of her daughter (who was a lunatic), for life :—Held, nevertheless, that the bequest of the residue was not specific, and consequently that certain leasehold houses, which formed part of it, ought to be sold, and the proceeds invested in the 3 per cents. *Chambers* v. *Chambers*, 15 Sim. 183 ; 15 L. J., Ch. 318 ; 10 Jur. 326.

Testator willed that his wife should receive the interest of "all the property I possess in the public funds for her life" :—Held, that the wife was entitled to receive the income of all the property which the testator had in the funds at the date of his will, and in its then state of investment, notwithstanding it consisted of long annuities. *Cockran* v. *Cockran*, 14 Sim. 248 ; 8 Jur. 679.

After a specific gift of certain leasehold houses to the testator's wife for her life, she paying the ground rents and performing the covenants, with remainder over to his nephew, the testator bequeathed the "rents and profits, dividends and interest," of all the residue of his property to his wife for her life, with a gift over of the whole of the residue after her decease to other persons :—Held, that the widow was not entitled to the enjoyment in specie during her life of that part of the residue which consisted of leasehold and other perishable property, but that the same ought to be converted. *Pickup* v. *Atkinson*, 4 Hare, 624 ; 15 L. J., Ch. 213 ; 10 Jur. 303.

A testator, having 3½ per cents., East India stock, Danish bonds, and other property, bequeathed to his wife, during her widowhood, the interest of all the money he had or might possess in the funds or other securities. "And I further bequeath to my wife the interest of any other property I do or may possess, to be enjoyed by her so long as she remains single" :—Held, that the testator's widow was entitled, as against the residuary legatees, to enjoy, in specie, every portion of her husband's property which came within the description of money in the funds or other property, and consequently his 3½ per cents., East India stock and Danish bonds. *Oakes* v. *Strachey*, 13 Sim. 414 ; 7 Jur. 433.

A testator began his will by bequeathing the whole of his property to his wife, and afterwards to be equally divided between his children. He then gave to each of his children and to his wife some pecuniary and specific legacies, and afterwards bequeathed as follows : "the property, my house 21, North Street, St. Marylebone, let on lease at 48*l.* a year, 1,000*l.* new 4 per cents., 1,500*l.* in the 3 per cent. consols, 645*l.* in the threes reduced, and 20*l.* per annum in the long annuities, all this I give to my wife, with the residue and interest, should there be any" :—Held, that the widow took a life interest only in the general residue, including the particulars enumerated in the concluding clause, but that of those particulars she was entitled to the enjoyment in specie. *Vaughan* v. *Buck*, 6 Jur. 23.

A testator gave all his real and personal estate and effects, upon trusts to pay the rents and profits, dividends and interest, to a tenant for life, with trusts over in remainder ; and declared that notwithstanding the gift of his freehold and leasehold estates, the trustees might sell them, except his dwelling-house, at such time as they should think fit. The testator's estate consisted partly of leasehold property and long annuities :—Held, that the tenant for life was entitled to the enjoyment of the income of both these descriptions of property in specie. *Burton* v. *Mount*, 2 De G. & Sm. 383 ; 12 Jur. 934.

Residuary devise and bequest on trust to pay the dividends, interest, and annual produce of the testator's real and personal estates to the separate use of his daughter or daughters for life, and after her or their decease to pay, transfer, and equally divide the whole of his real and personal estate among the issue of his daughter or daughters : and for want of such issue to pay certain legacies, and to sell the residue of the real and personal estate, not consisting of money :

—Held, to entitle the tenant for life to the enjoyment of the personalty in specie. *Hunt* v. *Scott*, 1 De G. & Sm. 219.

A testator bequeathed all his money, securities for money, money in the funds, household furniture, cattle, and all other his personal estate and effects, unto two trustees, upon trust to pay his debts and legacies, and, subject to the payment of a legacy, to stand possessed upon the trusts after mentioned. He then devised his freehold estates to trustees, upon trust to permit his wife to reside at his house, and to use the household furniture, plate, linen, and china therein for her life, and to "pay the rents and profits of his real estate," and "the interest, dividends, and proceeds to arise from his said money, and securities for money, money in the funds, and personal estate therein before bequeathed," to her for life, and after her decease, to sell his real estate, and divide and pay the purchase moneys, "and pay, assign, or transfer his said money and securities for money, money in the funds, and personal estate," unto his children. The testator possessed long annuities and leaseholds :—Held, that they ought to be converted into 3 per cents., and that the widow was merely entitled to the dividends thereon. *Morgan* v. *Morgan*, 14 Beav. 72.

A testator, by his will, gave the interest of all moneys and securities for money, and the rents and profits of all the real and personal estates of which he might die possessed, to his widow for life, or during such part thereof as she should continue his widow. He gave his son the residue of his estate and effects. He was possessed of long annuities and chattel leaseholds :—Held, that those parts of the property were not to be converted, but that the widow was entitled to enjoy them in specie. *Howe* v. *Howe*, 14 Jur. 359.

A testator gave all his residuary real estate, and his stock, mortgages, and securities for money, and all other his personal estate and effects, to his wife and his son, upon trust for his wife for life, subject to an annuity for his son; and after her death, as to all the devised and bequeathed freehold, and residuary real and personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. The testator left leaseholds as to which at the time of his death he was liable to the landlord for repairs, and they were afterwards repaired at the widow's expense :—Held, first, that the widow was entitled to the leaseholds in specie; secondly, that the repairs were to be borne by the residue, and not by the tenant for life. *Harris* v. *Poyner*, 1 Drew. 174; 21 L. J., Ch. 915; 16 Jur. 880.

A testator, after giving some legacies, proceeded: "the residue of my property, of every description it may be at my death, I bequeath the interest and proceeds thereof to" A. for life. He then gave the "interest and proceeds" to others for life, and after their deaths he bequeathed "the said residue" to another :—Held, that A. was not entitled to the specific enjoyment, and that the whole of the property, after giving some legacies, must be converted into consols. *Thornton* v. *Ellis*, 15 Beav. 193; 21 L. J., Ch. 714; 16 Jur. 236.

A testator gave the residue of his freehold, copyhold, and leasehold estates, and all other his estate and effects, upon trust to pay the dividends and interest, rents, profits, and annual produce to E. B. for life, with remainders over. This residue consisted of leasehold property, canal and insurance shares, and Dutch bonds :—Held, that the tenant for life was entitled to enjoy the leaseholds in specie, but not the shares or Dutch bonds. *Blann* v. *Bell*, 2 De G. M. & G. 775; 22 L. J., Ch. 236; 16 Jur. 1103.

A testator gave his freehold, copyhold, and leasehold estates, and all his stocks, shares, and personal estate to trustees, in trust to receive the "rents," issues, and profits, and thereout to keep the houses, &c., in good, substantial, and tenantable repair, and renew his leaseholds, &c., and then to pay "the net income arising from the residuary, real and personal estate," to his wife for life :—Held, first, that the wife was entitled to the enjoyment in specie; and secondly, that all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses. Part of the testator's property being at his death invested on insufficient securities, an inquiry was also directed, whether any and which of the outstanding debts due to the testator should be got in. *Crowe* v. *Crisford*, 17 Beav. 507; 2 W. R. 45.

A testator gave the "residue of his estate and effects" to trustees, upon trust to sell sufficient to pay his debts, and after payment, to hold "his residuary estate and effects," in trust to pay "thereout," interest, dividends, and annual produce to A. for life. There was a power to let and sell with the consent of A. :—Held, that A. was entitled to enjoy leaseholds in specie. *Hind* v. *Selby*, 22 Beav. 373.

A testator having freeholds, gave "all his real and personal estate" upon trust, "out of the rents and profits of his real and personal estate," to pay his widow sufficient for her maintenance; and on her death he devised "all his real and personal estate" to the children :—Held, that the trustee was not bound to convert the leasehold property. *Wearing* v. *Wearing*, 23 Beav. 99.

Devise of residue of real and personal estate on trust to permit A. to "receive and take the rents, issues, and profits" for life, with remainder over :—Held, that A. was entitled to enjoy leaseholds and railway stock in specie. *Vachell* v. *Roberts*, 32 Beav. 140.

A testator gave the residue of his estate and effects in trust to pay "the annual proceeds to his wife" for life, and after her death to divide his "residuary estate and effects" between his nephews and nieces; and he directed that his nephews, in the division, should take such parts of the joint property as he held with them. Part of the joint property was leasehold :—Held, that the tenant for life was entitled to enjoy the whole perishable property in specie. *Holgate* v. *Jennings*, 24 Beav. 623.

A. gave his real and personal estate to trustees, to permit his wife to receive "the income arising from one-third" for her life, with remainder to his children. And to facilitate the ultimate devise, he authorised them to convert his personal estate into money and to sell his real estate. And he authorised his trustees to permit any part of his personal estate to remain in the state of investment in which it might be at his death, and to invest his residuary personal estate in the public funds, &c., and, from time to time, to alter and vary the securities :—Held, that the widow was not entitled to enjoy leaseholds and perishable property in specie. *Llewellyn's Trust, In re*, 29 Beav. 171.

A. bequeathed to his widow "the interest, dividends, or income of all moneys or stock," and

"of all the property whatsoever yielding income at his death," for her life, the principal to remain untouched, and at her death to be divided amongst his children:—Held, that the widow was entitled to enjoy the residue in specie. *Boys* v. *Boys*, 28 Beav. 436.

E. devised and bequeathed all his freehold, and leasehold, and personal estates to trustees, and after directing conversion of his stock-in-trade, and payment of debts, directed that the trustees should, out of the annual rents and produce of the real and personal estate, pay to the persons named certain shares of the rents and produce for their lives, and with remainders over in favour of grandchildren. The will gave power to the trustees to invest all principal moneys which should arise from his real and personal estate, and declared that the receipts of the trustees for the purchase-money of the hereditaments and premises sold should be good discharges to the purchasers; but it contained no express trust for sale, and no power of sale was expressly given. Some of the leasehold property was held on terms, of which only eleven years remained:—Held, that the words of gift, which directed an enjoyment of the leasehold property in specie, were not controlled by the subsequent words in the will, and that the trustees were not bound to convert. *Elmore's Will, In re*, 6 Jur. (N.S.) 1325; 3 L. T. 359; 9 W. R. 66.

A testatrix directed that the interest and dividends of all the residue of her property should be applied by her trustees for the benefit and comfort of her sister during her life. Part of the residue so bequeathed consisted of terminable annuities:—Held, that the annuities must be converted, and the income arising from the investment of the proceeds paid to the tenant for life. *Pidgeon* v. *Spencer*, 16 L. T. 83.

A testator gave his residuary estate to trustees in trust to convert into money such parts as should not at his decease consist in money or be invested in any of the public funds or government securities, and to invest the same in such public funds or government securities as to them should seem most advantageous, and to pay the interest, dividends, and annual proceeds of such residue to his children in equal shares for their lives, and after their deaths upon other trusts:—Held, that long annuities, of which the testator died possessed, were within the exception from the trust for conversion, and that the tenants for life were entitled to enjoy them in specie. *Wilday* v. *Sandys*, L. R. 7 Eq. 455; 20 L. T. 861; 17 W. R. 603.

A husband gave the residue of his estate, real and personal, to trustees to pay to his wife the rents, issues, and profits for life for her own absolute use and benefit, and after making bequests of leaseholds, but not directing conversion, and of moneys, he gave the residue of his estate to five persons named equally. He authorised and empowered his trustees to allow the moneys which he possessed to remain in the same state of investment in which they should find them at his decease, unless circumstances should render it advisable to dispose of his bank shares. The testator's estate consisted of a sum of long annuities:—Held, that the widow was not entitled to enjoy the annuities in specie, but that they must be treated as having been converted at the death of the testator. *Porter* v. *Baddeley*, 5 Ch. D. 542.

A testator gave specific bequests by his will, and to his niece a leasehold house held for lives together with a policy of insurance on one of the lives, and all bonuses and additions, she paying the future premiums; and he directed that, if she should be married at his death, the house and policy should be settled on her and her children; and he gave the residue of his personal estate, including his furniture, to L. After the date of the will the testator married, and he then made a codicil, giving to his wife all the income, dividends, and annual proceeds of his entire estate, and postponing the payment of all legacies and the distribution of all estates vested in him until after her decease. Subject thereto he confirmed and republished his will. A portion of the property consisted of Egyptian 7 per cent. bonds of the nominal amount of 4,000*l*. On a bill by the widow for the administration of his estate, and claiming the enjoyment of all the estate in specie during her life:—Held, that there was nothing to exempt the case from the operation of the rule in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137), and that therefore the residuary estate, including the furniture and bonds, ought to be converted, and the income paid to the widow. *Macdonald* v. *Irvine*, 47 L. J., Ch. 494; 8 Ch. D. 101; 38 L. T. 155; 26 W. R. 381.

Held, also, that the bonuses ought to be added to the sum insured and not taken in reduction of the premiums; but that the premiums ought not to be charged on the rents of the leasehold property, but should be charged upon the policy money. *Ib.*

Testator, after bequeathing certain leaseholds for years to A., who died in the testator's lifetime, and after bequeathing several legacies, gave and bequeathed to trustees all his moneys in the long annuities and other of the public stocks or funds, ready money and securities for money, outstanding debts, and all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, upon trust, in the first place, by sale thereof, or of so much thereof as should be necessary for that purpose, to pay thereout all his debts, and funeral and testamentary expenses, and the legacies by him thereinbefore given, and, subject thereto, to pay the dividends and interest thereof to B. for life, and after B.'s decease to permit C. to have the dividends and interest for life, and after the decease of the survivor of B. and C. he bequeathed the principal of the said trust fund to the children of D.:—Held, that the tenants for life were not entitled to the enjoyment in specie of the rents of the leaseholds and the dividends of the stock, but that the leaseholds and stock must be invested so as to be permanently productive for the persons entitled to it according to the limitations of the will. *Sutherland* v. *Cooke*, 1 Coll. 498; 14 L. J., Ch. 71; 8 Jur. 1088.

A husband died on the 20th of December, 1870, having bequeathed the residue of his personal estate to trustees to invest as therein mentioned, and then to permit and empower his wife to receive "the dividends, interest and income of his trust money, stocks, funds, shares and securities" for her life; and on her death to permit his brother to receive the residue (after the payment thereout of certain legacies) of the same dividends, interest and income, for his life, with remainder to one of his brother's children and another legatee as therein mentioned. At his death the testator had twenty-five shares in the Sun Life Assurance Society, and fifty-two in the Sun Fire Insurance Office. The trustees of the will paid his widow the dividends on those shares

till 1873, when they withheld the January and July dividends on the respective shares, on the ground that it was doubtful whether the dividends were corpus, or income, of the estate. The question depended on the construction of the company's deed of settlement, and on the mode in which the company had declared the dividends, which were called extraordinary and special. The resolutions under which the dividends were declared were not produced to the court; but it was stated that they were identical in terms with the dividend warrants; and the warrants spoke of the money payable thereunder as dividend paid out of profits. The trustees paid the money into court; and the widow presented a petition praying payment of it out to her:—Held, that the dividends were income and not corpus of the estate and belonged to the widow. *Hopkins' Trusts, In re*, 43 L. J., Ch. 722; L. R. 18 Eq. 696; 30 L. T. 627; 22 W. R. 687.

—— **Property continued in Trade.**]—A testator gave his real and personal estate to trustees in trust to permit his wife to receive the "annual produce, interest, rents and profits thereof," for life; and after death in trust to stand seised and possessed of the said real and personal estate for A. and B. And he directed his trustees to carry on his partnership trade in which he was engaged, or such part as they should think proper, for the benefit of his wife and those in remainder. Sir John Leach held that the widow was entitled to any increase in the value of the testator's capital which took place between the death and the expiration of the partnership, but the decision was reversed on appeal. *Mousley* v. *Carr*, 4 Beav. 49; 10 L. J., Ch. 260.

By partnership articles the testator's capital was to remain in the concern for eighteen months after his death. The tenant for life of the residue was held, upon the terms of the will, entitled to the profits made during that period. *Skirring* v. *Williams*, 24 Beav. 275; 3 Jur. (N.S.) 927.

A. authorised his executors to enter into a partnership with his brother on such terms as they should think fit, and leave his capital therein. The executors did so, and the articles of partnership stipulated that interest at 5*l.* per cent. should be paid on the capital, and that part of the executor's profits should be left in the concern "as additional capital":—Held, that the tenant for life was entitled to the interest, but that the share of the profits retained as additional capital must, as between the tenant for life and remainderman, be considered as capital, and not income. *Stroud* v. *Gwyer*, 28 Beav. 130; 6 Jur. (N.S.) 719; 2 L. T. 400.

A testator directed that his widow should receive the income of his property, however invested, from the time of his death. The testator was a member of a partnership, by the articles of which accounts were to be taken once in each year. Each partner was then to receive interest on his capital, and the remaining profits were to be divided equally:—Held, that the widow was entitled to the whole of the testator's share of the profits divisible at the end of the current year, but that she was only entitled to interest on the capital from the time of the testator's death. *Ibbetson* v. *Elam*, 35 Beav. 594; L. R. 1 Eq. 188; 12 Jur. (N.S.) 114; 14 W. R. 241.

A sole trader by his will gave "the annual or other earnings, proceeds and profits to arise from his business," to one for life, with remainders over:—Held, that, in ascertaining these proceeds and profits, interest on his capital in his business was not to be first deducted. *Gee* v. *Liddell*, 35 Beav. 631, 658.

Where a testatrix, after giving specific chattels, bequeathed her residuary estate to R., on trust to sell all the estate, except the leasehold house in which she had carried on business, declared it to be her will and mind that R. should employ W., then in her service, to carry on and conduct the business until the expiration of the lease, allowing him a reasonable salary; and that after the expiration of the lease, R. should sell the business, goodwill, &c.; and then bequeathed pecuniary legacies, and the residue to the plaintiff:—Held, that the plaintiff was not entitled to have an immediate sale of the leasehold house. *Saunders* v. *Rotherham*, 3 Giff. 557; 9 Jur. (N.S.) 66; 7 L. T. 185; 10 W. R. 505.

A testator directed that his business should be carried on for the benefit of his widow or until her second marriage, with powers to the trustees to carry on the same; and to "increase or abridge his business, and his capital, stock and implements therein," and generally to act "as most advantageous and mostly for the benefit of the persons claiming under his will." He also directed that all his debts, funeral and testamentary expenses, and the "costs, charges and expenses of carrying into effect the trusts of his will," should be paid out of the capital of the business:—Held, that the widow was entitled for life or until second marriage, to the whole of the profits made by such business after the testator's death; the cash at the banker's and the trade debts being the assets or part of the capital of such business. *Dixon* v. *Dutfield*, 5 L. T. 741.

Held, also, that the debts, funeral and testamentary expenses, and the costs of a suit, should be borne out of the capital of such business; the testator having exonerated his residuary estate from any such or similar charges. *Ib.*

The testator having directed his property to be converted and invested, and the dividends paid to his children for life, with remainder to their children after their deaths, and the court being of opinion that it would be for the benefit of all parties that the business should be carried on, the tenants for life were allowed out of the profits, 5*l.* per cent. on the capital for the time being in the business, the surplus to be accumulated and to go with the capital. Some of the tenants for life had drawn larger sums out of the profits than others. It was ordered that the drawings should be equalised, but no allowance should be made of interest on the sums which had been allowed to remain in the business. *Lambert* v. *Rendle*, 3 N. R. 247.

A direction in a will empowering trustees to postpone the sale and conversion of any part of testator's property for such period as to them should seem expedient, justifies the trustees in postponing the sale of testator's business, and in carrying on the business with a view to benefit the tenant for life, who is entitled to the profits till sale. *Crowther, In re, Midgley* v. *Crowther*, 64 L. J., Ch. 537; [1895] 2 Ch. 56; 13 R. 496; 72 L. T. 762; 43 W. R. 571.

A testator devised and bequeathed his real and personal estate upon the usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and after her death for his children. The will contained a power to postpone the sale and conversion of the real and personal estate, and a direction that

until sale and conversion, the rents, profits and income thereof should be paid to the same persons and applied in the same manner as the income of the trust estate. The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—Held, that the executors had power to carry on the business for a reasonable period with a view to its sale as a going concern; and that, as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Dartmouth (Earl)* did not apply, and therefore the widow was entitled to the profits of the business. *Chancellor, In re, Chancellor* v. *Brown*, 53 L. J., Ch. 443; 26 Ch. D. 42; 51 L. T. 33; 32 W. R. 465—C. A.

—— **Colliery.**]—A father bequeathed all his real and leasehold estates, part of which consisted of leasehold collieries, to trustees upon trust, as to one moiety for his daughter E. for life, with remainder to her husband T. for life, with remainder to their eldest son who should attain twenty-one absolutely, and in default, to the eldest daughter, with power to E. and T. to appoint portions to their other children, to be raised out of the testator's real and personal estate, and upon trust as to the other moiety for the separate use of his daughter C. (then a spinster) for life, with remainder (subject to a power to C. to appoint a part of the income to any surviving husband) upon trust for C.'s eldest son, with remainder, in default of children, in trust as to the other moiety. There was a power in the will to appoint portions to be raised and paid out of the "real and personal estates respectively," and a power to C. to appoint part of the "rents, issues and profits, dividends and annual income" to a surviving husband, and a power of advancement out of the "income and annual produce" of the respective moieties. There was also a power to the trustees to lease all or any part of the freehold or leasehold estate, and from time to time to sell and convert all or any part of the trust estates, and, in case the trustees should deem it beneficial "to conduct, carry on and continue the collieries," and "either to increase or abridge the business thereof," all losses, costs, charges and expenses of carrying on the business to be borne, paid and defrayed out of the real and personal estate, and to procure any leases of the collieries to be renewed, and to continue the business thereof after such renewal. The trustees carried on the business, and renewed several of the leases:—Held, that the testator intended the tenants for life to enjoy the profits of the collieries in specie. *Thursby* v. *Thursby*, 44 L. J. Ch. 289; L. R. 19 Eq. 395; 32 L. T. 187; 23 W. R. 500.

A husband bequeathed to his wife a life interest in his one-seventh of a colliery of which he was a partner. By the deed of partnership, the majority in value of the partners had power to dispose of the profits by adding them to the capital or dividing them between the partners or carrying them to the separate accounts of the partners. For several years profits were made, but retained to the credit of a profit-and-loss account. Afterwards profits were divided, but at the death of the tenant for life a large sum remained to the credit of the profit-and-loss account, the greater part of which had been sunk in the works of the colliery:—Held, that the share of the testator in the sum standing to the credit of the profit-and-loss account belonged to the persons entitled in remainder, and not to the executor of the tenant for life. *Straker* v. *Wilson*, 40 L. J., Ch. 630; L. R. 6 Ch. 503; 24 L. T. 763; 19 W. R. 761.

—— **Brewery.**]—A brewer, who carried on trade upon leasehold premises, gave his freeholds, leaseholds, shares in the brewery, moneys and personal estate to trustees upon trust, after raising an annuity and portions, "to pay to or permit and suffer or well and sufficiently to authorise and empower his son and his assigns to receive and take the interest, dividends and annual income for life." The court, though of opinion upon the context that, if there had been no question as to the trade, the son would have been entitled to enjoy the leasehold property for life, in specie, yet thinking that there was not sufficient to authorise the carrying on of the trade, held, that the testator's property ought to have been converted on the testator's death. *Kirkman* v. *Booth*, 11 Beav. 273; 18 L. J., Ch. 25; 13 Jur. 525.

—— **Cotton Mills.**]—H., having a cotton manufactory and other property situate at H. and W., and a freehold estate at B., unconnected with his manufactory, by will gave to trustees all his freehold estates at B., and also all his freehold and leasehold property at H. and W., and all his real and personal estate and effects upon trust to carry on the cotton manufactory, for which purpose he authorised them to retain as much ready money as a capital in the business as by them might be considered necessary; and he directed, that at the end of every twelve months, provided his daughters L. and E. were living, the profits, if any, and the surplus income from the H. and W. estates, after paying the annuities charged thereon, and retaining a sufficient capital to carry on the manufactory, should be equally divided between his two daughters; but if the trustees were not inclined to carry on the business, they were to let the premises, and the reserved capital was to be equally divided between L. and E., and also the surplus rents of H. and W. The testator then gave estate B. to his daughter E. for life, remainder to her issue, share and share alike; remainder to L. for life, remainder to her issue; and if L. should die without issue, and E. should leave issue, such issue was to have the whole of the estates in B., H. and W., and all other his real and personal estates and effects; and if both L. and E. should die without leaving issue, "then the whole of the rents, profits and interests of all my estates, real and personal, situate in B., W. and H., to be paid to R. H." The trustees carried on the manufactory, retaining a very large sum for capital. L. and E. both died without leaving issue:—Held, that the daughters took absolutely all the testator's personal estate not retained by the trustees for capital; but that what was so retained was to be considered as annexed to, or as passing with, the H. and W. estates to R. H. *Ashton* v. *Horsfield*, 6 Jur., (N.S.) 355; 2 L. T. 1; 8 W. R. 285—H. L. (E.)

—— **Farming Stock.**]—A general residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, &c., for life, and as to the capital for the children. The stock being considerably increased between the death in April and the sale at Michaelmas, it was decreed that the conversion was in a reasonable time; and the party entitled for life should have interest from the conversion. *Gibson* v. *Bott*, 7 Ves. 89; 6 R. R. 87.

A testator directed his trustees to apply a sufficient part of his personal estate in carrying on his farm till the termination of his lease therein; and to employ the annual profits for the benefits of his wife for life, and then of his children; and, at the end of the lease, to sell the stock then on the farm, and apply it upon the trusts of the will. The trustees refused to act, and the widow carried on the farm; and, after applying a sufficient part for the maintenance of herself and children, employed the rest of the annual profits in purchasing stock, so that, at the end of the lease, the stock on the farm was of much greater value than that which was originally employed in carrying on the farm:—Held, that the widow was not entitled to the increased value of the stock on the farm at the end of the lease, although it had arisen in a great measure from the application by her of the surplus profits each year in purchasing stock. *Whiting* v. *Whiting*, 5 Jur. 1127.

Under a gift of farming stock to one for life, with remainder over, the first taker does not become absolutely entitled to such of the articles comprised in the gift as are of a consumable nature, but if he enjoys it in specie he must keep up the amount of it, and if it has to be sold he will only be entitled to the income produced by the proceeds. *Cockayne* v. *Harrison*, 41 L. J., Ch., 509; L. R. 13 Eq. 432; 26 L. T. 385; 20 W. R. 504.

Money Lent in Breach of Trust.]—Trustees, without authority, lent trust moneys at interest at 5*l.* per cent.:—Held, that the tenant for life was entitled to the whole interest, and that the remainderman had no right to insist that the excess of the interest beyond the dividends which would have been produced if the money had been invested in consols formed capital. *Strond* v. *Gwyer*, 28 Beav. 130; 6 Jur. (N.S.) 719; 2 L. T. 400.

Setting Value on Property.]—A testator gave the residue of his real and personal estate to trustees, upon trust to pay or permit his widow to receive the income and profits, and after her death he gave the capital over. The will contained no direction as to the conversion of his estate. Part of the testator's estate consisted of 12,000*l.*, invested in a partnership. Under a stipulation in the deed of partnership, the surviving partner gave a warrant of attorney to the executors of the testator, securing payment of the 12,000 by instalments of 1,500*l.* a year, with interest at 5 per cent. on the unpaid balances:—Held, that the rule laid down in *Howe* v. *Dartmouth* (*Earl*) (7 Ves. 137), as applied to this case, required the trustees not to convert the property, but to set a value upon it, and to give the tenant for life 4*l.* per cent. on the value, and to invest the residue of the surplus income, paying the income of these investments to the tenant for life, and appropriating the corpus to the remainderman. *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; 21 L. J., Ch. 678. And see *Gibson* v. *Bott*, 7 Ves. 89; 6 R. R. 87.

Where a part of the assets was so situated that it could not be realised immediately without loss to the estate, and was producing 5*l.* per cent., the tenant for life held entitled, in the meanwhile, to 4*l.* per cent. on the value. *Llewellyn's Trust, In re*, 29 Beav. 171.

A testator directed his executors to convert his personal estate, when and in such manner as they should see fit, with power to sail his ships for the benefit of his estate, till they could be satisfactorily sold. He gave his residuary estate to tenants for life, with remainders over, and gave his executors power to invest at their discretion, or to allow to remain as then invested, all his funds in certain specified securities. His ships gained considerable earnings after his death:—Held, that the tenants for life were not entitled to the earnings of the ships as income; but that they were entitled to interest at 4 per cent. on the value of the ships from the testator's death. *Brown* v. *Gellatly*, L. R. 2 Ch. 751; 17 L. T. 131; 15 W. R. 1188.

A testatrix, being possessed of reversionary interests, bequeathed them to a tenant for life, with remainder over. Before the reversionary interests fell into possession, the devisee for life died. The reversionary interests having afterwards fallen in:—Held, that, in estimating what was due to the estate of the devisee for life, the value of the reversions must be calculated as at the end of a year from the testatrix's death, on the assumption that they would fall in when they actually did; and that the devisee for life was entitled to 4*l.* per cent. on that amount from the death. *Wright* v. *Lambert*, 6 Ch. D. 649; 26 W. R. 206.

Where a will contains an implied but no specific direction for conversion of the property, and by an innocent mistake it has been left upon the original security, and the income enjoyed by the tenant for life in specie, the court, upon the mistake being rectified, will at its discretion allow the tenant for life interest at the rate of 4*l.* per cent. per annum upon the value of the property as taken at the expiration of one year from the testator's death. *Sutherland* v. *Cooke*, 1 Coll. 503; 14 L. J., Ch. 71; 9 Jur. 224.

Residuary personal estate of a testator, which, at the time of his death, stood invested in securities not recognised by this court, having been valued by the master, as at the period of one year after the testator's death, the court ordered the interest on the value so taken (not exceeding 4 per cent.) to be paid to the tenant for life from the testator's death. *Caldecott* v. *Caldecott*, 1 Y. & C. C. C. 737; 11 L. J., Ch. 414; 6 Jur. 1032.

Gift of residue to the testator's sister, confirmed in a codicil, but with a desire "that the same should be invested in any way my executors think proper," in trust for her sole benefit during her lifetime, and at her death for her children:—Held, that she was not entitled to the income of leaseholds and other parts of the testator's estate, consisting of investments not usually authorised by the court, which had remained for some time unconverted, but only to interest on their value at 4 per cent. *Green* v. *Britten*, 42 L. J., Ch. 187; 27 L. T. 811.

—— **In other Cases.**]—A testator gave to his wife all and every part of his property, in every shape, and without any reserve, for her life; and at her death the property so left to be divided, one-half among certain persons mentioned, the other half to be at the sole disposal of his wife. Part of the testator's property was leasehold:—Held, that the persons to whom a moiety of the testator's property was given over were not entitled to have the leasehold property sold, but that the widow was entitled to enjoy it for her life. *Collins* v. *Collins*, 2 Myl. & K. 703.

Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities and policies on the lives for securing the principal money. The court, seeing it for the benefit of all parties, did not order a sale, but directed the policies to be kept up, and that the surplus annuities should be paid to the tenant for life. *Glengall* v. *Barnard*, 5 Beav. 245.

Where the testator directed that the residue might be employed in any manner his executors should think proper:—Held, that they were not liable for not investing it in 3 per cent. consols as in ordinary cases. *Dickinson* v. *Player*, C. P. Cooper, 178; 2 Jur. 870.

In a suit for administration instituted by the administrator, who was also the first tenant for life of the estate under the will, orders were made for the sale of bank stock and East India stock, and for the realisation of other funds and securities, and the investment of the proceeds in consols, but such orders were not prosecuted:—Held, in a suit by the next tenant for life, that the estate of the administrator, plaintiff in the first suit, was liable for the loss or damage occasioned to the estate of the original testator by the neglect or omission to carry into effect the directions of the said orders. *Sowerby* v. *Clayton*, 3 Hare, 430; 8 Jur. 597.

Upon the construction of a will:—Held, that the testator's widow was not entitled to enjoy the testator's residuary property for her life in specie. *Johnson* v. *Johnson*, 2 Coll. 441; 10 Jur. 279.

A testatrix gave her property, with certain exceptions, to her granddaughter, and afterwards stated "that her property was in the bank and India House":—Held (assuming her to take for life), that she was entitled to enjoy the Bank and India stock in specie, and that it was not liable to be converted into consols. *Hubbard* v. *Young*, 10 Beav. 203; 16 L. J., Ch. 182; 11 Jur. 177.

Tenant for life held to be entitled to the income of the real and personal estate in specie. *Simpson* v. *Earles*, 11 Jur. 921.

The testator in the cause, by his will gave and bequeathed all the residue of his property, including the lease of the cottage in which he resided, unto his daughter C. for her life, upon trust that she should either allow her sister E. to live with her, rent free, in the said cottage while that lease should last, or, if from any cause whatever the said sisters should not life together and after the said lease should expire, pay to the said E. the yearly sum of 20*l*., by equal quarterly payments, the first payment to be made three months after they should cease to live together, or the said lease should have expired; and after the decease of his said daughter C., he gave the residue to his said daughter E., for her life, and after her decease, to his son S. absolutely. An administration suit having been instituted against the personal representative of the testator, the furniture in the cottage was (with the exception of certain articles) sold under an order, made at the hearing, to sell the personal estate not specifically bequeathed; and, by the master's report, it appeared that the testator had been only tenant from year to year of the cottage;—Held, on the hearing for further directions, that the furniture of the cottage was intended to be enjoyed by the tenants for life as specifically as the lease itself, and that they were entitled to retain in their possession the articles of furniture which still remained unsold. *Cotton* v. *Cotton*, 14 Jur. 950.

A testator devised his real and personal estate to trustees, upon trust to sell and put out one-ninth of the produce in government or real securities, and to pay the interest to A. for life, and afterwards to her children. By a codicil, he bequeathed a leasehold to the trustees, to hold upon the same trusts, in all respects, and for the same persons and subject to the same powers, provisoes, conditions and limitations, as the above one-ninth:—Held, that A. was not entitled to enjoy the leasehold in specie, but that it must be sold and invested for the benefit of the parties entitled in succession. *Murton* v. *Markby*, 18 Beav. 196.

The rule, that residuary property of a wasting nature is to be converted for the benefit of those in remainder, will not be followed where the testator has given indications of a contrary intention. *Simpson* v. *Lester*, 4 Jur. (N.S.) 1269.

A testator devised and bequeathed the whole of his property, comprising freeholds, leaseholds and personalty, to trustees, upon trust for the payment of annuities, and, subject thereto, for certain persons for life, with remainder to others, their heirs, executors, administrators, or assigns. The leasehold property belonging to the testator was considerable, and was held for short terms:—Held, that there being no indication upon the face of the will of any intention on the part of the testator that the leaseholds should not be converted, the general principle must be applied, and there must be a conversion. *Craig* v. *Wheeler*, 29 L. J., Ch. 374; 8 W. R. 172.

A testator gave his property to trustees for the benefit of his wife for her life, and after her decease to be equally divided among his ten children, the object being that during the widow's life she might have the means of bringing up her children. One of the children became insolvent, and, on a claim for the administration of the testator's estate, filed by assignees in insolvency, and praying that the widow might be ordered to convert certain leaseholds and long annuities, and to invest the money in court, instead of enjoying the income in specie:—Held, upon the construction of the will, and considering that the testator's object was to provide not only for his widow, but also for his children during her life, that she was entitled to the income in specie, and that the plaintiffs were not entitled to costs in prosecuting a claim in such a case. *Marshall* v. *Bremner*, 2 Sm. & G. 237; 2 W. R. 320.

Testator gave all his freehold and leasehold messuages, lands and hereditaments, ready money, securities for money, stock in the public funds, goods, chattels and effects, and all other his real and personal estates and effects, to trustees, in trust to pay the rents of his freehold and leasehold estates, and the dividends, interest and proceeds of his money in the funds,

and other, his said personal estate, to his daughter for life, and after her death to stand possessed of his said freehold and leasehold estates, money in the funds, and all other his real and personal estate for the children of his daughter, and in default of such children in trust to pay the rents of his said freehold and leasehold estates, and the dividends, interests and proceeds of his said stock in the funds, and other his said personal estate, to his nephews for their lives, and after their deaths in trust to stand possessed of his freehold and leasehold money in the funds, and other his said personal estate, for their children; and in default of such children, he gave his said freehold and leasehold estates, stock in the funds, and all other his said real and personal estate, to the corporation of S., in trust, as soon as conveniently might be after they should come into possession thereof, to sell the said freehold and leasehold estates, and also to sell, call in and convert into money his said stock in the public funds, and all other his said personal estate, and to lend the same to certain persons, upon the terms therein mentioned. The testator at the date of his will, and at his death, was possessed of leasehold estates, turnpike securities, bank stock, and other personal estate:—Held, that the bequest to the trustees was a general residuary bequest, and that the leasehold and bank stock ought to be sold, and the proceeds invested in 3 per cents.; and an inquiry was directed, whether the turnpike securities, were real and permanent securities. *Mills* v. *Mills*, 7 Sim. 501; 4 L. J., Ch. 266.

A direction that the trustees should retain a percentage on the rents to be collected, fortified by other expressions in the will, regarded as evidence that the testator contemplated the enjoyment of the leasehold property in specie by the legatees. *Cafe* v. *Bent*, 5 Hare, 36.

Where the general intention is to give a tenant for life interest upon the entire amount of a residue, the court has given him the benefit of property which never was realised during his life. In the same manner, the court will make proper arrangements, so as to make available for the remainderman the property which the testator intended for him. *Coote* v. *Milltown (Lord)*, 1 Jo. & Lat. 501; 7 Ir. Eq. R. 391.

Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments; and interests of the investments will belong to the tenant for life of the residue. *Crawley* v. *Crawley*, 7 Sim. 427; 4 L. J., Ch. 265.

A testator gave "all his freehold, copyhold and leasehold estates, and all other his real and personal estate," to trustees, upon trust to get in all money due to him on "mortgages, bonds or other securities, and rents," and after payment of debts and legacies, to lay out the residue in the public stocks or funds; and as to one-half of his "freehold, copyhold and leasehold estates, and all the trust moneys, stocks, funds and securities, and all other his real and personal estates," upon trust for A. and B. for life, and "the inheritance and capital," after their decease, to be in trust for the children of one of them:—Held, that terminable government annuities, and annuities for years charged on parish rates and furniture, &c., forming part of the testator's estate, ought to be converted into consols, but that the leaseholds were to be enjoyed in specie. *Hood* v. *Clapham*, 19 Beav. 90; 24 L. J., Ch. 193; 1 Jur. (N.S.) 78; 3 W. R. 78.

A testator gave all his property, both real and personal, to his wife for life, and he authorised her, with the consent of his executors, to sell or exchange any part of his property. After her death, he gave all his property, both real and personal, to his daughters, and afterwards to their children:—Held, that the tenants for life were not entitled to enjoy the property in specie, but that the perishable part must be converted. *Jebb* v. *Tugwell*, 20 Beav. 84; 24 L. J., Ch. 433; 1 Jur. (N.S.) 460; 3 W. R. 278.

A testator gave all his residuary estate, including leasehold estates, some of which were reversionary, to his trustees for his wife for life, and after her death to be divided into seven shares for the benefit of his seven children, and if W., one of his sons, should die under twenty-one, his share to accrue to the testator's other children living at his death, or their issue. The shares of the daughters were settled. The hotchpot clause provided that his son J. and his daughters H. and C. should bring in 1,000*l.* each before division of his residuary estate. W. died before the testator under twenty-one. The other six children survived him and attained twenty-one. C., one of the daughters named in the hotchpot clause, and her husband died in the widow's lifetime leaving children. The widow died in 1865:—Held, first, that the trustees were not bound to have converted the leasehold property on the death of the widow; secondly, that the share which accrued to the daughters of the testator on W.'s death was subject to the settlement trusts declared concerning their original shares; thirdly, that the hotchpot clause applied to the children of C., so that they must bring in 1,000*l.* before a division of the testator's residuary estate. *Lane* v. *Brown*, 23 L. T. 152.

Where a railway company took leaseholds, whereof one was tenant for life in specie, the court directed that the invested purchase-money, or so much as from time to time remained, and the interest thereon should, in each year, be divided by the number of years which would have remained yet unexpired of the lease, had it still existed, and that the amount of the quotient should be paid yearly to the tenant for life. *Littlewood* v. *Pattison*, 10 Jur. (N.S.) 875; 10 L. T. 875.

Where a term of years is bequeathed to a legatee for life with remainder over, and the legatee for life having joined with the executors in selling and assigning the term to a purchaser for a sum of stock survives the duration of the term, the legatee for life, and not the legatee in remainder, is entitled to the stock, although the latter was not a party to the sale. *Phillips* v. *Sargent*, 7 Hare, 33.

—— **Rents.**]—A receiver over a life estate continued in receipt of the rents after the death of the tenant for life, whose widow subsequently obtained a decree against the remainderman, appointing the same receiver over the lands, for an arrear of jointure:—Held, that the rents received by the receiver between the death of the tenant for life and the decree belonged to the remainderman as bygone rents. *Guinness* v. *Cottingham*, Ir. R. 7 Eq. 109.

—— **Rents and Royalties.**]—The owner of an estate contracted to lease coal to be worked by instroke from adjoining mines in the occupation of the intended lessees. The owner died before

his coal was reached or the leases granted:—Held, that the tenant for life, under his will, though impeachable for waste, was entitled to the rents and royalties. *Kemeys-Tynte, In re, Kemeys-Tynte* v. *Kemeys-Tynte*, 61 L. J., Ch. 377; [1892] 2 Ch. 211; 66 L. T. 752; 40 W. R. 423.

Rents and royalties of brickfields, one of which had been leased by the testator and the other by trustees of his will under a power held to belong to the tenant for life. *Cowley (Earl)* v. *Wellesley*, 35 Beav. 635; L. R. 1 Eq. 656; 14 L. T. 425; 14 W. R. 528.

—— **Fines on Renewals.**]—Lands let on lease for lives, with right of perpetual renewal at the same rent on payment of a fine on the dropping of each life, were settled to the use of A. for life with remainder over, and the settlement contained powers of leasing at rack rent only, and of sale and exchange, with a declaration that moneys arising from any sale should be laid out in land to be settled to the same uses:—Held, that the tenant for life was entitled to all fines payable on renewals, under the original lease, during his life. *Brigstocke* v. *Brigstocke*, 47 L. J., Ch. 817; 8 Ch. D. 357; 38 L. T. 760; 26 W. R. 761—C. A.

—— **Fines of Copyholds.**]—Fines paid to trustees as lords of the manor on the enfranchisement of copyholds by persons admitted before the 1st July, 1853, pursuant to the Copyhold Act, 1852, treated as income. *Cowley (Earl)* v. *Wellesley*, 35 Beav. 635; L. R. 1 Eq. 656; 14 L. T. 425; 14 W. R. 528.

—— **Wastes of Manor.**]—Proceeds of sale of gravel and earth taken and dug from the waste lands of a manor, according to custom pursued by testator, held income and not corpus. *Ib.*

Heirlooms.]—A tenant for life of heirlooms will not be required to give security for the heirlooms, but only to sign an inventory, unless there is reason to suppose that the heirlooms will be in danger in his possession. *Temple* v. *Thring*, 56 L. J., Ch. 767.

Practice as to tenant for life giving security for heirlooms. *Conduitt* v. *Soane*, 1 Coll. 285; 13 L. J., Ch. 390.

Jewellery and other articles were given by deed to trustees in trust, after the death of a person who had the use of them for life, for sale, and the proceeds of the sale to be held in trust for an infant, with a gift over in the event of the infant dying under twenty-one. The tenant for life threatened to pledge them, and the trustees refused to deliver them to her:—Held, that they were bound to deliver them to her, she undertaking not to pledge them. *Kay* v. *Watkins*, 17 W. R. 983.

See further SETTLEMENT and SETTLED LAND.

c. Outgoings.

i. *Rent.*

Incidence of Liability for.]—Where a testator directed his executors and trustees to arrange his affairs and manage his estate, and to retain certain specified leaseholds held on ground rents, and to let them on lease at fair rentals, and to pay the income derived from them to his wife for the benefit of herself and her children during her life, and after her decease to divide his estate equally between his children, it was held that the words, "income to be derived" from the premises, meant not the whole income, but the income after deducting all proper outgoings, and that the widow must, as from the testator's death, bear the expense of the ground rents, rates, taxes, insurance and other outgoings on the leaseholds. *Redding, In re, Thompson* v. *Redding*, 66 L. J., Ch. 460; [1897] 1 Ch. 876; 76 L. T. 339; 45 W. R. 457.

A testator bequeathed all debts which should be due to him, and all chattels which should be in his possession, and all other personal property to which he should be entitled at his decease, to his wife and her assigns absolutely; and he devised all his real property and estates to her for life, with remainder over in fee, and appointed his wife executrix, who proved the will, and went into possession of the real estate. The testator was a lessee for years of a house, which he had underlet at a rent lower than that reserved by the lease. The personal estate being insufficient to pay the rent:—Held, that the wife was bound to keep down the rent of the house out of the rents of the real estate in exoneration of the inheritance. *Fairtlough* v. *Johnstone*, 16 Ir. Ch. R. 442.

A testator directed his executors and trustees to allow his wife, if she pleased, to occupy his leasehold house during her life, with the use of the furniture, and after her death the same might be sold and the proceeds divided among his children:—Held, that the widow was liable to pay the rent and taxes during the period she occupied the premises, and to keep them in such repair as a tenant would be liable for in the absence of express contract; but that it was the duty of the trustees, and not of the widow, to keep the premises sufficiently insured. *Jeune* v. *Baring* (62 L. J., Ch. 50; [1893] 1 Ch. 61) not followed. *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170.

Rent Due at the Date of the Settlement.]—A testator had leaseholds; one he assigned to his partner, who, after the testator's death, took another partner, A., and became bankrupt. The bankrupt repudiated the leaseholds, and A., under the direction of the court, paid 100*l.* to the executors to release him from liability, and reassigned the lease to the executors. The testator had bequeathed his residue for life, with remainder over:—Held, that as to rent due at the death of the testator, and such subsequent rents and dilapidations, the corpus, and not the tenant for life, must bear them. *Allen* v. *Embleton*, 4 Drew. 226; 27 L. J., Ch. 297; 4 Jur. (N.S.) 79; 6 W. R. 272.

ii. *Dilapidations and Repairs.*

Arising from Permissive Waste.]—An action on the case does not lie for permissive waste. *Gibson* v. *Wells*, 1 Bos. & P. (N.R.) 290; 8 R. R. 801.

The estate of a legal tenant for life is not liable for permissive waste. A legal tenant for life of land, upon whom no express duty to repair was imposed by the will under which her estate was derived, died leaving the buildings upon the land in a dilapidated condition. In the administration of her estate the remainderman in fee claimed from her executor compensation by way of damages for permissive waste:—Held, that the claim could not be sustained. *Woodhouse* v. *Walker* (5 Q. B. D. 404, 407), and *Yellowly* v. *Gower* (11 Ex. 274), discussed. *Cartwright, In re, Avis* v. *Newman*, 58 L. J., Ch. 590; 41 Ch. D. 532; 60 L. T. 891; 37 W. R. 612.

Account against the representative of tenant for life, without impeachment of waste, of dilapidations permitted by him in and about the mansion-house, refused. *Lansdowne* v. *Lansdowne*, 1 Madd. 116; 1 Jac. & Walk. 522; 15 R. R. 225.

A house was devised to X. for life, subject to a condition to keep it in repair, with remainder to A. for life with remainders over, the estates being all legal:—Held, that A. had no remedy in equity against X. for breach of the condition. *Kinnersley* v. *Williamson*, 39 L. J., Ch. 788; 23 L. T. 39; 18 W. R. 1016.

A court of equity will not interfere at the instance of a remainderman, in cases of permissive waste, either by injunction or to give satisfaction against an equitable tenant for life in possession. *Powys* v. *Blagrave*, 4 De G. M. & G. 448; 2 Eq. R. 1204; 24 L. J., Ch. 142; 2 W. R. 700. S. P., *Godfrey*, *Ex parte*, *Warren* v. *Rudall*, 1 J. & H. 1; 29 L. J., Ch. 543; 6 Jur. (N.S.) 395; 2 L. T. 693; 8 W. R. 331. Contra *Caldwall* v. *Bayliss*, 2 Mer. 408; 16 R. R. 189.

Incidence of Repairs.] — Tenant for life, choosing to reside in mansion-house, must submit to expense of repairs done by himself. *Hibbert* v. *Cooke*, 1 Sim. & S. 552; 24 R. R. 225.

An agreement for letting a farm having been sanctioned by the court, the tenant for life was allowed the expense of permanent repairs done to the house and buildings out of stock settled upon the same trusts. *Macnolty* v. *Fitzherbert*, 27 L. J., Ch. 272; 3 Jur. (N.S.) 1237.

Devise of lands to successive tenants for life, and then in strict settlement:—Held, that although the mansion-house was inadequate to the income of the devised property, and was also dilapidated, the tenant for life was not authorised to employ towards improving or repairing the mansion-house any part of the capital of funds directed by the testator to be laid out in the purchase of lands to the same uses. *Dunne* v. *Dunne*, 7 De G. M. & G. 207; 3 Eq. R. 760; 3 W. R. 380.

It is not proper to keep up the mansion on a settled estate, as a residence, during the minority of the tenant for life. *Bennett* v. *Wyndham*, 23 Beav. 521.

A tenant for life in remainder cannot charge upon the inheritance money expended by him in repairs, which ought to have been performed by a prior tenant for life, unless the expense was occasioned by wilful waste done by him. *Sharshaw* v. *Gibbs*, 1 Kay, 333; 2 Eq. R. 314; 23 L. J., Ch. 451; 18 Jur. 330.

A testator gave all his personal estate to trustees upon trust to convert and invest; and to pay the annual produce thereof to his daughter during her life; and, subject thereto, and to the power (which was afterwards exercised) to appoint an estate for life to the daughter's husband, in trust for her children. And the testator declared that the trustees should, with the consent of his daughter, invest any of the trust moneys in (amongst other securities) the purchase of freehold lands. And in case any of his personal estate should be laid out in the purchase of lands, such lands should be liable to a trust for sale, in order that his personal estate so laid out might, notwithstanding such investment, retain for the purposes of his will the character of personal estate. The bulk of the trust moneys was laid out, with the consent of the daughter, in the purchase of freehold land. After the death of the daughter, and during the life of her husband, some of the buildings on the land were very much out of repair:—Held, that the tenant for life was not bound to put the property in repair, but that such repairs as were necessary should be done by the trustees, and the costs thereof defrayed out of the residuary personalty, by mortgage of the land or otherwise. *Freeman*, *In re*, *Dimond* v. *Newburn*, 67 L. J., Ch. 14; [1898] 1 Ch. 28; 77 L. T. 460.

—— **Dilapidations existing at the Date of the Settlement.**]—A testator gave land to tenants for life, with remainders over, and directed his trustees out of the rents and profits to keep the buildings in good repair:—Held, that those buildings which were in bad repair at his death must be put into good repair out of the rents and profits. *Cooke* v. *Cholmondeley*, 4 Drew. 326; 27 L. J., Ch. 826; 4 Jur. (N.S.) 827; 6 W. R. 802.

The testator at the time of his death was under liability under covenants in leases to repair, and a sum of 91*l.* 6*s.* 8*d.* was found due from him in respect of dilapidations:—Held, that the tenant for life was not bound to pay that sum out of her income, but that it was payable out of the corpus of the residuary personal estate. *Pinfold* v. *Shillingford*, 46 L. J., Ch. 491; 25 W. R. 425.

A testator gave the residue of his real and personal estate upon trust to permit his wife to receive the rents, issues and profits, interest, dividends and annual proceeds, after paying all outgoings; and after the decease of his said wife, as to all the said residuary real and personal estate, of which she was to have the clear yearly income for her life, subject as aforesaid, upon trust for his son absolutely. The testator had leaseholds and freeholds. The leaseholds being dilapidated at the death of the testator the wife repaired them, under notice from the superior landlord:—Held, that the amount expended in repairs might be charged on the estate. *Harris* v. *Poyner*, 1 Drew. 174; 21 L. J., Ch. 915; 16 Jur. 880.

A testator bequeathed certain leaseholds to trustees upon trust for his widow for life, and after her death upon trust to sell and to divide the proceeds as therein mentioned. And the testator authorised his trustees, "providing they should deem it advisable," to sell any portion of his short leasehold messuages. At the time of the death of the testator these leaseholds were in a very bad state of repair and the tenant for life only did sufficient repairs to keep them in a like state:—Held, that the tenant for life was under no legal obligation to put the leaseholds in such a state of repair as to satisfy the covenants in the leases. *Courtier*, *In re*, *Coles* v. *Courtier*, 56 L. J., Ch. 350; 34 Ch. D. 136; 55 L. T. 574; 35 W. R. 85; 51 J. P. 117—C. A.

As between a tenant for life of a leasehold, specifically bequeathed, and the general assets of a testator, there is no equity in favour of the latter to throw on the former the obligation of putting the leasehold premises, which were dilapidated at the time of the testator's death, into repair. *Brereton* v. *Day*, [1895] 1 Ir. R. 518.

—— **Where there is an Express Obligation to Repair.**]—Reversioner of leasehold renewed lease in his own name, and covenanted to repair with privity of tenant for life:—Held, he was to be considered as having entered into the covenant

on behalf of the tenant for life, and the latter's estate was liable for dilapidation occasioned by his neglect to repair. *Marsh* v. *Wells*, 2 Sim. & S. 87; 2 L. J. (o.s.) Ch. 191; 25 R. R. 160.

When a tenant for life of leasehold houses is allowed by the trustees to receive the rents, and the houses are not kept in a proper state of repair according to the covenants of the lease, the court will, at the instance of one of the trustees, appoint a receiver of the rents for the purpose of enforcing the proper repair of the houses. *Fowler, In re, Fowler* v. *Odell*, 16 Ch. D. 723; 44 L. T. 99; 29 W. R. 891.

A. B. being devisee for life of premises, with a condition against committing any manner of waste, and for keeping the same in good and tenantable repair, became lunatic, and the premises were subsequently destroyed by accidental fire. A petition was then presented by the committee of the person, who was also remainderman, praying a declaration that the premises ought to be rebuilt at the expense of the lunatic's estate, and a reference as to the amount of such expense, and out of what fund it ought to be defrayed. The Lord Chancellor made an order for the reference, holding, that the words of the will created an obligation upon the tenant for life to rebuild the premises, and that the question of such liability was rightly brought before the court on the petition. *Skingley, In re*, 3 Mac. & G. 221; 20 L. J., Ch. 142; 15 Jur. 958.

A testator directed his trustees to allow A. to occupy a mill, so long as he should think proper to do so, "he nevertheless keeping the premises in good and tenantable repair, and paying" a rent of 100*l*. A. accepted the gift, but the premises were afterwards totally destroyed by accidental fire:—Held, that A. was bound to reinstate them, and was liable for the rent in the meanwhile, and that he could not escape from the liability to rebuild by declining any longer to retain them. *Gregg* v. *Coates*, 23 Beav. 33; 2 Jur. (N.S.) 964; 4 W. R. 735.

A testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate to trustees, in trust to receive the "rents," issues and profits, and thereout to keep the houses, &c., in good, substantial and tenantable repair, and renew his leaseholds, &c., and then to pay "the net income arising from the residuary real and personal estate" to his wife for life:—Held, that all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses. *Crowe* v. *Crisford*, 17 Beav. 507; 2 W. R. 45.

A testator devised to his wife for life two freehold houses with the buildings, land and appurtenances thereto belonging, "she keeping the same in good and tenantable repair." The testator directed the property to be sold by his trustees after the death of his wife, the proceeds to be held upon the trusts mentioned in his will. After the death of the testator his widow entered into possession of the property and continued therein until the date of her own death. It was then discovered that the property was in a dilapidated condition. Evidence was adduced to shew that the greenhouses were wholly neglected and in complete disrepair at the time the testator purchased; that he never intended to put the same into repair, but had thought of having them pulled down:—Held, that the fact that the testator did not himself keep the greenhouses in good and tenantable repair could not be regarded as an excuse for his widow not doing so, having regard to the express direction contained in the will; and that, therefore, her estate was liable for the amount of the repairs required. *Bradbrook, In re, Lock* v. *Willis*, 56 L. T. 106.

Where a will contained a direction that the tenant for life of the settled estates should from time to time keep the mansion-house, outbuildings, parks, grounds, fences, gates and appurtenances thereto belonging in good and substantial repair, order and condition:—Held, that no obligation was thereby imposed upon the tenant for life to scour and cleanse an ornamental lake situate in the park near the mansion-house which had been allowed to become foul and choked with weeds, mud and filth, the state of the lake at the testator's death having to be taken into consideration. *Dashwood* v. *Magniac*, [1891] 3 Ch. 306; 64 L. T. 99.

Where a testator directed his executors and trustees to arrange his affairs and manage his estate and to retain certain specified leaseholds held on ground rents, and to let them on lease at fair rentals, and to pay the income to be derived from them to his wife for the benefit of herself and her children during her life, and after her decease to divide his estate equally between his children, it was held that the words "income to be derived" from the premises meant not the whole income, but the income after deducting all proper outgoings, and that therefore the widow must as from the testator's death bear the expense of the ground-rents, rates, taxes, insurance and other outgoings on the leaseholds. *Baring, In re, Jeune* v. *Baring* (62 L. J., Ch. 50; [1893] 1 Ch. 61) commented on. *Courtier, In re, Coles* v. *Courtier* (56 L. J., Ch. 350; 34 Ch. D. 136) distinguished. *Redding, In re, Thompson* v. *Redding*, 66 L. J., Ch. 460; [1897] 1 Ch. 876; 76 L. T. 339; 45 W. R. 457.

Other Matters.]—Where a tenant for life, under a covenant to repair, had permitted dilapidations to take place on the property, an application by trustees under 22 & 23 Vict. c. 35, s. 30, on behalf of a remainderman (an infant) for permission to effect a compromise as to the damage done, and thus prevent the necessity of a suit, was granted. *Cross's Settlement, In re*, 10 L. T. 405.

Moneys directed by a will to be laid out in the purchase of land to be settled to the same uses as those declared concerning estates thereby devised, and moneys arising from the sale of parts of the devised estates under a power conferred on the trustees by a private act of parliament, may be ordered by the court to be applied in erecting new buildings on the devised estates, or in rebuilding such as are actually in a ruinous condition; but as it is the duty of the tenant for life to keep the buildings in repair, and to reinstate the mansion-house if damaged by fire, the court will not order any of the moneys to be applied for either of these purposes. *Drake* v. *Trefusis*, L. R. 10 Ch. 364; 33 L. T. 85; 23 W. R. 762.

iii. *Other Outgoings.*

Tenant Right.]—An owner in fee demised a farm for seven years, and agreed at the expiration of the term to pay for the tenant's property in and upon the farm at a valuation. He devised the land to trustees for a term of 1,000 years upon trust to raise money in aid of his personal estate for payment of debts, funeral and testamentary

expenses, and legacies, and subject thereto to the plaintiff for life, with divers remainders over. On the testator's death the plaintiff took possession. On the expiration of the term a new tenant could not be found. The plaintiff paid the outgoing tenant for his property in the farm, and claimed to be repaid the amount out of the testator's estate:—Held, that the liability to pay the outgoing tenant was a liability attaching to the land, and that the landlord for the time being was the person primarily liable; that the plaintiff, being in receipt of the rents and profits, was the landlord, and not the trustees of the term, that he therefore was the person primarily liable, and had no claim to be repaid wholly or in part either out of the testator's estate or by the persons entitled in remainder. *Mansel* v. *Norton*, 52 L. J., Ch. 357; 22 Ch. D. 769; 48 L. T. 654; 31 W. R. 325—C. A.

Costs of Opposing Bill in Parliament.]—The tenant for life of a settled estate is not entitled to throw upon the estate his costs of opposing in parliament a bill brought in by a public company for taking part of the estate. But he is entitled to charge the estate with the costs, charges and expenses, properly incurred by him in or about an arbitration entered into between him and the company under the provisions of the Lands Clauses Act regarding the value of the land, on the ground that under the act he is made the fiduciary agent for such purposes on behalf of the estate. *Berkeley's (Earl) Will, In re*, 44 L. J., Ch. 3; L. R. 10 Ch. 56; 31 L. T. 531; 23 W. R. 195.

Drainage Expenses.]—A testator gave freehold and leasehold houses, bonds and consols on trust to pay the income after deducting ordinary outgoings to his widow for life:—Held, that the tenant for life must bear the cost of drainage work required to be done to one of the leasehold houses by the vestry under the Metropolis Local Management Act, 1855, s. 73. *Crawley, In re, Acton* v. *Crawley*, 54 L. J., Ch. 652; 28 Ch. D. 431; 52 L. T. 460; 33 W. R. 611; 49 J. P. 598.

Expenses of Making a Street.]—By leases in 1875 and 1877, of two houses abutting on a private road, the lessee covenanted to pay all rates and taxes, and to keep up the road. In 1882 the lessee executed a deed of gift of the two houses to his son upon trust for the father for life, he paying "all outgoings and performing the covenants in the leases," and after his death upon trust for the son absolutely. In July, 1884, the local board served notices on the father under s. 150 of the Public Health Act, 1875, requiring him to make up the portions of the road on which the houses abutted; but the notice was not complied with, and the board themselves did the work, which was completed in February, 1875. In June, 1885, the father died, and the son entered into possession of the houses. In September, 1886, the son was served by the board with notices assessing a sum on each house for the proportion of expenses of making up the road, and in February, 1887, he was served with demands and orders for payment of the assessed amounts by instalments, with interest:—Held, in an action by the son claiming payment of the assessed expenses out of the father's estate, (1) that the expenses were not a debt due from the father's estate, inasmuch as the relation of debtor and creditor was not created by the Public Health Act, 1875, between the board and an owner of property for expenses incurred by the board; and (2) that the charge of the expenses under s. 257 could not be recovered by the son against the estate of the tenant for life. *Boor, In re, Boor* v. *Hopkins*, 58 L. J., Ch. 285; 40 Ch. D. 572; 60 L. T. 412; 37 W. R. 349; 53 J. P. 467.

Fences.]—Expense of fencing waste lands of a manor granted to a trustee for the benefit of the estate, held payable out of corpus. *Cowley (Earl)* v. *Wellesley*, 35 Beav. 635; L. R. 1 Eq. 656; 14 L. T. 425; 14 W. R. 528.

Sanitary Works.]—The cost of the execution of sanitary works required by a local authority under the powers of the Public Health (London) Act, 1891, falls, as between tenant for life and remainderman of the premises in respect of which the works are executed, upon the corpus of the property. *Lever, In re, Cordwell* v. *Lever*, 66 L. J., Ch. 66; [1897] 1 Ch. 32; 75 L. T. 383; 45 W. R. 172.

Insurance of Buildings, &c.]—See *Redding, In re, Thompson* v. *Redding*, 66 L. J., Ch. 460; [1897] 1 Ch. 876; 76 L. T. 339; 45 W. R. 457; *Freeman, In re*, 67 L. J., Ch. 14; [1898] 1 Ch. 28; 77 L. T. 460; and *Kingham* v. *Kingham*, [1897] 1 Ir. R. 170, supra.

Incidence of Debts and Interest thereon.]—Upon taking the accounts in a suit to administer real and personal estate, if a question arises between the tenant for life and the remainderman as to the proper mode of applying the personal estate, the court will, if the justice of the case require it, for the purpose of seeing to what extent and in what form the real estate is to be exonerated by means of personalty, investigate the application of the personal estate, and proceed, as a general rule, upon the principle of applying the capital of the personal estate to pay the principal of debts and the income of the personal estate to pay the interest of debts. *Shore* v. *Shore*, 4 Drew. 219; 26 L. J., Ch. 386; 5 W. R. 250. *S. C.*, on further consideration, 4 Drew. 501; 28 L. J., Ch. 940; 7 W. R. 390.

As between tenant for life and remainderman, the interest of the testator's debts must be borne by the income, as from the day of his death. *Barnes* v. *Bond*, 32 Beav. 653.

The rule that in adjusting the accounts of a testator's estate between the tenant for life and the remainderman, the debts and legacies are to be taken as having been paid, not out of capital only, but with such portion of the capital as together with the income of that portion for one year is sufficient for the purpose, is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life. *Lambert* v. *Lambert*, 43 L. J., Ch. 106; 16 L. R., Eq. 320; 21 W. R. 748.

Where a testator expressly or in effect gives income-bearing property in specie to one for life, with remainders over, subject to debts or other liabilities, it must be considered, for the purpose of adjusting the relative rights of the tenant for life and remainderman, that an adequate portion

of the property is at the moment of the testator's death appropriated with all its future income, to meet such of the debts and liabilities as are then ascertained; but the tenant for life is entitled to the income of so much as is set apart to meet contingent liabilities. *Allhusen* v. *Whittell*, 36 L. J., Ch. 929; L. R. 4 Eq. 295; 16 L. T. 695.

Where a residue becomes settled, the above rule applies to so much as at the moment of the death of the testator who settles it is in a proper state of investment; the rest must be considered as converted and invested in consols at that time. *Ib.*

d. Improvements.

Mansion-house.]—The court will not, on the application of the tenant for life, direct an inquiry whether it would be for the benefit of all parties interested in the property that certain permanent and substantial improvements should be made in the mansion-house. *Nairn* v. *Marjoribanks*, 3 Russ. 582. S. P., *Mathias* v. *Mathias*, 3 Sm. & G. 552; 4 Jur. (N.S.) 780.

Tenant for life of real estate under will, having expended money in finishing mansion, which testator had begun, inquiry directed to ascertain if for benefit of all parties interested, and if so, expense would be charged on real estate if no personal. *Hibbert* v. *Cooke*, 1 Sim. & S. 552; 24 R. R. 225.

Tenant for life choosing to reside in mansion-house must submit to expense of repairs done by himself. *Ib.*

Other Improvements.]—The tenant for life laying out money on buildings and improvements cannot charge them on the inheritance; and an inquiry with that view refused. *Caldecott* v. *Brown*, 2 Hare, 144; 7 Jur. 693.

L. M. by his will directed that 50,000*l.*, part of his personal estate, should be laid out in the purchase of lands and settled to certain uses. C. M., the tenant for life, and the administrator with the will annexed of L. M., purchased the L. and other estates, which the master estimated to be of the value of 49,773*l.* On the L. estate which C. M. contracted to purchase for 35,500*l.*, he erected a mansion at a cost of 8,000*l.* and upwards, and by improvements increased the value of the estate to 60,000*l.* On petition by the personal representatives of C. M., praying that the amount so expended in building and in improvements, and the costs of and relating to the purchases, might be allowed as charges on the estate:—Held, that there was no ground for the application, and the prayer of the petition was refused, except as to the sum for costs and expenses in the purchases. *Mathias* v. *Mathias*, 3 Sm. & G. 552; 4 Jur. (N.S.) 780.

A tenant for life may ask for an inquiry respecting the outlay of money expended by him in the completion of a mansion commenced by a testatrix, and also in payments by him in respect of mines, to prevent their being forfeited, though the mines themselves had been unproductive. But a tenant for life is not entitled to any inquiry in respect of money expended by him in building a conservatory and vinery or other superfluous additions to the mansion, or in the erection of furnaces to copper-works, or for rebuilding dilapidated farmhouses, or for the substitution of new cottages for old dilapidated farm buildings, or for draining the estates, even though some of the improvements had been contemplated by the testatrix. *Dent* v. *Dent*, 30 Beav. 363; 31 L. J., Ch. 436; 8 Jur. (N.S.) 786; 10 W. R. 375.

When during the minority of a tenant for life part of the income has been expended under the order of the court in improving property, the court has no power to declare the sum so expended a charge on the property, even though the tenant for life dies an infant and the order may have been made in the presence of remainderman. *Floyer* v. *Bankes*, L. R. 8 Eq. 115.

A testator empowered his trustees, out of the funds from time to time coming to their hands under the trusts thereinbefore contained, to expend such sums or sum of money as they should deem expedient in the repairs and improvement, and insurance against fire, of any of the messuages, and other buildings, lands and hereditaments devised; and if any should think proper to permit the persons who might under the trusts be entitled to a life or other greater estate in the respective portions of the estate to occupy the mansion-house, gardens and premises without paying any rent or compensation for the same, and without such person being obliged at his expense to keep the same in repair, or being at any other expense than paying the rates and taxes:—Held, that the tenant for life was entitled under this trust to occupy a park surrounding the mansion, and to have the vineries and forcing pits kept in repair, and the gardens kept stocked with plants, shrubs and trees, at the expense of the trust estate. *Lethbridge* v. *Lethbridge*, 3 De G. F. & J. 523; 30 L. J., Ch. 388; 7 Jur. (N.S.) 296; 4 L. T. 127.

A testator gave his freehold, copyhold and leasehold estates, and all his stocks, shares and personal estate to trustees, in trust to receive the "rents," issues and profits, and thereout to keep the houses, &c., in good, substantial and tenant-able repair, and renew his leaseholds, &c., and then to pay "the net income arising from the residuary real and personal estate," to his wife for life:—Held, first, that the wife was entitled to the enjoyment in specie; and, secondly, that all ordinary repairs were to be paid out of the income, but not such extraordinary repairs as would amount to rebuilding the houses. *Crowe* v. *Crisford*, 17 Beav. 507; 2 W. R. 45.

S. was at the time of his death seised of a plot of ground upon which he had commenced to build certain houses. By his will he devised and bequeathed all his real and personal property to J., for life, upon trust, as to one moiety of the rents and profits for himself, and as to the other for other parties, with remainder over. J. became the personal representative of S., and after S.'s death expended large sums of moneys in completing the houses:—Held, that J. was not entitled to a charge upon the plot of ground for the moneys expended by him, either as tenant for life, trustee or personal representative of S. *Gilliland* v. *Crawford*, Ir. R. 4 Eq. 35; 18 W. R. 60.

Other Matters.]—The tenant for life under a settlement voluntarily expended moneys in erecting necessary buildings on the trust property. He also paid the expenses of the investment of the trust funds in land:—Held, that his executors could not set off his outlay as a satisfaction pro tanto of a covenant on his part to pay 3,000*l.* to the trustees of the settlement. *Horlock* v. *Smith*, 17 Beav. 572; 23 L. J., Ch. 962; 2 W. R. 117.

e. Charges and Incumbrances.

Right of Remainderman to pay off.]—A. devised his estate charged with the payment of a sum to trustees, and with interest at 4*l.* per cent. The trustees were to pay the interest to persons for life, and after their deaths to pay the money charged to their children:—Held, that the owner of the estate had a right, in the life of the tenants for life, to pay off the charge. *Marsh* v. *Keith*, 29 Beav. 625.

Proceedings by Tenant for Life for Protection of Estate—Expenses—Charge on Inheritance.]—A freehold estate was subject to four legal mortgages over different parts of the estate, also to an equitable mortgage over the whole, and to a charge over the whole. The rate of interest was 5 per cent. per annum reducible to 4 per cent. on three of the legal mortgages. On the fourth legal mortgage and on the charge it was 4 per cent. per annum. One of the legal mortgagees having commenced a foreclosure action, the estate was in danger of being broken up. To prevent this, A. and B. at the request of the tenant for life paid off his mortgagee and took a transfer of his security, and also of the equitable mortgage. The foreclosure action was stayed, and the tenant for life paid to the mortgagee his costs of the foreclosure action and of the transfer of his security. The tenant for life also incurred certain costs in that transaction. The other legal mortgagees having subsequently demanded repayment, the tenant for life arranged with C. to advance such a sum as would enable all the incumbrances on the estate to be paid off, and a transfer of the incumbrances to A. and B. for a term of five years at 3¾ per cent. to be procured. C. also agreed to advance a sum sufficient to pay the costs, charges and expenses already incurred by the tenant for life, and also the costs, charges and expenses of and incident to the transfer of the several mortgages. The tenant for life then commenced an action against the first tenant in tail (an infant, aged sixteen), claiming to be entitled to charge the inheritance with such costs, charges and expenses as he had incurred with interest for the same:—Held, that there must be a declaration that the plaintiff was entitled to a charge on that part of the estate comprised in the legal mortgage in respect of which the foreclosure action was brought, for the costs, charges and expenses paid or incurred by him in relation to the foreclosure action, and of the transfers, with interest at 4 per cent.; also to a charge upon the several parts of the estate comprised in the other legal mortgages and in the equitable mortgage, and the charge for costs, charges and expenses to be incurred by the plaintiff and the mortgagees and transferees thereof in relation to the proposed transfers of the last-mentioned securities, or for any other costs properly incurred by the plaintiff in protecting the estate from the claims of the mortgagees thereof, with interest at 4 per cent. Held also, that, if necessary, the above-mentioned costs, charges and expenses, and the costs of this action, might be raised by a proper mortgage of the estate. *Moore* v. *Moore*, 60 L. T. 626; 37 W. R. 414.

Apportionment of Charges.]—Charge on estate in settlement must be so raised as not to fall unequally on tenant for life to benefit of remainderman. Devise to trustees to sell for payment of testator's debts, and subject thereto to A. for life, sans waste, remainder to his first and other sons in tail. The trustees sold timber on the estates, and applied the proceeds in payment of the debts:—Held, that A. was entitled to have the amount raised by sale of part of the estate, and paid to him. *Davies* v. *Westcomb*, 2 Sim. 425; 29 R. R. 128.

Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, by demising, mortgaging or selling estate (except the mansion-house), for all or any part of the term, or by all or any of the said ways or any other reasonable ways, to raise 30,000*l.*, and pay the same to the parties therein mentioned:—Held, that as between tenants for life not impeachable for waste and the remaindermen, the corpus of the estate must bear the charge; and that the interest of the charge must be paid by the tenant for life in possession, who in the meantime was entitled (as part of the profits of the estate) to the timber, which, as tenant for life, he had a right to cut. *Marker* v. *Kekewich*, 8 Hare, 291; 19 L. J., Ch. 492; 14 Jur. 544. S. P., *Blake* v. *O'Reily*, [1895] 1 Ir. R. 479.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they think fit; and it does not follow that, because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. *Ib.*

The periodical payments of an annuity, for which the testator was liable, held payable by the tenant for life and remainderman under his will, in proportion to the values of their respective interests in the estate, the property having, for some years, been unproductive. *Yates* v. *Yates*, 28 Beav. 637. S. P., *Muffett, In re, Jones* v. *Mason*, 57 L. J., Ch. 1017; 39 Ch. D. 534; 59 L. T. 499; 37 W. R. 9.

A claim made against the estate of a testator, founded on an alleged breach of trust was compromised by the payment of a large sum several years after his death:—Held, that for the purpose of dealing between the tenants for life and remaindermen under the trusts of the will, the sum paid was to be treated as composed of a principal debt due on the day on which the transaction took place out of which the claim originated, of interest at 5*l.* per cent. from that day up to the date of the death, and of interest at 4*l.* per cent. on the aggregate of the principal and interest from the death to the time of payment; and that the principal and interest up to the testator's death were chargeable against corpus, and the subsequent interest against income. *Maclaren* v. *Stainton*, L. R. 11 Eq. 382.

A testator bequeathed several pecuniary legacies, to be paid after three years from his decease, but without interest. He directed his residuary personal estate to be accumulated to form a fund for payment of legacies; and in case of deficiency, charged his lands at U. with 1,000*l.* towards such deficiency; and in case of further deficiency, declared that the same should be raised out of the annual rents and profits of his lands at D.; and subject thereto he devised the lands at D. to M. for life, remainder to his first and other sons in tail, &c.

The personal estate and the 1,000*l.* being insufficient to pay the legacies:—Held, that the deficiency must be borne out of the rents and profits of the lands at D. as they accrued due, and that the tenant for life could not throw it as a charge on the corpus. *Marsh* v. *Marsh*, 2 Jur. (N.S.) 348.

C. gave to the trustees of his marriage settlement a bond to secure the payment, three months after his death, of a sum which was settled on trust for his widow for life, with remainder to his children. He died and his estate was insufficient to pay even the principal due on the bond; in addition to which there was a large amount for interest due thereon:—Held, that there must be a calculation what sum, received and invested when the principal debt secured by bond had become due, would, together with the interest thereon, have equalled the amount recovered from his estate at the time of such last-mentioned amount being paid, and an apportionment must be made between the tenant for life and remainderman on that basis. *Cox* v. *Cox*, 38 L. J., Ch. 569; L. R. 8 Eq. 343; 17 W. R. 790.

B. granted certain annuities by bond, and subsequently died, leaving his widow, the testatrix, his universal legatee and sole executrix. Under her will her residuary estate was held in trust for a tenant for life, with remainders over to other persons:—Held, that each payment of the annuities, as it became due, must be raised out of the corpus of the estate, and the rights of the tenant for life and remaindermen determined on that basis. *Muffett, In re, Jones* v. *Mason* (39 Ch. D. 534) explained. *Bacon, In re, Grissel* v. *Leathes*, 62 L. J., Ch. 445; 3 R. 459; 68 L. T. 522; 41 W. R. 478.

G. G. having an estate in fee, devised the same to C. G. for life, remainders over. G. G., at the time of his decease, was indebted to D. by judgment; after his decease, D. issued an elegit, obtained possession, and levied the amount of his judgment. The amount of the principal money, levied by D. out of the life estate of C. G., is a charge upon the inheritance; and forms part of the personal estate of C. G.; but C. G. having sold a house in G. Street, which the testator directed to be sold, for payment of debts, the court held that any portion of the purchase-money, which was not applied in payment of the debts of G. G., was applicable in exoneration of the inheritance from this charge, and directed inquiries accordingly. *Flood* v. *Digby*, 1 Jones, 520.

Tenant in fee borrowed money, to secure the payment whereof with interest he confessed a judgment in double the amount, and put his creditor into the receipt of a fee-farm rent, which was equal in amount to the annual interest, and afterwards devised all his estates to A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail. A. died in 1802, the full amount of the judgment being then due to the creditor, who had not been paid interest since 1786. B. died in 1824, never having received any part of the fee-farm rent, but his executors were paid twenty-one and a half years' arrears of the rent. B. having in 1824 paid off the judgment and taken an assignment of it to a trustee for himself:—Held, that his executors were not at liberty to retain, as against the remainderman, the arrears of the fee-farm rent received by them, and to leave the arrears of the interest a charge upon the estate, particularly as B. in 1803 and 1821 became a party to family settlements, in which the estate was dealt with as if the fee-farm rent had been applied in payment of the interest, and the benefits were given to him by those settlements. *Caulfield* v. *M'Guire*, 2 Jo. & Lat. 141; 8 Ir. Eq. R. 164.

A tenant for life under a settlement executed a deed, by which—reciting an agreement by O. to lend him 150*l.* on a bill of sale or transfer of a diamond necklace, and a desire to settle it as a heirloom—he assigned it in trust for O., subject to a proviso for cesser of the trust on repayment of the principal and interest, and, after repayment, in trust for himself for life, and, after his death, as a heirloom, with estates limited by the settlement; and he covenanted to pay the money with interest, and that, in default of payment, O. should possess and sell the necklace, and pay the surplus proceeds to the donor:—Held, that, as between remainderman and the personal representative of the donor, the necklace was primarily liable for the payment of the debt. *Owen* v. *Braddell*, Ir. R. 7 Eq. 358.

Keeping down Interest.]—The obligation of the tenant for life of an estate subject to incumbrances, to keep down interest on the incumbrances, exists only as between him and the remainderman, and not as between him and the incumbrancers. *Morley, In re, Morley* v. *Saunders*, L. R. 8 Eq. 594.

A testator devised real estate to trustees for a term of 500 years upon trust to raise a sum of 9,000*l.*, with interest, for his younger children, and subject thereto to his son F. for life, with remainders over. One moiety of the charge of 9,000*l.* became vested in the testator's daughter M. No part of the charge was ever raised; and F., who had been let into possession, failed to keep down the interest. M. died in the lifetime of F., having by her will left him a legacy to be paid out of her moiety of the 9,000*l.*:—Held, that the legacy could not be retained by the executors of M. in satisfaction of the arrears of interest due to her. *Ib.*

The general rule is, that the tenant for life is bound to pay the interest upon incumbrances; but an incumbrancer, if he merely neglects to enforce payment of the interest from the tenant for life, will not be debarred thereby from raising it, with the principal, out of the inheritance. *Wrixon* v. *Vize*, 1 Con. & L. 298; 2 Dr. & War. 192; 4 Ir. Eq. R. 463.

The obligation of a tenant for life to keep down the interest on a charge only extends to interest which accrues due during his life estate. *Kirwan* v. *Kennedy*, Ir. R. 4 Eq. 499. And see *S. C.*, Ir. R. 3 Eq. 472.

Where there are successive life estates, if a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued due during a prior life estate, he is entitled to repayment of that sum out of the inheritance. *Ib.*

A tenant for life of an estate, subject to a mortgage, is not liable, as between himself and the remainderman or reversioner in fee, to pay out of the rents and profits of the estate arrears of interest on the mortgage which accrued due during the life of a preceding tenant for life, who died insolvent; but such arrears are primarily a charge upon the inheritance. *Sharshaw* v. *Gibbs*, 1 Kay, 333; 2 Eq. R. 314; 23 L. J., Ch. 451; 18 Jur. 330.

Observations on the dicta in *Penrhyn (Lord)* v. *Hughes* (5 Ves. 99). *Ib.*

A second tenant for life cannot charge upon the inheritance money expended by him in repairs, which ought to have been performed by the first tenant for life, unless the expense was occasioned by wilful waste done by him. *Ib.*

Mortgagee, having permitted the tenant for life to run in arrear for the interest, purchases the estate for life, and takes possession under that purchase; he is bound to apply the surplus rents and profits beyond the current interest, in discharge of the arrear, and in the account, under a bill of foreclosure, was charged accordingly. *Penrhyn (Lord)* v. *Hughes*, 5 Ves. 99.

A tenant for life of real estate, upon which the debts of the testator have been ascertained to be a charge, must keep down all the interest which accrues due. *Marshall* v. *Crowther*, 2 Ch. D. 199; 23 W. R. 210.

As between tenant for life and remainderman, the interest on the testator's debts must be borne by the income, as from the day of his death. *Barnes* v. *Bond*, 32 Beav. 653.

Where a tenant for life of an estate subject to a charge bearing interest, pays the interest, although the rents and profits are insufficient for that purpose, he cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainderman any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption. (Dissentiente, Lords Cranworth and Wensleydale, who held that there is no such presumption, especially when the payment is made under force of a personal obligation to pay.) *Kensington (Lord)* v. *Bouverie*, 7 H. L. Cas. 557; 29 L. J., Ch. 537; 6 Jur. (N.S.) 105. And see *S. C.*, 24 L. J., Ch. 442; 1 Jur. (N.S.) 577; 3 W. R. 469.

If a tenant for life is himself the person entitled to the benefit of the charge, and has mortgaged it, and his mortgagees have regularly been paid the interest on the mortgage debt, they are in no better situation than the personal representatives. *Ib.*

Where a will of the tenant for life disposes of the charge "and interest," those words cannot be taken to refer to anything but the interest, which will accrue after his death till the charge itself is redeemed. *Ib.*

Tenant for life is only to keep down the interest of the incumbrance, but not to be charged with any part of the principal. *Shrewsbury (Countess)* v. *Shrewsbury (Earl)*, 1 Ves. Jun. 234; 3 Bro. C. C. 120.

Tenant for life bound to keep down the interest of incumbrances, though the whole should be exhausted. *Tracy* v. *Hereford*, 2 Bro. C. C. 129.

Where an estate, subject to a charge bearing interest, is limited to several persons in succession as tenants for life, the conclusion to be drawn from the authorities appears to be that each tenant for life is liable only for the interest for his own time, but that to liquidate the arrears during his own time, he must furnish all the rents, if necessary, during the whole of his life. *Caulfield* v. *Maguire*, 2 Jo. & Lat. 141; 8 Ir. Eq. R. 164.

In a mortgage by husband and wife of the wife's settled lands, the husband covenanted for payment of the mortgage money. On a bill by the husband, an inquiry was directed into the application of the money raised, and the husband was held discharged for so much as was applied to the wife's use, but as tenant for life, he was held bound to keep down the interest. *Kinnoul (Earl)* v. *Money*, 3 Swanst. 202, n.

A. created a trust for the payment of incumbrances, out of the rents and profits of his real estate, part of which being subject to the arrears of a rent-charge to the crown, was discharged by a privy seal, provided 5,000*l.* be paid to B. and C., for securing which a term was created by act of parliament:—Held, that this was a debt affecting the estate, and not within the trusts of the deed, and, therefore, that the tenants for life must keep down the interest. *Peterborough (Earl)* v. *Mordaunt*, 1 Eden, 474.

A devisee for life of a rent-charge, having granted several annuities thereon (and which were in arrear), assigned it to his creditors. The tenant for life of the estate, with intent to redeem it for the annuitant, gave bonds to the creditors in consideration of giving up their securities to be cancelled. The obligor's executor paid all the bonds. The annuitant is entitled against the executors, to the annuity, disencumbered, but not to have paid the arrears on the annuities to creditors, incurred in the life of the obligor, and as against the tenant of the estate to the arrears since the death of the obligor, but the future payments must be left to agreement. *Graham* v. *Graham*, 1 Ves. Jun. 272.

Testator gave his personal estate to his mother for life, remainder to his children, on condition that his mother should see the fines for renewal of a lease, and the interest of a mortgage, paid, and be consulted as to the manner of raising the fines, that she may give her approbation as she may think proper; she is only to keep down the interest. *Buckeridge* v. *Ingram*, 2 Ves. Jun. 652.

The testator, by his will, charged his debts and legacies upon his real and personal estate, and gave such real and personal estate to trustees upon trust for his nephew for life (to whom also he gave a legacy), with remainder to the first and other sons of the nephew successively in tail male, with remainder to the second and every other son of the testator's brother successively in tail male, remainder to the testator's own right heirs; and added, "and upon this last-mentioned contingency, failing heirs male of my said brother, and of my said estate going to my right heirs more remote as aforesaid, then I do hereby charge, subject, and make liable my said estate with the payment of the sum of 5,000*l.* to my niece." The testator died in 1775, leaving his brother his heir-at-law; the nephew entered into possession of the real estate, which consisted of a plantation in Jamaica, subject to a mortgage created by the testator in 1765; the brother afterwards died, leaving the nephew, his only son, and then heir-at-law of the testator: the nephew died in 1822, without issue male: a bill was filed in 1837, against the mortgagees and the devisees of the nephew, to obtain payment of the niece's legacy of 5,000*l.*:—Held, that, on the death of the nephew without issue male, the event happened on which the niece would become entitled to the legacy of 5,000*l.*; and that it was not too remote: that the nephew was only bound in his lifetime to keep down the interest of the debts and legacies: and that he was entitled to keep on foot, as subsisting charges against the real estate, the principal

of the debts and legacies paid off by him, and also his own legacy. *Faulkner* v. *Daniel*, 3 Hare, 199; 10 L. J., Ch. 33.

A. granted several annuities which he charged on real estates, and covenanted to pay and gave a warrant of attorney to confess judgment for double the consideration money. The annuities might be "purchased" or "redeemed" by him on certain conditions. A., by his will, gave several legacies and annuities, and devised his real estates to trustees to raise money in aid of his personal estate to pay debts, except mortgage debts, and legacies, and annuities thereby given, and to raise 500*l.* a year out of the rents as an accumulating fund for discharging the mortgages, and, subject as aforesaid, he devised his real estate to W. for life, remainder to his children in strict settlement:—Held, that W. was not bound to pay the annuities, but that they ought to be valued, and the tenant for life to keep down the interest on such value only. *Bulwer* v. *Astley*, 1 Ph. 422; 13 L. J., Ch. 329; 8 Jur. 523.

A testator charged all his estate with the payment of his debts and legacies, and he authorised the trustees of his will to raise 4,000*l.* by mortgage for that purpose. The property of the testator consisted chiefly of a lunatic asylum, the annual profits of which amounted to a considerable sum, and the will contained special directions for the management of the asylum, and referred to it as part of the property on which the debts were charged, and out of which several annuities given by his will were to be paid:—Held, that the debts, &c., were charged on the corpus of the property, including the asylum; and that as between the tenant for life and the parties entitled in remainder under the will, the income and profits of the asylum were not liable to bear the charge. *Wastell* v. *Leslie*, 13 L. J., Ch. 205; 8 Jur. 367.

Limitation of estates to successive tenants for life, with remainders in tail, subject to a term vested in trustees, the trusts of which were, in the first place, by cutting and selling timber of full growth, or by demising, mortgaging or selling the estate (except the mansion house) for all or any part of the term, or by all or any of the said ways, or any other reasonable ways, to raise 30,000*l.*, and pay the same to the parties therein mentioned:—Held, that, as between the tenants for life not impeachable for waste and the remaindermen, the corpus of the estate must bear the charge, and that the interest of the charge must be paid by the tenant for life in possession, who in the meantime was entitled (as part of the profits of the estate) to the timber, which as such tenant for life he had a right to cut. *Marker* v. *Kekewich*, 8 Hare, 291; 19 L. J., Ch. 492; 14 Jur. 544.

The trustees of the term in such a case have not an unlimited discretion to raise the charge in such a manner as they may think fit: and it does not follow that because their discretion in the mode of raising the charge has been honestly exercised, the charge will be left to be finally borne by those parties upon whom their act might chance to throw it. *Ib.*

A testator directed his real estate to be sold immediately or as soon as conveniently might be, and applied in aid of his personal estate in payment of his debts; but until the settlement should be made, as after directed, the rents were to be applied in keeping down the mortgages, and the residue to be paid to the persons entitled under the settlement. He then directed the unsold hereditaments to be settled on A. for life, with remainder over. The testator was greatly indebted on bonds, and his personal estate was largely deficient. More than a year elapsed before the sale of the real estates:—Held, that the interest on all the debts for the first year was payable out of the corpus of the real estate, but that the tenant for life was bound to keep down the subsequent interest. *Greisley* v. *Chesterfield* (*Earl*), 13 Beav. 288.

A testatrix directed her trustees to levy and raise, out of the interest, dividends and annual produce of certain trust funds, an annual sum of 100*l.*, and pay the same to R. P. during his life, and "subject and without prejudice to the payment of the said annuity," to pay the income of the trust funds to F. C. for life, and after his decease, "subject and without prejudice, as aforesaid," to stand possessed of the trust funds for other persons. The income of the fund was insufficient to pay the annuity:—Held, that such arrears were a charge upon the corpus of the trust property, and that the tenant for life was only bound to keep down the interest of such arrears. Held, also, that the claim for arrears beyond six years was not barred by the statute, there being a trust for the payment. *Playfair* v. *Cooper*, 17 Beav. 187; 1 Eq. R. 137; 23 L. J., Ch. 341, 343; 1 W. R. 216, 376.

Trustees allowed a tenant for life to enter into possession, and she paid the interest of incumbrances and expended money on improvements. The trustees did not call for any account of the rents; and the evidence, both as to the income being insufficient to keep down the incumbrances, and as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, and the trustees allowed her to deduct from the purchase-money the money expended in paying interest, and in improvements:—Held, that she ought not to have been allowed those sums. *Dixon* v. *Peacock*, 3 Drew. 288.

In the administration of a mixed estate, real and personal, where, owing to peculiar circumstances, considerable time has elapsed before the personal estate can be realised, and in the meantime interest runs upon debts, and has been paid out of the income of the tenant for life of the real estate, the court will investigate the application of the personal estate, so as to determine the equities between the tenant for life and the remainderman. *Shore* v. *Shore*, 4 Drew. 219; 26 L. J., Ch. 386; 5 W. R. 250.

A. was sole legatee and executor of the testator's personal estate, and tenant for life of his real estate, with remainder to his son. At the death of the testator he was largely indebted, and his personal estate was outstanding, owing, as to the greater part, to his having advanced large sums to a bank, of which his son was a partner, and which failed, and became bankrupt. For about eleven years the tenant for life kept down the interest of the debts out of his life estate, which was wholly or nearly absorbed by such payment. Ultimately enough personalty was got in to pay a large portion of the debts, and was so applied, and then the real estate was sold:—Held, that no portion of the money representing the corpus of the real estate could be applied in recouping the tenant for life the interest he had paid. *S. C.*, 4 Drew. 501; 28 L. J., Ch. 940; 7 W. R. 390.

Where, subject to debts and legacies, an estate is devised to one for life, the tenant for life is

bound, out of the income, to keep down charges; and where the charges had greatly accumulated in consequence of an unavoidable delay in selling a portion of the estate, directed by the will to be primarily liable:—Held, that such accumulations were chargeable on the interest of the tenant for life, and to no extent on the corpus of the estate. *Hawkins* v. *Hawkins*, 6 L. J., Ch. 69.

A trust by sale or mortgage of other estates to raise fines for the renewal of leaseholds imposes on the successive tenants for life the duty of keeping down the interest on the mortgages. *Ainslie* v. *Harcourt*, 28 Beav. 313; 30 L. J., Ch. 686.

Where an estate charged as a further security for a mortgage debt was devised to a tenant for life and remainderman in fee, and the interest was for many years paid by the remainderman and his assignee, and the tenant for life paid nothing, it was held that the tenant for life was bound to keep down the interest during his life. Therefore, where default was made in the payment of interest, and the mortgagee entered upon and sold the original security, thereby paying himself part of his mortgage debt, and the tenant for life paid the remainder, taking a transfer of the mortgage security, it was held, in a foreclosure suit by the representatives of the tenant for life, that they were entitled to interest only from her death, and not from the date of the transfer. *Long* v. *Harris*, 1 Jur. (N.S.) 913.

Testator devised his real estate to the use of trustees for a term of years, upon trust that in case his personal estate should be found insufficient for the payment of his debts and legacies, they should, after the decease of his wife, by sale or mortgage, raise such sums of money as should be sufficient to discharge his legacies, for the discharge whereof his personal estate should be found insufficient; and subject thereto he devised the estates to his issue, and for default of issue living at the time of his decease, to his wife for her life, remainder to the use of E. C. for his life, remainder to the first and other sons of E. C. in tail male, and died without issue:—Held, that the tenant for life should pay the interest on the deficiency, to be ascertained, either within a reasonable time after the death of the testator, or to be ascertained by the actual result of the account, and the estate is to bear the capital only of the deficiency. And if the personal estate be got in, in sums composed partly of capital money, and partly of interest, the interest will be applied in payment of the interest on the legacies, and the capital will be applicable to the payment of the capital of the legacies in ease of the term of years. *Coote* v. *Milltown* (*Lord*), 1 Jo. & Lat. 501; 7 Ir. Eq. R. 391.

A remainderman paid with his own money, after he came into possession, interest which had accrued, during the preceding estate for life, upon charges affecting the inheritance:—Held, first, that his executor was entitled in 1870 (as against the personal representative of the tenant for life), not only to be recouped out of, but to all the accumulations of, a fund in court, the produce of rents of the life estate brought in, in 1815, by a receiver appointed in an incumbrancer's suit instituted against the tenant for life. *Howlin* v. *Sheppard*, Ir. R. 6 Eq. 253. Affirmed Ir. R. 6 Eq. 497.

Held, secondly, that the remainderman had a specific lien upon all that remained of or represented the estate for life. *Ib.*

A tenant for life, who was entitled to charges on the inheritance vested in a trustee for himself, bequeathed to the remainderman all arrears of rent due at his death out of the settled estates, and also "the apportioned part up to the day of his death of the gale of rent which shall be then current," and died between two gale days:—Held, that the remainderman was entitled to the entirety of the apportioned part of the current gale, without deducting any sum in respect of an apportioned part of interest on the charges. *Lindsay* v. *Wicklow* (*Earl*), Ir. R. 6 Eq. 72.

—— **Extent of Liability—Aggregate Devise—Several Estates—Several Incumbrances—Application of Aggregate Income.**]—The tenant for life of several incumbered estates devised together as an aggregate whole must apply the aggregate income in keeping down the aggregate annual charges in respect of incumbrances. He cannot refuse the onerous and accept the beneficial portion of the property. *Guthrie* v. *Walrond* (52 L. J., Ch. 165; 22 Ch. D. 573) and *Hotchkys, In re, Freke* v. *Calmady* (55 L. J., Ch. 546; 32 Ch. D. 408) followed. *Syer* v. *Gladstone* (30 Ch. D. 614) discussed and distinguished. *Frewen* v. *Law Life Assurance Society*, 65 L. J., Ch. 787; [1896] 2 Ch. 511; 75 L. T. 17; 44 W. R. 682.

—— **Tenant for Life—Heir.**]—Tenant for life is bound to keep down the interest of debts, but being an heir-at-law not otherwise provided for, is, as against the remainderman, entitled to maintenance. *Burges* v. *Mawbey*, Turn. & R. 167; 24 R. R. 9.

An infant tenant in tail is bound to keep down the interest of debts charged upon the entailed estates. A tenant for life was also held to have been liable to keep down the interest of the debts, although, having the ultimate remainder in fee, he had consented to an act of parliament by which the estates were vested in trustees for the payment of the debts. *Ib.*

—— **Tenant for Life with Absolute Power of Appointment.**]—Tenant for life, with an absolute power of appointment, bound to keep down the interest on charges created by himself. *Whitbread* v. *Smith*, 3 De G. M. & G. 741; 2 Eq. R. 377; 23 L. J., Ch. 611; 18 Jur. 475; 2 W. R. 177.

—— **Obligation of Assignee of Tenant for Life.**]—The estate of a tenant for life was charged with a sum of 25,000*l.*, and interest from the time that the life estate commenced, and it was provided that the 25,000*l.* should not be raised until the expiration of two years from the commencement of the life estate. The tenant for life failed to keep down the interest of the 25,000*l.*, and there was raised on the estate by the trustees of the term created for the purpose of the charge a sum considerably exceeding the 25,000*l.* The persons entitled in remainder after the life estate, have an equity to recoup of the future income which shall accrue to the tenant for life, the excess raised beyond the 25,000*l.*, and the tenant for life having taken the benefit of the Insolvent Debtors Act, his assignees are affected by the same equity. *Waring* v. *Coventry*, 2 Myl. & K. 406.

Upon the sale of lands which were subject to an annuity, the vendor covenanted that certain other lands should be an indemnity against the annuity. He afterwards, on his marriage, settled the indemnity lands upon himself for life, with remainders over; and covenanted that the

settled lands were free from incumbrances. The tenant for life having suffered the annuity to run in arrear, the arrears were raised by a sale of part of the settled lands. The remainderman has an equity against the tenant for life and against his assignee, under the Insolvent Act, to be recouped the arrears so levied out of the produce of the life estate. *Coote* v. *O'Reilly*, 1 Jo. & Lat. 455; 7 Ir. Eq. R. 356.

If a mortgagee enters, not in his character of mortgagee only, but as purchaser of the equity of redemption, he must look to the title of his vendor, and the validity of the conveyance he takes; and if the conveyance be such as gives him only the estate of a tenant for life, he is bound, having united in himself the characters of mortgagor and mortgagee, to keep down the interest of the mortgage for the benefit of the person or persons entitled in remainder. *Raffety* v. *King*, 1 Keen, 601; 6 L. J., Ch. 87.

—— **What Interest.**]—The court refused to give interest entered upon judgment debts beyond the amount of the penalty in the bonds against remainderman, where the interest had accrued during the lifetime of the tenant for life; on appeal to the lords, decree affirmed. *Latouche* v. *Fitzgerald*, 2 Ridgw. P. C. 333.

A. devised two estates, known as the home estate and the outlying estate, to trustees as to the latter for sale, and with the proceeds to pay off the mortgages existing on both properties. The tenant for life of the home estate claimed to have the income of the outlying property in the meantime until the sale applied in discharge of the interest accruing on the mortgage:—Held, that he was so entitled. *Bond* v. *Biggs*, 6 L. T. 794.

Where a tenant for life has permitted arrears of charges to accumulate, the claim of a remainderman for compensation out of the life estate, for the increased burden thus cast on the inheritance has priority over charges on the life estate created by the tenant for life, and secured by a demise of a legal term, without notice of the facts constituting the remainderman's equity. *Fitzmaurice* v. *Murphy*, 8 Ir. Ch. R. 363.

—— **Other Matters.**]—Principles on which this court assumes, that a tenant for life, who is also the owner of a charge on the inheritance, has duly discharged his duty of keeping down the interest on the charge. *Burrell* v. *Egremont* (*Earl*), 7 Beav. 205; 13 L. J., Ch. 309; 7 Jur. 587.

A. B., being seised in fee of four estates, mortgaged two of them, and subsequently settled the mortgaged estates, and one of the others, on himself for life, with remainder to his son in tail, and covenanted against incumbrances; but the settlement did not recite that there were any incumbrances. He afterwards mortgaged the fourth estate, and took the benefit of the Insolvent Debtors Act. After this a creditor on certain bills of exchange became a registered judgment creditor, and then filed a bill against the tenant in tail and the assignee in the insolvency, and the other incumbrancers, praying a sale in satisfaction of the judgment debt, and what might be paid by the plaintiff in discharge of prior incumbrances, subject to the estate and interest of the tenant in tail under the settlement:—Held, reversing a decree of foreclosure against the tenant in tail, that the settled estates must be regarded as exonerated from incumbrances, as between A. B., the settlor, and the tenant in tail, and that the plaintiff was subject to the same equities as the settlor, and that, as the judgment debt was itself subsequent to the settlement, the tenant in tail could not be affected by the judgment. *Hughes* v. *Williams*, 3 Mac. & G. 683; 16 Jur. 415. And see *Chappell* v. *Rees*, 1 De G. M. & G. 393; 16 Jur. 415.

f. Apportionment.

i. *Of Charges and Incumbrances.*

See col. 301, ante.

ii. *Under the Apportionment Act.*

See APPORTIONMENT.

iii. *In Other Cases.*

Between Tenant for Life and Remainderman.]—Where a testator has bequeathed his residuary personal estate to trustees upon trust for conversion, with power to postpone such conversion at their discretion, and to hold the proceeds upon trust for a person for life with remainders over, and such residue includes outstanding personal estate, the conversion of which the trustees, in the exercise of their discretion, postpone for the benefit of the estate, and which eventually falls in some years after the testator's death—as, for instance, a mortgage debt with arrears of interest, or arrears of an annuity with interest, or moneys payable on a life policy—such outstanding personal estate should, on falling in, be apportioned as between capital and income, by ascertaining the sum which, put out at interest at 4 per cent. per annum, on the day of the testator's death, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, have produced, at the day of receipt, the amount actually received; and the sum so ascertained should be treated as capital, and the residue as income. *Chesterfield's* (*Earl*) *Trusts, In re*, 52 L. J., Ch. 958; 24 Ch. D. 643; 49 L. T. 261; 32 W. R. 361. S. P., *Beavan* v. *Beavan*, 52 L. J., Ch. 961, n.; 24 Ch. D. 649, n.; 49 L. T. 263, n.; 32 W. R. 363, n.

When reversionary property is allowed to remain unsold until it falls into possession, the estate of a tenant for life of the property under a will who dies before it falls into possession is entitled to have paid to it, in respect of interest, out of the property, 4*l.* per cent. upon the value of the reversion, commencing at the end of a year from the testator's death, and calculated upon the assumption that it was to fall in on the day when it actually did fall in. *Wright* v. *Lambert*, 6 Ch. D. 649; 26 W. R. 206.

Trustees, having a discretion, allowed a reversionary interest to remain unsold for nineteen years, when it fell into possession:—Held, that the tenant for life, who had in the meanwhile received nothing in respect of income on it, was entitled to be recouped out of the fund. *Wilkinson* v. *Duncan*, 23 Beav. 469; 26 L. J., Ch. 495; 3 Jur. (N.S.) 530; 5 W. R. 398.

Mode of calculating the amount to be received by the tenant for life, and of regulating the relative rights of the tenant for life and remainderman, in such a case. *Ib.*

Rate of Interest.]—The usual rate at which interest ought to be calculated in administration

proceedings is now 3 per cent. per annum. The old rate of 4 per cent. ought to be abandoned. *Goodenough, In re, Marland* v. *Williams*, 65 L. J., Ch. 71; [1895] 2 Ch. 537; 13 R. 454; 73 L. T. 152; 44 W. R. 44. And see *Cleveland's (Duke) Estate, In re, Hay* v. *Wolmer*, 65 L. J., Ch. 29; [1895] 2 Ch. 542; 13 R. 715; 73 L. T. 313.

What shall be Apportioned—Emblements.]—As between tenant for life and remainderman, emblements go to executor of former. *Lawton* v. *Lawton*, 3 Atk. 13.

—— **Quit Rents.**]—Quit rent shall not be apportioned as between the tenant for life and remainderman, the statute 11 Geo. 2, c. 19, s. 4, having no application in this case. *Sutton* v. *Chaplin*, 10 Ves. 66.

—— **Royalties.**]—A testator devised a brickfield to trustees for sale when they should think desirable. They deferred the sale in the exercise of their discretion:—Held, that the tenant for life was entitled to the royalties as income. *Miller* v. *Miller*, 41 L. J., Ch. 291; L. R. 13 Eq. 263; 20 W. R. 324.

—— **Debts.**]—Part of a testator's residuary estate consisted of a bond debt, which, owing to the insolvency of the debtor's estate, was not recovered until many years after the testator's death, when the gross sum recovered in respect of principal and interest did not equal the amount of the original debt:—Held, that as between the tenant for life of the residue, and those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at 4*l.* per cent. on the sum which the bond would have realised, if the debtor's estate had been administered at the end of a year after the testator's death. *Turner* v. *Newport*, 2 Ph. 14; C. P. Coop., 147. Reversing 14 Sim. 32.

When the trustees of a settlement proved against the estate of the obligor of a bond in an administration suit for the aggregate amount of principal and interest at 5*l.* per cent. per annum, secured by the bond, and recovered a sum less in amount than the principal:—Held, that a calculation back should be made to ascertain what sum with interest at 4*l.* per cent. per annum from the time the principal secured by the bond became payable to the time of the receipt of the sum ultimately recovered, would amount to the sum so recovered, and that the tenant for life was entitled to the difference between these sums. *Cox* v. *Cox*, 38 L. J., Ch. 569; L. R. 8 Eq. 343; 17 W. R. 190.

Part of a testator's residuary estate was not recovered until some years after the testator's death. The sum recovered consisted almost entirely of principal moneys:—Held, that as between the tenant for life of the residue and those in remainder, the sum recovered must be apportioned, the tenant for life being entitled to interest at the rate of 3 per cent. per annum as from the expiration of one year from the testator's death. *Turner* v. *Newport* (2 Ph. 14) followed. *Cleveland's (Duke) Estate, In re, Hay* v. *Wolmer*, 65 L. J., Ch. 29; [1895] 2 Ch. 542; 13 R. 715; 73 L. T. 313.

A testator directed a debt of 25,000*l.* to form part of his residuary estate, and bequeathed that and all his other residuary estate to his executors in trust to raise and collect the same, and from time to time to invest the same, and to pay the interest or annual proceeds among certain other legatees. He afterwards joined in a deed which provided that no interest should be payable on the 25,000*l.* during his life, and postponed the payment of the principal to three years after his death; and agreed that the principal and three years' interest should be payable then by instalments of 2,000*l.* a year, and that if those instalments were punctually paid, no more than the three years' interest should be payable. He afterwards, by a codicil, declared that this arrangement should not affect his will:—Held, that the three years' interest did not form part of the capital sum to be invested, but belonged to the legatees for life. *Caulfield* v. *M'Guire*, 8 Ir. Eq. R. 164; 2 Jo. & Lat. 141.

—— **Property not actually producing Income.**]—The testator left his residuary real and personal estate to trustees upon trust for sale and conversion, with power to postpone conversion and to spend money for the benefit of the estate, and he declared that no property not actually producing income should entitle any party to the receipt of income. A debt due to the testator was not paid to his trustees, but they obtained a mortgage to secure it, and subsequently they bought a prior mortgage on the same security. No interest was ever paid on the debt, and the security eventually realised less than the principal due:—Held, that the balance of the fund, after providing for the expenses of protecting the security, was apportionable between principal and interest, that the sum attributable to interest was income produced by the security, and that the tenant for life was not deprived of it by the clause in the will. *Hubbuck, In re, Hart* v. *Stone*, 65 L. J., Ch. 271; [1896] 1 Ch. 754; 73 L. T. 738; 44 W. R. 289—C. A.

—— **Annuity.**]—Where an annuity for a term of years forms part of a residue, the executors, until they can sell it, must invest the payments, and interest of the investments will belong to the tenant for life of the residue. *Crawley* v. *Crawley*, 7 Sim. 427; 4 L. J., Ch. 265.

—— **Contingent Reversionary Interest.**]—A testator by his will bequeathed his residuary personal estate upon trust, after payment of debts and legacies, to lay out and invest the residue as therein mentioned, and to pay the income to the plaintiff for life, with remainders over. Part of the residuary estate consisted of a contingent reversionary interest in some settled funds. The testator died in 1832, and the reversion first became salable in 1846, but it had never been sold. Since 1846 the reversion had enormously increased in value. Upon an application in effect to have the value of the reversion apportioned as between tenant for life and remainderman:—Held, that the principle of *Chesterfield's (Earl) Trusts, In re* (24 Ch. D. 643), applied, and that assuming the reversion to have been sold at an agreed price, it must be ascertained what principal sum would, with compound interest from the date of the testator's death, make up the agreed price, and such principal sum alone must be attributed to corpus, and the whole of the rest to income. *Hobson, In re, Walker* v. *Appach*, 55 L. J., Ch. 422; 53 L. T. 627; 34 W. R. 70.

—— **Where Estate is Insufficient.**]—A testator bequeathed a legacy of 10,000*l.* with interest

from his death at 4 per cent. per annum to trustees upon trust to pay the income to certain persons during the life of one of them, and after her death upon trust for other persons. The estate was insufficient for payment in full of his legacies, and the realisation of his assets occupied several years :—Held, that moneys from time to time received by the trustees and applicable to the legacy were divisible ratably between capital and income, so as to attribute to income 4*l.* per cent. from the testator's death on the amount attributed to capital. *Tinkler's Estate, In re*, 45 L. J., Ch. 135; L. R. 20 Eq. 456.

—— **Mortgage—Deficient Security.**]—A testator bequeathed his residuary personal estate to trustees upon trust for successive tenants for life, with absolute gifts over. After his death his trustees invested 8,000*l.*, part of his residuary personal estate, on mortgage. For some time the interest was regularly paid, but afterwards fell into arrear. After a time the mortgaged property was sold, and realised 7,900*l.* At the time of the sale the arrears of interest amounted to 536*l.* :—Held, that the tenants for life were not entitled to receive compound interest out of the fund, and that the fund must be apportioned between the tenants for life and remaindermen in the proportion which the arrears of interest bore to the original principal sum. *Moore, In re, Moore* v. *Johnson*, 33 W. R. 447.

—— **Unsalable Property.**]—A testator directed that his residuary estate should be sold and converted on a particular day, and that a share of the proceeds should be held upon trust for his wife for life, with remainders over. The residuary estate included a circus, which it was found impossible to sell advantageously, and which had been carried on at a loss by the executors since the day named for the sale and conversion of the estate. In a summons asking for directions how such losses and any future losses (or profits) should be apportioned as between capital and income :—Held, that the amount of annual profit or loss should be apportioned between the capital and the income of the testator's estate by inquiring what sum, put out at interest at 4 per cent. per annum on the day appointed for sale and conversion, and, as regards succeeding years, accumulating at compound interest calculated at the like rate, with yearly rests, would, together with such interest and accumulations, after deducting income-tax, be equivalent, at the end of each year, to the amount of such profit or loss, and by crediting such sum to, or charging it against, the capital of the testator's estate, the rest of such profit or loss being credited to or charged against the income thereof. *Hengler, In re, Frowde* v. *Hengler*, 62 L. J., Ch. 383; [1893] 1 Ch. 586; 3 R. 207; 68 L. T. 84; 41 W. R. 491.

—— **Where Testator was Mortgagee in Possession—Foreclosure.**]—A testator by his will directed his trustees to convert his real and personal estate, and to pay the income to tenants for life; he gave them power to postpone the conversion of any part of his estate. The testator at the date of his death was in possession of a colliery as mortgagee, and there were considerable sums owing to his estate under the mortgage. After his death the trustees commenced a foreclosure action, in which a receiver was appointed, and the trustees finally foreclosed the mortgage. Prior to foreclosure absolute the receiver had paid into court to the credit of the foreclosure action considerable sums of money, which sums had been increased by accumulations of interest. This fund had been transferred to the credit of an action for the administration of the testator's estate. The tenants for life claimed the whole fund as income :—Held, that the accumulations of interest were income, and belonged to the tenants for life; that the rest of the fund paid in before foreclosure absolute must be apportioned between the tenants for life and remaindermen, on the principle that the tenants for life were entitled to the difference between the sum transferred into court and the sum which, with interest at 4 per cent. from the date of the testator's death to the date of the transfer to the credit of this action, would amount to the sum transferred into court; and that the sum so calculated belonged to the estate as capital. *Chesterfield's (Earl) Trusts, In re* (24 Ch. D. 643) followed. *Godden, In re, Teague* v. *Fox*, 62 L. J., Ch. 469; [1893] 1 Ch. 292; 3 R. 67; 68 L. T. 116; 41 W. R. 282.

—— **Life Policy Moneys—Mortgage—Premiums.**]—A testator gave his residuary estate to a trustee on trust for a person for life with remainder over. The estate comprised an insurance policy on a surviving life, subject to a mortgage. The premiums and instalments of mortgage interest falling due after the testator's death were paid by the trustee out of the income of the estate. On the falling in of the policy :—Held, first, that the tenant for life was entitled as against the remaindermen to be repaid out of the policy moneys the amount of the premiums and mortgage interest paid as aforesaid, with interest thereon at 4 per cent; and secondly, that the respective rights of the tenant for life and remaindermen in the residue of such moneys should be adjusted in accordance with the principle of *Chesterfield's (Earl) Trusts, In re* (24 Ch. D. 643). *Morley, In re, Morley* v. *Haig*, 64 L. J., Ch. 727; [1895] 2 Ch. 738; 13 R. 680; 73 L. T. 151; 44 W. R. 140.

—— **Sum Paid out of Estate and subsequently Repaid—Apportionment—Rate of Interest.**]—Where the trustees of a will have, under the sanction of an order of the court, paid a sum of money out of the estate, which sum has, in consequence of the variation of the order on appeal, been subsequently repaid, such sum, although consisting of principal only, should, nevertheless, on repayment be apportioned between the tenant for life and remainderman of the beneficial interest in the estate, on the principles expounded in *Turner* v. *Newport* (2 Ph. 14), except that 3 per cent. interest should now be substituted for 4 per cent. *Cleveland's (Duke) Estate, In re, Hay* v. *Wolmer*, 65 L. J. Ch. 29; [1895] 2 Ch. 542; 13 R. 715; 73 L. T. 313.

—— **Mortgage by Trustees for a Term—Repayment by Arrangement in Eighteen Months with Additional Sum representing Interest for a further Year.**]—A fund settled by will on a person for life, with remainder to others in fee, was invested by the trustees on mortgage with a covenant that it should remain on the security for ten years. Afterwards an agreement was made under which it was repaid with interest in about eighteen months from the date of the agreement, with an additional sum representing in amount

interest for a further year at the old rate:—Held, that the additional sum was capital, not income, and belonged wholly to those entitled in remainder to the fund. *Searancke, In re, Simonds* v. *Huntingdon*, 74 L. T. 339.

—— **Moneys Paid in Error.**]—A tenant for life became a lunatic, and by orders in the lunacy made in 1867 and 1868 annuities were directed to be paid to a remainderman (upon proper security for repayment) out of the income of the settled estates for twenty years. The payments were through some unexplained cause continued beyond this period, and in the meantime the remainderman mortgaged his interest in the estates, and subsequently became bankrupt. On the death of the tenant for life, his personal representative claimed to retain out of the share of the personal estate, to which the remainderman then became entitled, the amount of the excessive payments beyond the period of twenty years, in priority to the remainderman and all persons claiming under him, together with interest thereon:—Held, that the personal representative was entitled so to retain these amounts, together with interest, and that the fact of the estate of the remainderman being in mortgage made no difference. *Langham, In re, Otway* v. *Langham*, 74 L. T. 611.

g. Other Matters.

Account of Rents.]—A tenant for life is not liable to account for rents already received in a suit instituted by the obligee of a bond against the personal representatives and devisees of the obligor. *Jesson* v. *Holt*, Romilly's Notes of Cases, 153.

Fiduciary Position.]—As a tenant for life, though his consent may be requisite to the exercise of a power of sale, stands in no fiduciary position towards the remainderman, and is as free as anyone else to buy from the trustees, a sale to him cannot be impeached on the ground of the purposes for which he buys, his motives being immaterial to the trustees, provided they sell on terms advantageous to the estate. *Dicconson* v. *Talbot*, L. R. 6 Ch. 32; 24 L. T. 49; 19 W. R. 138.

A bill will not lie at the suit of a remainderman to set aside a lease by tenant for life, on the ground of its being accompanied with a loan of money, there being no privity between them, and the remedy being at law. *Corbett* v. *Segrave*, 2 Ball & B. 98.

—— **Settlement of Leaseholds — Purchase of Reversion.**]—There is no case in which the doctrine of *Keech* v. *Sandford* (Sel. Cas. Ch. 61) has been applied to leaseholds not renewable by contract or custom, and a tenant for life of leaseholds purchasing the freehold reversion is not a trustee thereof for those entitled in remainder. *Longton* v. *Wilsby*, 70 L. T. 770.

—— **Statutory Right of Pre-emption.**]—The tenant for life of settled property (having a statutory right of pre-emption as adjoining owner) purchased on his own account from turnpike trustees the site of a disused tollhouse, the conveyance being made to himself in fee. He made lasting improvements thereon, and died, having devised the site to the defendants:—Held, that the defendants were trustees of the site for the remaindermen entitled to the settled property, but that the remaindermen could only enforce this equity on the terms of recouping the estate of the tenant for life not only the amount of the purchase-money, but also the value of the lasting improvements. *Rowley* v. *Ginnever*, 66 L. J., Ch. 669; [1897] 2 Ch. 503; 77 L. T. 302.

Exchange under Inclosure Act, 1845.]—A remainderman is not bound by an agreement, made by a tenant for life or tenant in tail, to apply for an order effecting an exchange under 8 & 9 Vict. c. 118. *Landed Estates Investment Co.* v *Weeding*, 21 L. T. 384; 18 W. R. 35.

Interest on Income in arrear.]—Interest at 4 per cent. allowed to the tenant for life of a trust fund upon the amount found due to her for arrears of interest of the fund. *Willcocks* v. *Butcher*, 16 Sim. 366.

D. ESTATE PUR AUTRE VIE.

1. In General.

Limitation of.]—A limitation of real estate to A., during the life of B. and C., without saying, "and during the life of the survivor of them," gives A. an estate during the lives of B. and C., and the survivor. But a limitation of 100 years, if A. and B. shall so long live, is determined by the death of either, because this is a collateral condition. *Day* v. *Day*, 1 Kay, 703; 18 Jur. 1013; 2 W. R. 700.

Semble, that these rules apply also to limitations of personal estate. *Ib.*

A tenant in fee conveyed lands "to H., her heirs and assigns, to hold to H. and her assigns during the life of G." G. was H.'s heir-at-law:—Held, that, after H.'s death, G. was entitled to hold for his life, as special occupant, and that the land did not pass to H.'s executors by the words in the habendum. *Doe* d. *Timmis* v. *Steele*, 4 Q. B. 663; 3 G. & D. 622; 12 L. J., Q. B. 272.

—— **Trustees to Preserve, &c.**]—Estate limited by deed to trustees and their heirs, to preserve, &c., construed an estate pur autre vie, to effect the general intention of the deed. *Beaumont* v. *Salisbury* (*Marquis*), 19 Beav. 198; 3 Eq. R. 369; 24 L. J., Ch. 94; 1 Jur. (N.S.) 458.

An estate was limited to trustees "and their heirs," to preserve contingent remainders, and it was subsequently, and after another life estate, limited to the same trustees for five hundred years to raise portions. It was held, having regard to the clear intention, that the estate to the trustees "and their heirs" must be controlled, and that they took an estate pur autre vie, so as to give effect to the term of five hundred years. *Ib.*

Limitations in a deed to trustees "and their heirs" (without words restricting it to the lives of preceding tenants for life), upon trust to preserve contingent remainders:—Held, that although the omission of such word was probably an oversight, yet, the instrument being a deed, the court could not construe the limitation as restricted, notwithstanding an estate in fee was a larger estate than was required for the purposes of the trust, and the limitation was repeated in a subsequent part of the deed, and was followed by a term of years in a third party, upon trust to raise portions, and

by a power for the tenants for life to grant leases. *Lewis* v. *Rees*, 3 Kay & J. 132; 26 L. J., Ch. 101; 3 Jur. (N.S.) 12; 5 W. R. 96.

To justify the court in restricting such a limitation by deed to an estate pur autre vie, it must be shown that the intention of the parties, as manifested by the deed, cannot be carried into effect unless the limitation be so restricted. *Ib.*

Distinction in this respect between deeds and wills. In the latter a greater latitude is allowed in the construction of legal terms, the testator being supposed inops consilii. *Ib.*

Nature and Quality of Estate.]—Where a lessee of lands demised to him, his heirs and assigns, for lives, devised the premises for the residue of the term to W. J. L. and his assigns, who died intestate:—Held, that the premises did not go to the heir of W. J. L., but to his personal representative, under the 29 Car. 2, c. 3, s. 12. *Doe* d. *Lewis* v. *Lewis*, 9 M. & W. 662; 11 L. J., Ex. 305; 6 Jur. 375.

Learning as to the nature and quality of estates pur autre vie. *Allen* v. *Allen*, 2 Dru. & W. 307; 1 Con. & L. 427.

A tenant quasi in tail in possession of such an estate has full power over, and may by an act inter vivos, deal with the estate precisely as if there never had been any settlement; but a quasi tenant in tail cannot, without the concurrence of the tenant for life, defeat the subsequent remainders. But if he aliens with the consent of the tenant for life, or obtains a renewal with his concurrence, or if the tenant for life procures a renewal and then conveys to the tenant quasi in tail, this will be sufficient to bar the quasi in tail. *Ib.*

A., seised to him and his heirs, for the life of B., devised to C. without using words of inheritance:—Held, that, on the death of C., B. living, the heir of A. took as special occupant. *Doe* d. *Jeff* v. *Robinson*, 2 Man. & Ry. 249; 6 L. J. (O.S.) K. B. 273. *S. C.*, nom. *Doe* d. *Jeff* v. *Hunter*, 8 B. & C. 296.

If an estate pur autre vie is limited to a man, his heirs, executors, administrators and assigns, and is not devised, it descends to the heir as a special occupant. *Atkinson* v. *Baker*, 4 Term Rep. 229; 2 R. R. 366.

A. being seised in fee of several freehold estates, and also possessed of a leasehold rectory for lives, devised all his manors, messuages, lands, tenements, tithes and hereditaments, and all his real estate whatsoever (except what was thereinafter mentioned and devised), to trustees in strict settlement; he charged his leasehold with rent-charges to two of his younger children, and directed that, when any of the lives dropped, the lease should be renewed, and the names of those two children put in, of whom a son was to have the preference; it was held that the rectory did not pass by the general words of the devise, but that A.'s eldest son and heir took as special occupant on the death of A. *Sheffield* v. *Mulgrave* (*Lord*), 5 Term Rep. 571.

A lady, who was domiciled in Hungary, was entitled as tenant in common with her two sisters, to an annuity charged on land in England for the lives of the three sisters and the longest liver of them. By her will made in Hungary she gave all her personal estate to her executors upon certain trusts:—Held, that the interest of the testatrix in the annuity was an estate pur autre vie, applicable by law in the same manner as personal estate within the Legacy Duty Act, 36 Geo. 3, c. 52, s. 20. *Chatfield* v. *Bertcholdt*, 41 L. J., Ch. 255; L. R. 7 Ch. 192; 26 L. T. 267; 20 W. R. 401.

Held, also, that though this interest was applicable as personal estate, it was not actually personal estate, but, on the contrary, real estate, and consequently that, notwithstanding her foreign domicil, legacy duty was payable on her interest in the annuity by virtue of s. 20. *Ib.*

There can be a special occupant of an equitable estate pur autre vie, although the legal estate is in a trustee. *Reynolds* v. *Wright*, 2 De G. F. & J. 590; 30 L. J., Ch. 381; 7 Jur. (N.S.) 246; 3 L. T. 531; 9 W. R. 211.

Leasehold estates pur autre vie were devised in trust for A., his heirs, sequels in right, executors, administrators and assigns. A. survived the devisor, and being illegitimate, died without heirs and intestate, living the cestui que vie:—Held, that the devised estates passed under 7 Will. 4 & 1 Vict. c. 26, s. 6, to A.'s administrator (the nominee of the crown). *Ib.*

An estate by wrong can never be an estate pur autre vie. *Penny* v. *Allen*, 7 De G. M. & G. 409; 3 Jur. (N.S.) 273; 5 W. R. 303.

An estate pur autre vie created by a will passes on the death of the grantee to his executor or administrator under s. 6 of the Wills Act, 1837, unless the will expressly or impliedly designates a special occupant. A devise without words of limitation does not import a designation of the grantee's heir as special occupant. *Philpotts* v. *James* (3 Dougl. 425) and *Wall* v. *Byrne* (2 Jo. & Lat. 118) explained. *Sheppard, In re; Sheppard* v. *Manning*, 66 L. J., Ch. 445; [1897] 2 Ch. 67; 76 L. T. 756; 45 W. R. 475.

If an estate is given to A. simply during the life of B., and A. dies before B., any person getting possession of the land after the death of A. will be entitled to hold it as the general occupant; but if an estate is limited to A. and his heirs during the life of B., a general occupant is not permitted, but the heir will take as special occupant, and not by descent. *Northen* v. *Carnegie*, 4 Drew. 587; 28 L. J., Ch. 930; 7 W. R. 481.

Semble, if an estate is given to A. and his executors and administrators during the life of B., and A. dies first, the executor would be capable of taking the estate as special occupant. In the case of an incorporeal hereditament, limited to A. simpliciter pur autre vie, an executor or administrator may be a special occupant, but there can be no general occupant. *Ib.*

If A., having an estate to himself, his heirs and assigns, during the life of B., conveys the legal interest to trustees, their executors, administrators and assigns, and the trustees die in the lifetime of the cestui que vie, the executors of the trustees will be special occupants, and A. will have no interest in the legal estate. *Ib.*

If A., tenant pur autre vie, parts with the beneficial interest contingently, and the contingency does not happen, then there will be a resulting trust in favour of A. of the interest, which he has not effectually parted with. *Ib.*

The estate of a tenant for life in lands held pur autre vie, cannot merge in the possible estate therein of his heir or executor; the latter being an independent estate, less in value than the former, and not taken by the heir or executor as a remainder upon the previous estate, but as a special occupancy upon the death of the tenant for life. *Pickersgill* v. *Grey*, 30 Beav.

352; 31 L. J., Ch. 394; 8 Jur. (N.S.) 632; 5 L. T. 706; 10 W. R. 207.

In 1865 B., by a written agreement, let to M. a farm, B. "giving him a lease of three lives for thirty-one years." The agreement did not contain any words of limitation. No lease was ever executed, but the lessee entered, and remained in possession till he died, intestate. His heir then entered. The personal representatives of the lessee brought ejectment. The heir filed a bill for an injunction, and prayed that a lease should be executed to him, his heirs, executors, &c., for three lives to be named by him, and for a concurrent term of thirty-one years:—Held, that, under the circumstances, the personal representatives took, under the statute, the interest of the lessee. *M'Dermott* v. *Balfe*, Ir. R. 2 Eq. 440.

—— **Copyholds.**]—Copyhold estates are liable to special occupancy. *Doe* d. *Lampriere* v. *Martin*, 2 W. Bl. 1148.

But there can be no general occupancy of a copyhold. *Zouch* d. *Forse* v. *Forse*, 7 East, 186; 3 Smith, 191.

The 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9, appropriating estates pur autre vie, where there is no special occupant, do not extend to copyholds. *Ib.*

2. PRODUCTION OF THE CESTUI QUE VIE.

In what Cases.]—Married woman, tenant for life, with remainders over, ordered to be produced. *Grant, Ex parte*, 6 Ves. 512.

Proceedings, under the act of 6 Anne, c. 18, to compel production of cestui que vie. *St. Aubyn, Ex parte*, 2 Cox, 373.

A lessee for years, determinable on lives, having paid an advanced rent during a dispute whether the last cestui que vie, who had been many years absent from the realm, was alive, and a demand of a farther advanced rent being made by the lessor, on a bill by the lessee to recover those payments, a commission to examine witnesses to prove the cestui que vie still living was used, the plaintiff paying into court the arrears and accruing payments of the advanced rent, which he had been accustomed to pay. *Brown* v. *Petre*, 2 Swan. 235.

There being no satisfactory proof that the persons were living for whose lives certain hereditaments were held, the court, on the application of the remainderman, made an order under the 6 Anne, c. 18, s. 1, requiring the tenant pur autre vie to produce the persons in question at a time and place specified in the order. *Clossey, In re*, 2 Sm. & G. 46; 2 Eq. R. 52; 18 Jur. 222; 2 W. R. 183.

Real estate stood limited to D. for life; remainder to A. in fee. D. assigned his life estate. Some time afterwards it became doubtful whether D. was living or not, and there was evidence that when last seen he was apparently hopelessly ill. The court, on the application of A., made an order under 6 Anne, c. 18, requiring the assignees of the life estate to produce D., at the time and place and to the persons mentioned in the order, although there was no allegation in the affidavit that the death of the cestui que vie was concealed by them. *Dennis, In re*, 7 Jur. (N.S.) 230; 8 W. R. 649.

Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a cestui que vie to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production. *Owen, In re*, 48 L. J., Ch. 248; 10 Ch. D. 166; 27 W. R. 305.

Under 6 Anne, c. 18, an assignee of the life interest of a tenant for life, can be required to produce his cestui que vie at the bar of the court, and, failing such production, the cestui que vie will be deemed to be dead. *Hall, In re, Castledine, Ex parte*, 44 L. T. 469; 29 W. R. 521.

When a cestui que vie of a lease for lives was not forthcoming, and there was good reason for supposing him to be dead, the court, on an application of those entitled in remainder, ordered him to be produced by the lessee at the bar of the court; or, for the purposes of the application, to be assumed to be dead. *St. John's Hospital, In re*, 18 L. T. 112; 16 W. R. 556.

Money was payable to a tenant pur autre vie under a policy, after proof, to the satisfaction of directors of the cestui que vie. An order was made under 6 Anne, c. 72, that the cestui que vie ought to be deemed and taken to be dead under the statute, and the remaindermen entered:—Held, that the directors might reasonably require further evidence of the death of the cestui que vie. *Doyle* v. *City of Glasgow Life Assurance Co.*, 53 L. J., Ch. 527; 50 L. T. 323; 32 W. R. 476.

Under the statute 6 Anne, c. 18, the court has power to made an order for the production of a cestui que vie as well upon a person having an interest determinable on a life, as on a person having an estate pur autre vie strictly so called. *Stevens, In re*, 55 L. J., Ch. 433; 31 Ch. D. 320; 54 L. T. 80; 34 W. R. 268.

A testator devised land to A., her heirs and assigns; but in the case she should die without leaving issue living, then to B. A. sold the land to C., and disappeared:—Held, that B. was entitled to call upon C. to produce A., under 6 Anne, 3. 18, notwithstanding that B.'s interest arose under an executory devise, and that it arose, not on A.'s death simpliciter, but on A.'s death without leaving issue living. *Pople, In re, Baker, Ex parte*, 58 L. J., Ch. 372; 40 Ch. D. 589; 60 L. T. 668; 37 W. R. 554.

The master of the rolls had no jurisdiction under the 6 Anne, c. 18, for the production of the tenant for life. *Meyrick* v. *Lowes*, 23 Beav. 449; 5 W. R. 746.

Enlarging Time for Production.]—Where a cestui que vie of a lease for lives, who has been ordered to be produced, was not forthcoming, but there was reasonable evidence of his existence, the court extended the time for his production. *St. John's Hospital, In re*, 18 L. T. 317; 16 W. R. 670.

Expenses of Production.]—The court has no power to order a remainderman expectant upon the determination of an estate pur autre vie, to pay to the tenant pur autre vie the expenses of producing the cestui que vie under the act 6 Anne, c. 18. *Isaac, In re*, 4 Myl. & C. 11.

Practice—Course of Proceeding.]—An order was made, ex parte, under the statute 6 Anne, c. 18, on the application of a person entitled in fee, subject to a lease for lives, that the lessee should produce the cestui que vie at a place and time and before persons named in the order. *Whalley, Ex parte*, 4 Russ. 561. S. P., *Owen, In re*, supra.

Course of proceeding under 6 Anne, c. 18, to compel a lessee pur autre vie to produce the cestui que vie to the reversioner. *Lingen, In re*, 12 Sim. 104.

Order to produce cestui que vie before commissioners, or the court, granted on motion, although notice of the motion had not been served on the tenant pur autre vie. *Abergavenny (Lord), Ex parte*, 6 N. R. 335.

—— **Evidence.**]—Where an application is made under the statute 6 Anne, c. 18, s. 1, to the party in possession of an estate for the production of a cestui que vie to the person entitled to the estate in remainder, and the party in possession does not respond to the application, the applicant is entitled to an order for production. *Owen, In re*, 48 L. J., Ch. 248; 10 Ch. D. 166; 27 W. R. 305.

E. ESTATE AT WILL.

Assignment.]—An estate at will is not assignable. *Murphy* v. *Ford*, 5 Ir. C. L. R. 19.

F. CUSTOMARY ESTATES.

1. GAVELKIND.

a. General Incidents.

Ouster.]—The possession of one co-heir in gavelkind is not the possession of the other, where he enters with an adverse intent to oust the other. *Devonport* v. *Tyrrel*, 1 W. Bl. 675.

A father was entitled in fee to an undivided moiety of gavelkind land, the other moiety of which belonged to his wife in fee. She died in May, 1870, leaving two sons, Samuel and John. John was then an infant. He attained twenty-one in 1877, and died in May, 1884. On the mother's death her moiety descended to her two sons in equal shares, but the father was by that custom entitled to a moiety of the rents so long as he remained a widower. On the mother's death he entered into the receipt of the whole of the rents of her moiety, and continued in possession, without accounting to his sons or acknowledging their title in writing, for more than twelve years. On the death of John in 1884, his interest descended to his brother Samuel as heir of the mother. In February, 1884, the father re-married and died in November 1884:—Held, that, as to one-eighth of the property to which John became entitled in possession on the death of his mother, the father must be taken to have entered into receipt of the rents as bailiff for his infant son, and that consequently the title of John was not barred by the Statute of Limitations, and that his brother Samuel was entitled to that one-eighth. But held, that, as to Samuel's own one-eighth the same presumption did not arise, and that, as there was no evidence that the father had received the rents as agent for Samuel, or had, before the expiration of the statutory period, acknowledged his title in writing, or accounted to him for the rents, the title to that one-eighth was barred by the statute. Consequently, Samuel was entitled to three-eighths of the whole property, and the remaining five-eighths passed under the father's will. *Hobbs, In re, Hobbs* v. *Wade*, 57 L. J., Ch. 184; 36 Ch. D. 553; 58 L. T. 9; 36 W. R. 445.

Disgavelling—Evidence.]—As to the evidence to shew that lands had been disgavelled by a private act of parliament, see *Doe* d. *Bacon* v. *Brydges*, 6 Man. & G. 282; 7 Scott (N.R.) 333; 13 L. J., C. P. 209.

Distress.]—One of several co-heirs in gavelkind may distrain for rent due to him and his companions without an actual authority from his companions. *Leigh* v. *Shepherd*, 2 Br. & B. 465; 5 Moore, 297; 23 R. R. 516.

Dower.]—The 3 & 4 Will. 4, c. 105 (Dower Act), extends to lands of gavelkind tenure. *Farley* v. *Bonham*, 2 Johns. & H. 177; 30 L. J., Ch. 239; 7 Jur. (N.S.) 232; 3 L. T. 806; 9 W. R. 299.

Exchange—Gavelkind and Socage Lands.]—Under 8 & 9 Vict. c. 118, s. 47, the inclosure commissioners have power to confirm an exchange of gavelkind lands in Kent for common socage lands in Middlesex. *Minet* v. *Leman*, 7 De G. M. & G. 340; 3 Eq. R. 783; 24 L. J., Ch. 545; 1 Jur. (N.S.) 692; 3 W. R. 580.

b. Descent.

In customary descent the ordinary incidents of descents attach to the custom. Therefore, in gavelkind descent, the jus representationis applies to the remoter issue as well as to the sons of the intestate's brothers. *Hook* v. *Hook*, 1 H. & M. 43; 1 N. R. 85; 32 L. J., Ch. 14; 9 Jur. (N.S.) 42; 7 L. T. 501; 11 W. R. 105.

An intestate had one brother, who died in his lifetime. The brother (besides a son who died without issue in the intestate's lifetime) had two sons; the elder, who died in the intestate's life, leaving two sons, and the younger who survived the intestate:—Held, that gavelkind lands of the intestate descended, as to one moiety, to the brother's younger son, and as to the other, to the two sons of the brother's eldest son equally. *Ib.*

c. Law and Custom.

Limitation to Right Heirs.]—A testator seised of lands in common socage, and of other lands in gavelkind, desired everything to remain in its then present position during his wife's life, for her use; and after her decease, devised his real estate to his then male heir and his heirs, in strict tail male:—Held, that the lands in gavelkind, as well as those in common socage, passed to the testator's heir at common law. *Thorp* v. *Owen*, 2 Sm. & G. 90; 2 Eq. R. 392; 23 L. J., Ch. 286; 18 Jur. 641; 2 W. R. 208.

On a devise of freehold and leasehold lands in Kent, in strict settlement, with an ultimate limitation to the testator's own right heirs, the will also containing a similar disposition of other leaseholds in Kent, not the subject of the suit, the common law heir is entitled. *Sladen* v. *Sladen*, 2 Johns. & H. 369; 31 L. J., Ch. 775; 7 L. T. 63; 10 W. R. 597.

A testator devised gavelkind lands to "William G., the eldest son of my nephew, J. G.," for life with remainder to such issue of William G. as in the will mentioned, and in default of such issue to his own right heirs. The nephew, J. G., had at the date of the will, and at the testator's death, two sons, of whom William G. was the youngest:—Held, that the devise was to William G., and that on his death without issue the land passed to the common law heirs of the testator, and not to his gavelkind heirs. *Garland* v.

Beverley, 47 L. J., Ch. 711; 9 Ch. D. 213; 38 L. T. 911; 26 W. R. 718.

By a voluntary settlement A. and his cousin limited certain gavelkind lands to a relative, C., for life, with remainder to her issue, and for default of such issue, "to the use of the right heirs of E., deceased, and J."—who was then living—"the two sisters of the said A., their heirs and assigns as tenants in common for ever": —Held—the court declining to read the limitation as a limitation to "the right heirs of E., deceased, and of J."—that J. herself took a vested remainder in fee simple in a moiety of the property expectant on the death of C. without issue; and, accordingly, that on the death of C., who survived J., and died without issue, the moiety passed to J.'s co-heirs in gavelkind. *Hawes* v. *Hawes*, 14 Ch. D. 614; 43 L. T. 280.

Limitation to Heirs of the Body.]—Testator being seised in fee of lands in gavelkind devised all his real estate to his nephew, T. C., for and during the term of his natural life, and from and after the determination of that estate to trustees to preserve contingent remainders, and from and after the decease of T. C. to and amongst all and every the heirs of the body of the said T. C. as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint tenants, and for default of such issue to trustees for a term of 500 years, upon trust that they should as soon as might be after the decease of T. C., in case he should die without issue of his body lawfully begotten, raise a sum of money to be applied to the maintenance of his niece, and after the determination of the said term of 500 years he devised the same to his T. C. and C. C. for and during their respective natural lives, to take as tenants in common, and not as joint tenants, and from and after their respective deceases, unto and amongst all and every the heirs of the respective bodies of the said T. C. and C. C., as well female as male, lawfully begotten or to be begotten, such heirs to take as tenants in common and not as joint tenants, and in default of such issue to his own right heirs for ever:—Held, that T. C. took an estate tail in the devised premises. *Doe* d. *Bosnall* v. *Harvey*, 4 B. & C. 610; 7 D. & R. 78; 4 L. J. (O.S.) K. B. 18.

Lands in Kent.]—A rectory in Kent, formerly belonging to one of the dissolved monasteries, having been granted by Henry VIII. to a layman, to be holden in fee by knight's service in capite: —Held, that the lands were descendible according to the custom of gavelkind, but the tithes according to the common law. *Doe* d. *Lushington* v. *Llandaff* (*Bishop*), 2 Bos. & P. (N.R.) 491; 9 R. R. 682.

Feoffment by Infant.]—A widow was entitled to dower out of gavelkind land of which her three sons (two of whom were infants) were co-heirs. The widow and adult son conveyed by deed to the present vendor, and this conveyance was confirmed by charters of feoffment by the infants on the youngest attaining fifteen years. It appeared that the infants had not received their full share:—Held, that as the two sons were still infants and could not release their rights, the title could not be forced on an unwilling purchaser. *Maskell and Goldfinch's Contract, In re*, 64 L. J., Ch. 678; [1895] 2 Ch. 525; 13 R. 685; 72 L. T. 836; 43 W. R. 620.

2. BOROUGH ENGLISH.

Descent.]—The custom of a manor was stated to be that all copyholds descended to the youngest son or daughter, brother or sister, uncle or aunt. A tenant died intestate seised of customary lands of the manor, leaving neither son, daughter, brother, sister, uncle, nor aunt; but leaving sons of deceased uncles:—Held, that the youngest son of the youngest uncle was not entitled, and that the heir-at-law was entitled to the lands. *Smart, In re, Smart* v. *Smart*, 18 Ch. D. 165; 30 W. R. 43.

According to the custom of descent in the manor of Taunton Deane, a surviving sister is not entitled to inherit in preference to the son of a deceased brother's son. *Locke* v. *Colman*, 2 Mylne & C. 635.

The custom of descent in a manor was in the nature of borough English, the youngest son of the person last seised inheriting in preference to the eldest; and if the youngest son were dead without issue, then the next youngest son; and if no son, the daughters as co-parceners; and if no issue, then the youngest brother of the person last seised, and the youngest son of the youngest brother, if such youngest brother were dead, or if such youngest brother were dead without issue, the next youngest brother; and if no brother, the sisters taking as parceners. There was also one entry of descent and admission in favour of the youngest son of the uncle of the person last seised, and one entry of descent and admission shewing the descent to the youngest sons respectively of two sisters, who were heirs parceners to the person last seised:—Held, that there was no evidence to authorise an extension of the custom of descent in favour of so remote a collateral relative as the youngest son of the youngest brother of the great-grandfather, ex parte maternâ, of the person seised. *Muggleton* v. *Barnett*, 1 H. & N. 282; 26 L. J., Ex. 47; 2 Jur. (N.S.) 1026. Affirmed in the Exchequer Chamber, 2 H. & N. 653; 27 L. J., Ex. 125; 4 Jur. (N.S.) 139; 6 W. R. 182; see 4 Jur. (N.S.) 5, Part 2.

Lands were devised to one for life, remainder to his eldest son, and the legal customary heirs of such eldest or only son for ever, remainder by way of proviso to the daughters as tenants in common in fee, and if the tenant for life left no son or daughter, or issue of a son or daughter living at his death, then over. Part of the property was copyhold, descendible according to the tenure of borough English among issue and collaterals also:—Held, that on the death of one of the daughters of the tenant for life without issue in his lifetime her interests in the copyholds descended to her youngest sister then living, and on the subsequent birth of another sister shifted to her. *Rider* v. *Wood*, 1 K. & J. 644; 3 Eq. R. 1064; 24 L. J., Ch. 737.

And see COPYHOLD.

Devise.]—Devise, after a tenancy for life, of borough English lands for sale, and to divide the moneys among all the testator's sons and daughters which might then be living, and to the heir and heirs of them which might be deceased, share and share alike:—Held, that under the gift to the heirs, the common law and not the heirs in borough English took. *Polley* v. *Polley* 31 Beav. 363.

Devise of copyholds to W. for life, and after

his death to his eldest son, and the legal customary heirs of such eldest or only son for ever provided, that if W. leave no son or issue of a son living at his death, devise to the daughters of W. as tenants in common in fee, and if W. leave no son or daughter, or issue of a son or daughter living at his death, gift over:—Held, that W.'s daughters, during his lifetime, took contingent descendible interests as tenants in common in fee in th edevised estate. *Rider* v. *Wood*, 1 K. & J. 644; 3 Eq. R. 1064; 24 L. J., Ch. 737.

Held, also, that the admission of W. did not enure for the benefit of his daughters, so as to bring them within the seisin. *Ib.*

Another part of the property was copyholds not proved to be descendible according to the tenure of borough English, but by custom the descent was shewn to be to the youngest son or daughter or sister of the copyholder last seised:—Held, that on the death of one of W.'s daughters in his lifetime without issue before she became seised her interest in these copyholds descended, not according to the custom, but to all her sisters as her co-heiresses at law. *Ib.*

Covenant.]—Borough English lands are not applicable in performance of a covenant in marriage articles to settle freehold lands on the first and other sons of the marriage, for it is not the kind of estate intended by the articles. *Pinnel* v. *Hallett*, Ambl. 106.

Law and Custom.]—Settlement before marriage on the husband and wife for life (of a freehold), remainder to the heirs of the husband and wife, and of a copyhold in borough English on the husband and wife for life, remainder to the heirs of their two bodies, in like manner, and to the same uses as the freehold:—The younger son shall succeed as heir in tail to the copyhold. *Roe* d. *Aistrop* v. *Aistrop*, 2 W. Bl. 1228.

G. CO-PARCENERS, JOINT TENANTS AND TENANTS IN COMMON.

1. Co-parceners.

Ouster.]—A feoffment by one parcener, who occupies alone under a general entry, operates as a conveyance of her own purparty, and as a deforcement of her co-parceners. *Doe* d. *Read*, or *Reed* v. *Taylor*, 2 N. & M. 508; 5 B. & Ad. 575; 3 L. J., K. B. 67.

Descent.]—*See* cols. 228, 231, ante.

Limitation to Right Heirs.]—Under the ultimate limitation in a settlement the equitable fee in real estate was limited to the "right heirs" of C., who had never had any estate in the property. C. was dead at the date of the settlement, and his right heirs at the date of his death were three sisters and five daughters of a deceased sister. The preceding limitations all failed:—Held, that the persons who were the right heirs of C. at his death took as personæ designatæ, and as joint tenants, and not as co-parceners with descent from them as such. *Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 356.

Entry.]—Where the entry upon a claim by one of several co-parceners, who make but one heir, is lawful, such entry made will generally vest the seisin in all as the entry of all. *Doe* d. *Gill* v. *Pearson*, 6 East, 173; 2 Smith, 295; 8 R. R. 447. S. P., *Doe* d. *Daniell* v. *Woodroffe*, 10 M. & W. 608; 12 L. J., Ex. 147.

2. Joint Tenants.

Limitation of Estate—By Deed.]—Settlement to permit "all and every the children to take rents, &c., to them and their heirs for ever," they are joint tenants, not tenants in common. *Stratton* v. *Best*, 2 Bro. C. C. 233.

Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction, as in partnership, a joint mortgage, &c. *Morley* v. *Bird*, 3 Ves. 628; 4 R. R. 106.

Conveyance to two persons, habendum to them their heirs and assigns as tenants in common, and not as joint tenants, to the use of them their heirs and assigns, they are tenants in common and not joint tenants, as the Statute of Uses does not operate. *Doe* d. *Hutchinson* v. *Prestwidge*, 4 M. & S. 178; 18 R. R. 436.

Under the ultimate limitation in a settlement, the equitable fee in real estate was limited to the "right heirs" of C., who had never had any estate in the property. C. was dead at the date of the settlement, and his right heirs at the date of his death were three sisters and five daughters of a deceased sister. The preceding limitations had failed:—Held, that the persons who were the "right heirs" of C. at his death took as personæ designatæ, and as joint tenants, and not as co-parceners with descent from them as such. *Berens* v. *Fellowes*, 56 L. T. 391; 35 W. R. 356.

A fund settled on the husband and wife "during their joint and natural lives":—Held, to be construed "during their joint lives, and the life of each of them." *Smith* v. *Oakes*, 14 Sim. 122.

Lands are settled to the use of the husband and wife for their lives, remainder to the heirs of both their bodies. The children of this marriage are joint tenants, and if any one dies before severance, his share shall survive to the others. *Staples* v. *Maurice*, 4 Bro. P. C. 580.

—— **Joint Purchases and Investments.**]—A joint purchase by two, to them and their heirs, with equal payments, creates a joint tenancy; and there is therefore a survivorship between them. *Aveling* v. *Knipe*, 19 Ves. 441; 13 R. R. 240.

Tenants in common of a mortgage term joining in a purchase of the equity of redemption to them and their heirs are tenants in common of the inheritance. *Ib.*

At the death of a testator two sums of stock which had been purchased by him and his sister were standing in their joint names. One had been purchased by them equally, but much the greater part of the other had been purchased by the sister, who was still living:—Held, that the sister was entitled, by survivorship, to both sums. *Harris* v. *Fergusson*, 16 Sim. 308.

Where two executors are joint tenants of the residue of the testator's personal estate, their employing part of it in trade for their mutual benefit does not amount to a severance as to the whole. *Hall* v. *Digby*, 4 Bro. P. C. 577.

If joint tenants of leasehold or freehold lay

out money jointly upon it, in the way of trade, there is no survivorship. *Lyster* v. *Dolland*, 1 Ves. J. 435.

In the absence of any provision in a deed of settlement to the contrary, the purchase of shares in a bank in the joint names of A. and B., with moneys belonging solely to A., upon the death of A. vests the legal right to the shares in B. *Garrick* v. *Taylor*, 29 Beav. 79; 30 L. J., Ch. 211; 7 Jur. (N.S.) 116; 3 L. T. 460; 9 W. R. 181. Affirmed 4 De G. F. & J. 159; 31 L. J., Ch. 68; 7 Jur. (N.S.) 1174; 5 L. T. 404; 10 W. R. 49.

Two sisters, spinsters, executrixes, and beneficiaries under their father's will, transferred a portion of the funds bequeathed to them as tenants in common into their joint names, and afterwards, out of the proceeds of that of which they were tenants in common, purchased stock in their joint names. They lived together, had all things in common, and made mutual wills in each other's favour:—Held, first, that the transfer made them joint tenants of the fund transferred. *Hughes' Trusts, In re*, 24 L. T. 415; 19 W. R. 468.

Held, secondly, that they were joint tenants of the stock afterwards purchased, though purchased out of the proceeds of a fund of which they were tenants in common. *Ib.*

Where A. and B., sisters, living together, and apparently intending to live always together, having a common source of income, made each, from time to time, investments in new three per cents., which were transferred into their joint names, and on which they received the dividends for their common use:—Held, that the proper inference was (in the absence of any inconsistent circumstances), that a joint tenancy was intended. *Rowe, In re, Jacobs* v. *Hind*, 61 L. T. 581—C. A.

On a purchase by two persons contributing equally to the cost of it, parol evidence of surrounding circumstances and of subsequent dealings is, notwithstanding the Statute of Frauds, admissible to prove an intention to hold in severalty. But, semble, parol evidence of statements of intention is not admissible. *Harrison* v. *Barton*, 1 J. & H. 287; 30 L. J., Ch. 213; 7 Jur. (N.S.) 19; 9 W. R. 177.

—— **By Will.**]—*See* WILL.

—— **In other Cases.**]—A sum of money was remitted to England to be secured for the benefit of a married woman and her children, so that the same might not come to the hands of her husband:—Held, that they took as joint tenants. *Bustard* v. *Saunders*, 7 Beav. 92; 7 Jur. 986.

—— **Evidence to prove Tenancy in Common.**]—*See* col. 335, post.

Of Renewable Leaseholds—Fine.]—A fine for the renewal of a lease by one of two tenants, jointly holding see lands, creates a lien on the other moiety, though under settlement. *Hamilton* v. *Denny*, 1 Ball & B. 199; 12 R. R. 14.

—— **Forfeiture.**]—Where A., holding under a lease for lives renewable for ever, containing a covenant, that he should within three months after the fall of each life give notice thereof, in writing, to his landlord, and within six months pay the renewal fine of 40*l.* 12*s.* 6*d.*, on the fall of each life, demised to B., at an increased rent for the same term, and with a similar covenant to pay the same renewal fine:—Held, that it is not sufficient for A., in order to work a forfeiture of B.'s interest, to shew that in a conversation about the renewal after the falling of the lives, B. objected to pay the renewal fines until A. should first procure a renewal from his head landlord; but there should have been a distinct demand upon B., calling upon him to pay the fines: semble, also, that where there are joint tenants, a demand made upon one only will not be sufficient to work a forfeiture of the interest. *John* v. *Armstrong*, Ll. & G. t. Plunk. 392.

If a demand be not made on the co-lessee even if proved to have been made on one, will not be sufficient to attach fraud on the other. *Ib.*

Expenditure—Lien.]—A. and B. were joint owners of a house, and A. had laid out on it moneys he had obtained from B.:—Held, that B. had no lien on the house for the amount. *Kay* v. *Johnston*, 21 Beav. 536.

—— **Foreclosure.**]—When A. and B., jointly interested in a policy of assurance, agreed to keep it up for their mutual benefit, paying the premium in certain proportions, and B. ceasing to pay his portion of the premium, the whole was paid by A.:—Held, that he was entitled to a foreclosure decree against B. *Parker* v. *Anglesea* (*Marquis*), 25 L. T. 482; 20 W. R. 162.

Partition.]—A specific performance of an agreement between joint tenants of copyhold estate for partition enforced, and a decree for mutual surrenders, although no jurisdiction to decree partition of copyholds before 4 & 5 Will. 4, c. 35. *Bolton* v. *Ward*, 4 Hare, 530; 14 L. J., Ch. 361; 9 Jur. 591.

Survivorship.]—If joint tenants die at same moment, estate remains in same nature to heirs. *Bradshaw* v. *Toulmin*, Dick. 633.

Account.]—In an action of account by a joint tenant, or a tenant in common, against his co-tenant, it is necessary to allege that he has received more than his share of the rent; he is not chargeable as a bailiff at common law. *Sturton* v. *Richardson*, 2 D. & L. 182; 13 M. & W. 17; 13 L. J., Ex. 281; 8 Jur. 476.

Severance.]—Where two executors are joint tenants of the residue of the testator's personal estate, their employing part of it in trade for their mutual benefit, does not amount to a severance as to the whole. *Hall* v. *Digby*, 4 Bro. P. C. 577.

Joint tenant devises his moiety, and afterwards the jointure was severed; nothing passed by the will. *Swift* v. *Roberts*, Ambl. 617; 3 Burr. 1488; 1 W. Bla. 467.

A fine or recovery by one joint tenant severs the joint tenancy, and operates on a moiety. *Moody* v. *Moody*, Ambl. 650.

A dormant surrender operates as a severance of a joint tenancy, though it is revocable during the lifetime of the surrenderor. *Gale* v. *Gale*, 2 Cox, 136.

Two executors being entitled as joint tenants to a mortgage debt, part of the residue of the testator's estate, one of them pledges the mortgage deed to A., as an indemnity against a future liability:—Held, that this was a severance of the joint tenancy of the executors in this debt. *Watkinson* v. *Hudson*, 4 L. J. (O.S.) Ch. 213; 27 R. R. 263.

Two women being joint tenants of copyhold lands, one of them and her husband surrendered their estate and interest, to the intent that the lord should regrant the same to such person or persons as the husband should by will appoint. The wife died in the lifetime of her husband and sister. The husband afterwards died, having by his will appointed the surrendered share to his executors :—Held, that there was no severance of the joint tenancy. *Edwards* v. *Champion*, 3 De G. M. & G. 202 ; 1 Eq. R. 419 ; 23 L. J., Ch. 123 ; 1 W. R. 497.

The several receipts by joint tenants of a portion of a trust fund does not destroy the joint tenancy as to the remainder of the fund. *Leak* v. *M'Dowall*, 32 Beav. 28.

Several legatees entitled to a sum of money as joint tenants in remainder expectant on the decease of a tenant for life, joined in mortgaging the share of one of them to the trustee of the fund, in consideration of an advance, and they jointly and severally covenanted with the trustee that if the money advanced should be more than the mortgage share, the covenanting parties respectively, and their respective heirs, executors and administrators, would not demand from the trustee more than he should have in hand without reckoning the sum advanced, and would indemnify him against all costs or damages in consequence of the advance so made :—Held, that this amounted to a severance of the joint tenancy as regarded all the shares. *Williams* v. *Hensman*, 1 John. & H. 546 ; 30 L. J., Ch. 878 ; 7 Jur. (N.S.) 771 ; 5 L. T. 203.

By a marriage settlement to which the intended husband and wife were parties, after reciting that upon treaty for the marriage it had been agreed that the property, "as well real as personal," to which the intended wife "is entitled and may be entitled," should be held upon certain trusts, and that it had been further agreed that the intended husband should enter into a covenant "for settling the last-mentioned real and personal property for the purposes last aforesaid," the indenture witnessed that the intended husband covenanted with the trustees that all the estate and effects, both real and personal, of which the intended wife "is now seised and possessed, or of which she shall hereafter become seised or possessed," should be settled. At the date of the settlement the intended wife and her two sisters were joint tenants in fee of real estate, in reversion expectant on the death without issue of their brother. Similar settlements were made on the marriages of the other two sisters. All three sisters and their husbands died in the lifetime of their brother, who died without issue. No settlements were ever made in fulfilment of the covenants :—Held, that the joint tenancy had been severed by the settlements. *Caldwell* v. *Fellowes*, 39 L. J., Ch. 618 ; L. R. 9 Eq. 410 ; 22 L. T. 225 ; 18 W. R. 486.

Leasehold property was given by will to two sisters as joint tenants, and they mutually agreed to bequeath it in trust for each other for life, and for their nieces after the death of the survivor. One sister having died, the survivor made a will giving the property in a different manner :—Held, that the agreement between the sisters, carried out by the making of the wills, severed the joint tenancy, and that the property must be administered on the footing of a tenancy in common. *Wilford's Estate, In re, Taylor* v. *Taylor*, 48 L. J., Ch. 243 ; 11 Ch. D. 267 ; 27 W. R. 455.

By their marriage settlement the intended husband and wife each covenanted to settle any personal estate which should, during the coverture, vest in the wife or in the husband in her right. At that time the wife was entitled, as one of two joint tenants, to personal estate in expectancy on the death of a person who died during the coverture :—Held, that the marriage and the covenant to settle each operated to sever the joint tenancy. *Baillie* v. *Treharne*, 50 L. J., Ch. 295 ; 17 Ch. D. 388 ; 44 L. T. 247 ; 29 W. R. 729.

A joint tenancy in freeholds and leaseholds is not severed by the marriage of a female joint tenant. A subsequent demise by the husband of such female joint tenant and the other joint tenant will not effect a severance. *Palmer* v. *Rich*, 66 L. J., Ch. 69 ; [1897] 1 Ch. 134 ; 75 L. T. 484 ; 45 W. R. 205.

A. and B., being entitled as joint tenants to an equitable interest in a chattel term expectant on the death of X., concurred in a deed by which the entire legal interest in the term was vested in A., in trust for X. for life, with an executory limitation over in favour of A. and B. :—Held, upon the death of X. in the lifetime of A. and B., that the equitable interest in the one undivided moiety to which A. became entitled in possession was absorbed in the legal estate already vested in him, and that the joint tenancy between A. and B. was thereby severed. *Conolly* v. *Conolly*, Ir. R. 1 Eq. 376.

Where the portions of land occupied by each of two joint tenants had been separated by a ditch, evidence given after the death of one of them, that the deceased had borrowed a sum of money for a third party, and had "handed him over his share of the land as security—he did it by deed," and that thereupon the lender had entered into possession thereof, and had remained therein for six years, is evidence to go to a jury of a severance of the joint tenancy. *Harris* v. *Harris*, Ir. R. 3 C. L. 294.

—— **By Covenant.**]—Covenant by a joint tenant to sell severs the joint tenancy in equity, though not at law. *Brown* v. *Raindle*, 3 Ves. jun. 257.

—— **By Parol.**]—A letter from A. to B., in which A. engages to secure to B.'s family, in any way B. may desire by his will, a moiety of a fund, in which A. and B. are interested as joint tenants, is a severance of the joint tenancy. *Gould* v. *Kemp*, 2 Myl. & K. 304.

—— **By carrying over Fund in Court.**]—A fund had been carried over in the action to the separate account of the "infant plaintiffs as joint tenants" :—Held, that there had not been any severance of the joint tenancy. *Wilks, In re, Child* v. *Bulmer*, 60 L. J., Ch. 696 ; [1891] 3 Ch. 59 ; 65 L. T. 184 ; 40 W. R. 13.

By a marriage settlement made in 1880 the intended husband and wife covenanted to settle the wife's after-acquired property. Under a voluntary settlement executed in 1883 the wife took a share of personal property as joint tenant : —Held, that the covenant to settle after-acquired property severed the joint tenancy created by the subsequent settlement. *Hewett, In re, Hewett* v. *Hallett*, 63 L. J., Ch. 182 ; [1894] 1 Ch. 362 ; 8 R. 70 ; 70 L. T. 393 ; 42 W. R. 233.

—— **By Contract for Sale.**]—Where a contract for sale severed a joint tenancy. See *Kingsford* v. *Ball*, 2 Giff. (App.) i.

—— **By Infant's Settlement.**]—A marriage settlement cantained a proviso for the settlement of the present and after-acquired property of the intended wife, who was an infant. She was then entitled in remainder jointly with two others to a share in bank annuities standing in the names of trustees :—Held, that the joint tenancy was severed. *Burnaby* v. *Equitable Reversionary Interest Society*, 54 L. J., Ch. 466 ; 28 Ch. D. 416 ; 52 L. T. 350 ; 33 W. R. 639.

—— **Of Income.**]—A joint tenancy in income is severed as to each instalment as it becomes payable, without actual payment. *Walmsley* v. *Fowhall*, 40 L. J., Ch. 28.

The mere fact that the rents of several properties held in joint tenancy were collected by the husband during his wife's lifetime, and that they were treated as a common fund for the maintenance and benefit of both husband and wife and the other joint tenant, is not a course of dealing sufficient to intimate an intention of constituting a tenancy in common. *Palmer* v. *Rich*, 66 L. J., Ch. 69 ; [1897] 1 Ch. 134 ; 75 L. T. 484 ; 45 W. R. 205.

—— **By Conduct.**]—Construction of will giving a vested interest, though subject to contingent charge, and creating a tenancy in common as to part of the property, and as to the residue a joint tenancy, there being nothing to control the legal effect of the words. *Jackson* v. *Jackson*, 7 Ves. 535.

But on appeal, it was held, that though by residuary disposition to testator's two sons, "and the survivor, their or his heirs, executors, &c.," they took, as joint tenants, the leasehold and personal estate embarked in trade, upon all the circumstances, the transactions for twelve years as between themselves, a severance was to be implied, both as to the profits and the capital. *S. C.*, 9 Ves. 591.

Joint tenancy in a residue of personal estate held to have been severed in equity ; all parties having, during their lives, acted with respect to it, under the supposition that they were entitled to it in common. *Wilson* v. *Bell*, Ir. R. 5 Eq. 501.

A testator devised certain properties to his sons, A., B., C., D., and E., respectively, as tenants in common, and appointed them residuary legatees :—Held, that they took the residue as joint tenants. For a number of years the dividends of the residue (which had been invested in stock), were paid in one-fifth shares to them, or, as each one of them died, to their personal representatives. E. survived and claimed the entire fund as surviving joint tenant :—Held, that the joint tenancy had been severed. Modes in which a joint tenancy may be severed. *Wallis' Trusts, In re*, 23 L. R., Ir. 460.

—— **Of Chose in Action — Severance by Marriage.**]—Marriage will only operate as a severance of a wife's joint tenancy when it would by itself, without the necessity of any act of the husband, have the effect of divesting the wife's property out of her and vesting it in her husband. Consequently, it is no severance of her joint tenancy in a chose in action, whether it be in possession or reversion. *Baillee* v. *Treharne* (17 Ch. D. 388) disapproved. *Butler, In re, Hughes* v. *Anderson*, 57 L. J., Ch. 643 ; 38 Ch. D. 286 ; 59 L. T. 386 ; 36 W. R. 817—C. A.

Other Matters—Action on a Bond—Plea of Accord and Satisfaction made to one Obligee.]—In equity joint creditors are primâ facie tenants in common. A defence of accord and satisfaction with one of two joint creditors in an action by both is a good answer as an equitable defence to the claim of the joint creditor to whom satisfaction was made ; but it is no answer to the claim of the other. *Steeds* v. *Steeds*, 58 L. J., Q. B. 302 ; 22 Q. B. D. 537 ; 60 L. T. 318 ; 37 W. R. 378.

3. Tenants in Common.

Limitation of Estate—In a Deed.]—The words "equally to be divided" in a deed of uses, makes a tenancy in common. *Goodtitle* d. *Hood* v. *Stokes*, 1 Wils. 341.

Conveyance to two persons, habendum to them, their heirs and assigns as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns, they are tenants in common and not joint tenants, as the Statute of Uses does not operate. *Doe* d. *Hutchinson* v. *Prestwidge*, 4 M. & S. 178 ; 16 R. R. 436.

Tenants in common of a mortgage term, joining in a purchase of the equity of redemption to them and their heirs, are tenants in common of the inheritance. *Aveling* v. *Knipe*, 19 Ves. 441 ; 13 R. R. 240.

Notwithstanding the leaning of late to a tenancy in common, an interest given to two or more, either by way of legacy or otherwise, is joint, unless there are words of severance, as "equally among," &c., or an inference of that sort arises in equity from the nature of the transaction, as in partnership, a joint mortgage, &c. *Morley* v. *Bird*, 3 Ves. 628 ; 4 R. R. 106.

On articles previous to the marriage of W. with R., the father of W. bound the whole of the farm of, &c., as a marriage portion to his son W., along with R., the one half of said farm to be the right, title and interest of the issue, whether son or daughter, if begotten on the body of R. by W. The issue take as tenants in common. *Taggart* v. *Taggart*, 1 Sch. & Lef. 84 ; 9 R. R. 19.

A. having been indebted to the estate of B., in a sum of money, but from which he had been discharged under a commission of bankruptcy, voluntarily executed to C., the widow of B., a bond for the payment of part of such debt, for the use of herself and children but at her disposal. Two years afterwards A. executed to C. another bond for the payment of the remainder of such debt, for the use and benefit of herself and children only, in what proportion among the latter she may think proper to direct, but for no other use, purpose or intent whatsoever :—Held, that the principal, after the widow's decease, became payable among the children, in such manner, and in such proportions, as she should direct, and the widow having made an exclusive appointment in favour of two of her children, it was held that such appointment was void, and that all the children took as tenants in common. Though generally speaking an instrument must be construed by the provisions contained in it, and not by anything dehors, yet under the circumstances of this case :—Held, that the court might call the language of the second bond in to aid in

construing the effect of the first. Where there is a general power of appointment among children, and the appointment from any circumstance becomes void, the children take as tenants in common. *Fowler* v. *Hunter*, 3 Y. & J. 506.

Settlement to permit "all and every the children to take rents, &c., to them and their heirs for ever," they are joint tenants, not tenants in common. *Stratton* v. *Best*, 2 Bro. C. C. 233.

Leaseholds were conveyed to trustees, and it was declared, that when the settlor's eldest son attained twenty-one, they should be in trust for him, and that the same should be assigned accordingly; but so that the settlor's wish that his other children "might be allowed by the eldest son to participate with him in the same," should be observed by him:—Held, that the younger children were entitled to equal shares with the eldest as tenants in common. *Liddard* v. *Liddard*, 28 Beav. 266; 29 L. J., Ch. 619; 6 Jur. (N.S.) 439; 2 L. T. 200.

—— **In a Will.**]—*See* WILL.

—— **Admissibility of Evidence.**]—To establish a tenancy in common by use and enjoyment, acts of ownership by all the alleged tenants in common, in various parts of the lands indifferently, must be proved. *Tisdall* v. *Parnell*, 14 Ir. C. L. R. 1.

Parol evidence, to be admissible to shew that a contract to purchase apparently as joint tenants was in reality a contract to purchase as tenants in common, must be confined, as evidence to vary an instrument is, to facts in pais, as distinguished from statements of intention. *Harrison* v. *Barton*, 1 J. & H. 287; 30 L. J., Ch. 213; 7 Jur. (N.S.) 19; 9 W. R. 177.

A. directed that his two sons should have the option of purchasing his property at a specified price upon signifying in writing within a certain time their acceptance of the privilege. The sons wrote a joint letter signifying their acceptance of the option to purchase. No conveyance was executed, but instructions were given, and a draft prepared for a conveyance to the sons as tenants in common. Voluntary settlements were simultaneously executed by the sons, each giving an option to the trustees of such settlement to invest the moneys in purchase of a moiety of the property; and after the death of one of the sons, his widow received the rents of a moiety of the property:—Held, that notwithstanding the joint nature of the contract contained in the letter, the legal presumption of a joint tenancy was refuted by the circumstances, and that the property was taken by the sons as tenants in common. *Ib.*

Two sisters carried on business as farmers. They had a joint account at their bankers' and an establishment and purse in common. They invested part of their money in the purchase of consols, in their joint names, and they had a balance due to them on their banking account, besides a sum due to them from their bankers on deposit notes:—Held, on the death of one, that the two sisters were joint tenants of the consols, and tenants in common of the balance and of the deposit notes. *Bone* v. *Pollard*, 24 Beav. 283.

Where stock has been purchased in the joint names of two, out of money standing to their joint account in a bank, it is not necessarily to be considered in equity as held in joint tenancy; but the origin of the money, and the acts and intentions of the parties, may be looked to, and a conclusion in favour of a tenancy in common drawn from the circumstances. *Robinson* v. *Preston*, 4 K. & J. 505; 27 L. J., Ch. 395; 4 Jur. (N.S.) 186.

Two sisters being tenants in common of real estates, had money arising from the rents standing to their joint account in a bank. Part of the money was, from time to time, invested in the purchase of stock, in their joint names, and part on mortgage, the mortgaged premises being conveyed to them as tenants in common. Each sister, by will, affected to dispose of her share of the stock:—Held, that they were entitled to the stock as tenants in common, and not as joint tenants. *Ib.*

Mortgages in fee were taken in the name of three sisters as joint tenants, each of the deeds containing a clause by which it was declared that the mortgage-money belonged to the mortgagees on a joint account in equity as well as at law. The money advanced on the security of the mortgages formed part of the proceeds of the estate of a brother, to which the three sisters were, under his will, entitled as tenants in common. Having regard to this fact and the other facts in evidence:—Held, that notwithstanding the insertion of the joint account clause the mortgagees were entitled to the mortgage-money as tenants in common. *Jackson, In re, Smith* v. *Sibthorpe*, 56 L. J., Ch. 593; 34 Ch. D. 732; 56 L. T. 562; 35 W. R. 646.

Ouster.]—Possession of some owners is possession of all. *Machell, Ex parte*, 2 Ves. & B. 216; 1 Rose, 447.

Thirty-six years' sole and uninterrupted possession by one tenant in common, without any account to, or demand made, or claim set up by his companion, is a sufficient ground for a jury to presume an actual ouster of the co-tenant. *Doe* d. *Fisher* v. *Prosser*, Cowp. 217.

One tenant in common levying a fine on the whole and taking the rents and profits afterwards without account for five years is no evidence from whence the jury should be directed (against the justice of the case) to find an ouster of his companion at that time on the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peaceable* d. *Hornblower* v. *Read*, 1 East, 568.

When two persons are tenants in common of a field, the merely putting, by one of them, a lock upon the gate, not shewn to be kept locked, will not constitute an ouster so as to enable the co-tenant in common to maintain trespass against the other. There must, for such a purpose, be other circumstances attending the act. *Jacobs* v. *Seward*, 41 L. J., C. P. 221; L. R. 5 H. L. 464; 27 L. T. 185. Affirming 18 W. R. 953—Ex. Ch.

In order to enable one tenant in common to maintain trover against another, there must not merely be a carrying away of the property, but such a carrying away of it as will disable the party complaining from having the lawful use or benefit of the property, or there must be the destruction of it. *Ib.*

There can be no ouster between tenants in common in possession; and, therefore, if one takes more than his share of the rents, the only remedy is account, either by action under the 4 Anne, c. 16, s. 27, or by a bill in equity. *Denys* v. *Shuckburgh*, 4 Y. & C. 42; 5 Jur. 21.

But one tenant in common can maintain trespass against another for an actual expulsion from premises of which they are tenants in common. *Murray* v. *Hall*, 7 C. B. 441 ; 18 L. J., C. P. 161 ; 13 Jur. 262.

The plaintiff's mother and the defendant were tenants in common in fee. She died in 1851, and her interest descended on the plaintiff, her heir (an infant). The defendant, who had previously occupied the estate, continued in possession, and thenceforward excluded the plaintiff. The plaintiff attained twenty-one in 1857 :—Held, that the defendant was accountable to the plaintiff for the whole period, and ought to be charged with an occupation rent. *Pascoe* v. *Swan*, 27 Beav. 508 ; 29 L. J., Ch. 159 ; 5 Jur. (N.S.) 1235 ; 1 L. T. 17 ; 8 W. R. 130.

A., being at the time abroad, became a tenant in common with B., and died fifteen years afterwards, without having been during that period in England, and being all the time ignorant of her right as tenant in common ; B. continued all along in possession and receipt of the rents and profits of the premises :—Held, that B.'s possession did not amount to an ouster. *Johnson* v. *Burslem*, 2 L. J. (O.S.) Ch. 168 ; 26 R. R. 212.

Motion for a receiver by one tenant in common against his co-tenant, on the ground that the latter had given notice to the tenants to pay their rents to him only, and had advertised the estate for sale, refused, because the conduct complained of did not amount to an exclusion. *Tyson* v. *Fairclough*, 2 Sim. & S. 142 ; 25 R. R. 175.

Liability for Rent.]—Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants. *M'Mahon* v. *Burchell*, 2 Ph. 127 ; C. P. Cooper, 457. Varying 3 Hare, 97. S. P., *Griffies* v. *Griffies*, 8 L. T. 758 ; 11 W. R. 943.

A tenant in common occupying the premises held in common, not excluding his co-tenants in common, is not chargeable by such co-tenants with an occupation rent. *S. C.*, 5 Hare, 322.

Joint Lease.]—Tenants in common cannot make a joint lease. *Heatherley* d. *Worthington* v. *Weston*, 2 Wils. 232.

To a declaration for arrears of rent, stating that the plaintiff and S., deceased, were seised in fee, and demised to the defendant from year to year, rendering a certain rent to the plaintiff and S., which had fallen into arrear since the death of S., it is a good plea that the plaintiff and S. were tenants in common. *Burn* v. *Cambridge*, 1 M. & Rob. 539.

Lease to Co-Tenant—Action for Use and Occupation.]—Where one tenant in common has by lease demised his interest to his co-tenant in common, if the tenant in common who was lessee continues in occupation as tenant at sufferance after the expiration of the lease, he will be liable in an action for use and occupation at the suit of his co-tenant in common who was lessor. *Leigh* v. *Dickeson*, 54 L. J., Q. B. 18 ; 15 Q. B. D. 60 ; 52 L. T. 790 ; 33 W. R. 538—C. A.

Where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given :—Held, that it then became a question of fact for the jury to say, whether it was the intention of the parties to enter into a new contract of demise, with a separate reservation of the rent to each. *Powis* v. *Smith*, 5 B. & Ald. 850 ; 1 D. & R. 490 ; 24 R. R. 587.

Other Leases.]—One tenant in common may bring an action for the double value of his moiety, under 4 Geo. 2, c. 28. *Cutting* v. *Derby*, 2 W. Bl. 1077.

A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it ; and if he do, the other tenant in common may distrain for his share. *Harrison* v. *Barnby*, 5 Term Rep. 246 ; 2 R. R. 584.

Reversion after Demise.]—One tenant in common of a reversion is entitled to maintain an action for injury to the reversion without joining his co-tenants as plaintiffs. *Roberts* v. *Holland*, 62 L. J., Q. B. 621 ; [1893] 1 Q. B. 665 ; 5 R. 370 ; 41 W. R. 494.

An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise. *Ib.*

Upon a lease by tenants in common, the survivor may sue for the whole rent ; although the reservation be to the lessor's account to their respective interests. *Wallace* v. *McLaren*, 1 Man. & Ry. 516 ; 31 R. R. 334.

Distress Damage Feasant.]—One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognisance as bailiff to his co-tenant. *Culley* v. *Spearman*, 2 H. Bl. 386 ; 3 R. R. 420.

Exchange.]—Tenants in common altogether make but one party, and may exchange estates. *Anon.*, Lofft, 414.

Partition.]—The estate of a tenant in common cannot be so settled on marriage of one as to prevent the right of the others to make partition. *Abel* v. *Heathcote*, 2 Ves. J. 98 ; 2 R. R. 171.

Repairs.]—One tenant in common of a house who expends money on ordinary repairs, not being such as are necessary to prevent the house from going to ruin, has no right of action against his co-tenant for contribution. *Leigh* v. *Dickeson*, 54 L. J., Q. B. 18 ; 15 Q. B. D. 60 ; 52 L. T. 790 ; 33 W. R. 538—C. A. S. P., *Heath* v. *Bostock*, 5 L. J., Ex. Eq. 20.

In a partition action a tenant in common will not be entitled to an allowance in respect of repairs and improvements unless he submits to be charged with an occupation rent. *Teesdale* v. *Sanderson*, 33 Beav. 534.

Improvements.]—In fixing a tenant in common with an occupation rent, in lieu of rents and profits under 4 Anne, c. 16, the court directed that he should be allowed for lasting improvements. *Pascoe* v. *Swan*, 27 Beav. 508 ; 29 L. J., Ch. 159 ; 5 Jur. (N.S.) 1235 ; 1 L. T. 17 ; 8 W. R. 130.

The owner of a moiety of property who was also tenant for life of the whole, and the tenant for life in remainder of the other moiety con-

curred in raising a sum of 900*l.* by a mortgage, which was expended in permanently improving the property :—Held, in a participation action, that the present value of the improvements, but not exceeding the amount raised, must be paid out of the proceeds of sale of the whole property. *Jones, In re, Farrington* v. *Forrester*, 62 L. J., Ch. 996 ; [1893] 2 Ch. 461 ; 3 R. 498 ; 69 L. T. 45. And see *Watson* v. *Gass*, 51 L. J., Ch. 480 ; 45 L. T. 582 ; 30 W. R. 286.

The owner in fee of one moiety of a property (subject to a paramount mortgage), who was also tenant for life of the whole, borrowed money on mortgage, which was expended in permanently improving the whole property. After her death the property was sold by the paramount mortgagee under his power of sale :—Held, that in distributing the surplus proceeds of sale, one-half of the present value of the improvements (not exceeding the amount actually expended) must be charged against the owner of the other moiety. *Cook's Mortgage, In re, Lawledge* v. *Tyndall*, 65 L. J., Ch. 654 ; [1896] 1 Ch. 923 ; 74 L. T. 652 ; 44 W. R. 646.

Money had and received.]—One tenant in common of real property cannot maintain an action for money received against his co-tenant, his remedy being by an action of account. *Thomas* v. *Thomas*, 5 Ex. 28 ; 1 L. M. & P. 229 ; 19 L. J., Ex. 175 ; 14 Jur. 180.

Chattels.]—When goods of different owners become by accident so mixed together as to be undistinguishable, the owners of the goods so mixed are tenants in common of the whole of the goods in the proportions which they have severally contributed to them. *Spence* v. *Union Marine Insurance Co.*, 37 L. J., C. P. 169 ; L. R. 3 C. P. 427 ; 18 L. T. 632 ; 16 W. R. 1010.

One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it as to render it impossible that the plaintiff should ever take and use it. *Fennings* v. *Grenville* (*Lord*), 1 Taunt. 241 ; 9 R. R. 760.

The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter as to prevent the plaintiff from taking and using it in its altered state ; therefore it creates no right of action. *Ib.*

Account.]—One tenant in common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being an action of account. *Thomas* v. *Thomas*, 5 Ex. 28 ; 1 L. M. & P. 229 ; 19 L. J., Ex. 175 ; 14 Jur. 180.

Mortgagee of the share of one tenant in common of a mine may maintain a bill for an account against the mortgagor and the co-tenants in common. On a bill for an account of the dealings and transactions of a mining partnership, it is not necessary to pray for a dissolution of the concern. *Bentley* v. *Bates*, 4 Y. & C. 182 ; 9 L. J., Ex. Eq. 30 ; 4 Jur. 552.

A., being at the time abroad, became a tenant in common with B., and died fifteen years afterwards, without having been during that period in England, and being all the time ignorant of her right as tenant in common ; B. continued all along in possession and receipt of the rents and profits of the premises :—Held, that B.'s possession did not amount to an ouster ; and that A.'s representative could sustain a bill for an account against B., without previously recovering the possession. *Johnson* v. *Burslem*, 2 L. J., (o.s.) Ch. 168 ; 26 R. R. 212.

There can be no ouster between tenants in common in possession ; and, therefore, if one takes more than his share of the rents, the only remedy is account either by action under the statute of Anne, or by bill in equity. *Denys* v. *Shuckburgh*, 4 Y. & C. 42 ; 5 Jur. 21.

In an action of account by a joint tenant, or tenant in common, against his companion, it is necessary to allege that he has received more than his share of the rent ; he is not chargeable as a bailiff at common law. *Storton* v. *Richardson*, 2 D. & L. 182 ; 13 M. & W. 17 ; 13 L. J., Ex. 281 ; 8 Jur. 476.

A., on behalf of herself and her infant children, filed a bill against B., who was tenant in common with her husband C., alleging that on his death B. entered into receipt of the entire rents, claiming the whole, and kept possession of the title deeds, for want of which the plaintiffs could not proceed at law ; and praying that they might be put in possession of C.'s moiety, and an account of the rents of it since his death, and for the title deeds. A. did not make affidavit that the deeds were not in her possession :—Held, that such affidavit is not necessary in a case where the plaintiffs have a right to sue in equity aliunde, and that a demurrer for want of it was bad in substance, that the demurrer not stating specifically the parts of the statement or relief to which it applied, was bad in form ; that though the bill could not be sustained for an account between tenants in common, yet that the infant plaintiffs were entitled to such account against the defendant ; and that the mother being co-plaintiff was no misjoinder. *M'Carthy* v. *Hatch*, 9 Ir. Eq. R. 206.

—— **In Equity.**]—A tenant in common of a farm may sustain a suit in equity for an account against his co-tenant, who has alone occupied it and cultivated it, for a moiety of the profits. *Leake* v. *Cordeaux*, 4 W. R. 806.

Where one co-tenant receives more than his share of the rents of a property, his co-tenant can compel an account, and payment, by suit in equity. *Montgomery* v. *Swan*, 9 Ir. Ch. Rep. 131.

Decree against licensee of two of three tenants in common for an account of the value at the pit's mouth of coal raised, less the cost of getting and raising, and for payment of one-third to the plaintiff. *Job* v. *Potton*, 44 L. J., Ch. 262 ; L. R. 20 Eq. 84 ; 32 L. T. 110.

—— **When Co-Tenant Answerable as Bailiff.**]—There is no relationship of trust or agency in one co-owner of a property towards the other ; and where one collects the rents of the whole he does so not in the capacity of agent, but in that of owner. *Kennedy* v. *De Trafford*, 66 L. J., Ch. 413 ; [1897] A. C. 180 ; 76 L. T. 427 ; 45 W. R. 671—H. L. (E.)

If there are tenants in common, and one tenant alone occupies the property, he is answerable as bailiff to his co-tenant in an action of account if he receives more than comes to his share, but not otherwise. And he is answerable only for what he receives more than comes to his just share. *Henderson* v. *Eason*, 17 Q. B. 701 ; 21 L. J., Q. B. 82 ; 16 Jur. 518—Ex. Ch.

He receives more than his just share if he receives money or something else, given or paid by another, which the co-tenants are entitled to simply by their being tenants in common, and if the amount which he so receives and keeps is more than in proportion to his interest as such tenant. *Ib.*

He does not receive more than comes to his just share if he merely has the sole enjoyment of the property, even though by the employment of his own industry and capital he makes a profit by the enjoyment, and takes the whole of such profit. *Ib.*

A. and B., tenants in common in fee, made a joint demise of land to C., with a general reddendum, not saying to whom the rent was payable. A. died on the 15th of March, 1848, and B. received the half-year's rent due at Lady-day, less 12*s.* 6*d.*, which he deducted as the share of A.'s heir for the period between A.'s death and the time the half year's rent became due:—Held, that although the words of the demise were joint, the reversions were several, and the rent followed the reversion, and consequently that the heir of A. was entitled to the moiety of the half year's rent accruing at Lady-day, 1848, and might maintain an action against B. as bailiff for receiving more than his just share. *Beer* v. *Beer*, 12 C. B. 60; 21 L. J., C. P. 124; 16 Jur. 223.

Held, also, on motion in arrest of judgment, that the declaration was good without an averment that a reasonable time had elapsed between the request to account and the commencement of the action. *Ib.*

In an action by a merchant against his partner, as tenant in common and bailiff, the defendant in substance pleaded plene computavit. To satisfy such a plea, the defendant must prove an account rendered, shewing an agreed balance between the plaintiff and the defendant; an account in which the defendant charges himself as factor for the whole, instead of charging himself as factor for one moiety and as owner of the other, thereby making himself liable for a moiety of the losses arising from the sale of the whole, is insufficient. *Baxter* v. *Hozier*, 7 Scott, 233; 5 Bing. (N.C.) 288; 1 Arn. 519; 8 L. J., C. P. 169.

—— **Claim for Arrears—Statute of Limitations.**]—Two, being tenants in common, one entered into possession in 1827, with the consent of the other, upon an understanding that he should pay an occupation rent when called upon to do so. The tenant in possession died in 1839. The survivor claimed six years' rent:—Held, that the claim must be allowed, and that 4 Anne, c. 16, was not repealed by 3 & 4 Will. 4, c. 27. *Henderson* v. *Eason*, 15 L. J., Ch. 457; 10 Jur. 821.

—— **Pleading.**]—In an action of account, nothing can be pleaded before auditors contrary to what has been pleaded to the action and found by verdict. *Godfrey* v. *Saunders*, 3 Wils. 73, 94.

A plea by a merchant against his partner, as tenant in common and bailiff, that after selling goods and merchandises the defendant rendered to the plaintiff a reasonable account of his goods and merchandises, and of the proceeds and profits, is in substance a plea of plene computavit. *Baxter* v. *Hozier*, 7 Scott, 233; 5 Bing. (N.C.) 288; 1 Arn. 519; 8 L. J., C. P. 169.

To satisfy such a plea, the defendant must prove an account rendered, shewing an agreed balance between the plaintiff and the defendant; an account in which the defendant charges himself as factor for the whole, instead of charging himself as factor for one moiety and as owner of the other, thereby making himself liable for a moiety of the losses arising from the sale of the whole, is insufficient. *Ib.*

A declaration stated that L., being seised in fee by deeds of lease and release and settlement, conveyed tenements to the use of himself for life, with remainder to the use of the plaintiff and defendant, his children by his late wife, in such shares as he should by deed or will appoint, and in default of such appointment to the plaintiff and the defendant, as tenants in common. Averment, that L. died without having made any appointment, and that thereby the plaintiff became seised in fee tail of one moiety of the tenements in common with the defendant. First plea, that, in pursuance of the power in the deed of settlement, L., by deed, appointed to A. and B. the tenements, upon certain trusts; and thereby made a valid appointment, under and by virtue of the power in the deed of settlement. Second plea, that, in pursuance of the power in the deed of settlement, L., by will, appointed the tenements, subject to the term created by the deed of appointment, to certain uses:—Held, that the allegation in the declaration, that L. died without having made an appointment, was premature, and therefore the defendant was not bound to traverse it; and that if it was not necessary in the declaration to allege that the power had not been exercised, the defendant was obliged to shew how and to whom the appointment was made, in order to shew that the plaintiff and defendant were not tenants in common; and therefore, that the pleas were good. *Rickets* v. *Loftus*, 14 Q. B. 482; 19 L. J., Q. B. 94; 14 Jur. 839.

A declaration by a plaintiff that the defendant was his tenant in common, and received in respect of rent, 48*l.* 15*s.* more than came to his just share and proportion, is bad for want of an averment of a request and refusal to render an account, and for being framed for a liquidated sum instead of laying as a breach the not accounting. *Purcell* v. *Harding*, 15 W. R. 128 Ir. *Ib.*

Held, also, that an averment of receipt, as bailiff, is also necessary. *Ib.*

—— **Practice—Parties.**]—Semble, that where several parties are tenants in common, an action of account may be brought by one against another without joining the rest. *Sturton* v. *Richardson*, 2 D. & L. 182; 13 M. & W. 17; 13 L. J., Ex. 281; 8 Jur. 476.

—— **Payment into Court.**]—A defendant can now pay money into court. *Anon.*, Bull. N. P. 128. See *Tomkins* v. *Willshear*, 1 Marsh. 115; 5 Taunt. 431; 15 & 16 Vict. c. 76, s. 70; and *Cresswell* v. *Hedges*, 1 H. & C. 421; 31 L. J., Ex. 497; 8 Jur. (N.S.) 767; 10 W. R. 777.

And see further PRACTICE (PAYMENT INTO COURT).

—— **Taking the Account.**]—Two principal officers of the court were appointed auditors after judgment of quod computet. *Smith* v. *Smith*, 2 Chit. 10.

A rule to appoint auditors is absolute in the

first instance. *Archer* v. *Pritchard*, 3 D. & R. 596.

In an action of account, the defendant having suffered judgment by default, the court granted a rule, calling on him to shew cause why he should not appear and consent to the appointment of auditors, or why a capias ad computandum should not issue against him. No cause was shewn, and the court made the rule absolute in the alternative. *Pryor* v. *Pettingell*, 2 D. (N.S.) 755; 12 L. J., Ex. 219; 7 Jur. 132.

In an action of account, nothing can be pleaded before auditors contrary to what has been pleaded to the action and found by verdict. *Godfrey* v. *Saunders*, 3 Wils. 73, 94.

Injunction.]—Injunction between tenants in common against destruction not against pure equitable waste. *Hole* v. *Thomas*, 7 Ves. 589; 6 R. R. 195.

Injunction against waste between tenants in common on the ground that one was occupying tenant to the other; otherwise not except as to destruction. *Twort* v. *Twort*, 16 Ves. 128; 10 R. R. 141.

The court will restrain one tenant in common from the wilful destruction of the common property, but where a railroad company had obtained a lease from five out of six tenants in common, and had, contrary to the wishes of the remaining tenant in common, constructed a railroad on the property which at law had been held to be an ouster, the court refused to interfere by injunction to prevent the dissenting tenant in common removing the rails, &c., though the rent agreed to be paid by the company was three times the former rent. *Durham and Sunderland Ry.* v. *Wawn*, 3 Beav. 119; 4 Jur. 764.

A husband, seised in right of his wife, concurred with the other tenants in common in a partition of estate and mines, but no fine was levied. He died in 1828; after which his widow acquiesced in the arrangement, and took the benefit of it. She and her lessee afterwards proceeded to get coal under the land awarded to other parties, and defended that proceeding on the ground that the husband's acts were invalid, and that the parties were still tenants in common of the whole. The court restrained her by injunction. *Maden* v. *Veevers*, 5 Beav. 503.

Where three out of forty-seven tenants in common filed a bill for an injunction to restrain the digging of stone on the common property, objection for want of parties not allowed. *Ackroyd* v. *Briggs*, 13 L. T. 521; 14 W. R. 25.

Destruction.]—It is not destructive waste for a tenant in common of a coal mine to get, or license to get, the coals, he, the working tenant or licensee, not appropriating to himself more than his share of the proceeds. *Job* v. *Potton*, 44 L. J., Ch. 262; L. R. 20 Eq. 84; 32 L. T. 110.

Lien.]—When a person seised in trust for himself and another in common in fee retains the entire rents, the debt arising in favour of the co-tenant will not be charged on the trustee's beneficial interest as against a purchaser, without notice from him. *British Mutual Investment Co.* v. *Smart*, 44 L. J., Ch. 695; L. R. 10 Ch. 567; 32 L. T. 849; 23 W. R. 800.

Other Matters.]—Abatement by the death of one of the plaintiffs, tenants in common. Bill of revivor by his representative. The survivor, if not co-plaintiff, must be made a defendant. *Fallowes* v. *Williamson*, 11 Ves. 306.

To a bill by a party for his share of a legacy given in common, the co-legatees are not necessary parties. *Hughson* v. *Cookson*, 3 Y. & C. 578; 8 L. J., Ex. Eq. 68.

I. SEISIN AND DISSEISIN.

Proof of Seisin.]—A father, who died in 1760, made a general devise of freeholds and copyholds to his daughter in tail. His grandson was in 1783 admitted to the copyholds as tenant in tail, and was proved to have been in 1833 in possession of the copyholds and of certain freeholds then held therewith. He made a will purporting to devise these freeholds and the copyholds, and died in 1840. His brother and heir in 1841 executed a deed purporting to be for the purpose of barring any estates tail in the freeholds, whereby he conveyed the freeholds to the devisee under the will, and covenanted to surrender the copyholds. This deed was not enrolled, but the devisee was admitted to the copyholds. The devisee died intestate, and his brother succeeded him as his heir, and made a will purporting to devise the freeholds and the copyholds in fifths, the plaintiff taking one-fifth and the defendant another fifth. The defendant afterwards agreed to buy the plaintiff's one-fifth, and a conveyance was made by her conveying to the defendant her one-fifth and all her estates and shares in the land, neither of them being aware of the earlier title. Four years afterwards the deed purporting to bar the estate tail was found, and thereupon the defendant requested the plaintiff, who was heir in tail of the original testator, to confirm the sale, and sent to her the draft of a deed reciting that the original testator was seised in fee of the freeholds and devised them, and that she was tenant in tail. She then filed a bill to have her conveyance set aside and to be declared tenant in tail of the freeholds:—Held, that the conveyance by the plaintiff of the fee in the whole when she had intended to convey one-fifth only might embarrass her in proceeding at law, and that the court must determine the question; but that the plaintiff was bound to shew that the original testator was seised in fee of the freeholds claimed by her, and that as she had not done so, her bill must be dismissed; and that, under the circumstances, the sending by the defendant of the draft deed stating that the original testator was seised in fee was not an admission by the defendant of the fact. The defendant had conveyed his estate to mortgagees, and they, as purchasers for valuable consideration without notice, could not be interfered with. *Bulley* v. *Bulley*, 44 L. J., Ch. 79; L. R. 9 Ch. 739; 30 L. T. 848; 22 W. R. 779.

Livery of seisin of land cannot be presumed from a feoffee's possession of less than twenty years. *Doe* d. *Wilkins* v. *Cleveland* (*Marquis*), 9 B. & C. 864; 4 Man. & Ry. 666; 8 L. J. (O.S.) K. B. 74; *Doe* d. *Lewis* v. *Davies*, 2 M. & W. 503; M. & H. 98; 6 L. J., Ex. 176.

A person's being assessed to the land-tax for certain lands is not evidence of his seisin of those lands. *Doe* d. *Stansbury* v. *Arkwright*, 5 Car. & P. 575.

A good title may be made to an estate, although the origin cannot be shewn by any deed or will;

but it must be shewn that there has been such a long uninterrupted possession and enjoyment of and dealing with the property as afford a reasonable presumption that there is an absolute title in fee-simple. *Cottrell* v. *Watkins*, 1 Beav. 361; 3 Jur. 283.

In ejectment, evidence that the shutters of the house claimed were repaired and a wash-house built on the premises, and that this was paid for by A., is evidence to go to the jury of his seisin. *Doe* d. *Loscombe* v. *Clifford*, 2 Car. & K. 448.

The heir and executor of T. having disputed whether certain estates of which T. died seised or possessed, was real or personal estate, all that appeared was that P., the original owner, through whom both claimed, so far as was known, died seised of the freehold. The heir-at-law of P. having sued T., the litigation was compromised by the execution of a deed conveying to T., his heirs and assigns all the estate and right of such heir and no other claim was ever heard of, nor was T. disturbed in his possession:—Held, that assuming that P. died seised of the fee, and that all the interests of the other claimants were conveyed to T., the presumption was that T. also impliedly acquired the fee. *Tudury* v. *de Pinna*, 7 L. T. 115—P. C.

Sufficiency of.]—Livery of seisin is not invalidated by omitting to remove from the house or land a child found there, unless that child is part of the family of a person having an immediate estate or interest in the premises, placed there for the purpose of continuing the possession of such person. *Doe* d. *Reed* v. *Taylor*, 2 N. & M. 508; 5 B. & Ad. 575; 3 L. J., K. B. 67.

A power of attorney contained in a deed to A. empowered him to give and deliver seisin of premises according to the form and effect of the deed:—Held, that he need not make livery of seisin on the day of the date of such deed, but that his power may be well executed afterwards. *Roe* d. *Heale* v. *Rashleigh*, 3 B. & Ald. 156.

The assent of a tenant at will is not necessary in order to perfect a livery of seisin. *Doe* d. *Hindmarsh* v. *Oliver*, 1 Car. & K. 543.

A. died seised, leaving two infant daughters by different venters:—Held, that an entry generally, by the mother of the youngest daughter, as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter, to carry the descent of her moiety, on her death, to her heirs. *Doe* d. *Barnett* v. *Keen*, 7 Term Rep. 386.

Being born on one part of the premises, and receiving rent for the rest by the hands of his mother and guardian, was a sufficient seisin by a posthumous son (who died at five weeks old) to bar the descent to his sister of the half-blood, and convey it to a collateral heir. *Goodtitle* d. *Newman* v. *Newman*, 3 Wils. 516; 2 W. Bl. 938. S. P., *Forder* v. *Wade*, 4 Bro. C. C. 521.

A. devised premises to an infant daughter of his sister; the infant died before entry and before obtaining any actual seisin or possession:—Held, that she had such a seisin in law of the premises devised as to enable her heir to take them from her by descent. *Doe* d. *Parker* v. *Thomas*, 4 Scott. (N.R.) 449; 3 Man. & G. 815; 11 L. J., C. P. 124.

To a plea in bar of a fine, a direct positive averment of seisin is necessary. *Dobson* v. *Leadbeater*, 13 Ves. 230. And see *Leach* v. *Jay*, 47 L. J., Ch. 876; 9 Ch. D. 42; 39 L. T. 242; 27 W. R. 99—C. A.

Livery of seisin not having been made according to the terms of a joint power contained in a feoffment, and one of the parties to whom the power was given to deliver seisin having refused to execute it, the court doubted whether authority could be given to deliver seisin, as to part only. *Att.-Gen.* v. *Pearson*, 3 Mer. 416; 17 R. R. 100.

Disseisin.]—The doctrine of relation applies only as between disseisor and disseisee, in which case the re-entry has relation back to prior occupation by the owner, and remits him to his original rights. *Litchfield* v. *Ready*, 5 Ex. 939; 20 L. J., Ex. 51.

A lease by a stranger, and entry by the lessee, is not a disseisin in fact, without an entry by force, or an avowed intention to disseise. *Jerritt* v. *Weare*, 3 Price, 575; 18 R. R. 665. And see *Doe* d. *Souter* v. *Hull*, 2 D. & R. 38.

A person entering under an instrument which operates under the Statute of Uses, or a deed to which he is a consenting party, is nevertheless capable of being remitted to any more ancient title he may have, and that a person is remitted nolens volens. *Doe* d. *Daniell* v. *Woodroffe*, 10 M. & W. 608; 12 L. J., Ex. 147.

A. enters under the lease of B., who acknowledges the entry as by his command. A. is a disseisor, and B. also is chargeable as such. *Hovenden* v. *Annesley*, 2 Sch. & Lef. 621; 9 R. R. 119. And see *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 60.

Possession gained under a title consistent with that of the person having right, and who was in possession, as where a lessee at will makes a lease for years, and the lessee for years enters; this, though the estate at will did not warrant the lease for years, is only a disseisin at election. *Ib.*

R., being seised of freehold houses, died intestate in 1864, leaving A. his sole heiress-at-law. Upon R.'s death his widow wrongfully entered into possession, and retained possession till her death in 1869, when her devisees entered. A. died in 1871, without ever having entered into possession, having devised to L. "all real estate (if any) of which she might die seised." An action having been brought by L. against the widow's devisees for recovery of possession, the devisees demurred to the statement of claim, on the ground that A.'s devise did not pass the property or any right of entry therein to L.:—Held, that "seised" being a purely technical word must be construed according to its technical meaning; and that as the seisin in law which A. had on R.'s death had been destroyed, and she had not at her death any seisin either in law or in fact, the property did not pass under her devise. *Leach* v. *Jay*, 47 L. J., Ch. 876; 9 Ch. D. 42; 39 L. T. 242; 27 W. R. 99—C. A.

—— **Chattel Interest.**]—A conveyance of a chattel interest by lease and release cannot work a forfeiture or disseisin. Secus, if it were by feoffment; but in that case the party entitled to take advantage of the forfeiture is not bound to do so till the expiration of the lease. *Saunders* v. *Annesley*, 2 Sch. & Lef. 99.

—— **Trust Estate.**]—Upon a bare trust, no estate can be gained by disseisin, abatement, or intrusion, while the trust estate continues. *Cholmondeley* v. *Clinton*, 2 Mer. 358; 16 R. R. 167. *But see* 2 Jac. & Walk. 1; 4 Bligh, 1; 22 R. R. 83, 84.

J. DISCLAIMER.

By Devisees.]—A devisee in fee may, by deed under his hand and seal, disclaim an estate devised to him, without a formal disclaimer in a court of record. *Townson* v. *Tickell*, 3 B. & Ald. 31; 22 R. R. 291; Preface vii.

After such a disclaimer he has no interest in the estate. *Begbie* v. *Crook*, 2 Bing. (N.C.) 70; 2 Scott, 128; 4 L. J., C. P. 264.

Quære, whether a devise of an estate can be waived by parol. *Doe* d. *Smyth* v. *Smyth*, 6 B. & C. 112; 9 D. & R. 136; 5 L. J. (O.S.) K. B. 13; 30 R. R. 258.

Where the devisee of an estate refused to take it, saying that she was entitled as heir-at-law, and would not accept any benefit by the will of the devisor:—Held, that this was not such a disclaimer as prevented her from afterwards bringing an ejectment, and relying on her title as devisee. *Ib.*

Quære, whether a verbal assent to a devise is sufficient to prevent the party from afterwards disclaiming the devise. *Doe* d. *Chidgey* v. *Harris*, 16 M. & W. 517; 16 L. J., Ex. 190.

Quære, whether a devisee in trust can disclaim by deed after a previous assent to the devise in words. *Ib.*

A devisee in trust, on the reading of the will after the testator's death, stated that he ought to have had 5*l.* for being trustee:—Held, that these words were so ambiguous that they ought not to have been left to the jury as evidence of his assent to the devise. *Ib.*

A. devised a copyhold tenement to B., C. and D. upon trust, and appointed them executors, who all proved the will and acted under it. C. and D. refused to be admitted tenants, and by deed made between them and B., reciting that C. and D. were desirous of releasing their estate and interest in the copyhold to B., to the intent that B. alone might be admitted tenant, to hold the same upon the trusts of the will, C. and D. granted, released and confirmed the copyhold to B., to the intent that B. might be solely seised. B. claimed to be admitted to the entirety of the copyhold, and to pay a single fine. The lord claimed a treble fine:—Held, that the deed should be construed, according to the intention of the parties, as a renunciation by C. and D. of their right to be admitted; that their having acted in the trusts of the will would not prevent this operation, and that B. became sole tenant, and the lord only entitled to a single fine. *Wellesley* (*Viscount*) v. *Withers*, 4 El. & Bl. 750; 3 C. L. R. 1187; 24 L. J., Q. B. 134; 1 Jur. (N.S.) 134.

By Trustee in Bankruptcy.]—*See* BANKRUPTCY.

K. EXCHANGE.

Between whom.]—Proprietors of lands in a parish having agreed upon an inclosure under 6 & 7 Will. 4, c. 115, two of such proprietors, A. and B., signed and sent to the commissioner mutual consents to give up certain closes, designated by the numbers attached to them in the commissioner's map, in exchange for such other lands of equal value as the commissioner might consider desirable for them, with an undertaking to ratify and confirm what the commissioner might do in the premises; upon which the commissioner prepared and signed a schedule, specifying the closes to be exchanged, which he produced at a public meeting convened under the act. The parties took possession of, cultivated and demised the closes exchanged, agreeably to the schedule. The commissioner not having published his award:—Held, that ejectment might be maintained by A., to recover from B. a close, given up by A. to, and taken possession of by, B. under the exchange. *Doe* d. *Beaufort* (*Duke*) v. *Neeld*, 3 Man. & G. 271; 3 Scott (N.R.) 618; 10 L. J., C. P. 266; 5 Jur. 751.

An exchange can only be between two parties; and if three mutually grant reciprocal estates to each other, viz. A. to C., B. to A., and C. to B.; and A. is evicted of the tenements granted to him by B., A. cannot recover of C. the tenements granted to him by A. *Eton College* v. *Winchester* (*Bishop*), 2 W. Bl. 936; 3 Wils. 468, 483; Lofft, 401.

Under an agreement of exchange between A., who held lands under a college-lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. occupied along with the residue of the leasehold, part of B.'s estate. A. having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of A.":—Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation. *Miles* v. *Langley*, 2 Russ. & M. 626.

L. ESTATE PASSING BY DEED.

1. FREEHOLDS.

What passes under.]—A tenant in tail in possession of hereditaments and premises, subject to an outstanding term, by indenture, in order to bar the estate tail and all remainders expectant thereupon, and to limit the same to himself in fee, and in consideration of 10*s.*, granted, bargained and sold the hereditaments and premises, and the reversion, &c., thereof to A. and B., their heirs and assigns, to hold to them, A. and B., to the use of A., that he might become tenant of the freehold of the premises, in order to suffer a recovery. The deed was afterwards duly inrolled as a bargain and sale:—Held, that it operated as a grant of the reversion to A. and B., and that A. became solely seised of the premises, so as to be a good tenant of the freehold of the entirety. *Haggerston* v. *Hanbury*, 5 B. & C. 101; 7 D. & R. 723; 4 L. J. (O.S.) K. B. 269; 29 R. R. 176.

Where the owner of certain lands, by deed describing them as in the possession of himself and A. B., granted, assigned, transferred, and set over, directed, limited and appointed the same to C. D. for life, but no livery of seisin was made:—Held, that the deed operated as a valid grant of the reversion of the part of the premises in the occupation of A. B. *Doe* d. *Ware* v. *Cole*, 7 B. & C. 243; 1 Man. & Ry. 33; 6 L. J. (O.S.) K. B. 20.

A. being seised in fee of a moiety of lands, and B. being seised for life of the other moiety, they, in 1805, by indenture, reciting that they were entitled thereto as tenants in common and that they had agreed to grant a perpetual lease thereof to C., his heirs, &c., granted, demised, &c., the same to C., "his heirs, executors, administrators and assigns, for ever," to hold from a day then past, unto and to the use of C., his heirs, executors, administrators and assigns, for ever, yielding and paying therefor, yearly and every

year, to A. and B., their heirs, &c., the clear yearly rent of 120*l.* half-yearly. The deed contained all the covenants usually found in ordinary leases :—Held, that, in the absence of proof, at the date of the deed the premises were in the occupation of tenants, so that a reversion could only pass ; and the expressed intention of the parties precluding the court from presuming that there had been livery of seisin, the deed could not operate as a conveyance of the fee, subject to a rent-charge, but created only a tenancy from year to year. *Doe* d. *Roberton* v. *Gardiner*, 12 C. B. 319 ; 21 L. J., C. P. 222.

Grant (before A. D. 1209) "of that pasture which is called B. to feed their animals," and that the grantees should "have in that pasture 100 cows." By deed of 25 Edw. 3, the owner of the fee granted all his right, and that it should be lawful for the grantees "to inclose the pasture, and to reduce it to cultivation, or to make any other profit thereof" :—Held, that the grantees were to be presumed to have been in possession at the time of the second grant, and that it operated as a release of the fee. *Doe* d. *Dearden* v. *Maden*, 1 N. & M. 533 ; 4 B. & Ad. 880.

A deed of release containing the words "all lands, &c., belonging, used, occupied and enjoyed, or deemed, taken, or accepted as part thereof," will pass leasehold lands which answer that description, as well as freehold ; especially against the releasor. *Doe* d. *Davies* v. *Williams*, 1 H. Bl. 25 ; 2 R. R. 703.

A lease for a year being made between A. and B., the release, stating B. to be a trustee for C., granted the premises unto C., then in his possession by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, habendum to B. and his heirs, to such uses as C. should appoint :—Held, that the release was sufficient to convey the premises to B. ; and that the words in the granting part, "unto C.," &c., might be rejected as surplusage. *Spyve* v. *Topham*, 3 East, 115 ; 6 R. R. 559.

—— **Subsequently Acquired Right.**]—A., B. and C., being tenants in common in tail, B. released to A. and C. and their heirs all his undivided part, and all his estate and interest therein, habendum to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns ; and B. covenanted with A. and C., their heirs and assigns, that he, his heirs, &c., would warrant and for ever defend the premises to A. and C. (without the word "heirs"), against all persons, and that A. and C., their heirs and assigns, should quietly enjoy :—Held, that the release passed the interest of B. to A. and C. as tenants in common, and not as joint tenants, and that the warranty annexed to the release created a discontinuance of B.'s estate tail, and barred B. and those claiming under him, as against those claiming under the release, of a subsequently-acquired right in fee. *Doe* d. *Hutchinson* v. *Prestwidge*, 4 M. & S. 178 ; 16 R. R. 436.

Covenant to Stand Seised.]—A deed which may take effect as a covenant to stand seised is good, though the use is to arise after the decease of the covenantor, and though he does not affect thereby to dispose of the freehold in the meantime. *Doe* d. *Dyke* v. *Whittingham*, 4 Taunt. 20 ; 13 R. R. 554.

The plaintiff in ejectment on a demise of the 12th October, 1850, claimed under the following deed : "In consideration of the love and affection which I have towards my son W. S. (the lessor of the plaintiff), I have given and granted, and by these presents do give and grant to W. S. all that, &c., and W. S. is to take possession of the same at Michaelmas day next (1850). I have delivered him, W. S., all the premises absolutely at Michaelmas day next without further condition" :—Held, that supposing such deed to be void as a grant of the freehold in future, still the day named having passed, the plaintiff was entitled to recover, the deed amounting to a covenant to stand seised to the use of W. S. *Doe* d. *Starling* v. *Prince*, 20 L. J., C. P. 223 ; 15 Jur. 632.

The 8 & 9 Vict. c. 106, s. 4, which enacts, "that the word 'give,' or the word 'grant,' in a deed shall not imply a covenant in law" :—Held, inapplicable. *Ib.*

Immediate Freeholds.]—By lease and release before 8 & 9 Vict. c. 106, s. 2, H. conveyed to W. and to his heirs and assigns certain freehold and copyhold premises, to hold the same unto W., his heirs and assigns, from and immediately after the death of H. to, for and upon the several uses, ends, intents and purposes thereinafter mentioned :—Held, that by the premises an immediate estate of freehold was given to W., and that the habendum had not the effect of rendering the deed void, or giving a freehold in future. *Goodtitle* d. *Dodwell* v. *Gibbs*, 5 B. & C. 709 ; 8 D. & R. 502 ; 4 L. J. (O.S.) K. B. 284 ; 29½ R. R. 366.

Contingent Rights.]—On the 31st March, 1852, H. demised to B. for ninety-nine years a piece of land, with four unfinished houses upon it, B. covenanting that he would complete the houses on or before the 25th June, 1852. Proviso for re-entry on default made. Upon the 31st March, 1852, B. mortgaged the premises to the plaintiff, and gave up possession to him after the 25th June, 1852, without having completed the houses. By deed of the 30th July, 1852, H. assigned to the defendant the premises, and all his estate, right, title and interest in, to or out of the premises. Whilst the plaintiff was in possession, and after the 30th July, 1852, the defendant entered into the premises :—Held, that even if the right of entry for condition broken was capable of passing by assignment by virtue of 8 & 9 Vict. c. 106, s. 6, yet that express words were necessary to pass such right of entry, and that the general words, "all the estate, right, title and interest," in the deed of the 30th July, were not sufficient. *Hunt* v. *Remnant*, 9 Ex. 635 ; 23 L. J., Ex. 135 ; 18 Jur. 335 ; 2 W. R. 276—Ex. Ch.

Sale of Right of Entry—Vendor out of Possession—32 Hen. 8, c. 9, s. 2.]—Although 32 Hen. 8, c. 9, s. 2, cannot be said to have been repealed by 8 & 9 Vict. c. 106, s. 6, nevertheless, since the passing of the latter statute a grant of lands to which the grantor has a title existing in fact, but of which he has never been in possession, and on which he is entitled only to a right of entry, will be valid, even although at the time of the grant a litigation is pending as to the title to the lands. A. sought to recover by ejectment certain lands ; the person in possession, amongst other defences, alleged that

one-fourth share thereof belonged to B., who had never been in possession. Thereupon A., for the sum of 10*l*., took from B. a conveyance dated the 4th July, 1877, of his share, containing covenants for title and quiet enjoyment. The actual value of B.'s share was 500*l*. A. then recovered possession of the lands. Before the date of the conveyance B. had been bankrupt, and after A. had recovered possession of the lands, B.'s trustees in bankruptcy recovered possession from A. of the one-fourth share which had been conveyed by B. to A. In an action by A. against B. for damages for breach of the covenants for title and quiet enjoyment:—Held, that the conveyance to A. from B. was not rendered void by 32 Hen. 8, c. 9, s. 2. *Jenkins* v. *Jones*, 51 L. J., Q. B. 438; 9 Q. B. D. 128; 46 L. T. 795; 30 W. R. 668—C. A.

Held, also, that A. was entitled to recover from B. the sum of 500*l*. as damages. *Ib.*

Under Acts of Parliament.]—A deed of conveyance made under the authority of an act of parliament must be read as if the sections of the act were incorporated in it. A conveyance granting land for a special purpose must be construed as conveying all the rights necessarily incident to the due execution of that purpose. *Elliott* v. *North Eastern Ry.*, 10 H. L. Cas. 333; 2 N. R. 87; 32 L. J., Ch. 402; 9 Jur. (N.S.) 555; 8 L. T. 307; 11 W. R. 604.

Whether the conveyance is a voluntary bargain between the parties, or is made because the act gives the grantee the power of compelling a grant, these rules are applicable. *Ib.*

2. In Reversion.

Covenants Running With.]—*See* Covenant.

On Leases.]—*See* Landlord and Tenant.

Merger.]—*See* Merger.

Nuisance.]—*See* Nuisance.

Who is Reversioner.]—The term "owner" as well as that of "proprietor" of premises, may mean any one who has the whole legal interest in the premises, so that no one else has any estate in possession or reversion, or it may mean one who has a subsisting estate at the time of the wrong complained of, or one who is the owner of the whole, or of some interest as distinguishable from that of the tenant in possession. *Chauntler* v. *Robinson*, 4 Ex. 163; 19 L. J., Ex. 170.

When Action is Maintainable by—For Injury to Chattel.]—An owner of a chattel, e.g. a barge, which is out on hire for an unexpired term, may maintain an action against a third person for a permanent injury thereto. *Mears* v. *L. & S. W. Ry.*, 11 C. B. (N.S.) 859; 31 L. J., C. P. 220; 6 L. T. 190.

—— **For Injury to Land.**]—There must be some injury to the land, to enable a reversioner to support an action on the case. *Baxter* v. *Taylor*, 1 N. & M. 14; 4 B. & Ad. 72; 2 L. J., K. B. 65.

—— **Wrongful Entry on Land.**]—A reversioner cannot maintain an action against a stranger, for merely entering upon his land held by a tenant on lease, though the entry is made in exercise of an alleged right of way; such an act during the tenancy not being necessarily injurious to the reversion. *Ib.*

—— **Excavating Coal.**]—The plaintiff having demised a cottage without exception of mines:—Held, that he might sue for an injury occasioned to the cottage by a stranger who had excavated coal; though it was not clear whether the injury resulted from excavation under the cottage, or under an adjoining house in the occupation of the plaintiff. *Raine* v. *Alderson*, 4 Bing. (N.C.) 702; 6 Scott, 691; 1 Arn. 329; 7 L. J., C. P. 273; 2 Jur. 327.

—— **For Injury to the Inheritance.**]—But an action lies by a reversioner for any injury done to the value of the inheritance. *Jesser* v. *Gifford*, 4 Burr. 2141. S. P., *Shadwell* v. *Hutchinson*, M. & M. 350.

—— **Not keeping House in Repair.**]—A house was devised to A. for life, she keeping the same in good repair, remainder to B.:—Held, that the court had no jurisdiction to enforce the condition at the suit of B. *Kinnersley* v. *Williamson*, 39 L. J., Ch. 788; 23 L. T. 39; 18 W. R. 1016.

Necessity of Proving Damage.]—An action against the sheriff for selling the reversionary interest of the plaintiff in goods in the possession of an execution debtor, cannot be supported unless actual damage has been sustained. *Tancred* v. *Allgood*, 4 H. & N. 438; 28 L. J., Ex. 362.

If the plaintiff declares as a reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment. *Jackson* v. *Pesked*, 1 M. & S. 234; 14 R. R. 417.

A declaration by a reversioner, after stating that he had a right of way for the tenants of his close over the close of the defendant, averred that he wrongfully locked, chained, shut and fastened a gate across the way, by means of which premises the plaintiff was injured:—Held, that the declaration disclosed a good cause of action. *Kidgell* v. *Moor*, 1 L. M. & P. 131; 9 C. B. 364; 19 L. J., C. P. 177; 14 Jur. 790.

A declaration for an injury to a reversionary interest by obstructing ancient lights, is sufficient if it shews an obstruction which may operate injuriously to the reversion, either by its being of a permanent character or by its operating in denial of the right. *Metropolitan Association for Improving Dwellings* v. *Petch*, 5 C. B. (N.S.) 504; 27 L. J., C. P. 330; 4 Jur. (N.S.) 1000.

A count, stating the plaintiff to be reversioner of premises occupied by his tenants, and abutting on a public navigable river; and that he and all the liege subjects of her majesty were accustomed of right to have free navigation and passage on the river for boats, and he was accustomed of right to have, for the enjoyment of the premises by his tenants, free use and navigation of that part of the river near to the same, and free passage for all persons in boats to approach the same, and pass to the premises, from the river, and unload the boats on the premises, without obstruction; but that the defendant fixed barges and planks in that part of the river

near the premises, and thereby obstructed the use and navigation of that part, and hindered persons from passing to the premises, from the river, and hindered the unloading of boats on the premises; and, by means thereof, the plaintiff was injured in his reversionary interest—is bad in arrest of judgment, as not shewing a damage to the reversionary interest. *Dobson* v. *Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233; 11 Jur. 556.

So a count which states that certain messuages were in the possession of tenants of the plaintiff, and alleges a similar obstruction, and that the plaintiff was injured thereby in his reversionary interest, is bad, as shewing no act which, per se, imports any damage to his reversionary interest. *Ib.*

What may be a Defence.]—An action may be maintained by a reversioner for an injury done to the inheritance by an erection, which may be removed before his estate becomes one in possession. *Jesser* v. *Gifford*, 4 Burr. 2141.

In an action by a reversioner for an injury to the reversion, it is no answer that the injury complained of was caused by the wrongful act of the tenant, for which he might be liable to an action. *Egremont* v. *Pulman*, M. & M. 404.

In an action, by a reversioner, for an injury to a house and land in the occupation of his tenant, by reason of the defendant not cleansing a watercourse on his own land, which it was his duty to do, it is no answer to plead that the obstruction of the watercourse was caused by the neglect of the tenant to repair a wall on the demised land, and in consequence it fell into the watercourse and caused the damage, and that the defendant removed the obstruction within a reasonable time after the notice; because the plea ought, at all events, to shew an obligation on the tenant to repair the wall; and also, because the removal, after notice, or even as soon as possible after the injury, would not make the defendant the less bound to compensate for neglect of an unqualified legal duty. *Bell* v. *Twentyman*, 1 G. & D. 223; 1 Q. B. 766; 10 L. J., Q. B. 278; 6 Jur. 336.

To a declaration for breaking and entering rooms in the occupation of the tenant of the plaintiff, and tearing down the ceiling over the landing of the staircase, the roof over the same, and the chimneys, and demolishing the windows, the defendant justified under a deed of assignment in trust for creditors, from H. (who was shewn to be the lessee of the premises before the accrual of the title of the plaintiff), whereby a right of entry was given to take and sell furniture:—Held, that the plea was bad, as confessing more than it avoided, inasmuch as the right to enter did not give a right to tear down the ceiling, &c., unless an entry could be obtained in no other way; which was not averred. *Foulkes* v. *Scarpe*, 1 D. (N.S.) 691; 4 Man. & G. 126; 4 Scott (N.R.) 713; 11 L. J., C. P. 247.

To an action by a reversioner for an injury to his reversionary interest, a plea by the defendant that he was the occupier of the adjoining house and wall, and that, whilst he was repairing his dwelling-house, by accident and against his will, and without any default on his part, it fell down, and in falling fell upon the adjoining wall and close to the plaintiff, and threw the plaintiff's wall down; that thereupon the defendant, within a reasonable time, rebuilt the wall at his own expense, and in so doing committed the grievances mentioned—is bad, for not shewing that he had the leave and licence of the tenant, or of some party having authority to allow him to come on the land. *Taylor* v. *Stendall*, 3 D. & L. 161; 7 Q. B. 634; 14 L. J., Q. B. 301; 9 Jur. 1096.

In an action by a reversioner, for the removal of the eaves from his house, and the erection of a building with eaves and a gutter overhanging his wall, evidence of a diminution of the saleable value of the premises in consequence of the nuisance was rejected; and it appearing that the cost of replacing the tiles which had been removed would not exceed 30*s.*, and the defendant having paid 40*s.* into court on account thereof, the jury was directed to find for the defendant, if they thought the sum paid into court was sufficient to cover the actual damages sustained by the plaintiff:—Held, that the evidence tendered was properly rejected, and the direction right, the true measure of damages being, not the diminution in the saleable value, although the nuisance might be of a permanent character, but such damages as the jury might think sufficient to compel the defendant to abate the nuisance. *Battishill* v. *Reed*, 18 C. B. 696; 25 L. J., C. P. 290; 4 W. R. 603.

For the portions of the wharf occupied by his two tenants, B. was to be paid a certain royalty on all coals sold; the minimum royalty to be paid by one being 200*l.* per annum, and by the other 180*l.*; and B. was, at the time of the obstruction complained of, in treaty with a third person for letting him the remaining portion of the wharf at 300*l.* per annum:—Held, that the jury was warranted in taking these sums into their consideration in estimating the amount of damage B. had sustained from the obstruction of a right of way. *Bell* v. *Midland Ry.*, 10 C. B. (N.S.) 287; 30 L. J., C. P. 273; 7 Jur. (N.S.) 1200; 4 L. T. 293; 9 W. R. 612.

And see further specific titles, NUISANCE, TRESPASS, &c.

Liability of Reversioner.]—If the owner of a house is bound to repair it, he, and not the occupier, is liable to an action on the case for an injury sustained by a stranger from the want of repair. *Payne* v. *Rogers*, 2 H. Bl. 350; 3 R. R. 415.

An action lies against a reversioner who has demised his premises with the chimneys in a ruinous condition and in danger of falling, they being known by him to be so at the time of the demise, and in consequence of their condition, falling during the demise, and injuring the building of another person. *Todd* v. *Flight*, 9 C. B. (N.S.) 377; 30 L. J., C. P. 21; 7 Jur. (N.S.) 291; 3 L. T. 325; 9 W. R. 145.

A nuisance of a permanent character having been created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shewn that since the creation of the nuisance and before the damage he might have determined the tenancy and did not, such continuing of the tenancy being equivalent to a re-letting; and it is no defence that he had no notice or knowledge of the existence of the nuisance. *Gandy* v. *Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151; 10 Jur. (N.S.) 652; 9 L. T. 800; 12 W. R. 526. Upon appeal the case was compromised. *See* 5 B. & S. 485; 13 W. R. 1022. The Court of Exchequer Chamber was prepared to reverse the judgment in Queen's Bench. *See* 9 B. & S. 15, where the judgment is set out.

In an action for damages against the landlord of premises let on a weekly tenancy, by a person who has sustained injuries through an accident which took place on the premises, it is a question for the jury whether the accident was caused by a structural defect existing at the time of the original letting, or whether it was caused by the negligence of the tenant. *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; 10 R. 47; 42 W. R. 236.

3. In Remainder.

Apportionment between Tenant for Life and Remainderman.]—*See* col. 261, et seq., ante.

Cross-remainders.]—Cross-remainders cannot be implied in a deed, and can only be raised by proper words of limitation, however plainly expressed the intention of the parties may be. *Doe* d. *Foquett* v. *Worsley*, 1 East, 416; 6 R. R. 303. S. P., *Edwards* v. *Alliston*, 4 Russ. 78; 6 L. J., (o.s.) Ch. 30; 28 R. R. 9. *Doe* d. *Tanner* v. *Dowell*, 5 Term Rep. 518; 2 R. R. 662. *Meyrick* v. *Whishaw*, 2 B. & Ald. 810; 21 R. R. 501.

Cross-remainders may lie between more than two, where the intent is plain. *Wright* v. *Cadogan* (*Lord*), Cowp. 31. *Perry* v. *White*, 1 Dougl. 53, n.; Cowp. 777. *Phiphard* v. *Mansfield*, 1 Dougl. 53, n.; Cowp. 797. *Doe* d. *Burden* v. *Burville*, 1 Dougl. 53, n.; 2 East, 47, n. *Doe* d. *Gorges* v. *Webb*, 1 Taunt. 234; 9 R. R. 754. *Maden* v. *Taylor*, 45 L. J., Ch. 569.

Leaseholds for life were settled by a deed on the parents for life, with remainder to the children of the wife equally and the heirs of their bodies, and if but one child then to such child and the heirs of his body, and in default of such issue to the heirs of the wife:—Held, that there were no cross-remainders between the children, and that on the death of a child without issue, and without having made any disposition, his share went to the heir of the wife. *Bainton* v. *Bainton*, 34 Beav. 563.

The limitations in a deed were to trustees to the use of A. and B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common, "and in case any such child or children should die without issue of his, her or their bodies, then the part of such child should be and remain to the use of the surviving child or children of B., and the heirs of his, her or their bodies issuing; and in case all the said children should die without issue, &c., then to A. in fee":—Held, that the deed created cross-remainders between the children of B.; and that on the death of one without issue, his share vested in a surviving child, and the heir of one deceased, as tenants in common. *Doe* d. *Watts* v. *Wainewright*, 5 Term Rep. 427; 2 R. R. 634.

—— **In Marriage Settlement.**]—A., by marriage settlement, conveyed estates to trustees, with remainder to his children of the marriage, share and share alike as tenants in common; and for default of such issue, and if any of such children, there being more than one, should happen to die without issue before twenty-one, that in every such case the share of such child should go to the survivors, as tenants in common; and in case all such children should die without issue, then to the use of the settlor in fee:—Held, that there were no cross-remainders between the children of the marriage, except in the case of a child having died without issue, and under twenty-one, and that one of the children having died without issue, but after twenty-one, his share vested in the settlor, and not the survivor. *Meyrick* v. *Whishaw*, 2 B. & Ald. 810; 21 R. R. 501.

Settlement of the wife's estate on herself for life, remainder to the husband for life, if any issue of the marriage so long lives, remainder, if she dies without issue, of one moiety to him in fee, and of the other to the wife's relations: his remainder in fee does not arise, unless he survives his wife. *Monkhouse* v. *Wainhouse*, 1 W. Bl. 638.

If an estate is limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. *Denn* d. *Trickett* v. *Gillot*, 2 Term Rep. 431; 1 R. R. 516.

But if the remainder is limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife solely. *Ib.*

Settlement to C. for life, remainder to the heirs on the body of his wife, the male to be preferred to the female, is an estate in tail male in the first instance. *Denn* d. *Creswick* v. *Hobson*, 5 Burr. 2609.

A settlement made on the marriage of H. W. and A. D. (after giving the husband and wife respectively estates for life, with powers of appointment, which were not exercised), contained the following limitation in default of any such appointment:—"To the use of all and every the child and children of the marriage, both sons and daughters equally, part and share alike, if more than one as tenants in common, and not as joint-tenants, and of the heirs of the body and bodies of all and every such child and children lawfully issuing; and in case there shall be more children than one of the said intended marriage, and any such child and children shall happen to die under the age of twenty-one years, without issue of his or their body or bodies lawfully issuing, then so often as to the part and share, parts and shares of all and every such child and children, to the use of the surviving children, part and share alike, if more than one as tenants in common and not as joint-tenants, and to the heirs of the body of every such child and children, until every such child and children should be dead; and in case there should be but one child only of the marriage, or one only surviving child, then to the use of such surviving child in tail, and for default of issue of the marriage, and in case there should be issue who should all die without issue under the age of twenty-one years, then to the heirs and assigns of the survivor of H. W. and A. D. in fee." The marriage between H. W. and A. D. having taken place, H. W. died intestate, leaving his widow and two children, Joseph and Ann. The widow died, leaving the two children, Joseph and Ann, who both attained the age of twenty-one years. Ann married, and Joseph died shortly after, having by his will devised to her in fee all his lands in the county of K. or elsewhere:—Held, that Ann, who was already tenant in tail of one moiety of the lands comprised in the settlement, became, as heir-at-law of J. W., tenant fee of the other moiety. *Levin* v. *Weatherall*, 1 Br. & B. 401; 21 R. R. 669.

Amount of Estate.]—Settlement to the use of G. for life, remainder to the use of the first son of the body of G. by A., his intended wife; and for default of such issue, to the use of the second, third and other sons of the body of G. by A., severally and successively as they shall be in

seniority of age, and of the several heirs male of their several bodies; and for default of such issue, then in case A. should be enceinte by G., to the use of P. till A. should be delivered, in trust for the after-born child or children; and in case such should be a son or sons, to the use of such after-born son or sons, severally and successively as they should be in priority of birth: and the heirs male of the body and bodies of such after-born son or sons:—Held, that the first son of G. by A., born during his life, took an estate tail. *Galley* v. *Barrington*, 2 Bing. 387; 10 Moore, 21; 27 R. R. 663.

An estate to A. for life in a deed, and a limitation of the estate to the heirs of the body of A. in a will (though the estate by the deed was voluntary, and moved from the testator and is recited in the will), do not unite so as to give A. an estate tail, but the heirs of his body take by purchase. *Doe* d. *Fonnereau* v. *Fonnereau*, 2 Dougl. 487.

A limitation in a deed, to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue to the second, third and other sons of A., and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing, gives an estate in tail male to the first son of A. *Owen* v. *Smyth*, 2 H. Bl. 594; 3 R. R. 513.

Where a marriage settlement conveyed an estate to trustees for the use of the settlor for life, then to the use of his wife for life, and then for the use of his first son and the heirs of such first son, and from and immediately after the determination of that estate for the use of his second, third, and all and every other son and sons, and their several and respective heirs; and for default of such issue, then to the use of all and every his daughter and daughters, and their heirs, to take as tenants in common, and not as joint-tenants; and for want of such issue, then for the right heirs of the survivor of himself and his wife for ever:—Held, that under these limitations the sons took successively estates tail, and the daughters an estate in fee. *Doe* d. *Littledale* v. *Smeddle*, 2 B. & Ald. 126; 20 R. R. 377.

By a marriage settlement, land was conveyed to trustees to the use of the husband for life, and from and after his decease, in case the wife survived him, to the use and intent that the wife should receive 14*s.* per week; and subject thereto that the trustees should, from time to time, and at all times thereafter, stand possessed of the residue to the use of all and every the child and children of his former wife, viz. A., B., C., D. and E., and their issue lawfully begotten, equally to be divided amongst them in equal shares and proportions, as tenants in common, and not as joint-tenants, and his, her or their respective issues:—Held, that the five children took estates for life, and that no estate was taken by grandchildren born after the settlement and before the death of the settlor, the husband, or by grandchildren born after his death. *Wheeler* v. *Duke*, 1 C. & M. 210; 3 Tyrw. 61; 2 L. J., Ex. 33.

—— **Trust Estates.**]—By deed and fine, an estate was limited to the use of the husband for life, remainder to trustees and their heirs during his life, to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying during her life), in trust to support the contingent uses and estates thereinafter limited, remainder to the first and other sons in tail, remainder to the wife in tail, remainder in default of issue to such persons and for such estates as she should appoint:—Held, that the trustees took a legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were trust estates. *Venables* v. *Morris*, 7 Term Rep. 342, 436; 4 R. R. 455.

B. devised to his only son, E., for life, remainder to his issue in tail, remainder to B.'s two daughters in tail, remainder to B.'s right heirs: the two daughters suffered recoveries to the use of E.; and by an act of parliament reciting the will, the recoveries, and that E. had no issue, trustees were empowered to sell the estates devised, and to lay out the purchase-money in the purchase of other estates, to be settled to such of the uses in the will of B. as should be existing, undetermined, or capable of taking effect at the time of the sale: the trustees sold, and bought with the purchase-money an estate, which, by a conveyance reciting the will of B. and the act, was conveyed to them to such of the uses in the will of B. as were then existing, undetermined, and capable of taking effect:—Held, that under the conveyance the trustees took a fee. *Wortham* v. *Mackinnon*, 8 Bing. 564; 1 M. & Sc. 543.

Heirs Male.]—By a marriage settlement, Whiteacre was limited to A. for life; remainder to trustees during the life of A. to preserve contingent remainders; remainder to B. for life; remainder to the trustees during the life of B. to preserve, &c.; remainder to the sons of B. by D. successively in tail male; remainder to the right heirs male of B. for ever. By the same deed Blackacre was limited to B. for life; remainder to trustees, during the life of B., to preserve, &c.; remainder to D. for life, for raising out of the rents an annuity, and subject thereto to the sons of B. by D. successively in tail male; remainder to the trustees to the use of the issue female of B. by D., for raising portions and maintenance until twenty-one; and after raising such sums, or in default of issue female, to the use of the right heirs male of B. for ever:—Held, first, that the words "heirs male" were words of limitation, and gave B. the ultimate remainder in fee, and that even if they were words of purchase, they created a remainder contingent during B.'s life, which upon his death vested in his heir, by whom it was devisable. Secondly, that the trustees took at most a limited fee, determinable on the portions being raised, and that after twenty years' adverse possession as against them, their right must be presumed to have been satisfied or released. *Doe* d. *Brune* v. *Martyn*, 2 Man. & Ry. 485; 8 B. & C. 487; 7 L. J. (O.S.) K. B. 60; 32 R. R. 459.

Estates were limited to C. for his life, remainder to such one or more of his children as he should appoint; remainder, in default of appointment, to D., the first son of C., and the heirs of D.'s body. C. appointed to D. for D.'s life, remainder to a daughter of C. for her life. It being admitted that all the limitations were to be read as one conveyance, quære, whether the life estate, when vested in D., united with the estate limited to O. and the heirs of his body, under the rule in *Shelley's Case*. Semble, per Lord Denman, C.J., Littledale, J., and Patteson, J., that the rule does not apply to such a limitation. *Doe* d. *Nicholson* v. *Welford*, 12 A. & E. 61; 4 P. & D. 77; 9 L. J., Q. B. 334; 5 Jur. 38.

But held, that, if the rule was applicable, the limitations did not so unite as to displace the

ntervening estates; and therefore D. could not bar these by a recovery. *Ib.*

Shares.]—Prior to the marriage of E. and B., lands, of which E. H., the mother of E., was seised in fee, were settled to the use of B., the husband of E., for his life, and then with remainder to the use of E., his intended wife, for her life, with remainder to the use of all and every the children of the body of B. on the body of E., to be begotten, to be equally divided among them, share and share alike, to take as tenants in common, and not as joint-tenants, and of the heirs of the bodies of all and every such children lawfully issuing; and in case one or more of such children should happen to die without issue of his or their body or bodies, then as to the share or shares of him or them so dying without issue, to the use of the survivors or others of them, share and share alike, to take as tenants in common, not as joint-tenants, and the heirs of their bodies lawfully issuing; and in case all such children but one should happen to die without issue, or if there should be but one such child, then to the use of such surviving or only child and of the heirs of his or her body lawfully issuing; and for default of such issue, then to the use of E., the wife of W. H., and of her heirs and assigns for ever. The marriage was duly solemnised. There was issue of it eight children, three of whom died in infancy, unmarried, and in the lifetime of their parents. E., the wife of B., survived both W. H. and his wife, E. H.:—Held, that the word "share" included every interest which each child took under the limitations of the settlement, and that cross-remainders were created by apt words as well in respect of the accruing as of the original shares. *Doe* d. *Clift* v. *Birkhead*, 4 Ex. 110; 18 L. J., Ex. 441.

Grant by Crown.]—An estate, granted by the Crown to a subject as tenant in tail for services, is not barred so as to destroy the reversion of the Crown, although two private acts of parliament may have been passed, confirming a settlement by the tenant in tail, purporting to pass such reversion, the Crown being a party to neither of such acts, and each of them containing a saving clause, by which its rights were expressly reserved. *Mitford* v. *Elliott*, 1 Moore, 434; 8 Taunt. 1.

Contingent Remainders.]—Where by a marriage settlement, lands were conveyed to the use of the settlor for life, remainder to his wife for life, remainder, if there should be only one child of the marriage living at the death of the survivor of the settlor and his wife, and no such child dead leaving issue, to such surviving child in fee; but if, at the death of the survivor of the settlor and his wife there should be more than one child living, or a child or children should have died leaving issue, then, to such surviving child or children and such children's children, as tenants in common in tail, with cross-remainders, and for default of all such issue, to the defendant in fee. The settlor and his wife died without leaving any child or children, or issue of child or children them surviving, and all the preceding limitations failed:—Held, that the remainder to the defendant was an independent remainder and took effect, and that it was not contingent upon the preceding limitations in tail, and dependent on their having vested. *Doe* d. *Lees* v. *Ford*, 2 El. & Bl. 979; 2 C. L. R. 654; 23 L. J., Q. B. 53; 18 Jur. 420.

By an indenture in 1804, hereditaments were settled to the uses of such persons as the settlor should by deed or will appoint; and in default of appointment to the use of the settlor in tail general: remainder to J. L., the second son of the late Sir J. L., for life; remainder to the eldest son, J. L., in tail male; remainder to the second, third, fourth, fifth, and all and every other, the son and sons of the body of J. L. in tail male; remainder to L. C. for life, with remainders over: subject to a proviso, "that in case J. L., or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates of Sir J. L., deceased, then and in every such case the uses and estates hereinbefore limited, expressed and declared of and concerning the hereditaments to or for the benefit of him or them who shall so become entitled to the possession or the receipt of the rents and profits of the family estates of Sir J. L., and to and for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine, and be absolutely null and void: and then and in every such case, all and singular the premises shall immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, and shall go over in such and the same manner to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." J. L., as the second son of the late Sir J. L., became entitled to the possession of the family estates mentioned in the proviso, in the lifetime of the testator, who afterwards died without issue, and without having exercised the power of appointment. At the time of his death there were living J. L. (then Sir J. L., who had become entitled to the family estate), J. H. L., the eldest son of Sir J. L., the son, H. L., his second son and four other sons; also L. C. mentioned in the indenture:—Held, that the remainders to the sons of J. L. were destroyed; and that L. C. took an estate for life. *Morrice* v. *Langham*, 8 M. & W. 194; 10 L. J., Ex. 289.

—— **Limitations under 10 & 11 Will. 3, c. 16.**]—An estate which, by virtue of settlement, devolves on a posthumous heir as tenant in tail by descent, is not a settled estate within the operation of this enactment. *Richards* v. *Richards*, Johns. 754; 29 L. J., Ch. 836; 6 Jur. (N.S.) 1145.

Mortgage — Recovery of Interest against Remainderman — Laches.] — Incumbrancer is entitled to arrears of interest against remainderman, though by laches he omitted to obtain it against tenant for life. *Roe* v. *Pogson*, 2 Madd. 457. And see *McKiernan* v. *Kernan*, Fl. & K. 352; 4 Ir. Eq. R. 269.

De Ventre inspiciendo.]—A writ of de ventre inspiciendo may be had by a devisee as well as by an heir-at-law. A writ of de ventre inspiciendo is always applied for by petition. *Bellett, Ex parte*, 1 Cox, 297.

Writ de ventre inspiciendo ordered to issue against a married woman, whose husband had been ten years abroad, on the application of a devisee, there being a limitation in the will, that if she had a male child within forty weeks after testator's decease, it should take previous to the devisee; but to lie in the office fourteen days, and if she be submitted to an examination of midwife in the meantime, not to go; otherwise to issue. *Wallop, Ex parte*, 4 Bro. C. C. 90; Dick. 781.

A writ de ventre inspiciendo may be had by devisee, as well as by an heir-at-law. *Ib.*

A writ de ventre inspiciendo ordered in a case where the child or children would be entitled to a sum of money to be raised, under the trusts of a term of years, out of a real estate. *Blakemore, In re*, 14 L. J., Ch. 336.

4. OTHER MATTERS.

An estate was settled by deed, after several preceding estates tail, to the use of all and every the nearest of kin in equal degree to A., at the time of her decease without issue, of the name of B.:—Held, that a person who at the time of A.'s death was her nearest of kin born with the name of B., but who was not her nearest of kin, and who had, previously to her death, married and assumed her husband's name, was not entitled to take under the deed. *Doe* d. *Wright* v. *Plumptre*, 3 B. & Ald. 474.

Strangers.]—Before 8 & 9 Vict. c. 106, s. 5, a deed inter partes could not operate as a release to strangers. *Storer* v. *Gordon*, 3 M. & S. 308; 15 R. R. 499.

A right of entry could not be reserved to a stranger to the estate. *Doe* d. *Barber* v. *Lawrence*, 4 Taunt. 23.

A. E. R.

ESTATE DUTY.

See REVENUE.

ESTOPPEL.

[By E. MANSON.]

A. GENERAL PRINCIPLES, 362.

B. BY RECORD.
1. *General Principles*, 363.
2. *In what Cases*, 377.
3. *Against what Parties*, 398.
4. *Judgments of what Courts*, 410.
5. *Pleading and Proceedings thereon.*
   a. Generally, 418.
   b. Nul Tiel Record, 421.

C. BY DEED.
1. *Generally*, 423.
2. *Parties*, 423.
3. *By Recital*, 427.
4. *Landlord and Tenant*, 431.
5. *Mortgages and Debentures*, 435.
6. *In other Cases*, 438.
7. *Pleading*, 444.

D. BY MATTER IN PAIS.
1. *General Principles*, 444.
2. *Acts of Agents*, 450.
3. *Bills of Exchange*, 455.
4. *Carriers and Bailees*, 459.
5. *Delivery Orders and Bills of Lading*, 461.
6. *Insurance*, 463.
7. *Mortgage*, 464.
8. *Patents, by Assignmen tor Use of*, 464.
9. *Sale*, 466.
10. *Share and other Securities*, 468.
11. *Trustee*, 473.
12. *In other Cases*, 473.
13. *Pleading*, 490.

E. ESTATES BY, 491.
Foreign Judgment by—See INTERNATIONAL LAW.
Lessee of—See LANDLORD AND TENANT.
Agent or Principal, of—See PRINCIPAL AND AGENT.
Trustee, of—See TRUST AND TRUSTEE.
Patent, of Assignee of—See PATENT.

A. GENERAL PRINCIPLES.

Definition.]—An estoppel may be said to exist where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth. This formula nearly approaches a correct definition of estoppel. *Simm* v. *Anglo-American Telegraph Co.* (per Bramwell, L.J.), 49 L. J., Q. B. 392; 5 Q. B. D. 188, at p. 202; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280—C. A.

Estoppel is quaintly defined stopping of man's mouth from speaking truth, but legal definition of it contains much good sense. Law cannot be known until facts are ascertained, and facts can never be ascertained unless some evidence is allowed to be of such a nature as cannot be contradicted, and therefore it is that estoppels are allowed. Estoppels may be pleaded or given in evidence; jury, however, is not bound by estoppel, arising by act in pais, or by matter of writing, when given in evidence, but they may find such estoppels, and if they will find, court is bound to give judgment accordingly. "Estoppels being specially found by jury, court must judge according to special matter, for albeit estoppel ought to be regularly pleaded and relied upon by apt conclusion, and jury is sworn to find veritatem facti, yet, when they find estoppel, court must judge according to law." 1 Inst. 227. But, if estoppel arises by matter of record, and is given in evidence, jury is bound to find accordingly, under peril of an attaint. *Needlar* v. *Winton* (*Bishop*), Hob. 227.

Does not apply to Act of Parliament.]—The doctrine of estoppel cannot be applied to an act of parliament. Estoppel only applies to a contract inter partes and it is not competent to parties to estop themselves or anybody else in the face of an act of parliament. *Stapleford Colliery Co., In re, Barrow's Case*, 49 L. J., Ch. 498, at p. 501; 14 Ch. D. 432, at p. 441; 41 L. T. 755; 28 W. R. 270.

Consent Judgment—Estoppel inter partes.]—A judgment by consent operates as an estoppel inter partes as much as if the case had been fought out. It makes no difference that the court has not exercised its mind on the matters in controversy. *South American and Mexican Co., In re, Bank of England, Ex parte*, [1895] 1 Ch. 37; 12 R. 1; 71 L. T. 594; 43 W. R. 131—C. A. But see *Jenkins* v. *Robertson*, L. R. 1 Sc. App. 117.

Where a judgment by consent for a sum of money proceeded on the ground that an agreement under which the money was payable was a valid one, the court held that parties to the judgment were estopped from disputing the validity of the agreement. *Ib.* And see *Parker* v. *Simpson*, 18 W. R. 204.

Inconsistent with Document.]—No estoppel can be raised on a document inconsistent with the document itself. *Colonial Bank* v. *Hepworth*, 56 L. J., Ch. 1089; 36 Ch. D. 36; 57 L. T. 148; 36 W. R. 259.

B. BY RECORD.

1. General Principles.

Same Matters and Parties.]—The judgment of a court of competent jurisdiction is, as evidence, conclusive as to the matters at issue, whenever the same matters shall be afterwards in question between the same parties in another court. *Flitters* v. *Allfrey*, 44 L. J., C. P. 73; L. R. 10 C. P. 29; 31 L. T. 878; 23 W. R. 442.

Decrees of the court, though erroneous, are binding until set aside on rehearing, or in a suit for the purpose. *Clanmorris* v. *Clanmorris*, 14 Ir. Ch. R. 420.

The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. *Mackintosh* v. *Smith*, 4 Macq. H. L. 913.

The judgments of courts of exclusive jurisdiction are evidence, whether the matter arises incidentally, or is the matter directly in issue. *Ib.*

The validity of a defence of res judicata depends upon whether the case made by the plaintiff in the subsequent suit is the same as in the former suit, and therefore, although the relief prayed by both bills is substantially the same, if the case presented is different, the defence would not avail. *Hunter* v. *Stewart*, 4 De G. F. & J. 168; 31 L. J., Ch. 346; 8 Jur. (N.S.) 317; 5 L. T. 471; 10 W. R. 176.

One of the criteria of the identity of two suits, in considering a plea of res judicata, is the inquiry whether the same evidence would support both. *Ib.*

When a record is an estoppel to the party, it must be direct and in point to the fact, which the party is estopped from proving contrary to the record concerning that fact. *S. C.*, Co. Litt. 352.

There are only two ways of taking advantage of an estoppel. If the estoppel appear on the record the party may demur, or if not on the record he may plead. *Ib.* 69.

After issue joined, publication passed, and the cause heard, the same matter or the same title shall not be drawn into question again by another original bill. *Peterborough* v. *Germaine*, 6 Bro. P. C. 1. See *Hawkins* v. *Miles*, 4 L. J. (O.S.), Ch. 139.

Semble, a plea of res judicata is of no effect unless between the same parties, and as to same subject-matter; and semble, that a party to a suit is not bound to amend at a late stage which would introduce a new state of circumstances. *National Bolivian Navigation Co.* v. *Wilson*, 5 App. Cas. 176; 43 L. T. 60.

If estoppel appears upon record, and issue is joined, if jury find fact against estoppel, yet judgment shall be given according to estoppel, and not according to verdict, because, says the Year Book, 11 Hen. 6, c. 42, verdict is nothing to purpose, being mere jeofail to try a matter contrary to the record. *Hume* v. *Burton*, 1 Ridgw. P. C. 247; 1 Bridg. 658.

Court must have Concurrent or Exclusive Jurisdiction.]—To establish the plea of res judicata, the judgment relied on must have been pronounced by a court having concurrent or exclusive jurisdiction directly upon the matter in question. *Att.-Gen. for Trinidad and Tobago* v. *Eriché*, 63 L. J., P. C. 6; [1893] A. C. 518; 1 R. 440; 69 L. T. 505—P. C.

Judgment Necessary.]—One personal action not going on to judgment is no bar to another for the same cause. *Hitchin* v. *Campbell*, 2 W. Bl. 831; 3 Wils. 304; Lofft, 208.

Same Thing to be Recovered.]—To constitute a plea of res judicata, it must be shewn that the former suit was one in which the plaintiff might have recovered precisely that which he seeks to recover in the second suit. *Nelson* v. *Couch*, 15 C. B. (N.S.) 99; 33 L. J., C. P. 46; 10 Jur. (N.S.) 366; 8 L. T. 577; 11 W. R. 964.

Where, therefore, a plaintiff had under a decree of the Admiralty Court in a suit for a collision obtained the whole proceeds of the sale of the defendant's vessel:—Held, that such recovery was no bar to a subsequent action in a court of common law, the amount so recovered in the Admiralty Court being insufficient to cover the damage the plaintiff had sustained. *Ib.*

Pleadings—Contents of.]—The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by making a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or a plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated. *Boileau* v. *Rutlin*, 2 Ex. 665; 12 Jur. 899.

Decree and Pleadings considered.]—The verdict on issues in a suit between predecessors in title does not, in itself, create an estoppel. The decree and the pleadings must be taken into consideration. *Robinson* v. *Duleep Singh*, 48 L. J., Ch. 758; 11 Ch. D. 798; 39 L. T. 313; 27 W. R. 21—C. A.

Failure to get Interlocutory Injunction.]—The plaintiffs having failed to get an interlocutory injunction, discontinued that action, and paid the costs. Semble, that is not a res judicata, nor can it be pleaded or dealt with as res judicata. All it amounts to is, that the Vice-Chancellor did not then think that a case had been made out for the interference of the court upon interlocutory application. *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966.

Grounds of Decision.]—A judgment is not only conclusive with reference to the actual matter decided, but also with reference to the grounds of the decision, provided that the grounds of the decision can be clearly discovered from the judgment itself. *Bank of Hindustan, China, and Japan, In re, Alison's Case*, 43 L. J., Ch. 1; L. R. 9 Ch. 1; 29 L. T. 524; 22 W. R. 113.

An estoppel by record is not of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment. Much less, therefore, is either side estopped by the reasons which the judge assigns for the conclusion that he comes to. It is the conclusion that constitutes the estoppel. *Allsop and Joy, In re*, 61 L. T. 213.

A., tenant in tail in remainder, mortgaged the estate by demise to B. for ninety-nine years, if A. should so long live. A. next, by deed not inrolled, conveyed to X. and Y., their heirs and assigns, by way of security. Some time afterwards, in 1849, A., with the consent of the protector, disentailed the estate, and as part of the same transaction and for valuable consideration, the estate was by a separate deed settled (subject to the prior life estate) to the use of A. for life, remainder to W. in fee, W. covenanting to pay B.'s mortgage. A. next, suppressing all the above transactions except the security to X. and Y., borrowed money from C., who paid off X. and Y., and the estate was conveyed to him by A., X. and Y., by way of security, the deed being inrolled as a disentailing assurance. W. afterwards, without notice of C.'s security, bought A.'s life estate and took a transfer of B.'s security to a trustee for himself. C. filed a bill against W., alleging that the deed of 1849 had the effect of enlarging the estate of X. and Y. into an absolute fee, which was now vested in C., and that the settlement of 1849, so far as it was for the benefit of W., was voluntary and void as against C., and that B's security was merged, and C. the first incumbrancer; and by his bill C. offered to redeem if the court should hold B.'s security still subsisting and prior to his. This bill was dismissed at the hearing, A. being still living. After the death of A., W. filed his bill for an injunction to restrain C. from bringing ejectment, on the ground that the order of dismissal had determined the right of W. to the estate:—Held, that such bill could not be sustained, for that the order of dismissal in the former suit could only have proceeded on the ground that there was no equity to deprive W. of the benefit of the term of ninety-nine years, determinable on the death of A., which was vested in his trustee, and did not decide who was the rightful owner of the estate. *Waine* v. *Crocker*, 3 De G. F. & J. 421; 31 L. J., Ch. 285; 5 L. T. 702; 10 W. R. 204. And see *South American and Mexican Co., In re, Bank of England, Ex parte*, col. 362.

Judgment-roll erroneously made up—Estoppel in Subsequent Proceedings — Injunction.]—Where the judgment-roll in an action, as made up, does not accurately represent that which really was found at the trial, a court of equity ought not, in a subsequent proceeding between the same parties, to grant the plaintiff an injunction to enforce a right which was not established by any finding of the jury in the former proceedings notwithstanding what appears on the face of the judgment-roll. *Want* v. *Moss*, 70 L. T. 178—P. C.

Point actually Decided though not then in Issue.]—A judgment concludes not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided as to the groundwork of the decision itself, though not then directly the point at issue. *Reg.* v. *Hartington Middle Quarter (Township)*, 4 El. & Bl. 780; 3 C. L. R. 554; 24 L. J., M. C. 98; 1 Jur. (N.S.) 586; 3 W. R. 285.

Fact distinctly put in Issue.]—If a verdict is found on any fact or title distinctly put in issue in an action, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. *Outram* v. *Morewood*, 3 East, 346; 7 R. R. 473. S. P., *Strutt* v. *Bovingdon*, 5 Esp. 58; 8 R. R. 834.

When an allegation of a matter of fact has been once fairly investigated between the litigating parties, before a competent judicature, the unsuccessful party not having been taken by surprise, nor being able to allege mistake, accident or any subsequent discovery of a material kind, the investigation should be considered sufficient, and the judgment thereupon conclusive as between those parties. *Waters* v. *Waters*, 2 De G. & Sm. 591.

When issues have been directed in a suit between the parties' predecessors in title, the findings upon the issues will not alone create an estoppel, but must be considered in connection with the order directing the issues and the decree made upon the findings. *Robinson* v. *Duleep Singh*, 48 L. J., Ch. 758; 11 Ch. D. 798; 39 L. T. 313; 27 W. R. 21.

To an action on a deed, whereby the defendant covenanted to pay 600*l.* with interest, on a certain day, the defendant pleaded, by way of estoppel, that the plaintiff had impleaded him in a former action on a bond, conditioned in the penal sum of 1,200*l.* for payment of 600*l.* and interest, being the same principal sum and interest as were secured to the plaintiff by a deed of even date with the bond; in which action the defendant pleaded an usurious agreement made between the plaintiff and himself, and averred that the bond was given in pursuance of the agreement. The plaintiff traversed the latter allegation; and thereupon issue was joined, and found for the defendant. The plea then alleged the identity of the deed in this and in the former action mentioned, and of the 600*l.* and interest in this and the former action mentioned:—Held, no estoppel, inasmuch as the existence of an usurious agreement was not directly in issue in the former action, but only the question, whether the bond was given in pursuance of the agreement alleged in the plea; and that the admission of the usurious agreement on the record in that action was not sufficient to estop the plaintiff from contesting it in this action. *Carter* v. *James*, 13 M. & W. 137; 2 D. & L. 236; 13 L. J., Ex. 373; 8 Jur. 912.

A plaintiff discounted for the defendant a bill for 250*l.*, drawn by the latter upon A., the defendant and A. at the same time signing the following memorandum, addressed to the plaintiff: "Sir,—In consideration of your discounting the undermentioned bill, we do hereby, jointly and severally, undertake, if the same is not wholly paid at maturity, to pay as interest thereon, 20*l.* for each month, any portion of which shall have elapsed after maturity of the bill, and until the same is wholly paid and satisfied." At the foot of this memorandum was written, "250*l.*, Jennings on A., at three months." The bill not having been paid at maturity, the plaintiff sued the defendant thereon, claiming by the particulars indorsed on the writ, interest at the rate of 20*l.* per month, as per agreement, but declaring only on the bill, and obtained a verdict and judgment thereon. The plaintiff afterwards brought another action against the defendant, upon the agreement for the stipulated interest of 20*l.* per

month :—Held, that the former judgment was no answer to the claim for interest accruing before such judgment, but that the plaintiff was not entitled to recover in the second action interest accruing since the judgment. *Florence* v. *Jennings*, 22 C. B. (N.S.) 454 ; 26 L. J., C. P. 274 ; 3 Jur. (N.S.) 772.

Meaning of Doctrine as to Res Judicata.]—The doctrine of res judicata does not apply only where there is a record. It is one of the most fundamental doctrines of all courts that there must be an end to litigation, and that the parties have no right of their own accord after having tried a question between them and obtained a decision of the court, to start that litigation over again on precisely the same questions. Per Lord Esher, M.R. *May, In re, House, Ex parte*, 54 L. J., Ch. 338 ; 28 Ch. D. 518 ; 52 L. T. 79 ; 33 W. R. 917.

Same Litigant setting up opposite Constructions of Deed.]—Where a litigant has obtained the decision of the court on the construction of a deed in his favour, he cannot ask the court in a subsequent action to put an opposite construction on the same deed. *Gandy* v. *Gandy*, 54 L. J., Ch. 1154 ; 30 Ch. D. 57 ; 53 L. T. 306 ; 33 W. R. 803—C. A. See also *Roe* v. *Mutual Loan Fund Association*, 56 L. J., Q. B. 541 ; 19 Q. B. D. 347 ; 35 W. R. 723—C. A.

Same matter in Issue—Forgery of Will—Revocation of Probate.]—In an action in the Probate Division, T. and G. propounded an earlier, and P. a later will. The action was compromised, and by consent verdict and judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which T. and G. were parties, obtained a verdict of a jury to that effect, and judgment that the compromise should be set aside. In another action in the Probate Division for revocation of the probate of the earlier will :—Held, that T. and G. were estopped from denying the forgery. *Priestman* v. *Thomas*, 53 L. J., P. 109 ; 9 P. D. 210 ; 51 L. T. 843 ; 32 W. R. 842—C. A.

Demand Substantially the same.]—A judgment recovered is a bar in another action, even of a different nature, if the demand in each action is substantially the same : and it is so, if the whole amount sought to be recovered in the second action was or might have been recovered in the first, even although the second action is against a different defendant, and is founded on a different matter of fact. And it makes no distinction that the sum sought in the second action is for a larger sum than was recovered in the first : and the former recovery is a good bar even to the difference. *Buckland* v. *Johnson*, 15 C. B. 145 ; 2 C. L. R. 704 ; 23 L. J., C. P. 204 ; 18 Jur. 775 ; 2 W. R. 565.

So judgment recovered, though without satisfaction, against one, in an action for a conversion of goods by wrongfully selling, is a bar to an action for money had and received, against another, for the proceeds of the same sale, whether he is a party to the conversion or a stranger. *Ib.* And see *Bowden* v. *Beauchamp*, 2 Atk. 82.

Main Object of Second Bill Different.]—Plea of decree, dismissing a former bill, overruled, on the ground, that although the new bill in part prayed the same relief, yet that its main object must be taken to be different. *Rattenbury* v. *Fenton*, Coop. t. Brougham, 60. *Moore* v. *Battie*, Ambl. 372 ; 1 Eden, 273.

New Bill brought in different Right.]—Plea of bill being for same matter overruled, where the last was brought in a different right. *Higgins* v. *York Building Co.*, 2 Atk. 44 ; Barnard, 83.

Consent Judgment—No Examination by Court.]—A decree obtained by arrangement between the contending parties, the court bestowing no judicial examination on the merits of the question can never be res judicata. *Jenkins* v. *Robertson*, L. R. 1 H. L. Sc. 117.

—— **Estoppel inter partes—Company—Winding-up.**]—A judgment by consent operates as an estoppel inter partes as much as a judgment which has been arrived at by the court after exercising its mind on the matters in controversy. Where a judgment by consent for a sum of money proceeds on the ground that an agreement, under which the money was payable, was a valid one, the parties to the judgment are estopped from disputing the validity of the agreement. *South American and Mexican Co., In re*, 64 L. J., Ch. 189 ; [1895] 1 Ch. 37 ; 12 R. 1 ; 71 L. T. 594 ; 43 W. R. 131—C. A.

And see *Ribble Joint Committee* v. *Croston Urban Council*, 66 L. J., Q. B. 384 ; [1897] 1 Q. B. 251 ; 45 W. R. 348.

Judgment against two of three Joint Debtors.]—An action, and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied), constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested, as a partner, with the two debtors in the business for the purposes of which the money had been borrowed. *King* v. *Hoare* (13 M. & W. 494) adopted. *Kendall* v. *Hamilton*, 4 App. Cas. 504 ; 48 L. J., C. P. 705 ; 41 L. T. 418 ; 28 W. R. 97.

Technical Defect.]—A. brought an action for an attorney's bill against B., but only recovered a small sum for money lent, as there had been no bill delivered :—Held, that A. might recover the amount of the attorney's bill in another action, brought after the bill was delivered, although this was a part of his demand in the first action ; and that it was not necessary that he should have been nonsuited in the first action to entitle him to bring the second. *Heming* v. *Wilton*, 5 Car. & P. 54.

Improper Direction to Jury.]—In an action for malicious prosecution for larceny, the defendant pleaded that the plaintiff before action sued him for assault and imprisonment upon a false and unreasonable assertion that he the plaintiff had committed felony ; that the defendant pleaded in that action not guilty, and a justification that the plaintiff had committed felony, and that at the trial the judge directed the jury to consider whether the defendant had falsely and maliciously and without reasonable or probable cause charged the plaintiff with the felony ; that the jury found for the plaintiff, and assessed damages accordingly, and that the plaintiff afterwards recovered judgment upon the verdict, with costs :—Held, that the direction to the jury in the former action was improper,

and that the facts pleaded afforded no answer to the action. *Guest* v. *Warren*, 9 Ex. 379; 2 C. L. R. 979; 23 L. J., Ex. 121; 18 Jur. 133; 2 W. R. 159.

Pleading Matters not Raised in Previous Action.]—A defendant, by allowing judgment to go by default in an action to which he has a good defence, is not estopped from pleading such defence in a subsequent action against him by the same plaintiff, if such defence is not inconsistent with any traversable averment in the declaration in the former action. *Howlett* v. *Tarte*, 10 C. B. (N.S.) 813; 31 L. J., C. P. 146; 9 W. R. 868.

Therefore where, in an action in which judgment by default was obtained, the declaration was for nonpayment of rent which had accrued due under an agreement to grant a lease, and the plaintiff, in a subsequent action, sued the defendant for further rent under the agreement, he is not estopped from pleading in such action that a yearly tenancy had, by agreement between the parties, been substituted for the defendant's interest under the agreement declared on, and that such yearly tenancy had been duly put an end to before the accruing of the cause of action. *Ib.*

If, when a plaintiff could reply an avoidance of the release, instead of doing so, he confesses such plea and receives the costs of the cause up to the time of pleading such plea, as he is entitled to do by rules 22 and 23, Reg. Gen., T. T. 1853, he is estopped from bringing any fresh action for any claim which he might have thus set up in the first action; for the effect of such confession is not that of a mere nolle prosequi, but of a final judgment for the defendant. *Newington* v. *Levy*, 39 L. J., C. P. 334; L. R. 5 C. P. 607; 23 L. T. 70; 18 W. R. 1198. Affirmed on appeal, 40 L. J., C. P. 29; L. R. 6 C. P. 180; 23 L. T. 595; 19 W. R. 473—Ex. Ch.

New Charges of Fraud.]—For the purpose of having a contract of sale of a concession set aside on the ground of fraud, and repayment of the purchase-money, 65,000*l.* with interest, a company filed a bill of complaint in the English Court of Chancery. At the same time it lodged a claim to be ranked, for the same sum, upon the estates of a firm carrying on business in Edinburgh and London, which had been sequestrated in Scotland. In the claim, the company described the debt as owing under the circumstances set out at length in the bill in chancery "produced and held as repeated brevitatis causâ." To the chancery suit the trustee of sequestrated estates was a party. The trustee having rejected the claim, the Lord Ordinary ordered a condescendance and proof. The proof was adduced on the 16th of June, 1874. The Court of Session, and ultimately the House of Lords, held that the claimants were not entitled to the debt claimed against the sequestrated estates, and refused to sist the proceedings in the sequestration pending the issue of the chancery suit (1 App. Cas. 780). The bill in chancery as filed alleged certain indicia of fraud. Afterwards additional evidence of fraud was discovered, in time to have it inserted by way of amendment. The bill was finally amended on the 3rd of March, 1874. Subsequently a decree was made by the Vice-Chancellor and affirmed by the Court of Appeal rescinding the contract, and ordering repayment of the 65,000*l.*; and a declaration was added, that plaintiff company should be at liberty to prove in the sequestration suit in Scotland for the 65,000*l.* (L. R. 5 Ch. D. 394). Founding on this decree the company lodged another claim with the trustee in Scotland. Again the trustee rejected the claim; and again a condescendance was made up. The company this time put its claim upon the allegations contained in the bill in chancery as finally amended on the 3rd of March, 1874. The trustee relied on the plea of res judicata:—Held, that the plea of res judicata prevailed, because (1) the new allegations of fraud in the amended bill in chancery did not constitute a new medium concludendi; (2) the alleged facts were within the knowledge of the claimants before the proof was adduced in the former action, and might have been inserted by amendment in their closed record in Scotland. *Phosphate Sewage Co.* v. *Molleson*, 4 App. Cas. 801.

Held, also, that no question arose as to the validity, or examinability, of a foreign judgment. *Ib.*

Semble, a party who has been unsuccessful cannot be allowed to reopen the litigation merely by saying, since the former litigation there is another fact, going exactly in the same direction with the facts stated before, and leading up to the same relief asked for before, but it being in addition to those facts, it ought now to be allowed to be the foundation of a new litigation, and he should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way on which that could possibly be admitted would be if the litigant were prepared to say—"I will shew you that this is a fact which entirely changes the aspect of the case, and further I will shew you that it was not and could not by reasonable diligence be obtained by me before." *Ib.*

New Facts brought before the Court.]—In determining whether a decision of a court of competent jurisdiction operates as an estoppel, the court in a subsequent case is entitled to consider what facts were before the court in the former case, and to give effect to any fresh facts that had subsequently taken place. *Heath* v *Weaverham Overseers*, 63 L. J., M. C. 187; [1894] 2 Q. B. 108; 10 R. 274; 70 L. T. 729; 42 W. R. 478; 58 J. P. 557.

Where Judgment stands it cannot be impeached by subsequent Action.]—A judgment which has been regularly and in good faith signed, though for an amount greater than is actually due, although it is afterwards set aside, furnishes a defence to an action brought against the party who causes the defendant to be arrested under a ca. sa. sued out upon it. Secus, if the judgment has been signed irregularly or in bad faith. *Smith* v. *Sydney*, 39 L. J., Q. B. 144; L. R. 5 Q. B. 208; 22 L. T. 16; 18 W. R. 628.

In order to determine whether the party who causes the arrest is a wrongdoer, the court will look and see what were the grounds on which the judgment was set aside. Action for false imprisonment. Plea, a justification under a ca. sa. upon a judgment for 34*l.* 9*s.* Replication, that the judgment was irregularly signed for 34*l.* 9*s.*, there being only 16*l.* 1*s.* due, as the parties who sued out the ca. sa. well knew, and that for that cause it was set aside by the master, and the money paid in excess of the amount due ordered to be repaid. Rejoinder, that the judgment was regularly signed on the non-appearance of the defendant to a writ specially indorsed, and was not set aside for irregularity:—Held, that the

judgment having been regularly signed, and not having been set aside for bad faith, an action could not be maintained against the defendant, who had caused the plaintiff to be arrested under the ca. sa. issued upon it. *Ib.*

Finding not Necessary—Decision—Domicil of Testator.]—A native of Chili made his will in London and died. A caveat having been entered on behalf of his daughter, the executors propounded the will in solemn form, alleging that the testator was domiciled in England. The daughter pleaded that the deceased was at the date of the will and until his death domiciled in Chili, and that the will was not duly executed according to the law of Chili. Upon this plea (inter alia) the executors took issue. The judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the deceased was at the date of the will and at his death a domiciled Englishman, and decreed probate to the executors. The daughter afterwards filed a bill against the executors, alleging that the testator was a domiciled Chilian, that his will being executed in England according to English law was good by the law of Chili, but so far only as the testator could by the law of Chili dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the daughter. The executors by answer set up the decree of the Probate Court as a bar. An order having been made for inquiry as to the testator's domicil, in an administration suit under circumstances (which it was contended) made it equivalent to an order in the suit by the daughter against the executors, the question whether the order was right was litigated between the daughter and the residuary legatee:—Held, that the decree of the Probate Court was not conclusive in rem as to the domicil, because the finding as to the domicil was not necessary to the decree:—Held, also, that for the same reason the decree of the Probate Court was not conclusive inter partes as to the domicil, as between the daughter and the residuary legatee, for the executors could not, by litigating in the probate suit a question of domicil which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to the testator's power of disposing of his property, and that as the residuary legatee was not bound, the daughter could not be bound, since estoppel must be mutual. *Concha* v. *Concha*, 56 L. J., Ch. 257; 11 App. Cas. 541; 55 L. T. 522; 35 W. R. 477—H. L. (E.)

Action for Rectification of Agreement already construed by Court.]—C. built a ship for B., and a considerable sum remained due to them, for which they had a lien on the ship. M. had made advances to B. An agreement was made between the three parties for sale of the ship by C., and for the distribution of the proceeds. The agreement was very obscure, and left it doubtful in what order the claims of C. and of M. were to be paid. After the sale M. sued C. for an account of the proceeds, and judgment was given in the Court of the County Palatine for carrying into execution the trusts of the agreement, and for the requisite account. On taking the account before the registrar, C. claimed to be allowed his debt, but the registrar held that M. had priority. The proceeds were amply sufficient to pay M.'s claim, but not C.'s also. The vice-chancellor affirmed the view of the registrar, and made an order for C. to pay M.'s claim. C. appealed, but the appeal was dismissed, and the money was paid to M. After this C. brought an action to rectify the agreement by making it provide that C.'s claim should have priority over that of M. M. pleaded that the agreement having been executed, and the money paid under the order of the Palatine Court, C. was not entitled to any relief:—Held, on appeal, that the action must be dismissed, for that although the question of rectification not having been before the Palatine Court, there was no res judicata, C. could not come to have the agreement rectified after it had been worked out, and the fund distributed, under the order of the court in the Palatine action. *Caird* v. *Moss*, 55 L. J., Ch. 854; 33 Ch. D. 22; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—C. A.

Proof that Actions are the same—Pleadings.]—In order to raise the defence of res judicata it is not necessary to set forth in detail in the defence the pleadings in the other action the judgment in which is said to operate as res judicata, but, in order to judge whether the same questions were at issue in the first action as in the second, the court will look at the pleadings in the first action, though they were not set forth in the defence in the second action. *Houstoun* v. *Sligo* (*Marquis*), 29 Ch. D. 448; 52 L. T. 96.

Judgment in First Action pending Second Action.]—Whether a judgment obtained in one action before the trial of another can operate by way of estoppel as res judicata, unless the judgment was obtained before the issue of the writ in the second action, quære. *Ib.*

Judgment against Agent set aside—Action against Principal.]—The plaintiff had supplied goods, on K.'s order, to a theatre, and had obtained judgment against K. for the price. Whilst the judgment was still standing the plaintiff commenced an action against the lessee of the theatre for the price of the same goods. The lessee objected that the matter was res judicata. The judgment against K. was set aside before the hearing of an appeal to the Divisional Court:—Held, that as the judgment had been set aside, the action was rightly brought against the lessee. *Partington* v. *Hawthorne*, 52 J. P. 807.

Judgment for one of several Demands.]—Though an action be brought for several demands, and a judgment for one only, it is as much a judgment as if there had been a particular determination on each. *Gregory* v. *Molesworth*, 3 Atk. 627.

Purchaser—Previous Suit—Determination as to Title.]—Where a purchaser pleads a former suit, he must shew it was res judicata, and absolutely determined by the court that plaintiff had no title. *Brandlyn* v. *Ord*, 1 Atk. 571.

A bill, dropped for want of prosecution, cannot be pleaded as a decree of dismission. *Ib.*

Matters subsequently arising.]—A record works an estoppel only as to those matters capable of being controverted between the parties at the time of the proceedings in the action; and therefore, although a deed may have been proved to be valid in one action, yet it may be shewn in a subsequent suit to have become invalid, if the circumstances avoiding it have happened after the determination of the earlier

action. *Hall* v. *Levy*, 44 L. J., C. P. 89; L. R. 10 C. P. 154; 31 L. T. 727; 23 W. R. 393.

To a declaration on a bill of exchange by the plaintiff, as indorsee, the defendant, the acceptor, pleaded by way of estoppel, setting out the proceedings in a former action by the plaintiff upon the same bill of exchange, in which former action the defendant had pleaded to the further maintenance a composition deed executed after action, by which the defendant's creditors, including the plaintiff, agreed to release him from their debts in consideration of his agreement to pay a composition by two instalments, with a proviso that, on default in payment of the composition, the release was to become null and void. The plea then set forth that the plaintiff had replied to such plea in the first action the nonpayment of the first instalment under the deed, and that the defendant had rejoined, on equitable grounds, a mistake in nonpayment on the proper day and a subsequent tender; that, thereupon, the plaintiff struck out the replication, confessed the plea, and taxed his costs under the rule of Trinity Term, 1853, which were paid, and that such determination of the first action estopped the plaintiff from bringing the present action. Replication, that after the proceedings in the first action, and before the present action, a second instalment under the deed became payable; that the defendant had made default in payment of it, and that thereby the release in the deed became null and void:—Held, that the replication was good. *Ib.*

On the 24th of March an application to commit a person for contempt was made and refused on the ground of privilege as a member of parliament:—Held, that this refusal was no bar to an application on the 15th of April after the privilege had expired. *Anglo-French Co-operative Society, In re*, 49 L. J., Ch. 388; 14 Ch. D. 533; 28 W. R. 580.

The plaintiffs having failed to get an interlocutory injunction, discontinued that action, and paid the costs. That is not a res judicata, nor can it be pleaded or dealt with as res judicata. All it amounts to is, that the vice-chancellor did not then think that a case had been made out for the interference of the court upon interlocutory application. Per James, L.J. *Massam* v. *Thorley's Cattle Food Co.*, 14 Ch. D. 748; 42 L. T. 851; 28 W. R. 966—C. A.

Relief Claimed Omitted in Former Decree.]—If a case is made for a bill for specific relief, and proof gone into by the parties in respect of it, and the right to it is a question which is fairly raised and may properly be decided at the hearing, and if a decree is pronounced in which no notice is taken of this portion of the case, while relief is given in respect of other matters in controversy, then, in a suit subsequently instituted to obtain the relief so omitted, it must be assumed that the claim to it in the former suit was either waived by the plaintiff at the hearing or refused by the court. *Blake* v. *O'Kelly*, Ir. R. 9 Eq. 54.

B.'s executors filed a bill against K., as executor de son tort, for an administration of B.'s personal estate, raising issues as to the validity of the transfer of a sum in bank stock from B.'s name to the joint names of B. and K., and also as to B.'s mental capacity at the time of the transfer. At the hearing it was objected that relief of such a nature could not be given, and an ordinary decree for administration was pronounced. B.'s executor subsequently filed a bill raising the same issues, and also impeaching a second transfer from B. to B. and K., and praying that both transfers should be declared null and void:—Held, that the former suit or decree did not bar the relief sought for. *Ib.*

Matter must be Adjudicated on.]—It was agreed between A. and B. (partners), that the former should relinquish to the latter his share of the business; B. agreeing to give A. a promissory note, payable by instalments; and in case a mortgage on property of A.'s should be called in before the note should be fully paid, to pay the whole amount which should remain due, or provide a fresh mortgage. A. (after the mortgagee had given notice to redeem the mortgage) sued B. upon this agreement, alleging for breach the nondelivery of the note. This cause was terminated by a judge's order, directing a certain note and securities to be given. A. afterwards brought a second action upon the agreement, alleging for breach damages resulting from the calling in of the mortgage:—Held, that a plea setting up the recovery in the former action afforded no answer, such former action being brought in respect of a different breach. *Bristowe* v. *Fairclough*, 1 Scott (N.R.) 161; 1 Man. & G. 143; 9 L. J., C. P. 245.

The having included a demand in a declaration for another cause of action, to which the evidence was confined on a writ of inquiry, and on which only the verdict was taken, will not prevent the plaintiff from bringing another action for the demand to which the evidence and verdict did not apply. *Seddon* v. *Tutop*, 6 Term Rep. 607; 1 Esp. 401; 3 R. R. 274.

It is no bar to an action for goods sold that the plaintiff had, in a previous action, recovered one demand from the same defendant, and in which he might have recovered the present demand, but it was not made a subject of inquiry in the first action. *Ib.*

Aliter, if the present demand had been inquired into in the former action. *Ib.*

A testator directed his trustees to hold certain real and residuary personal estate upon trust, to pay thereout to his widow for life such an annual sum as, together with the income of a settled fund of 10,000*l.*, "shall produce to her a clear annual income of 1,500*l.*," and declared that "no deduction shall be made from any of the legacies given by this my will for the legacy tax, or any other matter, cause or thing whatsoever." The testator's estate had been administered by the court, and by orders made in 1861 and 1863, the trustees had been directed to pay the annuity to the widow during her life, or until further order, free of all deductions except income tax. On petition by the widow, in 1882, that the income tax, which had been deducted from her annuity during the previous years, might be repaid to her out of the testator's estate:—Held, that the orders of 1861 and 1863 were final as to the rights of the parties, and could not now be reconsidered. *Peareth* v. *Marriott*, 52 L. J., Ch. 221; 22 Ch. D. 182; 48 L. T. 170; 31 W. R. 68—C. A.

Justices made an order in bastardy, directing the putative father to pay until the mother married, and the father accordingly made payments, some of which were made within a year from the birth. Afterwards the mother married, but her husband died, and thereupon on her application justices made a second order on the putative father to pay:—Held, that the matter

was res judicata, and therefore the order was invalid. *Williams* v. *Davies*. 52 L. J., M. C. 87; 11 Q. B. D. 74; 47 J. P. 581.

Conditions of sale represented that a deed under which C. claimed an interest in the estate was a forgery, and that the vendor had made his affidavit to that effect, and that the purchaser therefore should not take any objections to the title by reason of the deed. The purchaser afterwards refused to complete the purchase, brought an action for his deposit, and obtained a verdict, the jury declaring the deed to be genuine. In this state of circumstances, it was held by a court of law that the purchaser was precluded from rescinding the contract on the ground that the statement of the vendor turned out to be untrue; and by a court of equity, that the vendor in case he could make a good title in other respects was entitled to a decree for specific performance. *Cattell* v. *Corrall*, 3 Y. & C. 413. *S. C., Corrall* v. *Cattell*, 4 M. & W. 734; 8 L. J., Ex. 225.

The plaintiff, a sheriff, levied upon goods in the possession of the defendants, who were agents for their sale, and who proceeded with the sale which had then been advertised. The defendants, by inadvertence, failed to appear upon an interpleader summons taken out by the sheriff in the action concerning which he was obeying the writ of fi. fa., and the defendants were barred. They subsequently attempted to rescind the order, but failed, and their appeal to the court was also dismissed. This action was brought to recover the proceeds of the sale:—Held, that the defendants could not set up as a defence to the action the facts by which they claimed to be entitled to the goods upon which the sheriff had levied. *Williams* v. *Richardson*, 36 L. T. 505.

I cannot imagine anything more unsafe than to attempt to cut down the effect of judgments distinct and absolute on the face of them, on a surmise that the case was imperfectly considered or that the court had not proper materials for a judgment. Especially does it appear to me unsafe to enter on such speculations after the lapse of nearly a century, when every source of information except what is written in the judgment, has been dried up by lapse of time. Per Cairns, L.C. *Dundas* v. *Waddell*, 5 App. Cas. 263.

In an action by A. against B. for breaking and entering A.'s land, and building thereon a wall and a cornice, the issue on the plea of liberum tenementum was found in B.'s favour. In a subsequent action by B.'s devisees against A. and his wife, the plaintiffs declared for an injury to their reversion by the wife in pulling down part of a wall and a cornice built on land in the occupation of the plaintiff's tenant, and described as in the former action. The defendants denied that the reversion was the plaintiffs'. At the trial, the plaintiffs having put the record of the former action in evidence, the defendants admitted that the wife had no title but her husband's, but proposed to shew that in the former action the land overhung by the cornice was not in litigation:—Held, first, that the plaintiffs could not have replied to the plea by way of estoppel. *Whittaker* v. *Jackson*, 2 H. & C. 926; 33 L. J., Ex. 181; 11 L. T. 155.

Held, secondly, that the record was conclusive as to the title to the land overhung by the cornice at the period to which the plea of liberum tenementum referred, and that the evidence tendered was rejected rightly. *Ib.*

A declaration stated that A. had in a former action issued a writ of summons against H., specially indorsed for 28*l.*, and that, although H. paid 10*l.* before judgment, thereby reducing the debt to a sum under 20*l.*, A. maliciously, and without reasonable or probable cause, signed judgment for 28*l.* and costs (as appeared by the then record), and issued a ca. sa. and arrested him, and compelled him to pay 35*l.*:—Held, that while the judgment in the former action subsisted in its entirety, no averment by either party could be admitted to controvert it; and that, therefore, H. could not maintain this action against A. *Huffer* v. *Allen*, 4 H. & C. 634; 36 L. J., Ex. 17; L. R. 2 Ex. 15; 12 Jur. (N.S.) 930; 15 L. T. 225; 15 W. R. 281.

Judgment not to be Varied by Evidence in Second Action.]—A record, as evidence only of what is in issue and appears on the record, ought to be conclusive of the matter; therefore evidence is not admissible to shew that any matter occurred at the trial not appearing on the face of the record. *Sintzenick* v. *Lucas*, 1 Esp. 44.

In an action of ejectment the defendant, in order to shew a surrender, by operation of law, of a tenancy, previously subsisting in the plaintiff, proposed to give parol evidence that a previous action between the same parties, but not affecting the land, had been compromised by their counsel:—Held, that as the postea in the former action contained nothing from which it could be inferred that the verdict in that action had been taken by consent, no foundation was laid for the reception of such evidence as explanatory of the record; and that the evidence tended to contradict the record, and was inadmissible. *Keane* v. *O'Brien*, Ir. R. 5 C. L. 531.

Validity of Rule or Order.]—A party who has accepted costs under a judge's order cannot subsequently question the validity of the order. *Tinkler* v. *Hilder*, 7 D. & L. 61; 4 Ex. 187; 18 L. J., Ex. 429; 13 Jur. 684.

Action for breaking and entering the plaintiff's house and seizing his goods. Plea, that the defendant brought an action against the plaintiff, which was referred to arbitration by an agreement, afterwards made a rule of court; that the arbitrator awarded a certain sum to be due to the defendant, and ordered the plaintiff to pay it on a certain day, which he refusing to do, the defendant issued a fi. fa., and levied on the plaintiff's goods. Replication, that, by a rule of court, it was ordered, that the writ should be set aside for irregularity. Rejoinder (by way of estoppel), that after the making of that rule of court, the plaintiff ruled the sheriff to return the fi. fa.:—Held, that the replication was good, and that it was unnecessary to aver that the rule of court was acted on. *Jones* v. *Williams*, 8 M. & W. 349; 9 D. P. C. 702; 10 L. J., Ex. 253; 5 Jur. 895.

Held, also, that the plaintiff, by ruling the sheriff to return the writ, was not estopped from shewing that it was not a good writ, and, therefore, that the rejoinder was bad. *Ib.*

Fraud—Plea of Decree.]—On suggestion of a gross fraud, the court will, upon an original bill, overrule a plea of a decree, and a report made and confirmed thereon, if the suggestion of fraud be not denied. *Lloyd* v. *Mansell*, 2 P. W. 73.

Onus of shewing Res judicata.]—Where defendant pleads former suit, it must be shewn that it was res judicata. *Brandlyn* v. *Ord*, 1 Atk. 571.

2. In What Cases.

Breach of Agreement.]—The dismissal of a bill to restrain breaches of an agreement is no bar to the institution of a fresh suit for the same purpose, unless either the dismissal was for want of equity, or the facts alleged and proved in the first suit were the same as those on which the second suit is founded. *Moss* v. *Anglo-Egyptian Navigation Co.*, 35 L. J., Ch. 179; L. R. 1 Ch. 108; 12 Jur. (N.S.) 13; 14 W. R. 150.

Dismissal—Want of Prosecution—Effect of.]—Dismission of a bill for non-prosecution is no bar to a new suit. It amounts to nothing. It has no effect even on the running of time. But a bill dismissed by defendants after publication passed, is different from a bill dismissed for non-prosecution. *Byrne* v. *Frere*, 1 Moll. 157.

A bill dropped for want of prosecution cannot be pleaded as a decree of dismission. *Brandlyn* v. *Ord*, 1 Atk. 517.

—— **Consent Order.**]—An order by consent, in the absence of an agreement to compromise the cause of action, to dismiss an action for want of prosecution, is no bar to the institution of a fresh action. In this respect the practice of the old Court of Chancery remains unchanged. *Magnus* v. *National Bank of Scotland*, 57 L. J., Ch. 902; 58 L. T. 617; 36 W. R. 602.

The plaintiffs in an action, wherein the same parties were respectively plaintiffs and defendants, and the same relief was sought as in the present action, had paid the defendants' costs and consented to an order, made on summons taken out by the defendants, dismissing the action for want of prosecution. The plaintiffs subsequently brought the present action, whereupon the defendants moved that the question of law might first be tried whether the plaintiffs were not estopped from bringing the present action by reason of the consent order made in the previous action:—Held, that the motion must be dismissed. *Ib.*

The dismissal of a bill by consent, as well as adversely, is a bar to a second suit for the same object, and the defendant may avail himself of this defence by a motion to stay proceedings, or, semble, by a motion to take the bill off the file. *Parker* v. *Simpson*, 18 W. R. 204. *And see* col. 368.

—— **On Merits.**]—When a bill is dismissed on the merits, the insertion of a clause that the dismissal shall be without prejudice to any question but that specifically put in issue by the pleadings, is superfluous; for the dismissal of the bill without such reservation would only be a bar as to matters in issue in that suit between the same parties, and the court has no power to interfere with the effect which such a decree may have as a matter of evidence in any future proceeding in which it might without such reservation be legitimately used as evidence. *Rochester Corporation* v. *Lee*, 1 Macn. & G. 467.

—— **Different State of Circumstances.**]—The dismissal of a bill does not prejudice the right to file another for the same purpose under a different state of circumstances. *Liverpool Corporation* v. *Chorley Waterworks Co.*, 2 De G. M. & G. 852.

Plea of decree, dismissing a former bill, overruled, on the ground, that although the new bill in part prayed the same relief, yet that its main object must be taken to be different. *Rattenbury* v. *Fenton*, Coop. t. Brough. 60.

A plea of a former decree overruled, the same matter not being in issue in the former suit. *Moore* v. *Battie*, Ambl. 372; 1 Eden, 273.

—— **Want of Evidence.**]—Plea of a former suit and decree signed and inrolled in the Court of Chancery, in respect to the same matters, allowed, though the bill in the Court of Chancery was dismissed, not on the merits, but for want of evidence. *Jones* v. *Nixon*, Younge, 359.

—— **Without Prejudice.**]—The dismission of a suit without prejudice, either in law or equity, is no bar to a suit for same matter in another court. *Seymour* v. *Nosworthy*, 1 Ch. Ca. 155.

Reasons for not declaring the dismissal of the bill to be without prejudice to another suit. *Gloucester Corporation* v. *Wood*, 3 Hare, 148.

—— **Decree not Inrolled.**]—A decree of dismission may be pleaded in bar to a new bill, though it is not signed and inrolled. *Prettyman* v. *Prettyman*, 1 Vern. 310. But see *Kinsey* v. *Kinsey*, 2 Ves. 577; 1 Atk. 809; and *Joly* v. *Swift*, 11 Ir. Eq. R. 410.

—— **Fraud.**]—A plaintiff, charging fraud as to various matters, sought to set aside an order made in a former suit, in which he was likewise plaintiff, on the same ground of fraud. Three pleas were put in by different defendants pleading in bar the order sought to be impeached. A preliminary objection was taken, that the order sought to be impeached was not signed and inrolled, on the authority of *Kinsey* v. *Kinsey*, (2 Ves. 579):—Held, that that case does not apply, and objection overruled. *Pearse* v. *Dobinson*, 35 L. J., Ch. 110; 13 L. T. 519; 14 W. R. 121.

Fresh Bill en autre droit.]—Plea of bill being for same matter overruled, where the last was brought in a different right. *Higgins* v. *York Building Co.*, 2 Atk. 44; Barnard, 83.

Legatee not able to Investigate Executor's Accounts in First Suit.]—Under a decree in a legatee's suit to take the usual accounts, A. B. went in and claimed the residue which the master found him entitled to, but the residue was not then ascertained, and no order was made in respect of it:—Held, that A. B. was not precluded from afterwards asking relief against the executor in respect of an alleged breach of trust in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second. *Guidici* v. *Kinton*, 6 Beav. 517.

Annuity—Application to Set Aside Refused.]—The refusal of a summary application to set aside an annuity, is no objection to the same ground being taken again upon an attempt to enforce it. *Bromley* v. *Holland*, 5 Ves. 610; 7 Ves. 3; Coop. 9.

Award — Effect on Subsequent Breach.]—Where the parties to a contract have referred the question of its construction to an arbitrator, his award is conclusive evidence as to the construction in a subsequent action brought for other breaches of the same contract. *Gueret* v. *Audouy*, 62 L. J., Q. B. 633—C. A.

Assignment of Debts—Bankruptcy—Claim by Trustee — Interpleader.]—An assignee of book debts sued a debtor for the debt assigned and the assignor's trustee claimed the money; an interpleader issue was ordered, and at the trial the trustee disputed the assignment on the ground of notice of an act of bankruptcy:—Held, that after the issue was decided against the trustee, he could not set up any other ground upon which the assignment could be impeached. *March, Ex parte, Hilton, In re*, 67 L. T. 594; 9 Morrell, 286.

Calls—Action for—Application to place on List of Contributories.]—By the articles of association of a dairy company, it was provided that a director's qualification should be the holding in his own right of not less than ten shares. P., a medical man, not being a shareholder, was invited by the directors to take a seat at the board and the office of medical examiner, and he accepted this offer by letter, and acted as a director during a short period, but no shares were ever allotted to him. He subsequently resigned, but his resignation was declined, and an action, afterwards dismissed for want of prosecution, was brought against him to recover calls due on the qualification shares. The company having gone into liquidation:—Held, that the action for calls was no bar to the liquidator's claim to place P. on the list of contributories for the qualification shares, that his acceptance of the offer was, at the least, equivalent to an application for the shares, and that his name must be placed upon the list accordingly. *Hampshire Co-operative Milk Co., In re, Purcell's Case*, 29 W. R. 170.

River Pollution—Mistake as to Facts—Subsequent Proceedings to enforce Order—Consent Order.] — Where an order of a county court, good upon the face of it, declaring that a defendant has committed an offence under ss. 3 and 10 of the Rivers Pollution Prevention Act, 1876, by permitting sewage matter to flow into a river, and requiring him to construct such sewage works as may be necessary, is drawn up by consent, the defendant is estopped in a subsequent action brought to recover penalties for breach of the order from shewing that the part of the river comprised in the order was in fact tidal water, and that therefore the order with respect to such part was beyond the jurisdiction of the court, even though at the time of consenting to the order the defendant was unaware that such part of the river was in fact tidal water. *Ribble Joint Committee* v. *Croston Urban Council*, 66 L. J., Q. B. 384: [1897] 1 Q. B. 251; 45 W. R. 348. And see *Goucher* v. *Clayton*, 34 L. J., Ch. 239; 11 Jur. (N.S.) 107; 13 W. R. 336.

Damage to Person and Property— Distinct Causes of Action.]—Damage to goods, and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action for compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person. The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—Held, by Brett, M.R., and Bowen, L.J. (Lord Coleridge, C.J., dissenting), that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court. *Brunsden v. Humphrey*, 53 L. J., Q. B. 476; 14 Q. B. D. 141; 51 L. T. 529; 32 W. R. 944; 49 J. P. 4—C. A.

A ship, A., and her cargo, belonged to the same owners, and the plaintiffs advanced 1,000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1,000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship A. was lost through a collision with the defendant's vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of a bill of lading for 1,300*l.* against the defendant's ship:—Held, that the plaintiffs were entitled to recover the sum, and that the fact that a sum in respect of disbursements for ship A. on her voyage and wages paid in advance had been awarded to the owners of the A. by the registrar and merchants was no bar to the plaintiffs' right to recover in this action. *The Thyatira*, 52 L. J., P. 85; 8 P. D. 155; 49 L. T. 406; 32 W. R. 276; 5 Asp. M. C. 147.

Consignment of Goods—Separate Actions for Injuries to part of same.]—In September, 1883, the plaintiffs (a firm of millers) delivered to the defendant railway company a quantity of flour to be carried on the railway, nine sacks being consigned to D., and the remainder being consigned to the plaintiffs themselves. Some of the flour, comprising one of the sacks received by the plaintiffs and the greater portion of that delivered to D., was damaged in the carriage. D. used up two and a half sacks of the injured flour, and then he returned five sacks to the plaintiffs and claimed damages for the two and a half sacks which he had used. The plaintiffs notified to the defendants the damage sustained, and proceeded to recover damages for the injury to six sacks of the flour, but did not claim in respect of the two and a half sacks used up by D., and they obtained decree against the defendants on the 31st October, 1883. D., on the 17th December, 1883, issued a civil bill against the plaintiffs for the damage to the two and a half sacks, and obtained a decree against them on the 17th April, 1884, which was affirmed on appeal, and the amount was paid by the plaintiffs to D. The defendant railway company were served by the present plaintiffs with notice of D.'s civil bill and the appeal from the decree, and invited to attend on the hearing. The plaintiffs afterwards sued the defendant railway company by civil bill to recover the amount which they had been obliged to pay to D. for damages and costs under the decree of 19th April, 1884:—Held, that the injury to the two and a half sacks being an integral part of the cause of action arising from the defendant's negligence in the carriage of flour and for which the plaintiffs sued in the first process, the second action was not maintainable. *Russell* v. *Waterford and Limerick Ry.*, 16 L. R., Ir. 314.

—— **Tort not a Continuing Cause of Action.**]—The plaintiff, who had obtained damages in the county court for a misrepresentation under which he had been induced to enter into a

contract, brought an action in the High Court for further damages accrued since judgment in the county court:—Held, that a tort not being a continuing cause of action, no further damages could be obtained. *Clarke* v. *Yorke*, 52 L. J., Ch. 32; 47 L. T. 381; 31 W. R. 62.

Flow of Stream — Interference — Continuing Damage — Nemo bis vexari debet pro eadem causa.] — In 1887 the defendants entered upon the bed of a stream which formed the boundary between the lands of the plaintiff and of an adjoining owner, and they dug holes in, and deepened the bed of, the stream for their own purposes. The plaintiff averred that in consequence of the defendants' acts the stream flowed past his land more rapidly and at a less depth, so that the plaintiff's lands were liable to trespass of cattle. The plaintiff had brought an action against the defendants for trespass, which resulted in March, 1892, in a verdict for damages for 40*l.*, on which judgment was entered. No further acts of trespass had since been committed by the defendants. The present action was brought in November, 1892, for a continuing lowering of the stream and interference with its natural flow. At the trial the jury found for the plaintiff with 15*l.* damages, and leave was reserved to either party to apply for judgment:—Held, that the plaintiff was entitled to judgment. *Clarke* v. *Midland G. W. Ry.*, [1895] 2 Ir. R. 294—C. A.

Joint Debt—Judgment against one Defendant—Right to proceed against other.]—On an application under Ord. XIV. r. 1, in an action against two joint debtors, one of the defendants consented to judgment being entered against him, and the other obtained leave to defend. The defendant who had consented to judgment paid the plaintiff half of the debt:—Held, that under Ord. XIV. r. 5, the plaintiff was entitled to proceed with his action against the other defendant; the principle laid down in *King* v. *Hoare* (13 M. & W. 494) and *Kendall* v. *Hamilton* (4 App. Cas. 504) not applying to such a case. *Weall* v. *James*, 68 L. T. 515; 4 R. 356—C. A.

Previous Findings of Adultery, Cruelty and Collusion—Rescission of Decree—Second Suit.]—A verdict of cruelty and adultery against a husband upon a wife's petition in the Divorce Court for dissolution of marriage, followed by a decree nisi which is afterwards rescinded on grounds dehors the verdict and wholly unconnected therewith, is conclusive evidence of the husband's guilt in a subsequent suit between the same parties, where the husband seeks similar relief against the wife. *Butler* v. *Butler* (No. 2), 63 L. J., P. 1; 1 R. 535; 69 L. T. 545; 42 W. R. 49—C. A.

On motion by the Queen's Proctor to dismiss a husband's petition for divorce on the ground that in former proceedings he had been found guilty of adultery and collusion, the court held that, although the fact of the petitioner's adultery could not be again disputed, yet it would be open to the petitioner to shew such circumstances as would get rid of its effect, and that "collusion" referred to in s. 30 of the Matrimonial Causes Act, 1857, means collusion in the suit pending. *Butler* v. *Butler* (No. 1), 62 L. J., P. 105; [1893] P. 185; 1 R. 521; 69 L. T. 54.

Nullity — Previous Marriage to Domiciled Englishman—Divorce in Scotland — Fictitious Domicil—Fraud on Scotch Courts.]—M., a domiciled Englishman, obtained a divorce in the Scotch courts on the ground of his wife's adultery with B., by fraudulent representations as to his domicil and otherwise, to which B. was a party. The wife then went through a form of marriage with B. during the lifetime of M. B. afterwards brought a suit to have such subsequent marriage declared null and void:—Held, that the Scotch divorce had not dissolved the marriage, that B. was not estopped from taking advantage of the fraud to which he was a party, and the court declared the subsequent marriage null and void. *Bonaparte* v. *Bonaparte*, 62 L. J., P. 1; [1892] P. 402; 1 R. 490; 67 L. T. 531.

Personal Earnings of Bankrupt — Judgment of County Court—Application in Bankruptcy.]—In an interpleader issue between the trustee in bankruptcy and the bankrupt, commenced in the High Court and remitted to the county court, the county court judge decided that certain royalties were in the nature of personal earnings. In a subsequent application by the trustee in the High Court, claiming to be entitled to the royalties:—Held, that the trustee was estopped from denying that the royalties when paid were in the nature of personal earnings. *Graydon, In re, Official Receiver, Ex parte*, 65 L. J., Q. B. 328; [1896] 1 Q. B. 417; 44 W. R. 495.

Patent Action—Dismissal—Agreement not to Appeal—Amendment of Specification — Subsequent Action.]—An action was brought by H. against S. for infringement of a patent. During the course of the trial, H. stated that he would be content with the decision of the judge on the question of disconformity between the provisional and the complete specifications. The action was dismissed on the ground that the patent was invalid for want of novelty in the invention, and also on the ground that there was disconformity between the specifications. Thereupon H. amended his complete specification to meet the objection of want of novelty, but not that of disconformity. Several years afterwards H. commenced a fresh action against S. for infringement of the patent as amended. S. then moved to dismiss the action as being frivolous and vexatious, and an abuse of the process of the court. Kekewich, J., dismissed the action on the ground that the question of the validity of the patent was res judicata by reason of the judgment in the former action. The plaintiff appealed:—Held, without deciding the point on which Kekewich, J., based his judgment, that what took place at the trial of the former action amounted to an undertaking on the part of H. that, as between himself and S., the decision of the judge on the question of disconformity should be treated as final; and that therefore, on that ground, the action should be dismissed as a vexatious proceeding. *Horrocks* v. *Stubbs*, 74 L. T. 58—C. A.

Patent—Certificate of Validity.]—On a trial for infringement of a patent the defendant contested its validity and denied infringement. The issue as to validity was found against him, and the court directed the defendant to pay the costs of that issue, and granted the plaintiff a certificate of validity. The issue of infringement was found against the plaintiff, and he was directed to pay the costs of that issue. In a second action between the same parties on the same patent:—

Held, that the defendant could not reopen the question of validity, on the ground that he had, since the first action, discovered further anticipations. *Shoe Machinery Co.* v. *Cutlan*, 65 L. J., Ch. 314; [1896] 1 Ch. 667; 74 L. T. 166.

—— **Infringement—Revocation.**]—A finding in an action for infringement of a patent, that is adverse to the plaintiff, is no estoppel upon him in a subsequent petition for revocation presented by the defendant in that action. *Deeley's Patent, In re*, 64 L. J., Ch. 480; [1895] 1 Ch. 687; 12 R. 272; 72 L. T. 702; 43 W. R. 517—C. A.

—— **Validity of Patent admitted—Denial of Validity not allowed.**]—In 1876 the plaintiff took out a patent for improvements in mariners' compasses, and in 1885 commenced an action against the defendant for infringement, in which action an order was made with the defendant's consent restraining him from such infringement. The defendant subsequently adopted another form of making compasses which the court held to be an infringement of the plaintiff's patent, and the plaintiff moved for an attachment for disobedience to the order of 1885:—Held, that the defendant was estopped by the order made in 1885 from denying the validity of the plaintiff's patent, that the plaintiff was entitled to the relief sought, and that a fresh action was not necessary. *Thomson* v. *Moore*, 23 L. R., Ir. 599—C. A.

—— **Action for Infringement — Consent Judgment — Subsequent Suit for Infringement.**]—Judgment was given by consent before declaration in an action by a patentee against the members of a partnership for an infringement, and they immediately took a licence to use the invention. A suit to restrain a subsequent alleged infringement having been brought by the patentee against the same members at law and two fresh partners:—Held, that the defendants in equity were not estopped by the judgment from disputing the validity of the patent. *Goucher* v. *Clayton*, 34 L. J., Ch. 239; 11 Jur. (N.S.) 107; 13 W. R. 336.

Restitution Suit — Former Cause between same Parties.]—To a petition by a wife against her husband for restitution of conjugal rights, the respondent, by his answer and cross-petition for a divorce, pleaded cruelty on the part of the petitioner. Reply, that previously to the filing of the present petition the now petitioner filed a petition for a divorce on the ground of cruelty, and the now respondent filed his answer preferring charges of cruelty against the petitioner extending over the same period mentioned in his present answer, and prayed for a divorce; that the charge of cruelty in his former answer was the same as the charge alleged in the present answer and petition; that the former case was set down to be heard before the judge and a jury, and the issues were, first, whether the respondent was guilty of cruelty; secondly, whether the petitioner was guilty of cruelty; that the said issues were tried, and the respondent gave in evidence the several allegations of cruelty set forth in the present answer and cross-petition; and that thereupon the claim of the now respondent to a divorce a mensa et thoro was refused; and further, that after the evidence was so given, the judge asked the respondent's counsel whether they required to have any question left to the jury on the second issue, and the counsel replied that they did not, and abandoned the claim on the former cross-petition, and the jury were thereupon discharged from finding on the second issue; and that the respondent was estopped and concluded by the proceedings had in the former suit, and by the said issue, and by acts and admissions of his counsel at the trial:—Held, on demurrer, that the reply was bad, the facts stated by it not amounting to an estoppel on the respondent. *Carnegie* v. *Carnegie*, 17 L. R., Ir. 430—Affirmed in C. A.

Prohibition in previous Action.]—The plaintiff's solicitor, who carried on business within the jurisdiction of the Mayor's Court, wrote to the defendant demanding payment of 7*l.* 6*s.* 6*d.* for goods sold and delivered. The defendant wrote to the plaintiff's solicitor (which he received within the jurisdiction) admitting that he owed to the plaintiff 5*l.* 6*s.* 6*d.* The plaintiff brought an action in the Mayor's Court for 7*l.* 6*s.* 6*d.*, and the defendant obtained a writ of prohibition staying proceeding therein, as the contract was entered into and the plaintiff and defendant resided out of the jurisdiction. The plaintiff then commenced a second action to recover 5*l.* 6*s.* 6*d.* on an account stated, and the defendant obtained a second writ of prohibition:—Held, that the prohibition in the first action was not an estoppel against bringing the second action. *Grundy* v. *Townsend*, 36 W. R. 531—C. A.

Probate—Fresh Action on Fresh Evidence.]—The next of kin of a testator instituted a suit for administration with a will annexed, bearing date 1868, of which the sole executor and universal legatee was the testator's wife, who predeceased him. The opposition parties claiming to be legatees set up the contents of a later will, alleged to have been executed in 1877 or 1878, but which could not be found. The Court of Appeal, reversing the judgment of the Probate Division, decided that there was not sufficient evidence of the contents of the second will, and their decision was affirmed in the House of Lords. A fresh suit for probate of the second will was then commenced by the executor of the testator and residuary legatee of the will of 1877-8, who had been the confidential solicitor of the deceased, and who had acted as solicitor for the legatees all through the litigation. The suit was founded upon fresh evidence of the contents and execution of the second will:—Held, that although the plaintiff had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of the plaintiffs in the prior action had been paid. *Peters* v. *Tilly*, 55 L. J., P. 75; 11 P. D. 145; 35 W. R. 183.

Stock—Petition for Re-transfer.]—Where a petition for the re-transfer of stock has been heard on the merits, and is dismissed on the ground that the petitioner has failed to make out his title, he cannot on the subsequent discovery of fresh evidence to support it, present a fresh petition for the same object without the leave of the court previously obtained. *May, In re, House, Ex parte*, 54 L. J., Ch. 338; 28 Ch. D. 518; 52 L. T. 79; 33 W. R. 917—C. A.

Second Action for same Cause—Prayer for "further or other Relief."]—In March, 1881, the plaintiff handed to one Bird, a broker, shares in a mining company, with a transfer signed (a blank being left for the name of the transferee), for the purpose of sale. Bird died; and it was then discovered that he had, without the knowledge or authority of the plaintiff, lodged the shares with the defendant's firm as security for an advance. Having received notice from the company that they were about to register the shares in the name of the defendant, the plaintiff commenced an action in the Chancery Division of the High Court to restrain the defendant's firm and the company from parting with the shares, or registering the defendant as transferee — concluding with the usual prayer for "such further or other relief as the nature of the case might require." On the 23rd of February, 1882, the defendant in that action consented to an order for the delivery up of the shares to the plaintiff forthwith. The order directed that, "upon delivery of the deed or form of transfer, and the securities representing the same, and upon payment of costs to the plaintiff and the mining company, all proceedings in the said chancery action should be stayed." The shares were not delivered up to the plaintiff until the 28th of April, 1882, when they were sold at a considerable loss. In an action against the defendant in the Queen's Bench Division to recover damages for this detention, the jury found that the plaintiff did not authorise Bird to pledge the shares for his own debt, or lend them to him for that purpose:—Held, that the plaintiff was estopped by the consent order made in the chancery action on the 23rd of February, 1882, from recovering in this action damages for such detention, and that the defendant was not responsible for the detention of the shares by the mining company after the order had been made in the suit in the Chancery Division. *Serrao* v. *Noel*, 15 Q. B. D. 549—C. A.

Same Facts—Two Offences.]—On 5th March B. was charged under 1 & 2 Will. 4, c. 32, s. 30, with trespass in pursuit of game, but acquitted for want of corroboration of a witness. On 14th May, B. was charged under s. 23 with unlawfully using a dog for taking game, he having no licence. The facts were precisely the same, but on the second occasion the witness was corroborated and the justices were satisfied, but B. was discharged on the ground of res judicata:—Held, that the justices were wrong, and that there was no res judicata as the offences were not inconsistent. *Bollard* v. *Spring*, 51 J. P. 501.

Application technically Different.]—Where a divisional court has decided against an applicant on one application, a divisional court consisting of other judges will not overrule or review that decision on a second application by him, which though technically different from the first, raises the identical point again. *Reg.* v. *Eardley*, 49 J. P. 551.

Same Charge.]—L. was charged with night poaching under 9 Geo. 4, c. 69, and, in course of cross-examination of prosecutor's witnesses, the justices considered he had been illegally arrested, and discharged him. L. was again summoned for the same offence, on the same facts, when the justices held that they had no jurisdiction, as the former discharge was res judicata:—Held, that the justices were right. *Reg.* v. *Brackenridge*, 48 J. P. 223.

Counterclaim in County Court—Action in High Court.]—Where in an action in a county court a defendant has relied upon a cause of action by way of counterclaim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the county court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action. *Webster* v. *Armstrong*, 54 L. J., Q. B. 236; 1 Cab. & E. 471.

The defendant in the High Court is estopped by the verdict and judgment of the county court from denying the cause of action of the plaintiff in the High Court, and the only question to be decided in the High Court is the amount of damages. *Ib.* *See* 47 & 48 Vict. c. 61, s. 18.

Declarator of Marriage.]—In 1842 a suit for declarator of marriage was brought against a lady, but after trial was dismissed in 1846. In 1875, after the lady's death, a second suit was brought for declarator of the same marriage, and for reduction of the former decree. In 1876 the second suit was held to have been barred by the plea of res judicata, and this decision, on appeal, was affirmed by the House of Lords.—Per Lord Cairns, Lord Chancellor: The appellant has not alleged any new matter whatever coming to his knowledge which should entitle him to get rid of the former proceedings.—Per Lord Hatherley: I do not apprehend that we need go further than to say that this gentleman—who had the opportunity of having his case fairly heard thirty years ago—cannot now, after the death of the person principally concerned, be in a position to ask that the principle of res judicata shall not be pressed to its fullest and furthest results.—Per Lord Selborne: When there is res judicata the original cause of action is gone; and it would be destructive of all certainty in the administration of law, in the status of families, and in the enjoyment of rights, if it were not held incumbent on any one attempting to get rid of a solemn judgment to shew that he comes forward to do so with reasonable promptitude and diligence.—Per Lord Blackburn: The object of the rule of res judicata is always put upon two grounds; the one, public policy, that there should be an end to litigation; the other, the hardship on the individual that he should be vexed twice for the same cause. It seems to me that nothing is here alleged that would have been ground for a new trial before, and à multo fortiori there is nothing alleged that would be ground for a new trial, after judgment pronounced thirty years ago.—Per Lord Gordon: It would be lamentable for the law of Scotland, especially with reference to the marriage law, if it were competent for parties to come forward again after a lapse of thirty years and ask for a new trial with reference to matters which must have been within their own knowledge when the cause was originally tried. *Lockyer* v. *Ferryman*, 2 App. Cas. 519.

Estoppel by Decree in Equity.]—As to estoppel by decree in equity. See *Collier* v. *Walters*, 43 L. J., Ch. 216; L. R. 17 Eq. 252, and col. 410.

If a case is made for a bill for specific relief and proof gone into by the parties in respect of it, and the right to it is a question which is fairly raised and may properly be decided at the hearing, and if a decree is pronounced in which no notice is taken of this portion of the case, while relief is given in respect of other matters in controversy, then, in a suit subsequently instituted to obtain the relief so admitted, it must be assumed that the claim to it in the former suit was either waived by the plaintiff at the hearing or refused by the court. *Blake* v. *O'Kelly*, Ir. R. 9 Eq. 54.

B.'s executors filed a bill against K., as executor de son tort, for an administration of B.'s personal estate, raising issues as to the validity of the transfer of a sum in bank stock from B.'s name to the joint names of B. and K., and also as to B.'s mental capacity at the time of the transfer. At the hearing it was objected that relief of such a nature could not be given, and an ordinary decree for administration was pronounced. B.'s executor subsequently filed a bill raising the same issues, and also impeaching a second transfer from B. to B. and K., and praying that both transfers should be declared null and void:—Held, that the former suit or decree did not bar the relief sought for. *Ib.*

Policy void at Law.]—A plaintiff in equity filed his bill stating that a policy had become void at law, and claiming to have it treated as valid in equity. After bill dismissed the plaintiff sued at law on the policy:—Held, that a bill would lie to restrain the action, and injunction granted accordingly. *Tredegar* (*Lord*) v. *Windus*, 44 L. J., Ch. 268; L. R. 19 Eq. 607.

Verdict for Debt impeachable in Bankruptcy.]—A verdict is only primâ facie evidence of a debt which the creditors of the bankrupt are at liberty to impeach, and into the circumstances of which, if impeached, the commissioners are bound to inquire. *Butterfill, Ex parte*, 1 Rose, 192.

Legatee's Suit for Account.]—Under a decree in a legatee's suit to take the usual accounts, A. B. went in and claimed the residue which the master found him entitled to, but the residue was not then ascertained, and no order was made in respect of it:—Held, that A. B. was not precluded from afterwards asking relief against the executor in respect of an alleged breach of trust in a suit of his own, he not having, in the first suit, been in a situation to investigate the accounts of the executor, or to claim the relief which he asked in the second. *Guidici* v. *Kinton*, 6 Beav. 517.

Settlement of Account in Previous Action—One of co-Plaintiffs bound by.]—The bill sought a general account of the estate of a testator who died in 1807. One of the co-plaintiffs being held bound by a settlement of accounts in 1822:—Held, that in this suit, all the other co-plaintiffs were equally bound by that settlement, and that in this suit the accounts could only be directed on the footing of such settlement. *Lambert* v. *Hutchinson*, 1 Beav. 277; 8 L. J., Ch. 196.

Estates Subject to Ancient Rent—Sale of One—Indemnity.]—Estates A. and B. were subject to an ancient rent. A. being sold, the vendor (Lord T.'s ancestor) covenanted to indemnify the purchaser (C.'s ancestor), and paid the entire rent since 1766. In a suit against Lord T. it was decided that so much only of the rent as was payable out of B. could be recovered, and a decree was made for so much, the amount of which was defined. In a subsequent suit against Lord T. and C. to recover the remainder of the rent payable out of A.:—Held, that the former suit afforded no defence to Lord T., and that he was a proper party to the new suit, either as claiming a part of the lands charged, or in respect of the remedy over against him. *Dublin* (*Archbishop*) v. *Trimleston* (*Lord*), 12 Ir. Eq. R. 251.

Judgment by Confession against old Corporation—New Corporation.]—A judgment obtained by confession against an old corporation subsequently to the 16th February, 1836, is not conclusive against the new corporation in a case where the court is doubtful whether the demand upon which the judgment was obtained was within the terms of the 6 & 7 Will. 4, c. 100, and it was held, upon an information filed by two of the burgesses of the new corporation to stay the issuing of execution against the goods of the corporation, upon that judgment, that they were entitled to have an issue to try whether or not it was originally such a demand as came within the provisions of that act. *Att.-Gen.* v. *Dublin Corporation*, 1 Dr. & War. 545.

Legacy—Action against Executors—Equity Suit—Statute of Limitations.]—H. died in 1811, having bequeathed a legacy to a woman who afterwards married the plaintiff. In December, 1825, the two executors of H. gave the plaintiff a written acknowledgment, whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy, and 50*l.* for interest. In 1835 the plaintiff's wife died; matters of business having occurred between the plaintiff and the executors, in which mutual demands and accounts arose, the plaintiff, in September, 1839, brought an action against the executors to recover what he alleged to be due on those accounts, including the 200*l.* mentioned in the memorandum, and interest thereon. In this action the defendants pleaded separately, and one of them paid 46*l.* into court, which the plaintiff received, and abandoned the action as to him. The plaintiff then filed a bill against both defendants for payment of the legacy, and, in defence to the bill, the defendants amongst other things insisted by their answers on the Statute of Limitations (stat. 3 & 4 Will. 4, c. 27), and that the action was a bar to the demand in equity:—Held, that the proceedings in the action did not necessarily amount to an estoppel of the suit in equity, but, that, in order to determine the efficacy of the suit, it was competent for this court to inquire on what account the 46*l.* was paid into court in the action. *Holland* v. *Clark*, 1 Y. & Coll. C. C. 151.

Widow and Daughter—Indian Estate.]—A decree in a suit by A. against B., claiming as widow to succeed to her husband's estate, in preference to B., his nephew, on the ground of the family being divided, does not operate as res judicata, or as capable of being pleaded in bar to a suit by C., a daughter, claiming to succeed to her father's estate on A.'s death, on the ground that the property was self-acquired by her father. Such judgment determines only an issue raised

concerning a particular person, and is not a judgment in rem, but simply a judgment inter partes. *Katama Natchiar* v. *Shivagunga (Rajah)*, 9 Moo. Ind. App. 539, 540.

Bill to Redeem—Decree of Foreclosure.]—Bill to redeem, mortgage being overpaid, decree of foreclosure, signed and inrolled, is good plea in bar. *Mallock* v. *Galton*, Dick. 65.

Incumbrancers' Suits — Consolidation.] — Several incumbrancers' suits having been consolidated, a decree was made in them all, directing certain incumbrances to be kept down, and the several plaintiffs' costs to be added to the debts :—Held, that a party to one of the suits was estopped by the decree from disputing the validity of one of the incumbrances directed to be kept down. *Ford* v. *Tynte*, 3 N. R. 559.

Tithes.]—Decree in former suit cannot be pleaded to bill for tithes of any subsequent year. *St. Paul's Minor Canons* v. *Crickett*, Wightw. 30.

Plea of former decree for payment of tithes, where a modus and lands alleged to be covered by it were improperly stated, so that the court could not direct an issue, it is not a good plea in bar to bill brought for establishing the modus. *Collins* v. *Gough*, 7 Bro. P. C. 94.

Suit by Husband and Wife—Suit by Wife and Next-of-Kin.]—Suit by husband and wife against trustees of latter's separate property cannot be pleaded in bar to a subsequent suit by her and her next friend against her trustees and husband, although the relief prayed in both suits is the same. *Reere* v. *Dalby*, 4 L. J. (o.s.) Ch. 117; 2 Sim. & S. 464.

Lease—Relief against Fraud—New Bill.]—A. filed his bill in the Court of Chancery in Ireland, to be relieved against a long lease granted by his ancestors, on the foot of fraud, but not giving sufficient evidence of the fraud, his bill was dismissed with costs. Some years after, A. filed a new bill for the same purpose, charging fresh proofs of the fraud, which were not discovered pending the former suit. Upon hearing this second cause, the lease was set aside; and on an appeal, this decree was affirmed, but varied by consent. *Cotter* v. *Barrymore (Earl)*, 4 Bro. P. C. 203.

Writ of Right—Trial—Bill for Discovery.]—Plea that a writ of right has been tried and determined against the plaintiff, a good plea for a bill for discovery of matter relative to the title. *Leicester* v. *Perry*, 1 Bro. C. C. 305.

Execution of Power—Decision of Ecclesiastical Court.]—Where, in a marriage settlement, a power of appointment by will, signed, sealed, published, and declared, in the presence of two witnesses, is given to the wife notwithstanding her coverture, and an instrument afterwards executed by the wife is proved as a will, this court is concluded, by the decision of the Ecclesiastical Court, that the instrument propounded is a will, and is bound to consider it as a valid execution of the power, if the instrument be proved in this court to have been executed with the formalities prescribed by the power. *Douglas* v. *Cooper*, 3 Myl. & K. 378.

Judgment examinable in what Court.]—Bill to be relieved against a bond, and judgment thereon, suggesting that same was irregularly obtained. Defendant pleaded the judgment, and demurred, for that the validity of the judgment was examinable only in the court where it was pronounced. Plea and demurrer allowed. *Huddleston* v. *Asbugg*, Rep. t. Finch, 204.

Judgment for Salvage in Admiralty Court—Action against Underwriter—Defence that Loss did not arise from Perils insured against.]—The captain of a steamer that had during a voyage run short of coal engaged a steam trawler to tow her to her port of discharge. The owner of the trawler brought an action in the Admiralty Court and recovered a sum of money for salvage. In an action by the owner of the steamer to recover, from an underwriter who had insured the ship against perils of the sea, the amount paid under the judgment :—Held, that the defendant was not concluded by the judgment of the Admiralty Court from setting up that the loss did not arise from any of the perils insured against. *Ballantyne* v. *Mackinnon*, 65 L. J., Q. B. 616; [1896] 2 Q. B. 455; 75 L. T. 95; 45 W. R. 70; 8 Asp. M. C. 173—C. A.

Dismissal of Bankruptcy Petition—Second Petition grounded on Non-payment of same Judgment Debt.]—The court of bankruptcy has no jurisdiction, upon the hearing of a bankruptcy petition grounded on non-compliance with a bankruptcy notice to pay a judgment debt, to go behind the judgment and decide that there is not a good petitioning creditor's debt, except for the purpose of exercising its discretion upon that petition; and the dismissal of such a petition is not, therefore, a bar to the presentation by the same judgment creditor of a second petition founded on non-compliance with a second bankruptcy notice to pay the same judgment debt. *Vitoria, In re, Vitoria, Ex parte*, 63 L. J., Q. B. 795; [1894] 2 Q. B. 387; 9 R. 536; 71 L. T. 48; 42 W. R. 529; 1 Manson, 236—C. A. And see *Larrard, In re, Yeomans & Heap, Ex parte*, 3 Manson, 317.

Petition to supersede Bankruptcy.]—A bankrupt is not estopped from petitioning to supersede, although he has surrendered to his commission, interfered as in choice of assignees and the disposition of the estate, and also passed his last examination, and endeavoured to obtain his certificate. A bankrupt is not bound by acts of acquiescence, when he is ignorant of his rights. A judgment at law, establishing the validity of a commission, is not conclusive on the Great Seal, on a subsequent petition to supersede; and the court is bound to look into all the circumstances of the case, as affecting the requisites to support the commission. *Chambers, Ex parte*, 1 Deac. 197.

Dismissal of Charge on First Hearing a Bar to subsequent Conviction.]—The appellant was charged with non-compliance, on the 21st August, 1889, and ten days thereafter, with an order made by justices under s. 2 of the Dogs Act, 1871, requiring him to keep a dangerous dog under proper control. No evidence was given to support the charge except as to the 21st August, and the charge was dismissed on the ground that the offence had not been made out. Subse-

quently the appellant was charged with not keeping the dog under proper control on the 21st August simply; this charge was proved and the appellant was convicted:—Held, that as the appellant was put in peril and might have been convicted on the first hearing, the matter was res judicata on the second hearing, and the maxim Nemo bis vexari debet applied. *Ryley* v. *Brown*, 62 L. T. 458; 17 Cox, C. C. 79; 54 J. P. 486.

Fund carried to a Separate Account—Charge—Stop Order by Incumbrancers—Undisclosed prior Claim—Contribution.]—By an order made on further consideration, funds were carried over to "the account of the perpetual annuity of the defendant and her issue," with a direction to pay the dividends thereon to the defendant for life. The defendant charged her interest in this fund, and the incumbrancers obtained stop orders thereon. Subsequently it was discovered that at the time the order was made the defendant was jointly and severally liable with the testator for breaches of trust which had been wholly made good out of the testator's estate. The order was made in the presence of the plaintiff, who was not at the time aware of the defendant's liability in respect of the breach of trust. On a motion by the plaintiff to obtain contribution from the defendant to the extent of a moiety of this liability, and to have this claim satisfied out of the funds carried over to the defendant's separate account, notwithstanding the stop orders:—Held, that though the defendant was liable to contribute towards making good the loss occasioned by her breach of trust, and could take nothing beneficially from the testator's estate until she had done so, still, as between the plaintiff and incumbrancers, the matter was res judicata, and that the incumbrancers were entitled to priority over the claim now made for contribution for breach of trust. *Jervoise, In re* (12 Beav. 209), followed. *Eyton, In re, Bartlett* v. *Charles*, 59 L. J., Ch. 733; 45 Ch. D. 458; 63 L. T. 336; 39 W. R. 135.

Liability of Husband for ante-nuptial Debt of Wife—Prior unsatisfied Judgment against Wife's separate Estate.]—The plaintiff, having done work for the defendant's wife before her marriage, recovered judgment against her separate estate after the marriage for the amount of his debt. The judgment was unsatisfied, the wife having no separate estate. The plaintiff then commenced an action for the debt against the defendant, who admitted having received with his wife assets sufficient to satisfy the debt:—Held, that the prior judgment against the wife was no bar to the action. *Beck* v. *Pierce*, 58 L. J., Q. B. 516; 23 Q. B. D. 316; 61 L. T. 448; 38 W. R. 29; 54 J. P. 198—C. A.

Compromise of Former Action.]—One of several cestuis que trust brought an action against the trustees of a settlement claiming execution of the trusts, and that the trustees might be charged with any loss on alleged improper investments. Judgment was given for execution of the trusts and inquiries as to investments. Certain other cestuis que trust (infants) were served with the judgment, and had leave to attend. Before certificate a compromise was effected, which on a petition in the action was sanctioned on behalf of the infants. The petition did not refer to the alleged improper investments, but the fact of the investment complained of having been made appeared in the answers of the trustees to interrogatories administered to them in that action. After the infants came of age they brought an action against the trustees on the same grounds as those relied upon by the plaintiff in the former action:—Held, that the question as to the breach of trust was not res judicata, and that the plaintiffs in the second action were not estopped by the former proceedings. *Worman* v. *Worman*, 43 Ch. D. 296; 61 L. T. 637; 38 W. R. 442.

Action by Executors after Originating Summons.]—Executors handed over their testator's residuary estate, including the certificates of certain shares in a limited company, to a married woman entitled for her separate use, but did not execute a transfer of the shares. Subsequently a call was levied, which the executors paid. They then took out an originating summons against the married woman, claiming a lien over the shares in respect of the call and in respect of their costs, charges and expenses in relation to the shares incurred subsequently to the distribution of the estate, and the shares were sold, but the proceeds proving insufficient to indemnify them, they commenced a second action against the married woman to recover the balance out of her separate estate:—Held, that the first action was not a bar to the second, and that the executors were entitled to recover. *Kershaw, In re, Whittaker* v. *Kershaw*, 60 L. J., Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23—C. A.

Action by Executor for Damage to Personal Estate—Previous Action under Lord Campbell's Act.]—A passenger on a railway was injured by an accident, and after an interval died in consequence. The executrix brought an action under Lord Campbell's Act for his death, which suit was settled for 750*l*. The executrix now sued for damage to his personal estate, caused during his lifetime by medical expenses and loss from inability to attend to business:—Held, that the former action was no bar to the present one. *Bradshaw* v. *Lancashire & Yorkshire Ry.* (L. R. 10 C. P. 189) followed and approved. *Daly* v. *Dublin, Wicklow & Wexford Ry.*, 30 L. R., Ir. 514—C. A.

Libel—Second Action for same Libel, but in respect of different Passages.]—In an action brought by the plaintiff against the defendant for libel in respect of the publication of a pamphlet purporting to be the judgment delivered in court in a certain action between the parties, the jury found that the pamphlet was a fair, honest and accurate report of the judgment, and was published without malice, and judgment was accordingly entered for the defendant. The plaintiff afterwards commenced a second action for libel in respect of the same pamphlet, but relying upon defamatory passages in the pamphlet other than those relied upon in the first action. The different defamatory statements, however, relied upon in both actions were all spoken of the plaintiff in the same character:—Held, that the subject-matter of the second action was res judicata, and that an order striking out the statement of claim and dismissing the action was rightly made. *Macdougall* v. *Knight*, 59 L. J., Q. B. 517; 25 Q. B. D. 1; 63 L. T. 43; 38 W. R. 553; 54 J. P. 788—C. A.

Teinds—Res Judicata.]—The minister of the parish of B., Scotland, in 1875 raised an action of augmentation, modification and locality, against the heritors. A scheme of locality was prepared, D. lodged objections to the scheme, in so far as it localled minister's stipend on eighty-one acres of his land, alleging that these eighty-one acres were held under titles cum decimis inclusis et nunquam antea separatis, and that in respect of certain judicial proceedings in 1795 and 1807 it was res judicata that these lands were so held. The proceedings relied on were as follows:—In 1795 the then minister of B. raised an action of augmentation, &c., and produced a rental of the whole lands in the parish, in which he included the eighty-one acres in question as liable for teinds. The ancestor of D. "and the other heritors" lodged a minute stating, inter alia, that these eighty-one acres were held cum decimis inclusis, and craving that they might be struck out of the rental. On the 2nd of December, 1795, the teind court pronounced an interlocutor ordering them to be struck out. Rectified schemes of locality were prepared, and objections lodged by other heritors, but the proceedings were not carried out to a final decree. In 1807 the same minister raised a new action of augmentation, &c., which, after certain objections were disposed of, proceeded to a final decree. In none of the schemes of locality since 1795 were the eighty-one acres included: —Held, that the plea of res judicata was well founded. *Dundas* v. *Waddell*, 5 App. Cas. 249 —H. L. (Sc.)

Detention of Goods—Order of Metropolitan Police Magistrate—Subsequent Proceedings for Damages.]—An order made by a magistrate under s. 40 of the Metropolitan Police Courts Act, 1839, for the delivery up of goods detained without just cause, is no bar to a subsequent proceeding for damages arising out of the same detention. *Midland Ry.* v. *Martin*, 62 L. J., Q. B. 517; [1893] 2 Q. B. 172; 5 R. 480; 69 L. T. 353; 17 Cox, C. C. 687; 58 J. P. 39.

Ejectment.]—Since the Common Law Procedure Act, 1853 (Ireland), a judgment by default in ejectment is not an estoppel; and, therefore, in an action for mesne rates, is not conclusive as to the time at which the plaintiff's title accrued. *Kenna* v. *Nugent*, Ir. R. 7 C. L. 464—Ex. Ch.

To an action for mesne profits the defendants pleaded title to the lands in themselves during the time for which mesne profits were claimed. The plaintiff replied, by way of estoppel, as to so much of the mesne profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein he claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them:—Held, that the judgment in ejectment did not operate as an estoppel with respect to the duration of the plaintiff's title, and the replication was therefore bad. *Harris* v. *Mulkern*, 45 L. J., Ex. 244; 1 Ex. D. 31; 34 L. T. 99; 24 W. R. 208.

A plaintiff in ejectment, who enters judgment by default against several, is not estopped by the record from shewing that some of them were not in possession, and were unnecessary parties. *Le Clerc* v. *Greene*, L. R. 7 Eq. 371.

Validity of Execution against Bankrupt.]—The right of an execution creditor to enforce an execution against the estate of a bankrupt depended on whether the bankrupt had or had not been a trader. In an action by the creditor against the sheriff for wrongfully withdrawing from possession of the goods which he had seized under the execution, judgment passed for the sheriff, on the ground that the bankrupt was a trader, and that therefore the goods belonged to the trustee in bankruptcy:—Held, that the creditor was precluded from raising the question of the validity of his execution in an application against the trustee in the Court of Bankruptcy. *Harper, Ex parte, Bremner, In re*, 44 L. J., Bk. 57; L. R. 10 Ch. 379; 32 L. T. 317; 23 W. R. 433.

Proof in Bankruptcy—Election of Remedy.]—A stockbroker was employed to purchase and sell stocks and shares for the plaintiff, and purchased certain shares of which transfers were never executed, but the certificates of which were deposited by the stockbroker as security for moneys advanced to him by the defendant. The plaintiff was not aware of this deposit, and on the stockbroker's bankruptcy proved for the value of these shares. The defendant sold the shares under the order of the Bankruptcy Court, and paid the balance to the trustee in bankruptcy. The plaintiff received a dividend on his proof, and afterwards having discovered the deposit of the certificates, commenced an action against the defendant to have him declared a trustee of the shares:—Held, that the plaintiff was estopped by the bankruptcy proceedings from pursuing his remedy by action. *Hone* v. *Boyle*, 27 L. R., Ir. 137—C. A.

A creditor tendered a proof for the balance of a judgment, signed against the debtor by default, for bets won by the creditor from the debtor. It was alleged that the trustee was estopped by a letter from the debtor's solicitors to the creditor requesting him to prove his debt and vote for the scheme:—Held, that the letter from the debtor's solicitor to the creditor did not operate as an estoppel between the creditor and the trustee. *Seaton, Ex parte, Deerhurst, In re*, 60 L. J., Q. B. 411; 64 L. T. 118; 8 Morrell, 97.

In Action against Executor by Creditor.]—A creditor of a testator having recovered judgment for his debt in an action against the executor after issue found in favour of the creditor on a plea of plene administravit, sued the executor in an action on such judgment, suggesting a devastavit:—Held, that the executor could not shew that the acts of waste complained of were committed by him before such judgment with the concurrence of the creditor, as that would amount to no assets as between him and the executor, and would therefore negative the judgment, which the executor was estopped from doing. *Jewesbury* v. *Mummery*, 42 L. J., C. P. 22; L. R. 8 C. P. 56; 27 L. T. 618; 21 W. R. 270—Ex. Ch.

Master and Servant.]—A fire-iron forger, in the employment of fire-iron manufacturers at Sheffield, was summoned before a magistrate, for having absented himself from their service without just cause or lawful excuse, under the Master and Servant Act, 1867 (30 & 31 Vict. c. 141), s. 9 (repealed). An order was made directing him to pay 11*l.* 14*s.* as compensation to the complainants. On February 25th, 1871, the servant agreed to

work for his employers for the term of five years. On April 1st, 1873, he was summoned for absenting himself, and ordered to pay 11*l.* 8*s.*, with costs, and the money not being paid he was ordered to be imprisoned in the house of correction for three months. On June 6th, 1873, he was again summoned for not returning to his work, and was ordered to find security to fulfil his contract; in default was again sentenced to three months' imprisonment. After his liberation he continued to absent himself, and a fresh summons was taken out, and the order appealed against made:—Held, that the previous orders were not a bar to the subsequent complaint, and the order made upon it. *Cutler* v. *Turner*, 43 L. J., M. C. 124; L. R. 9 Q. B. 502; 30 L. T. 706; 22 W. R. 840.

Collision—Disbursements—Advanced Freight.]—A ship A. and her cargo belonged to the same owners, and the plaintiffs advanced 1,000*l.* as a loan to such owners, and received as security, in conformity with the agreement made between them and the borrowers, the bill of lading, on which the master indorsed a receipt for 1,000*l.* as advanced freight, and also a policy of insurance on advanced freight. Ship A. was lost through a collision with the defendants' vessel, whose negligence was admitted. It was proved that the difference between the value of the cargo at the port of destination and at the port of loading would have considerably exceeded 1,000*l.* In an action by the holders of the bill of lading for 1,000*l.* against the defendants' ship:—Held, that a sum in respect of disbursements for ship A. on her voyage and wages paid in advance which had been awarded to the owners of the A. by the registrar and merchants was no bar to the plaintiffs' right to recover. *The Thyatira*, 52 L. J., P. 85; 8 P. D. 155; 49 L. T. 406; 32 W. R. 276.

Action for Rent—Action for Quarrying.]—A landlord sued his tenant for rent, and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant. At the trial he took a general verdict, but for the amount of rent only. The plaintiff brought another action against the defendant for quarrying and carrying away the stone, and a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular delivered on the count for money had and received in the first action:—Held, that the recovery in the first action was no bar to the plaintiff's recovery in the second. *Hadley* v. *Green*, 2 C. & J. 374; 2 Tyr. 390; 1 L. J., Ex. 137.

Note Payable in Instalments.]—A promissory note, on the face of it payable on demand, was given to the trustee of a building society to secure certain instalments, fines and interest. The payee having sued upon the note, took a cognovit for the instalments then due and costs, which were afterwards paid; and he gave a receipt as for debt and costs in the action:—Held, that he could not maintain another action on the note for instalments which subsequently became due. *Siddall* v. *Rawcliffe*, 1 C. & M. 487; 1 M. & Rob. 263; 2 Tyr. 441; 2 L. J., Ex. 237.

Bond to replace Stock—Separate Breaches.]—A. advanced to B. bank stock, for which B. executed a bond conditioned for the replacing of the stock on a day certain, and the payment to A. of all dividends, bonuses and profits, which would have arisen from the same in the meantime. B. made default. A. recovered judgment with damages assessed upon both breaches:—Held, that a plea of judgment recovered was a good bar to a sci. fa. *Saville* v. *Jackson*, M'Clel. 377; 11 Price, 343; 13 Price, 715.

Trover—Money had and received.]—A judgment for the defendant in trover is not a bar to an action against him for money had and received for the plaintiff's use. —— v. *Campbell*, 3 Wils. 240. See *Buckland* v. *Johnson*, 15 C. B. 145.

Set-off in another Action.]—A. having obtained a verdict against B. in a case in which B. pleaded a set-off:—Held, that B. was estopped from suing A. in another action for the subject-matter of the set-off. *Eastmure* v. *Hawes*, 5 Bing. (N.C.) 444; 7 Scott, 461; 7 D. P. C. 431; 2 Arn. 54; 8 L. J., C. P. 236; 3 Jur. 460.

If a defendant in the county court plead a set-off and the plaintiff has judgment, the action is barred in respect of the matter of the set-off, notwithstanding no evidence has been received in respect of it, the judge having improperly rejected the only witness who was prepared to prove it. *Danks* v. *Harley*, 1 W. R. 291.

B. to an action by A. pleaded a set-off exceeding A.'s claim. An award under 9 & 10 Vict. c. 95, s. 77, awarded to B. the amount of the excess. B. sues A. for this. A. pleads judgment recovered:—Held, that the plea was no answer. *Jones* v. *Jones*, 22 W. R. 577. And see *Munro* v. *Ennis and Athenry Ry.*, 15 W. R. 255.

Verdict and Judgment.]—A verdict and judgment in law may be pleaded in bar to a bill seeking relief. *Pitt* v. *Broadway*, Rep. t. Finch, 70. S. P., *Hellam* v. *Grave*, *Ib.* 265.

To a bill for discovery of title, and perpetuating testimony of witnesses, defendant pleaded two verdicts and judgment in ejectment, obtained by his father. *Ib.* And see *Lee* v. *Boles*, 2 Ch. Ca. 95; and *Sewell* v. *Freeston*, 1 Ch. Ca. 65.

—— **Bill to supply Defective Execution of Power to Lease.**]—To a bill to supply a defective execution of a power to make leases, defendant pleaded a special verdict and judgment, under which the leases made under the power were declared void. *Temple* v. *Baltinglass*, Rep. t. Finch, 275.

Verdict in Action of Crim. Con.—Divorce Suit.]—A verdict obtained by a husband in an action of crim. con. against the alleged adulterer, is so far from being conclusive against the wife as to the adultery in a suit for divorce in the Ecclesiastical Court, that it is not even considered as furnishing any confirmation or corroboration of the charge, the wife being no party to the proceeding at common law, which is thus res inter alios acta. *Evans* v. *Evans*, 1 Rob. 165. And see *Jenkyn* v. *Jenkyn*, 5 W. R. 43; and *Fraser* v. *Fraser*, 5 N. C. 20.

Order for Maintenance not Conclusive as to Infant's Life.]—Semble, the existence of an order for the maintenance of an infant out of the income of a fund does not prevent the court, in a subsequent proceeding in which the title to the principal comes directly in question, from making an order negativing the infant's title to the fund. *Saunders* v. *Vautier*, Cr. & Ph. 240; 10 L. J., Ch. 354. Affirming 4 Beav. 115.

Unskilfulness in erecting Kitchen Range—Plaintiff having paid no Estoppel.]—To an action against the defendant for unskilfully erecting a kitchen range in the plaintiff's house, he pleaded that the plaintiff ought not to be admitted to allege that he did not use due skill in constructing the range, because, after the supposed grievance, the now defendant commenced an action against the now plaintiff for work and labour in constructing the range, and for the price thereof, and that the now plaintiff pleaded payment of money into court, which the now defendant took out of court in full satisfaction:—Held, that the plea did not amount to an estoppel, and afforded no answer to the action. *Rigge* v. *Burbidge*, 16 M. & W. 598; 15 L. J., Ex. 309.

Warrant—Negligent Representation—Estoppel.]—Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. and E. In that month, no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed holder of the warrant, and as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. and E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession. In an action to recover damages for a wrongful conversion of the goods:—Held, that the defendant was liable, being estopped from denying that he had the goods specified in the warrant, because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same. *Seton* v. *Lafone*, 56 L. J., Q. B. 415; 19 Q. B. D. 68; 57 L. T. 547; 35 W. R. 749—C. A.

Judgment in rem and in personam—Distinction.]—The distinction between a judgment in rem and a judgment in personam is that the judgment in rem binds everybody, though not parties to the litigation; the judgment in personam binds parties and privies. *Simpson* v. *Fogo*, 29 L. J., Ch. 657; 32 *Ib.* 249; 1 H. & M. 195; 8 L. T. 61; 11 W. R. 418; 9 Jur. (N.S.) 403.

A judgment in rem is an adjudication upon the status of the thing adjudicated upon. *Cammell* v. *Sewell*, 3 H. & N. 617; 5 *Ib.* 728; 27 L. J., Ex. 447; 29 *Ib.* 350; 2 L. T. 799; 8 W. R. 639. *And* cols. 411, 412.

The sentence in a foreign court of admiralty, decreeing a ship to be lawful prize, is conclusive. *Hughes* v. *Cornelius*, Shower, 495. *See* INTERNATIONAL LAW.

An order to wind up a company is not a judgment in rem, and if made improperly is not binding on strangers. *Bowling and Welby's Contract, In re*, 64 L. J., Ch. 427; [1895] 1 Ch. 663; 72 L. T. 411; 43 W. R. 417.

As to domicil, see *Concha* v. *Concha*, 56 L. J., Ch. 257; 11 App. Cas. 541; 55 L. T. 522; 35 W. R. 477; and INTERNATIONAL LAW.

Judgment obtained by Fraud.]—*See* JUDGMENT.

3. AGAINST WHAT PARTIES.

Same Parties.]—A judgment is conclusive between the same parties. *Kingston's (Duchess of) Case*, 2 Sm. L. Cas. 713; 20 How. St. Tr. 537: *Reg.* v. *Inhabitants of Harlington*, 4 E. & B. 780; *Outram* v. *Morewood*, 3 East, 346.

A judgment obtained by A. in an action for use and occupation, against B. and C., is no evidence to charge B. in a subsequent action brought by A. against him alone, for the use and occupation of the same premises for a subsequent period. *Christy* v. *Tancred*, 9 M. & W. 438; 11 L. J., Ex. 109.

But a judgment in a former action for use and occupation between the same parties, given in favour of the plaintiff, is evidence of the defendant's having occupied, but is not conclusive. *Jones* v. *Reynolds*, 7 Car. & P. 335.

On an issue whether the churchwarden ought to be elected by the select vestry, a record of a trial between the former churchwarden and another person is admissible. *Berry* v. *Banner*, 1 Peake, 212; 3 R. R. 674.

In ejectment for lands in Kent, the plaintiff's case depended upon shewing that the lands had been disgavelled by a private act, which was alleged to have been passed in 2 & 3 Edw. 6. The act, after proper search, could not be found. As secondary evidence of its contents, there was produced an office copy of a special verdict returned upon the trial of a feigned issue in H. T. 13 & 14 Car. 2, wherein the jury found that, at a parliament, &c., holden, &c., it was enacted, &c. The act was then set out, whereby certain lands in Kent, including some held by T., were disgavelled. There was evidence to identify the lands with those held by a person of that name at the time the act was stated to have passed:—Held, that the special verdict, being res inter alios acta, was not admissible per se, and that it was not receivable as containing an authenticated copy of the act, inasmuch as it was strictly the finding of a matter of fact, not professing to set forth a copy of the act according to its tenor, nor stating the title of the act so as to identify it with the lost act. *Doe* d. *Bacon* v. *Brydges*, 6 Man. & G. 282; 7 Scott (N.R.) 333; 13 L. J., C. P. 209.

To a replication taking issue on a plea of a public right of way to a declaration for trespass, the defendant rejoined by way of estoppel, that P. and others, being seised in fee of the locus in quo, were indicted and convicted for a nuisance in obstructing the way, and on proof of the abatement were fined; and that the plaintiff afterwards took possession of the land as trustee for P. and others, and was prior in estate to them, and that the defendant was one of the prosecutors of the indictment:—Held, that the rejoinder was bad, the indictment not operating by way of estoppel on the plaintiff. *Petrie* v. *Nuttall*, 11 Ex. 569; 25 L. J., Ex. 200. And see *Hacking* v. *Lee*, 9 W. R. 70.

Where in an action improperly brought against an administratrix, she pleaded in abatement that others were jointly liable, which she failed to

prove, in consequence of which the plaintiff recovered a verdict, with one shilling damages :—Held that such a verdict did not amount to satisfaction, so as to bar the plaintiff from recovering against the others. *Godson* v. *Smith*, 2 Moore, 157 ; 19 R. R. 553.

All Parties to Suit.]—All original parties to the suit, or those that are made parties thereto, or to the decree, of full age, and such as claim under them pendente lite, are regularly bound by the decree. *Style* v. *Martin*, 1 Ch. Ca. 152.

Persons not Parties to Agreement.]—A decree for the execution of an agreement to inclose a common, parties having an interest in the common, but not parties to the agreement, shall not be bound. *Thirreton* v. *Collier*, 1 Ch. Ca. 48. *Anon.*, 3 Ch. Rep. 13 ; Nel. 79.

Decree against Lord of Manor not binding on Copyholders.]—A decree against the lord of a manor will not bind copyholders in fee or freeholders for life where they are not parties. *Poore* v. *Clarke*, 2 Atk. 516.

As between Copyhold Tenants themselves.]—How far tenants of manor, who are not parties to decree against other tenants shall be bound by it. *Brown* v. *Howard*, 1 Eq. Abr. 163.

Decree in Chancery on Matter of Right.]—Decree of Court of Chancery determining matter of right, is good evidence of that right as to all persons claiming under party against whom decree was made, though at ever so great a distance of time. *Borough* v. *Whichcote*, 3 Bro. P. C. 595.

Real Estate Abroad—Unregistered Litigants.]—A judgment in a suit between A. and B. in respect to real estate in Natal registered in C.'s name as purchaser, holding the transaction fraudulent, is res inter alios acta as to C., in a subsequent suit by A. against C. *Natal Land and Colonization Co.* v. *Good*, 5 Moore, P. C. (N.S.) 132 ; L. R. 2 P. C. 121 ; 16 W. R. 1086.

Incumbrancers' Suits — Consolidation.]—Several incumbrancers' suits having been consolidated, a decree was made in them all directing certain incumbrances to be kept down, and the several plaintiffs' costs to be added to their debts :—Held, that a party to one of the suits was estopped by the decree from disputing the validity of one of the incumbrances directed to be kept down. *Ford* v. *Tynte*, 3 N. R. 559.

Where same Person practically both Plaintiff and Defendant in First Suit.]—The defendants pleaded in bar to an action to recover a penalty for breach of 21 Geo. 3, c. 49, a judgment in favour of a third party for the same penalty. That judgment was obtained in an action which was commenced in the name of R., with his consent, while the plaintiff's action was pending, and was carried through to judgment by the intervention of a solicitor employed by the defendants and without the interference of R. : it was commenced for the protection of the defendants from any action brought or to be brought in respect of the penalty claimed in it ; and also for the purpose of taking the home secretary's opinion whether he would remit the penalty :—Held, that the judgment recovered was no bar to an action for the same offence by a different plaintiff.—By Brett, L.J., on the ground that the judgment had been recovered in an action in which the present defendants were, in truth, both plaintiffs and defendants.—By Thesiger, L.J., on the ground that the judgment had been obtained by covin and collusion.—By Cotton, L.J., on both grounds. *Girdlestone* v. *Brighton Aquarium Co.*, 48 L. J., Ex. 373 ; 4 Ex. D. 107 ; 40 L. T. 473 ; 27 W. R. 523—C. A.

Privity by Act of Law.]—In replevin between the assignees of a bankrupt (who was formerly tenant to A.) and the bailiff who distrained, one issue was whether the assignees were tenants to A. A verdict against the assignees on this issue is conclusive as to the tenancy of the assignees in an action by A. for rent. *Hancock* v. *Welsh*, 1 Stark. 347.

Action by assignees of a bankrupt for goods sold by the bankrupt ; and upon an account stated with the assignees : plea, a former action brought by the bankrupt, upon the same promises, before his bankruptcy, and still pending :—Held, that the plea was bad ; first, because the former action could not be brought upon the account stated with the assignees ; secondly, because the assignees could not continue the former suit even if they wished it. *Biggs* v. *Cox*, 7 D. & R. 409 ; 4 B. & C. 920 ; 4 L. J. (O.S.) K. B. 58.

Privity of Estate.]—An unsatisfied judgment recovered by a vestry for the expenses of paving a street under the metropolis local management acts against a former owner of tenements, is no bar to an action for these expenses against a tenant under a succeeding owner of the tenements. *Bermondsey Vestry* v. *Ramsey*, 40 L. J., C. P. 206 ; L. R. 6 C. P. 247 ; 24 L. T. 429 ; 19 W. R. 774.

A judgment of ouster against one corporator is conclusive evidence against another who derives title under him. *Rex* v. *York Corporation*, 5 Term Rep. 66.

In an action by A. and B., for diverting water from their works, it appeared that A., when in the sole possession of the same works, had brought a former action for a similar injury, against the same defendants, in which he had recovered a verdict and judgment against them ; and it being proved that A. and B. were in possession of the same works :—Held, that this was abundant primâ facie evidence, that they were privy in estate to the former plaintiff, and that the verdict and judgment in the former action were admissible against the same defendants in this action. *Blakemore* v. *Glamorganshire Canal Co.*, 2 C. M. & R. 133 ; 1 Gale, 78 ; 5 Tyr. 603.

A suit was instituted in the Court of Chancery by the plaintiffs on behalf of themselves and all other occupiers of lands and tenements within Epping Forest, against the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorised the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made defendants thereto. A decree was made establishing the right of common claimed, and granting an injunction. After the judicature acts came into operation the same

plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction:—Held, that the defendant was bound by the decree in the suit so that he could not litigate the right of common thereby established. *Sewers Commissioners* v. *Gellatly*, 45 L. J., Ch. 788; 3 Ch. D. 610; 24 W. R. 1059.

Held also, that the proceedings for enforcing the decree against him were not merely supplemental, but in the nature of original proceedings. *Ib.* See also *Reg.* v. *Blackmore*, 2 Den. C. C. 410; 21 L. J., M. C. 60; 16 Jur. 154.

—— **Decree against Lessee — Surrender to Reversioner.**]—A decree against the lessee, and all claiming under him. He surrenders to him in reversion who was held to be bound by the decree for so long a time as the lease would have continued. *Chapman* v. *Bissow*, Toth. 61.

—— **Person assisting to pay Costs in former Action.**]—Debentures issued by an American company purported to be charged on land in Mexico, and were secured by a trust deed dated March 10, 1888. The debenture-holders had power under the deed by special resolution to sanction any modification or compromise of their rights against the company or its property. In 1889 an English company was formed, to which all the assets and liabilities of the American company were, subject to the debentures, transferred by a notarial deed of transfer dated May 11, 1889, and the English company covenanted to indemnify the American company against all claims and liabilities. Registration of the transfer was, according to Mexican law, necessary to complete the title of the English company, and such registration was not completed until 22nd September, 1891. At a meeting of the debenture-holders in the American company, held on March 4, 1889, a special resolution was duly passed that all the rights of the debenture-holders against the American company should be compromised by the acceptance of fully paid-up shares in the English company. The plaintiffs, who were debenture-holders in the American company and opposed to the resolution, did not attend the meeting, and brought an action against the American company to recover interest due in respect of their debentures. On July 3, 1891, judgment was given for the plaintiffs on the ground that the resolution was not binding upon them. The English company assisted the American company in their action and paid their costs. The plaintiffs then brought this action against the English company, the trustee, and the debenture-holders' committee under the trust deed, to enforce their charge against the land in Mexico:—Held, that the English company, not having been parties to the action against the American company, were not estopped by the judgment in that action, notwithstanding the assistance they had given to the American company; that the English company were not bound as "privies in estate" of the American company, inasmuch as there was at the time of the prior action no charge on the land binding according to the laws of Mexico, the plaintiffs merely seeking in that action to enforce a personal claim in this country against the American company. *Mercantile Investment and General Trust Co.* v. *River Plate Trust Loan and Agency Co.*, 63 L. J., Ch. 366; [1894] 1 Ch. 578; 8 R. 791; 70 L. T. 131; 42 W. R. 365.

—— **Conversion of Leaseholds into Fee.**]—A judgment inter partes is an estoppel against privies in estate only where the estate has been acquired by the person sought to be estopped subsequently to the date of the judgment. The conversion of an existing renewable leasehold into a fee farm grant is not the acquisition of a new estate for this purpose. *De Burgho's Estate, In re*, [1896] 1 Ir. R. 274.

Persons whose Interests not quite Identical.]—If parties litigate a question in a court of competent jurisdiction, and a final decision is given thereon, such parties or those claiming through them cannot afterwards re-open the same question in another court. This restriction does not extend to other persons whose interest is almost identical with that of one of the parties to the first suit if they do not actually claim through such party. *Spencer* v. *Spencer*, 40 L. J., P. 45; L. R. 2 P. 230; 24 L. T. 513; 19 W. R. 703.

Will—Construction—Decision in respect of another Fund—Person interested, but not Party accepting Benefit of Decision.]—A person interested under a will who has accepted, with reference to a particular fund, the benefit of a construction put on the will by the court in an action to which he was not formally made a party, but of which he had full knowledge, is, in the absence of special circumstances, bound by the decision of the court, and the court will not allow such a person to dispute its decision by commencing a fresh action in respect of another fund arising under the will under a different interest, but in identical circumstances. *Lart, In re, Wilkinson* v. *Blades*, 65 L. J., Ch. 846; [1896] 2 Ch. 788; 75 L. T. 175; 45 W. R. 27.

Trustees not Parties to Administration Suit.]—Trustees of property assigned to them for the benefit of younger children cannot in any way be bound by orders in chancery made in an administration suit to which they are not parties. Such orders are irregular. *Muskerry* v. *Skeffington*, L. R. 3 H. L. 144.

Orders in Administration Suit—Maintenance.]—A testator, in 1823, directed his trustees to apply such part of a moiety of the surplus rents, as they in their discretion should see fit, for the maintenance, &c., of his younger children during his widow's life, and, at her decease, to pay them 1,000*l.* apiece. Subject thereto, A. B. was absolutely entitled to the estate. In a suit for the performance of the trusts, the estate was sold, and a fund was set apart to provide for the widow's dower, which was ordered to be charged with the legacies, payable at her death, and A. B. was declared entitled to the remaining fund. The widow died in 1854, and no provision having been made for the children's maintenance under the discretionary direction, a younger child sought to obtain payment out of the dower fund, but the court held, that whatever his rights may be, they had been concluded by the previous orders made in this cause. *Livesey* v. *Harding*, 21 Beav. 227.

Representative Class — Right Fairly Contested.]—When a general right is fairly contested and established against a representative class, parties not actually parties are still bound by representation, so far as the general right is tried and established. *Sewers Commissioners* v.

Gellatly, 45 L. J., Ch. 788; 3 Ch. D. 610; 24 W. R. 346.

Foreclosure in England—Bill for, in Ireland.]—A mortgagee of part of estate in Ireland files his bill of foreclosure in Court of Chancery in England, and obtains the usual decree. A mortgagee of other part of same estate files bill of foreclosure in Ireland, and on hearing of cause desired that decree of English chancery might be read, to intent that decree in Irish chancery might be made agreeable thereto. But refused, because present plaintiff, though defendant in former cause, was not brought to hearing in that cause, and consequently was no party to that decree. *Everard* v. *Ashton*, 3 Bro. P. C. 561.

Charitable Gift—Decree distributing among Parishes.]—A testator devised his real estates, in trust to dispose of the rents for the benefit of the poor of the city of R., and the limits and precincts thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information was filed on behalf of two other parishes, claiming to participate in the charity, and a decree was made in 1680 directing that the rents should for ever thereafter be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish, for a similar purpose, and that parish was decreed to be entitled to a share of the rents, in the proportion of its extent and the population of the three other parishes; but the proportions, as between those parishes, were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents, on account of its population having increased more than the population of the other parishes. But the information was dismissed, the decree of 1680 being final. *Att.-Gen.* v. *Rochester Corporation*, 6 Sim. 273.

Debt due by Decree binds Heir with Assets.]—A debt due by decree in equity, though but a personal demand, will bind the heir or devisee having assets, and such heir or devisee refusing to perform a decree against him, will be subject to an attachment. *Connor* v. *Browne*, 1 Ridgw. P. C. 139.

Actions by Persons in different Capacities.]—An action by an administratrix for damage caused to the personal estate of the intestate through the negligence of the defendant in causing his death, is not brought in the same right as an action under Lord Campbell's Act (9 & 10 Vict. c 93), to recover compensation to the family of the deceased for his death, and an admission in the latter action creates no estoppel in the former. *Leggett* v. *G. N. Ry.*, 45 L. J., Q. B. 557; 1 Q. B. D. 599; 35 L. T. 334; 24 W. R. 784. And see *Hacking* v. *Lee*, 9 W. R. 70.

Feme Covert.]—Feme covert not entitled to a day to shew cause against a decretal order, as an infant; but it is binding till reversed. *Burke* v. *Crosbie*, 1 Ball & B. 503.

A feme covert is as much bound by a decree as a feme sole. *Ib.* 502. And see *Turner* v. *Turner*, 2 De G. M. & G. 28; 21 L. J., Ch. 422.

Husband and Wife—Action by.]—In February, 1881, Mrs. N., by her next friend, brought an action of *N.* v. *N.* against her husband for specific performance of an ante-nuptial agreement to settle on her a share of property given to her by her father's will. In March of the same year the husband brought the action *N.* v. *L.* in his own and his wife's name against the trustees of her father's will for an account of the said share. The trustees in their defence pleaded that the plaintiff's right to an account depended upon the facts which were in issue in the action of *N.* v. *N.* Before the hearing of *N.* v. *L.* judgment was delivered in *N.* v. *N.*, establishing Mrs. N.'s right to a specific performance of the agreement to settle:—Held, that the action of *N.* v. *L.* must be regarded as that of the husband alone, and the judgment against him in *N.* v. *N.* was an estoppel in fact to him setting up any right to an account of the share which that judgment had decided did not belong to him. *Defries, In re*, *Norton* v. *Levy*, 48 L. T. 703; 31 W. R. 720. *And see* col. 406.

Held, also, that the pleading of the pendency of the action prevented any failure of the estoppel from the judgment not having been pleaded. *Ib.*

Executor's Claim—Priority of Charge.]—A. and B. had charges on a plantation and the slaves. In 1834 an issue was tendered in a suit between them as to their priority on the slave compensation money. B. withdrew his claim, and the bill was, on motion, dismissed sixteen years afterwards, when the witnesses were dead. B.'s executors raised the same question of priority in regard to the plantation itself:—Held, that they were concluded by the transactions of 1834. *Bushby* v. *Ellis*, 17 Beav. 279.

In Creditors' Administration Suit.]—In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) is primâ facie evidence of a debt as against the persons interested in the real estate; but they will be at liberty to adduce rebutting evidence. *Harvey* v. *Wilde*, 41 L. J., Ch. 698; L. R. 14 Eq. 438; 27 L. T. 471.

Ejectment—Parties not in Possession.]—A plaintiff in ejectment, who enters judgment by default against several, is not estopped by the record from shewing that some of them were not in possession, and were unnecessary parties. *Le Clere* v. *Greene*, Ir. R. 7 Eq. 371; 22 W. R. 428.

Validity of Execution.]—The right of an execution creditor to enforce an execution against the estate of a bankrupt depended on whether the bankrupt had or had not been a trader. In an action by the creditor against the sheriff for wrongfully withdrawing from possession of the goods which he had seized under the execution, judgment passed for the sheriff, on the ground that the bankrupt was a trader, and that therefore the goods belonged to the trustee in bankruptcy:—Held, that the creditor was precluded from raising the question of the validity of his execution in an application against the trustee in the court of bankruptcy. *Harper, Ex parte*, *Bremner, In re*, 44 L. J., Bk. 57; L. R. 10 Ch. 379; 32 L. T. 317; 23 W. R. 433.

Order in Administration Suit—Subsequent Petition.]—A testator directed his trustees to hold certain real and residuary personal estate upon trust, to pay thereout to his widow for life such an annual sum as, together with the income

of a settled fund of 10,000*l.*, shall produce to her a clear annual income of 1,500*l.*, and declared that "no deduction shall be made from any of the legacies given by this my will for the legacy tax, or any other matter, cause, or thing whatsoever." The testator's estate had been administered by the court, and by orders made in 1861 and 1863, the trustees had been directed to pay the annuity to the widow during her life, or until further order, free of all deductions except income tax. On petition by the widow, in 1882, that the income tax, which had been deducted from her annuity during the previous years, might be repaid to her out of the testator's estate:—Held, that the orders of 1861 and 1863 were final as to the rights of the parties, and could not now be reconsidered. *Peareth* v. *Marriott*, 52 L. J., Ch. 221; 22 Ch. D. 182; 48 L. T. 170; 31 W. R. 68.

Contracts of Indemnity.]—A judgment in an action inter partes is only binding on the parties to the action and those claiming under them, except in a case where there is an express contract by C. to indemnify B. against an action brought against him by A. In such a case judgment in the action by A. against B. will be conclusive in an action by B. against C. upon the contract of indemnity, because that is the real meaning of such a contract. *Parker* v. *Lewis*, 43 L. J., Ch. 281; L. R. 8 Ch. 1035; 29 L. T. 199; 21 W. R. 923, 928.

A. had guaranteed the payment to B. of two bills of exchange accepted by C., and afterwards handed over the amount of the bills to B. A fiat having issued against C., his assignees, in an action, recovered the money from B., as having been paid by way of fraudulent preference. In an action by B. against A. upon the guarantee, A. pleaded that C. paid, and B. received, the money in satisfaction of the bills; which allegation was traversed:—Held, that the verdict and judgment in the action by the assignees against B., although evidence to explain the transaction, were not conclusive against A. that the money had been received by B. to the use of the assignees. *Pritchard* v. *Hitchcock*, 6 Man. & G. 151; 6 Scott (N.R.) 851; 12 L. J., C. P. 322.

In an action on a bond to save the plaintiff harmless from any loss he might incur in being surety for S., who had been appointed collector of taxes, the defendant pleaded non damnificatus; to which the plaintiff replied, "that, during the time S. was collector there came to his hands as such collector large sums of money, amounting in the whole to 500*l.*," and alleged that S. had not duly paid the sums to the receiver-general of taxes, by which the plaintiff was forced to pay to the receiver-general 500*l.*, and had so incurred loss:—Held, that a judgment which was signed against the plaintiff in a suit against him by the receiver of taxes for the money so due from S., was not evidence against the defendant of the amount the plaintiff had been obliged to pay through the default of S. *King* v. *Norman*, 4 C. B. 884; 17 L. J., C. P. 23; 11 Jur. 824.

Joint Contractors or Debtors.]—One of three joint covenantors gave a bill of exchange for part of a debt secured by a covenant, on which bill judgment was recovered:—Held, that such judgment was no bar to an action on the covenant against the three, such bill not being averred to have been accepted in satisfaction, or to have produced it in fact. *Drake* v. *Mitchell*, 3 East, 251; 7 R. R. 449.

The defendant being jointly interested with W. & Co. in a contract in respect of which they were indebted to the plaintiff, the plaintiff recovered judgment against W. & Co. W. & Co. afterwards became bankrupt. The plaintiff proved against their estate, and then brought an action on the contract against the defendant:—Held, that the judgment obtained against W. & Co. was a bar to the action. *Kendall* v. *Hamilton*, 48 L. J., C. P. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97—H. L. (E.)

Partnership debts are not necessarily joint as well as several, the liability of the estate of a deceased partner on a partnership contract being based on the ground that where there is no survivorship of interest there ought not to be survivorship of liability. *Ib.*

A judgment (without satisfaction) recovered against one of two joint debtors, is a bar to an action against the other. *King* v. *Hoare*, 13 M. & W. 494; 2 D. & L. 382; 14 L. J., Ex. 29.

Secus, where the debt is joint and several. *Ib.*

A judgment recovered by one of several joint debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shews that the judgment was recovered on a ground which operated as a discharge of all. *Phillips* v. *Ward*, 2 H. & C. 717; 33 L. J., Ex. 7; 9 Jur. (N.S.) 1182; 9 L. T. 345; 12 W. R. 106.

In an action against one of several joint contractors, he cannot plead in abatement the pendency of another action for the same cause against another co-contractor; but he should plead in abatement the non-joinder of the joint contractor; and if a second action is brought against all, the pendency of the former action against the other joint contractor may be pleaded. *Henry* v. *Goldney*, 4 D. & L. 6; 15 M. & W. 484; 15 L. J., Ex. 298; 10 Jur. 439.

Where the master of a ship signs a bill of lading in his own name, and is sued upon it, and judgment is obtained against him, an action will not lie against the owner of the ship upon the same bill of lading, although satisfaction has not been obtained on the judgment against the master. *Priestley* v. *Fernie*, 3 H. & C. 977; 11 Jur. (N.S.) 813; 13 W. R. 1089.

Two partners, acting by one of them, bought goods, and afterwards the vendor, with notice of the partnership, brought an action and recovered judgment against the one partner alone, and issued execution which was however, defeated by an adjudication of bankruptcy against him, followed by an adjudication against his partner:—Held, that the original debt was merged in the judgment, and that there could be no proof upon it against the joint estate. *Higgins, Ex parte, Tyler, In re*, 3 De G. & J. 33; 27 L. J., Bk. 27; 4 Jur. (N.S.) 595; 6 W. R. 406.

—— Judgment against Husband — Action against Wife, a Joint-Contractor.]—H. sued C. N. for breach of an agreement to let a furnished house for a year with the option of purchasing the furniture and effects, and obtained judgment for 30*l.* damages. C. N. only satisfied this judgment in part, and became bankrupt. H. then commenced an action against the wife of C. N., upon the same contract and for the same breaches:—Held, that H. was properly nonsuited in the second action: for the judgment already obtained against the husband in respect

of the same cause of action must be treated as a judgment against one of two joint contractors; and the ordinary rule of law that a judgment (although unsatisfied) against one of two joint-contractors is a bar to a subsequent action for the same breach against the other joint-contractor was applicable. *Hoare* v. *Niblett*, 60 L. J., Q. B. 565; [1891] 1 Q. B. 781; 64 L. T. 659; 39 W. R. 491; 55 J. P. 664.

—— **Judgment against one of two Joint-Contractors—Application to set aside by Consent—Adding other Joint Contractor as Defendant.**]—An application was made, by consent of the plaintiff and defendant, to set aside a judgment, and to add as a party to the suit another person alleged to be a joint-contractor with the defendant:—Held, that the plaintiff's rights against the defendant's joint-contractor having been extinguished by the judgment, the consent of the parties thereto could not be allowed to revive them, and that the application must be refused. *Hammond* v. *Schofield*, 60 L. J., Q. B. 539; [1891] 1 Q. B. 453.

Against one of several Tortfeasors.]—Final judgment recovered against one of two joint wrong-doers is a bar to an action against the other for the same cause of action, although such judgment is unsatisfied, but unless it is satisfied, the property in goods obtained by the wrong-doer is not changed so as to vest it in the person against whom such judgment was obtained. *Brinsmead* v. *Harrison*, 40 L. J., C. P. 281; L. R. 6 C. P. 584; 24 L. T. 798; 19 W. R. 956. Affirmed 41 L. J., C. P. 190; L. R. 7 C. P. 547; 27 L. T. 99; 20 W. R. 784—Ex. Ch.

Status of Legitimacy—Attorney-General—Interest of Crown.]—In a petition under the Legitimacy Declaration Act, the citation of parties between whom and the petitioner there already exists a judgment of a court of competent jurisdiction upon the subject now in suit does not afford ground for a plea of res judicata. The Attorney-General is by the act a necessary respondent, and the court is bound therefore to decide the personal question of status as between the Crown and the petitioner. *Shedden* v. *Attorney-General*, 30 L. J., P. 217.

Agents or Principals.]—When an agent (his principal being undisclosed) makes a contract in his own name, and the contractor sues the agent for breach of that contract, and obtains judgment against him, he, the contractor, cannot afterwards, upon discovery of the principal, sue the latter in respect of the same breach of contract, although the judgment recovered against the agent remains unsatisfied. *Priestley* v. *Fernie*, 3 H. & C. 977; 11 Jur. (N.S.) 813; 13 W. R. 1089.

Effect of Mistake.]—A verdict against one defendant in trespass upon an issue of a justification of a public right of way, negativing such right, is evidence in an action for breaking and entering the same close against another defendant, who justifies under the same right; and the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such finding, though not as to the truth of it between other parties. *Reed* v. *Jackson*, 1 East, 355; 6 R. R. 283.

Where Public are Interested.]—A plaintiff claimed tolls throughout the port of Padstow:—Held, that a record of K. B. of 7 Ric. 2, of a cause removed by certiorari from the maritime court of Aldestowe, was receivable for the plaintiff, although that cause was trespass for taking a ship, and the present plaintiff and defendant did not claim under either of the parties to it; evidence was allowed to be given by the witness who produced it, that he had ascertained from records that Aldestowe and Padstow are different names for the same place. *Brune* v. *Thompson*, Car. & M. 34.

A right of ferry is a matter in which the public is interested, and as to which, therefore, a verdict or a judgment of a court of competent jurisdiction touching the same right is evidence, although between other parties. *Pim* v. *Curell*, 6 M. & W. 234.

In an action by the lord of a manor against a copyholder, for trespassing on a free warren of the lord, a judgment on a quo warranto against a former owner of the manor, in which the attorney-general confessed a prescriptive title to the franchise of free warren, as appurtenant to the manor, is evidence for the plaintiff in support of a prescriptive right of free warren. *Carnarvon* (*Earl*) v. *Villebois*, 13 M. & W. 313; 14 L. J., Ex. 233.

Where an information charged a usurpation of the franchise over the lands of tenants as well as demesne lands, and the court gave judgment for the defendant as to both, the record was held to be evidence of a prescriptive right over both, although the plea set forth a title over demesne lands only, and the attorney-general confessed the title as pleaded. *Ib.*

A judgment in a former action against another copyholder, for a trespass on the plaintiff's free warren, is also admissible. *Ib.*

Privity between Incumbent of Benefice and Patron.]—An incumbent who comes into a benefice is a privy in law to the patron who appointed him, so as to be entitled to the benefit, and subject to the burden, of the same estoppel as the patron. R., the incumbent of a living, sent in his resignation of the benefice to the bishop, on the understanding that the resignation was not to be formally accepted, nor the benefice declared vacant, until a date agreed upon between himself and the bishop. Before that date arrived R. withdrew his resignation, but the bishop refused to accept the withdrawal, and at the time agreed upon declared the benefice vacant, after which the patrons appointed another incumbent, who was duly instituted and inducted into the benefice. R. brought an action against the bishop to have his resignation declared null and void. To this action the patrons of the living were parties, and the sole question was whether the resignation was effectual, and it was decided against R. that the resignation was effectual and complete. R. refused to give up the parsonage-house and glebe lands, and in an action brought against him by the new incumbent, for an injunction to restrain him from continuing in wrongful possession of the premises and for trespass, R. set up, substantially, the same defence as in the former action, namely, that his resignation was not effectual:—Held, that, as the question of the effectuality of the resignation was raised and disposed of in the former action to which the patrons were parties, and as R. would have been estopped from raising that question again in any

proceedings between himself and the patrons, he was also estopped from raising the same question as a defence against the incumbent, who, as being a privy in law to the patrons, was entitled to take advantage of the same estoppel. *Magrath* v. *Reichel*, 57 L. T. 850.

Lord of Manor and Corporation.]—In a dispute between a lord of the manor and the corporation of an adjoining port as to the right of foreshore, a decision between the parties in an action tried 150 years ago, followed by a long enjoyment on the part of the winner, and long acquiescence on the part of the loser, is primâ facie binding on the latter. *Tomline, Ex parte, Walton-cum-Trimley Manor, In re*, 28 L. T. 12 ; 21 W. R. 475.

Partners — Judgment against One — Action against other Partners Barred.]—An unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, is a bar to an action against the other joint contractor on the original contract. The plaintiffs sold goods to a partnership consisting of the defendant and W. After the sale the partnership was dissolved. The plaintiffs, who were not aware of the dissolution, drew bills for the price of the goods, which were accepted by W. in the partnership named. The plaintiffs sued W. in the partnership named on the bills, and recovered judgment, which was not satisfied. The plaintiffs afterwards sued the defendant for the price of the goods :—Held, that the case was within the principle of *Kendall* v. *Hamilton* (col. 406), and the judgment against W. on the bills was an answer to the action. *Drake* v. *Mitchell* (3 East, 251 ; 7 R. R. 449), distinguished. *Cumbefort* v. *Chapman*, 56 L. J., Q. B. 639 ; 19 Q. B. D. 229 ; 57 L. T. 625 ; 35 W. R. 838 ; 51 J. P. 455.

—— **Proof against Estate of One—Action against other Partner.**]—Although by the law as settled by *King* v. *Hoare* (13 Mee. & W. 494) and affirmed by *Kendall* v. *Harrison* (4 App. Cas. 504), a judgment obtained against one or more of the members of a firm of co-contractors precludes recourse to any other person not joined in the action, an exception to that rule has been long established in courts of equity—namely, that a surviving partner, or the estate of a deceased partner, is still liable to creditors of the partnership. *Hodgson, In re, Beckett* v. *Ramsdale*, 55 L. J., Ch. 241 ; 31 Ch. D. 177 ; 54 L. T. 222 ; 34 W. R. 127—C. A.

Executors of Executrix de son tort.]—J. being indebted to the plaintiff in the sum of 360*l.*, died on November 2, 1882, intestate. His widow, A., without obtaining letters of administration, intermeddled with his assets, and the plaintiff having sued her as executrix of her husband for the sum of 360*l.*, she consented to judgment, and the plaintiff thereupon signed judgment against her as executrix for his debt and costs. After her death he brought an action against her executors to recover 372*l.* 5*s.*, suggesting a devastavit by A. of her husband's assets :—Held, that the judgment against A. was conclusive as against her to shew that she then had assets of J. to satisfy the amount of the debt, viz. 372*l.* 5*s.*, and that to the extent of the difference between that amount and the sum of 154*l.*, found by the jury to be remaining at her death, a devastavit must be presumed to have been committed by her, for which her assets in the hands of the defendants were liable. *Ennis* v. *Rochford*, 14 L. R., Ir. 285.

Right of Common—Supplemental Suit.]—A suit was instituted in the Court of Chancery by the plaintiffs on behalf of themselves and all other occupiers of lands and tenements within Epping Forest, against the lord of a manor within that forest and two grantees from that lord of part of the wastes of the manor. The plaintiffs claimed to be entitled to rights of common over the wastes of the manor, and alleged that the lord of the manor in question inclosed or authorised the inclosure of large portions of the waste, so as to interfere with the rights of common, and had granted other portions of the waste to persons who made similar inclosures, and that such persons were too numerous to be made parties to the suit, but were sufficiently represented by the two grantees made defendants thereto. A decree was made, establishing the right of common claimed, and granting an injunction. After the Judicature Acts came into operation the same plaintiffs filed a supplemental statement of claim against another grantee from the same lord, seeking to have the benefit of the decree against him, and an injunction :—Held, that the defendant was bound by the decree in the suit so that he could not litigate the right of common thereby established. *Sewers Commissioners* v. *Gellatly*, 45 L. J., Ch. 788 ; 3 Ch. D. 610 ; 24 W. R. 1059.

Held, also, that the proceedings for enforcing the decree against him were not purely supplemental, but in the nature of original proceedings. *Ib.*

4. Judgments of what Courts.

Court known to the Law.]—Upon the trial of an issue in prohibition, whether the usurpation of office, in a quo warranto information mentioned, was committed out of the jurisdiction of the county palatine and within the city of Chester, a document from the remembrancer's office of the Court of Exchequer was produced, purporting to be a decree made (after the hearing of a complaint against the citizens of Chester, and their answer) by the lord high treasurer of England, the chancellor of the exchequer, the under-treasurer, and the chief baron, with the advice and assent of the Queen's attorney and solicitor-general, and others of the same court :—Held, that this document was not admissible as a decree, because it was not a decree of the Court of Exchequer, nor of any court known to the law at the time when it purported to have been made ; nor as an award, because there appeared no voluntary submission of the parties ; nor as evidence of reputation, because the parties making the decree had no knowledge of the subject, except that which they derived in the course of the proceedings. *Rogers* v. *Wood*, 2 B. & Ad. 245.

Proceedings in Equity.]—The dismissal of a bill, seeking equitable relief in respect of an instrument on which a party can sue at law, is no bar to an action upon the same instrument, although the decree does not state the dismissal to have been without prejudice. *Beere* v. *Fleming*, 13 Ir. C. L. R. 506.

Declaration for injury to a wall. Plea, that the plaintiff commenced proceedings in chancery against the defendant for the very same

rights and claims for which the action was brought, and that proceedings were had, and the Court of Chancery determined the same, and decreed in favour of the defendant, which decree is in force. Replication, that the Court of Chancery dismissed the bill of the plaintiff in the plea mentioned, reserving to the plaintiff the right of proceeding at law:—Held, that the plea and replication were both good. *Longmead* v. *Maple*, 18 C. B. (N.S.) 255; 11 Jur. (N.S.) 177; 12 L. T. 143; 13 W. R. 469.

In an action to recover damages for a fraudulent representation, the defendant, having obtained leave to demur, and to plead legal defences, asked leave to plead, for defence on equitable grounds, that the plaintiff had filed a bill in chancery for the very same alleged grievances and causes of action, which court gave judgment in favour of the defendant, and that the plaintiff had no right to maintain that suit against him. The court thought this decision in chancery no estoppel, and refused to allow the plea unless all the rest were abandoned. *Collins* v. *Cave*, 27 L. J., Ex. 146; 4 Jur. (N.S.) 31.

Judgment was given by consent before declaration in an action by a patentee against the members of a partnership for an infringement, and they immediately took a licence to use the invention. A suit to restrain a subsequent alleged infringement having been brought by the patentee against the same members at law and two fresh partners:—Held, that the defendants in equity were not estopped by the judgment from disputing the validity of the patent. *Goucher* v. *Clayton*, 34 L. J., Ch. 239; 11 Jur. (N.S.) 107; 13 W. R. 336.

A plaintiff in equity filed his bill, stating that a policy had become void at law, and claiming to have it treated as valid in equity. After bill dismissed the plaintiff sued at law on the policy:—Held, that a bill would lie to restrain the action, and injunction granted accordingly. *Tredegar (Lord)* v. *Windus*, 44 L. J., Ch. 268; L. R. 19 Eq. 607; 32 L. T. 596; 23 W. R. 511.

Compensation Cases.]—By a canal act commissioners were appointed for settling, determining and adjusting all questions, matters and differences between the company and the owners of lands prejudiced by the execution of any of the powers thereby granted; and the amount of compensation was to be assessed by a jury, and the commissioners were to give judgment for the sum so assessed, which was to be binding, and conclusive to all intents and purposes:—Held, that the verdict and judgment were conclusive as to the amount, but not as to the claimant's right to compensation. *Barber* v. *Nottingham and Grantham Ry.*, 15 C. B. (N.S.) 726; 33 L. J., C. P. 193; 10 Jur. (N.S.) 260; 9 L. T. 829; 12 W. R. 376.

The verdict and judgment upon an inquisition under the compensation clauses of the Lands Clauses Act, 1845, do not estop the company, in an action upon the judgment, from denying that the lands in respect of which the damage has been assessed, and the plaintiff's interest therein, were damaged and injuriously affected by their works. But where the damages claimed and awarded exceed 50*l.*, the company is estopped from denying that the claimant is entitled to compensation to an amount exceeding 50*l.* *Read* v. *Victoria Station and Pimlico Ry.*, 1 H. & C. 826; 32 L. J., Ex. 167; 9 Jur. (N.S.) 1061; 11 W. R. 1032.

In rem, in the Exchequer.]—A judgment of condemnation in rem in the exchequer is conclusive as to the legality of a seizure of the goods, in a subsequent action to recover them from the seizing officer. *Cooke* v. *Sholl*, 5 Term Rep. 255.

The record of condemnation is admissible, on a defence to an action for the price of rum sold, to prove that the rum was adulterated, being a proceeding in rem. *Hart* v. *M'Namara*, 4 Price, 154, n.; 18 R. R. 690.

But the record of a conviction for penalties, as it is a proceeding in personam, is not evidence in any case where the parties are different. *Ib.*

A record of condemnation of goods seized, for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute. *Att.-Gen.* v. *King*, 5 Price, 195. *See* col. 397, and INTERNATIONAL LAW.

Courts of Concurrent or Exclusive Jurisdiction.]—The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. *Mackintosh* v. *Smith*, 4 Macq. H. L. 913.

The judgments of courts of exclusive jurisdiction are evidence, whether the matter arises incidentally, or is the matter directly in issue. *Ib.*

Admiralty Court.]—To an action for negligence in causing a collision between the defendant's and the plaintiff's vessels on the river Thames, a plea that the merits had been tried in the Court of Admiralty, and, "after due proceedings taken in that court, and in due form of law, determined in favour of the defendant," it was held that the collision occurred through the plaintiff's negligence, and not by the defendant's negligence, is a bad plea, for not shewing that the collision occurred within the jurisdiction of the Admiralty; and the allegation "that due proceedings were taken, and in due form of law determined," does not cure the defect. *Harris* v. *Willis*, 15 C. B. 710; 3 C. L. R. 609; 24 L. J., C. P. 93; 3 W. R. 238. And see *Roberts* v. *Hartley*, 1 Bro. C. C. 57.

Bankruptcy Court.]—The file of procedings in bankruptcy is not a record, but may be questioned. *Bacon, Ex parte, Bond, In re*, 17 Ch. D. 447; 44 L. T. 834; 29 W. R. 574—C. A.

A creditor who had proved a debt, and voted in respect of it, subsequently discovered that he had omitted to state and value a certain mortgage security. He obtained leave to withdraw his proof and file an amended one upon certain conditions. Having appealed against the order, and the appeal having been dismissed, no further steps were taken by the creditor. The trustees in the bankruptcy obtained an order declaring that they were entitled to the proceeds of the mortgage security which had been omitted from the original proof:—Held, that the matter was not res judicata, and that as there had been a bonâ fide mistake on the part of the proving creditor in the omission of his mortgage security, he was entitled to have it rectified and to amend his proof. *Whitton, Ex parte, Greaves, In re*, 43 L. T. 480.

Colonial Court.]—If a bill is filed in the Court of Chancery in England, praying the same relief as a bill previously filed by the plaintiff in a

colonial court of concurrent jurisdiction, an adverse decree in the former suit cannot be pleaded as a defence, unless the grounds on which the subsequent claim is made are identical with those alleged in the former suit. *Hunter* v. *Stewart*, 31 L. J., Ch. 346; 8 Jur. (N.S.) 317; 10 W. R. 176.

County Courts.] — A servant in husbandry having been hired from 1st of August, 1858, to Martinmas next ensuing, for the wages of 5*l.*, entered the service, and continued in it till 7th of September, 1858, when her master discharged her. Thereupon she sued him in a county court claiming damages for the discharge, as having been without reasonable cause. The judge of the county court gave a verdict for the master. Afterwards, in May, 1859, the servant took out a summons before justices against the master, to recover 5*l.* wages:—Held, that the question for decision in the county court and by the justices being substantially identical, namely, whether the discharge of the servant was without just cause, the justices were bound to treat the decision of the county court, a court of concurrent jurisdiction, upon it, as conclusive between the parties; although the form of the claim in the summons varied from that made in the plaint in the county court. *Routledge* v. *Hislop*, 2 El. & El. 549; 29 L. J., M. C. 90; 6 Jur. (N.S.) 398; 2 L. T. 53; 8 W. R. 363.

By Ord. XVI. r. 17, of county court orders, 1875, "any judgment of nonsuit, unless the judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant." Such rule is a copy of Ord. XLI. r. 6, of the judicature orders, and was made by a committee of county court judges, with the approval of the lord chancellor, under the authority of s. 32 of the County Courts Act, 1856 (19 & 20 Vict. c. 108), which authorises such county court judges, with such approval to frame rules and orders "for regulating the practice of the courts and forms of proceedings therein":—Held, that unless rule 17 of the county court orders was ultra vires, a judgment of nonsuit in a county court not appealed against nor set aside, was a bar to an action by the plaintiff for the same debt in the superior court. *Poyser* v. *Minors*, 50 L. J., Q. B. 555; 7 Q. B. D. 329; 45 L. T. 33; 29 W. R. 773; 46 J. P. 84—C. A.

The plaintiffs being summoned to appear before justices of the peace to answer a complaint that they had refused to pay the amount of a church-rate, appeared, and upon the hearing gave notice that they disputed the validity of the rate, and required the justices to forbear from, and not to give judgment in respect of the matter of complaint. They, nevertheless, being of opinion that the objection to the rate was not bonâ fide, made an order for payment, and subsequently issued a distress warrant, under which the plaintiffs' goods were seized. The plaintiffs brought an action against the justices in respect of the seizure, and the plaintiffs having levied a plaint of replevin in a county court against the churchwardens in respect of the seizure, and recovered damages and costs in respect thereof:—Held that such recovery was a bar to the recovery of damages as against the justices. *Pease* v. *Chaytor*, 3 B. & S. 620; 32 L. J., M. C. 121; 9 Jur. (N.S.) 664; 8 L. T. 613; 11 W. R. 563.

The judgment of a county court as to matters within its jurisdiction, is by virtue of 9 & 10 Vict. c. 95, s. 89, of equal validity for the purposes of evidence with the judgment of a superior court, although the record in the county court may not shew upon what issues or upon what grounds the decision was given. *Flitters* v. *Allfrey*, 44 L. J., C. P. 73; L. R. 10 C. P. 29; 31 L. T. 878; 23 W. R. 442.

F. was tenant to A. of a cottage. A. treated F. as a weekly tenant, and gave him one week's notice to quit. As F. remained in the cottage, A. obtained a warrant of justices under 1 & 2 Vict. c. 74 (Small Tenements Act), and evicted F. from the cottage. Afterwards A. sued F. in a county court for rent of the cottage, claimed to be due upon the weekly tenancy. F. alleged that his tenancy was from year to year, and that at the time of his eviction a year of his holding had not expired, and no rent was due. The judge held that the tenancy was from year to year, and gave judgment for F. Thereupon F. sued A. in the superior court for trespass in wrongfully evicting him from the cottage by the warrant of the justices, and he again contended that as he was tenant from year to year his tenancy had never been lawfully determined. The jury found that F.'s tenancy was from week to week:—Held, that despite of the finding of the jury F. was entitled to have the verdict entered for him; for the judgment of the county court was, as evidence, conclusive, between F. and A. as to the tenancy, in this court; that the tenancy must be assumed to have been from year to year, and that the eviction of F. from the cottage must be taken to have been unlawful. *Ib.*

As to a consent judgment in the county court, see *Ribble Joint Committee* v. *Croston Urban District Council*, 66 L. J., Q. B. 384; [1897] 1 Q. B. 251; 45 W. R. 348.

Consular Courts.]—A judgment of a British consular court, established abroad under 6 & 7 Vict. c. 94, in an action of debt properly brought by the plaintiff in that court, together with payment by the defendant to the plaintiff of the sum awarded to the latter by such judgment, forms a good bar to an action in a court here for the same subject-matter. *Barber* v. *Lambe*, 8 C. B. (N.S.) 95; 29 L. J., C. P. 234; 6 Jur. (N.S.) 981; 2 L. T. 238; 8 W. R. 461.

Divorce Court.]—A married woman, living apart from her husband, incurred a debt for necessaries. The husband being sued, pleaded never indebted, and gave in evidence an account of proceedings instituted by himself against the wife for adultery, in which the jury found in the affirmative, judgment being entered accordingly. As it was proved that the husband had also committed adultery, the judge dismissed his petition:—Held, that the judgment in the divorce court was merely the finding of the jury, and though it might bind the parties themselves, it did not affect strangers. *Needham* v. *Bremner*, 1 H. & R. 731; 35 L. J., C. P. 313; L. R. 1 C. P. 583; 12 Jur. (N.S.) 434; 14 L. T. 437; 14 W. R. 694.

Ecclesiastical Courts.] — A sentence in an ecclesiastical court in a matter properly cognizable there, is conclusive evidence where the same matter comes in question collaterally in a court of law or equity. *Meadowes* v. *Kingston, (Duchess)*, Amb. 756.

A sentence of jactitation of marriage was not conclusive evidence of its validity: and might be impeached as having been obtained by fraud.

Kingston's (Duchess) Case, 1 Leach, C. C. 146; 1 East, P. C. 468. And see *Harrison* v. *Southampton Corporation*, 22 L. J., Ch. 372; 1 W. R. 422.

If the sentence of an ecclesiastical court in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in the Court of Chancery between the same parties for distribution. *Barrs* v. *Jackson*, 1 Ph. 582; 14 L. J., Ch. 433; 9 Jur. 609.

Indian Court.]—The plaintiff, resident in England, carried on business in India and England in partnership with the defendant, who resided in India. Questions having arisen between them, the plaintiff filed a bill in the Supreme Court of Equity at Calcutta against the defendant for an account, and for an injunction, and a revivor. Pending the suit, the defendant left India and came to, and resided permanently in England; and eventually the bill was taken pro confesso, and a decree was made referring it to the master to take the accounts. The plaintiff then filed his bill in this country, alleging that by reason of the absence from India of the defendant the suit there could not be prosecuted, and praying relief here similar to that sought in the suit in India. The defendant, answering such parts of the bill as sought discovery of documents, pleaded the existence of the decree in the court in India, and the present existence of the proceedings before the master there, in bar to the substantial parts of the plaintiff's bill:—Held, that the plea must be overruled. *Ostell* v. *Lepage*, 5 De G. & Sm. 95; 21 L. J., Ch. 501; 16 Jur. 404.

Privy Council.]—A second incumbrancer filed a bill in Granada, to which the mortgagor and first incumbrancer were parties, defendants, impeaching one of the deeds under which the first incumbrancer claimed, and praying that the equity of redemption of the mortgaged premises might be sold. By a decree made in that suit, the court in Granada declared the impeached deed void, the effect of which was to reduce considerably the claim of the first incumbrancer; he, therefore, appealed from that decree to the privy council, who reversed the decree of the court in Granada, and established the deed in question. Before that suit was finally concluded, the mortgagor filed a bill here against the first incumbrancer for redemption, praying that the same deed which had been affirmed by the privy council might be declared void. His bill was dismissed with costs, on the ground that he was concluded by the decree of the privy council from raising in a new suit, the question as to the validity of that instrument. *Farquharson* v. *Seton*, 5 Russ. 45.

Inferior Courts.]—A sentence of expulsion, unappealed from, may be given in evidence on an indictment for assaulting a member of a college in the University of Cambridge, by turning him out of the college gardens, and is conclusive for the defendant. *Rex* v. *Grundon*, Cowp. 315.

Where a cause is removed by habeas corpus from an inferior court after judgment by default, that judgment is not evidence against the defendant in the superior court. *Bottings* v. *Firby*, 9 B. & C. 762; 4 M. & Ry. 566; 7 L. J. (O.S.), K. B. 329.

To an action for money had and received, the defendant pleaded a recovery by foreign attachment at the suit of a creditor of the plaintiff, and that the creditor had execution of the sum recovered according to the custom of London; the plaintiff insisted that no execution was executed; on which the defendant joined issue:—Held, that the jury was not precluded by a record of satisfaction in the former attachment from finding the real facts of the case. *Magrath* v. *Hardy*, 4 Bing. (N.C.) 782; 6 Scott, 627; 6 D. P. C. 749; 1 Arn. 352; 7 L. J., C. P. 299; 2 Jur. 594.

Orders of the commissioners of sewers requiring land-owners to repair and alter sea-walls, are admissible as adjudications by a court of competent jurisdiction, without proof of their having been acted on. *Reg.* v. *Leigh*, 2 P. & D. 357; 10 A. & E. 398.

After a considerable lapse of time (as seventy years), the court will presume that such orders were executed. *Ib.*

Where a plaintiff sued his steward in an inferior court for 4,000*l.*, which was a less sum than he knew to be due to him, and upon the final investigation of the defendant's accounts, and upon judgment by default verified 3,400*l.* only:—Held, upon a plea of judgment recovered in answer to a second action for the balance due, that the plaintiff was concluded by the action brought in the inferior court. *Bagot (Lord)* v. *Williams*, 5 D. & R. 87; 3 B. & C. 235; 27 R. R. 340.

—— **Lord Mayor's Court.**] — Plea, that a verdict and judgment in the Lord Mayor's Court had been obtained by the defendant against the plaintiffs in the same matter in respect of which relief was sought by the bill, allowed, the Lord Mayor's Court being a court of competent jurisdiction to decide the matter in dispute between the parties, and that matter in dispute, if not finally decided by the judgment, being in a proper course for decision. *Behrens* v. *Pauli*, 1 Keen, 456.

Proceedings before Justices.]—An application to justices by a local board under the Public Health Act, 1875, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices, on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such expenses:—Held, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment. *Reg.* v. *Hutchins*, 50 L. J., M. C. 35; 6 Q. B. D. 300; 44 L. T. 364; 29 W. R. 724; 45 J. P. 504—C. A.

Order of Quarter Sessions when a Decision "on Merits."]—Upon the hearing of an appeal

to quarter sessions against an order of affiliation, it appeared that the respondent and her witnesses were not present, having mistaken the day of hearing, and her counsel applied for an adjournment till the following morning, offering to pay the costs of the day. The appellant having declined to accede to this proposal, the sessions directed the case to proceed, and quashed the order, no evidence having been adduced on the part of the respondent:—Held, that the order of quarter sessions was not a decision upon the merits, and that fresh proceedings in respect of the same matter might be taken before justices. *Reg.* v *May*, or *Essex JJ.*, 49 L. J., M. C. 67; 5 Q. B. D. 382; 42 L. T. 772; 28 W. R. 918.

Police Magistrate.]—By 2 & 3 Vict. c. 71, s. 40, metropolitan police magistrates are empowered, upon a complaint to them of the unlawful detention of goods of less value than 15*l.*, to summon the person complained of, and to inquire into the title thereto, or to the possession thereof, and to order the goods to be delivered up to the owner either absolutely or upon certain terms, provided that no such order shall bar any person from recovering possession of the goods so delivered by action at law. To an action for the conversion of goods the defendant pleaded an estoppel, setting up the above statute, and alleging that the plaintiff had complained of the detention of the goods to a metropolitan police magistrate, who summoned the defendant before him, and after inquiring into the title to the goods, dismissed the summons, and thereby adjudicated in his favour:—Held, that such dismissal and adjudication did not bar the action, and that, therefore, the plea was bad. *Dover* v. *Child*, 45 L. J., Ex. 462; 1 Ex. D. 172; 34 L. T. 737; 24 W. R. 537.

W. was injured by the furious driving of the defendant's servant. The driver was summoned by the police, and W. attended as a witness. The driver was fined, and was ordered by the magistrate to pay to W. 5*l.* by way of compensation, under the provisions of 6 & 7 Vict. c. 86, s. 28. He was asked by the magistrate if that sum would compensate him, and he said it would not, but nevertheless he took it. In a subsequent action for damages by W. against the driver's employers:—Held, that the order of the magistrate was a bar to the action, inasmuch as W. must be taken to have accepted the 5*l.* in full satisfaction of his claims in respect of his injuries. *Wright* v. *London General Omnibus Co.*, 46 L. J., Q. B. 429; 2 Q. B. D. 271; 36 L. T. 590; 25 W. R. 647.

Conviction of Injury to Person when a Bar to Action brought subsequently for Injuries.]—*See* CRIMINAL LAW, ante, vol. IV., col. 1475.

Convictions on Indictments.]—A record of an indictment for an assault to which the defendant pleaded guilty, is admissible against him in an action for damages for the same assault. *Anon.*, 1 Phil. Evid. 320.

But a verdict of guilty, and judgment thereon in an indictment for obstructing a public highway, cannot be pleaded as an estoppel in an action brought by the party convicted against a third party for using the way. *Petrie* v. *Nuttall*, 11 Ex. 569; 25 L. J., Ex. 200.

Indictment against a township for not repairing an ancient highway. On the trial an indictment against an adjoining township, for non-repair of a part of the same line of road to which that township had submitted, was received:—Held, that it was properly received as evidence that the whole highway was ancient. *Reg.* v. *Brightside Bierlow*, 13 Q. B. 933; 19 L. J., M. C. 50.

An indictment for non-repair of a highway charged the defendant as liable to repair by reason of his tenure of S. P. field. He pleaded not guilty. On the trial, evidence was given on the part of the prosecution of the conviction in 1801, of S., a former owner of S. P. field, for the non-repair of the highway, the liability being charged as arising in respect of the tenure of the S. P. field. Proof was also given of repairs done since 1801 by the owners of the field. For the defendant, evidence was adduced of an agreement and award previously to 1801, which found, in effect, that the owner of S. P. field was liable to repair the road, and directed that S. should plead guilty to an indictment for non-repair ratione tenuræ. The jury convicted the defendant; but the court reserved the question, "Whether the usage or liability in respect of which the defendant was charged in the indictment was established?"—Held, that the defendant was estopped from denying his liability, in consequence of the conviction of S., with whom he was a privy in estate. *Reg.* v. *Blaemore*, 2 Den. C. C. 410; 21 L. J., M. C. 60; 16 Jur. 154.

Indictment for non-repair of a highway against the inhabitants of a township, averring them to be liable by prescription to repair such highways in the township, as the inhabitants of the parish, but for the prescription, would have been liable to repair, with an averment that the highway was in the township. The prosecutors gave in evidence a record of the presentment by a justice, under 13 Geo. 3, c. 78, on his view, that the road in question was out of repair, averring that it was in the township, and that the inhabitants of that township ought to repair it. The record shewed a plea of guilty by two inhabitants of the township, a conviction before the sessions, and a sentence of fine:—Held, that this conviction was conclusive evidence against the township, that the road was in that township; and that, though the presentment might be bad on error for not shewing how the township was liable, the conviction being before a competent tribunal and being unreversed, was not the less an estoppel. *Reg.* v. *Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455; 1 W. R. 164.

Held, also, that it was not necessary to shew that the fine had been levied, the conviction not being impeached on the ground of fraud or collusion. *Ib.*

Foreign Courts.]—*See* INTERNATIONAL LAW.

Lis alibi pendens creates no Estoppel.]—In an action of collision a judgment of a foreign court given in a cause between the same parties cannot be pleaded as an estoppel unless such judgment was obtained prior to the institution of the action in this country; there being no res judicata, but lis alibi pendens, when the plaintiff instituted his action here, he can claim to proceed to judgment in this country if he chooses. *The Delta*, 45 L. J., P. 111; 1 P. D. 393; 35 L. T. 376; 25 W. R. 46.

5. PLEADING AND PROCEEDINGS THEREON.

a. Generally.

Plea.]—A plea raised in Chancery of proceedings in another court of competent jurisdiction, must shew not only that the same issue was

joined as in the suit in the Court of Chancery, but that the subject-matter was the same, and that the proceedings in the other court were taken for the same purpose. *Behrens* v. *Siereking*, 2 Myl. & C. 602.

The 10th rule of Hilary term, 1853, does not apply to a plea of judgment recovered against an executor. *Power* v. *Izod*, 1 Bing. (N.C.) 304; 1 Scott, 119; 3 D. P. C. 140; 4 L. J., C. P. 5.

A plea to an action for money lent, that the plaintiff is estopped from suing in consequence of his having, in a former action brought against him by the defendant, pleaded the demand sued on by way of set-off, which was negatived by the jury, is not a plea of judgment recovered within this rule. *Brokenshir* v. *Morgan* or *Monger*, 9 M. & W. 111; 11 L. J., Ex. 90; 5 Jur. 1200.

To a count in an action on a covenant on an annuity with a breach for non-payment of the annuity on the 15th June, 1834, the defendant pleaded a judgment recovered against him by the plaintiff in an action of debt, for the sum of 2,000*l.*, of Easter term, 1832, concluding with an averment that the causes of action in the two suits were identical:—Held, a bad plea on general demurrer. *Few* v. *Backhouse*, 1 P. & D. 34; 8 A. & E. 789; 1 W. W. & H. 658; 8 L. J., Q. B. 30.

To an action for work done by the plaintiff as a correspondent for the defendant in New York. Plea, as to 50*l.*, part of the claim, that an action had been brought against the plaintiff in the Supreme Court of New York for a sum exceeding 50*l.*; that by process duly issued out of that court, and executed on the defendant, that sum due and owing from the defendant to the plaintiff, was attached in the defendant's hands, according to the laws of that state, to satisfy the demand in the action; that judgment was afterwards recovered in that court, and execution issued to the sheriff of New York, whereupon the defendant was obliged, by the laws of the state, to pay and did pay over to the sheriff the value of the 50*l.*, deducting the necessary expenses of the attachment. The plea alleged, that the plaintiff and the defendant were citizens of the state, and the defendant was resident there and subject to the jurisdiction and process of the court, and that by the laws of the state the defendant was discharged and acquitted of the 50*l.*:—Held, that the plea was a good defence pro tanto. *Gould* v. *Webb*, 4 El. & Bl. 933; 24 L. J., Q. B. 205; 1 Jur. (N.S.) 821; 3 W. R. 399.

A plea of a former recovery for the same offence, to a penal action, must allege that the plaintiff in the former action had priority of suit, or it will be bad. *Jackson* v. *Gisling*, Bull. N. P. 179.

—— **Amendment.**]—A plea of judgment recovered in general terms, but alleging that the debt was satisfied, will not be ordered to be amended, or set aside as embarrassing. *Lawler* v. *Robertson*, 1 F. & F. 307

Replication.]—In an action by the indorsee against the acceptor of a bill of exchange, he pleaded a plea of judgment recovered by him in a former action brought by the plaintiff, on the same bill. The plea set out the pleadings, the finding of the jury and the judgment of the court in the former action. It alleged the plea therein was, that the plaintiff and the defendant had agreed that if the defendant dishonoured the bill when due the plaintiff should extend the time for the payment of the amount till the 25th of December, 1848, and the defendant should execute a warrant of attorney for the payment of the amount with charges and interest, on that day; and that the defendant, having dishonoured the bill, offered to execute the warrant of attorney, which the plaintiff refused to accept. That the plaintiff replied de injuriâ to that plea, and that the defendant had judgment. To the present plea of judgment recovered, the plaintiff replied that he did not extend the time for the payment of the bill till the 25th of December, 1848; that that day had elapsed before the commencement of the present suit, and that the defendant did not execute the warrant of attorney:—Held, that the replication was bad, and the plea a good plea of judgment recovered, containing all necessary details of the judgment. *Overton* v. *Harvey*, 1 L. M. & P. 233; 9 C. B. 324; 19 L. J., C. P. 256; 14 Jur. 902.

Where a declaration set out a libel in which it was alleged that the plaintiff was tried for murder, and that "it was understood that the counsel for the prosecution were in possession of a damning piece of evidence, viz., that he had spent nearly the whole of the night preceding the duel in practising pistol firing," and the plea stated that the plaintiff had committed murder:—Semble, that, a replication by way of estoppel, stating that the plaintiff was tried and acquitted, is not good. *Helsham* v. *Blackwood*, 11 C. B. 111; 20 L. J., C. P. 187; 15 Jur. 861.

Where a plea to a declaration for goods sold and delivered stated that the plaintiff sued the defendant in an inferior court for the same causes of action in the declaration mentioned, and that the defendant recovered against the plaintiff by the judgment of that court, and that such judgment remained in full force; and the plea proceeded to set out the declaration in the court below, in which it was not stated that the goods were sold, or that the consideration for the promise arose within the jurisdiction of that court; and the plaintiff in his replication alleged that both he and the defendant, at the time of levying the plaint in the court below, and the latter obtaining judgment, resided out of the jurisdiction of that court; and that the cause of action arose out of such jurisdiction:—Held, that the replication was sufficient, on the ground that the proceedings in the court below were coram non judice, and altogether void. *Briscoe* v. *Stephens*, 9 Moore, 413; 2 Bing. 213; 3 L. J. (O.S.) C. P. 257; 27 R. R. 597.

Whether Pleading is necessary.]—A verdict which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue is not conclusive, but only evidence to go to the jury. *Vooght* v. *Winch*, 2 B. & Ald. 622; 21 R. R. 446. S. P., *Stafford* v. *Clark*, 9 Moore, 724; 2 Bing. 377; 1 Car. & P. 24, 403. *Doe* v. *Huddart*, 2 C. M. & R. 316; 5 Tyr. 846; 4 D. P. C. 437.

Estoppels by record and by deed must, in order to make them binding, be pleaded if there be an opportunity; otherwise the party omitting to plead it waives the estoppel and leaves the issue at large, on which the jury may find according to the truth: aliter of estoppels in pais. *Freeman* v. *Cooke*, 2 Ex. 654; 6 D. & L. 187; 18 L. J., Ex. 114; 12 Jur. 777. See *Reg.* v. *Haughton*, 1 El. & Bl. 501; 22 L. J., M. C. 89; 17 Jur. 455; 1 W. R. 164.

An administrator being sued for a debt due from the intestate, pleaded no assets: replication, that he had assets. Issue thereon and verdict for the plaintiff. Judgment was entered and execution issued, and nulla bona returned. The plaintiff

declared in debt setting forth these proceedings and alleging that the defendant had at the time of the recovery, assets to be administered, and had eloigned and wasted them. Plea, that at the time of the recovery, the defendant had fully administered, &c., without this, that he eloigned or wasted, &c. Issue thereon :—Held, that the defendant could not prove that all assets which had come to his hands at the time of the former recovery had been duly administered, and that the plaintiff might take this objection without having replied the former recovery as an estoppel. *Dawson* v. *Gregory*, 7 Q. B. 756 ; 14 L. J., Q. B. 286 ; 9 Jur. 688.

b. Nul Tiel Record.

Effect of.]—A plea of nul tiel record to a declaration in scire facias, on a judgment more than a year and a day old, puts in issue only the recovery of the judgment. *Phillips* v. *Smith*, 2 D. (N.S.) 688 ; 12 L. J., Q. B. 187 ; 7 Jur. 491.

Pleading after Decision.]—A defendant may plead puis darrein continuance after judgment has been given for the plaintiff, upon an issue tried by the record. *Wagner* v. *Imbrie*, 2 L. M. & P. 333 ; 6 Ex. 380 ; 20 L. J., Ex. 235 ; 15 Jur. 405.

Replication to Plea of former Judgment.]—A replication of nul tiel record to a plea of a former judgment recovered, in respect of the same causes of action, against a joint contractor with the defendant, is a proper form of pleading, where such judgment has been reversed in error, although the former action and judgment were against a different defendant, and it appears from the record that such reversal was by the consent of the parties. *Baily* v. *Turner*, 6 D. & L. 730 ; 18 L. J., Q. B. 232 ; 14 Jur. 432.

Proof of.]—A plaintiff brought an action against the defendant for words imputing a felony, and had a verdict against him. In a second action, the declaration contained an averment that the plaintiff was a trader, and alleged that the words (which were not precisely the same as those in the first action) were spoken of him in the way of his trade. Upon an issue of nul tiel record :—Held, that as the record, when produced, did not shew on the face of it that the cause of action might be the same, judgment must be for the plaintiff. *Wadsworth* v. *Bentley*, 1 B. C. C. 203 ; 23 L. J., Q. B. 3 ; 2 C. L. R. 127 ; 17 Jur. 1077 ; 2 W. R. 56.

When a plaintiff declares on a judgment generally to which the defendant pleads nul tiel record, it is no variance that the judgment is alleged, in the record produced, to have been by default in consequence of the defendant not having paid the debt by instalments, as directed by a judge's order obtained by consent. *Hopkins* v. *Francis*, 2 D. & L. 664 ; 13 M. & W. 668 ; 14 L. J., Ex. 207 ; 7 Jur. 250.

A declaration on a judgment described it as obtained in the court of our lady the Queen, of her Bench at Westminster, in the county of Middlesex. Plea, that there is not any record of the recovery remaining in the court of our lady the Queen, of her Bench at Westminster. Replication, that there is such a record of the recovery remaining in the court of our lady the Queen, of her bench :—Held, that the issue was proved by the production of a judgment of the Common Pleas. *Bradley* v. *Grey*, 4 De G. & Sm. 458 ; 3 C. B. 726 ; 16 L. J., C. P. 26.

In an action against husband and wife, the declaration alleged that the plaintiff recovered judgment against the female, by the name of E. R., on promises made by her dum sola ; to which the defendants pleaded nul tiel record. On the record being produced, the judgment appeared to have been recovered against her and others :—Held, no variance. *Cocks* v. *Brewer*, 11 M. & W. 51 ; 2 D. (N.S.) 759 ; 12 L. J., Ex. 225 ; 7 Jur. 218.

A declaration on a replevin bond for not prosecuting a suit with effect, according to the condition, stated (after setting out the bond) that the plaintiff made his plaint at the Whitechapel county court, and that it was adjudged by that court that the plaintiff should take nothing by his plaint. Plea, nul tiel record. Replication, there is such a record. The order made in the minute-book of the county court was struck out for want of jurisdiction, a disputed title having been sworn to :—Held, that the entry did not support the allegation in the declaration of a judgment against the plaintiff in the county court, and that the defendant was entitled to judgment. *Tubby* v. *Stanhope*, 5 D. & L. 781 ; 5 C. B. 790 ; 17 L. J., C. P. 190 ; 12 Jur. 357.

An action brought in a superior court under 6 & 7 Vict. c. 96, s. 8, to recover the costs sustained by the plaintiff upon the trial of an indictment for libel, preferred against him at the assizes by the defendant, upon which trial a verdict of "not guilty" was returned and judgment was given for the plaintiff, who was duly discharged, is a "proceeding" in which under s. 13 of the Evidence Amendment Act, 1851 (14 & 15 Vict. c. 99), a certified copy of the record of such trial and acquittal under the hand of the proper officer of the court of assize is admissible in evidence in proof of such trial and acquital in answer to a plea of "nul tiel record." *Richardson* v. *Willis*, 42 L. J., Ex. 15 ; L. R. 8 Ex. 69 ; 27 L. T. 828 ; 12 Cox C. C. 298.

The issue of nul tiel record is tried by the court and not by a jury. *Ib.*

Colonial Judgment.]—A plea of nul tiel record cannot be pleaded to an action on a colonial judgment. *Chapman* v. *Sherrie*, Ir. R. 5 C. L. 36. S. P., *Philpott* v. *Adams*, 7 H. & N. 885 ; 31 L. J., Ex. 421.

Trial.]—On the trial of an issue of nul tiel record, when the defendant begins he is entitled to reply. *Cocks v. Brewer*, 11 M. & W. 51 ; 2 D. (N.S.) 759 ; 12 L. J., Ex. 225 ; 7 Jur. 218.

Amendment.]—Upon a trial by the record the court amended the declaration by inserting therein the true amount recovered by the judgment. *Hunter* v. *Emmanuel*, 15 C. B. 290 ; 24 L. J., C. P. 16.

So where there was a variance as to the date between the record produced and that stated in the declaration, the court allowed the latter to be amended. *Noble* v. *Chapman*, 14 C. B. 400 ; 23 L. J., C. P. 56 ; 18 Jur. 44 ; 2 W. R. 154.

Formerly the amendment was the subject of a separate application. *Billing* v. *Hitchings*, 2 Ex. 297 ; 18 L. J., Ex. 192.

Production of Record.]—An action being brought in the Exchequer against the plaintiff and his attorney for causing the defendant's goods to be taken in execution under a fi. fa. upon a judgment which a judge afterwards set

aside for irregularity, without imposing it as a condition that no action should be brought, and the defendant in the action in the Exchequer having pleaded a justification under the judgment in Common Pleas, the plaintiff replied nul tiel record, and a day being given to produce the record, and the plaintiff in the action in the Common Pleas ruled to carry in the roll, his attorney delayed it until the day before that appointed for the trial by the record in the Exchequer, and then carried it in without any suggestion that the judgment had been set aside, and in that state caused the transcript to be returned under a writ of certiorari into the Exchequer. The Common Pleas made absolute a rule for quashing the judgment with costs, to be paid by the plaintiff or his attorney. *Nash* v. *Swinburn*, 4 Scott (N.R.) 562; 1 D. (N.S.) 190; 3 Man. & G. 853.

Where in an action upon a judgment to which the defendant pleaded nul tiel record, a motion was made under 43 Geo. 3, c. 46. s. 5, for judgment upon the production of the record of the original judgment and costs, the court refused to grant a rule absolute in the first instance, as costs were demanded, although notice of the motion had been given. *Fraser* v. *Moses*, 1 D. (N.S.) 705; 4 Scott (N.R.) 749.

C. BY DEED.

1. Generally.

Inconsistent with Document.]—No estoppel can be raised on a document inconsistent with the document itself. *Colonial Bank* v. *Hepworth*, 56 L. J., Ch. 1089; 36 Ch. D. 36; 57 L. T. 148; 36 W. R. 259.

2. Parties.

Grantor.]—In an action on a deed for the payment of an annuity, the grantor is estopped from pleading that the annuity was granted for the fraudulent purpose of multiplying votes. *Phillpotts* v. *Phillpotts*, 10 C. B. 85; 20 L. J., C. P. 11.

A grantor by his deed is estopped from saying that he had no interest. *Fairtitle* v. *Gilbert*, 2 Term Rep. 171; 1 R. R. 455.

—— **Unless Acting under Statute.**]—Unless he is a trustee for the public, deriving his authority from an act of parliament. *Ib.*

By an act for building a bridge, commissioners were empowered to borrow money by way of mortgage, and every mortgage was to be in a form given by the act, whereby the commissioners were to grant and convey, by deed, to the lender, the bridge, toll-houses and tolls, until the principal should be repaid with interest, and the "several persons to whom any such mortgages shall be made, shall be entitled, in proportion to the annual amount of the interest of the moneys borrowed on mortgage, to the tolls and revenues of the commissioners, without any preference by reason of the priority of date of any such security." Against an ejectment by a mortgagee, the commissioners set up a prior mortgage still subsisting:—Held, that although they were commissioners acting in execution of a statute, they were estopped by their mortgage to the plaintiff from saying that their whole estate had been conveyed to the prior mortgagee, so that no estate passed to the plaintiff. *Doe* d. *Levy* v. *Horne*, 3 G. & D. 239; 3 Q. B. 757; 12 L. J., Q. B. 72; 7 Jur. 38.

Privies.]—B., who had, in 1832, been admitted for life by the benchers of the society of Lincoln's Inn (the owners of the fee) to chambers in that inn, by indenture of July, 1833, reciting that he was "seised or well entitled to an estate for his own life in or to the said chambers," conveyed them to the plaintiff, to secure an annuity, and in Michaelmas term, in the same year, surrendered them to the society with a view to the admission thereto of the defendant, who was accordingly let into possession:—Held, that, inasmuch as the defendant did not claim by, through, or under B., he was not estopped by the recital of July, 1833, from denying that B. had a life estate in the premises. *Doe* d. *Marchant* v. *Errington*, 8 Scott, 210; 6 Bing. (N.C.) 79; 9 L. J., C. P. 9; 3 Jur. 1126.

B. conveyed Blackacre in fee to L. in 1827, and the wife of B. was a party to the deed. It was agreed at the time of executing the conveyance, that B. should continue to occupy till he or L. died. L. died, and his heir gave B. notice to quit. A few days after the notice to quit expired, B. died, and his widow continued in possession. On ejectment by the heir against the widow:—Held, that she could not set up a prior mortgage of Blackacre by B., for her possession accrued through B., and therefore she was estopped by the conveyance of 1827. *Doe* d. *Leming* v. *Shirrow*, 7 A. & E. 157; 2 N. & P. 123; W. W. & D. 517.

W. purchased from the assignees of D. lands which had been devised to G. as freehold, and which were described as freehold in the conveyance to W.:—Held, that W. was not estopped by the deed, as against the widow of G., from shewing that the lands were not freehold, and consequently not chargeable with dower. *Gaunt* or *Grant* v. *Wainman*, 3 Scott, 413; 3 Bing (N.C.) 69; 2 Hodges, 186; 5 L. J., C. P. 344.

A plaintiff in ejectment, claiming under a mortgagee, gave in evidence the deed executed by the mortgagor and mortgagee, which recited that the mortgagor was seised in fee. The defendant was no party to the deed, but had subsequently endorsed upon it this memorandum:—"The within premises were charged by me, W. S. (defendant), the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.*":—Held, that the memorandum was evidence for the jury, that the defendant came in under the mortgagor, and that, if so, he was estopped from setting up an adverse title prior to the date of the deed. *Doe* d. *Gaisford* v. *Stone*, 3 C. B. 176; 15 L. J., C. P. 234; 10 Jur. 480.

The Westminster improvement commissioners were authorised by acts of parliament to borrow such sums of money as they should think necessary for the purposes of the act, and to give bonds for the same, and which bonds were assignable. In an action by a transferee of one of such bonds, the condition of which recited that the commissioners had in pursuance of the acts borrowed of P. 5,000*l.* for enabling them to carry the acts into execution, they pleaded that they did not borrow the sum of P., or any part thereof, for the purposes of the acts, and that they were not authorised to make the bond, and that the same was made contrary to the provisions of the acts, of which P. and the plaintiff had notice at the time when the bond was made and transferred to the plaintiff:—Held, upon general demurrer, that the plea was bad. *Horton* v. *Westminster Improvement Commissioners*, 7 Ex. 780; 21 L. J., Ex. 297.

The commissioners also pleaded that before the bond was made, C. M. and W. M. were entitled to receive from them bonds; that P. and others conspired fraudulently to procure for P. one of the books to which C. M. and W. M. were entitled, and by means of such conspiracy and fraud they procured C. M. and W. M. to authorise the commissioners to give to P. one of the bonds they were so entitled to; and that the bond sued upon was thereupon given to P. by the commissioners, and that they had never borrowed any sum of money from P., of all which premises the plaintiff at the time of the transfer to him of the bond had notice:—Held bad, because the commissioners could not set up as a defence the fraud that had been committed upon C. M. and W. M., by whose directions they had in pursuance of their contract with them given the bond to P. *Ib.*

By Person claiming under Instrument.]—A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine and be void" if all the creditors in Great Britain to a certain amount did not execute it within six months from its date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate:—Held, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had executed the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. *Dunn* v. *Wyman*, 51 L. J., Q. B. 623.

Entry on Land under Deed or Will—Tenant for Life and Remainderman—Title.]—Where a person who has no title, or an imperfect title, to land, purports by deed or will to settle it to the use of one for life with remainders over, and the tenant for life enters under the settlement and remains in possession long enough to bar any claim by the true owner, he, and persons claiming under him, are estopped as against the remaindermen from disputing the validity of the settlement. *Board* v. *Board*, infra, approved. *Dalton* v. *Fitzgerald*, 66 L. J., Ch. 604; [1897] 2 Ch. 86; 76 L. T. 700; 45 W. R. 685—C.A.

A tenant by the curtesy of premises, devised them by his will to trustees for his daughter Rebecca for life, with remainder to his grandson. Upon the death of the testator, Rebecca entered into possession of the premises purported to be devised, and paid for some years the annuities charged by the will upon the premises, and was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. The grandson conveyed his remainder to the plaintiff. Rebecca, after she had been in possession more than twenty years, conveyed the premises in fee to the defendant, who, upon her death took possession. The plaintiff, the assignee of the grandson, the remainderman, having brought ejectment:—Held, that Rebecca having entered under the will, the defendant claiming through her was estopped as against all those in remainder from disputing the validity of the will, and that the plaintiff was entitled to recover. *Board* v. *Board*, 43 L. J., Q. B., 4; L. R. 9 Q. B. 48; 29 L. T. 459; 22 W. R. 206.

By indenture of the 6th February, 1845, W., equitable tenant for life in possession, under the will of the Earl of Burlington, of, amongst other hereditaments, the land demised by the said indenture, granted a lease to S., the defendant, and to Y. and B. (whose estate the defendant now has), of a piece of land for a term of eighty years, at a yearly rent of 5*l.* by the following description, viz.: "All that piece or parcel of ground part of Hide farm, within the hamlet of Beard, in the county of Derby, containing by admeasurement 1,198 square yards, being forty yards long and thirty yards wide, or thereabout, bounded on the north and east by lands belonging to the said W., on the south by a public road leading from Disley to Hayfield, and on the west by another public road leading from Disley to New Mills, together with cottages and buildings thereon, and with the right of a carriage road from the said piece or parcel of ground to the works of the said S., Y. & B. at New Mills, aforesaid, the ground plot whereof is shewn in the margin of these presents," and the lessees thereby covenanted to build certain houses on the demised land. At the date of the lease S. and Y. & B. were owners respectively of certain mills and works at New Mills, and the trustees under the said will held the fee simple and inheritance of the lands on each side of the said two public roads for a considerable distance. Several houses, occupied as private residences, and called Beard Terrace, had since the date of the lease been erected on the demised land by the lessees, who had also since the same date made the said carriage road upon land, parcel of the hereditaments comprised in the said will, and other than the said demised land, and erected a stone bridge over the river there at the north-west end of the said carriage road, to connect the same with the said mills and works. This carriage road did not communicate directly with the demised land, but ran from the said bridge southward into the said public road from Disley to Hayfield, having the other public road from Disley to New Mills on the east, between it and the demised land. In October, 1865, the defendant and the other lessees assigned the demised land to the Midland Railway Company for the residue of the term, subject to the said yearly rent, but expressly reserving out of the assignment the before-described right of carriage road; and by an indenture of the 26th December, 1865, to which W. was a party, the trustees of Earl B.'s will conveyed the same land to the said company in fee simple. In 1875 the trustees put up to auction and sold, and by indenture dated the 29th September, 1875, to which W. was a directing party, conveyed to the plaintiff in fee, amongst other lands, the carriage road in question by the following description: "A road to the works and premises of Messrs. S., B. & Y., situate in New Mills, for which Messrs. S., B. & Y. pay an acknowledgment of 1*s.* per annum. Number on plan, 173; quantity, 29 perches," and by the 8th condition of sale it was stated that "every lot was sold subject to all rights of way and other easements charged and subsisting thereon." After the assignment and conveyance

to the Midland Railway Company, the defendant continued to use the said road up to the date of this action, and since the said conveyance to the plaintiff entered upon and passed over the road, not only for going to or from Beard Terrace or the land demised by the lease of 1845, but also for going to and from and for the carriage of goods between his said works and the Midland Railway station, which is not on any part of the said demised land, and also for going to and from collieries and other places in connection with his works, and he claimed to use, and then still used the said road by himself and servants and persons employed at his said works for all purposes connected therewith. On the 28th September, 1875, a six months' notice was given by W. and the trustees to the defendant to give up all hereditaments held by him in the county of Derby as yearly tenant, and since the 26th March, 1876, payment of the 1*s.* per annum in respect of the user of the said road was demanded by the plaintiff of the defendant, and refused by the latter, and it was admitted that such acknowledgment had never been paid by the defendant, or any lessee under the lease of 1845, but up to the assignment to the Midland Railway Company the rent reserved by that lease was duly paid to and received by W. The plaintiff had no knowledge or notice of the existence of the lease of 1845, or of the defendant's claim to any right of way other than was expressed in the said conditions of sale and the conveyance to the plaintiff, or as might be inferred therefrom, and from the existence of the road itself leading from the highway to the defendant's premises. In an action by the plaintiff to recover damages from the defendant for his wrongful entry upon and user of the said carriage road:—Held, that whether W. had, or not, power to grant the lease for 80 years, yet as he was a party to the conveyance of September, 1875, to the plaintiff, both he and the plaintiff, who claimed through him, were estopped from disputing during W.'s lifetime the grant of land and roadway contained in the said lease, and that although the plaintiff, even if without notice, could not claim title to the lands except subject to any charge or burden created by W., yet having had notice sufficient to put him upon inquiry he could not be deemed a purchaser for value without notice. *Summer* v. *Scholfield*, 43 L. T. 763.

3. By Recital.

Not Conclusive in Collateral Proceedings.]—Estoppel on the ground of any statement in a deed only operates in a proceeding upon the deed containing such statement. In any collateral proceeding upon some other deed or contract, though between the same parties, the statement contained in the first deed is evidence, but not conclusive evidence, of the fact, so as to estop the parties from denying it. *Carter* v. *Carter*, 3 Kay & J. 618; 27 L. J., Ch. 74; 4 Jur. (N.S.) 63.

A mortgagee agreed to assign her security on payment of principal, interest and costs. An excessive claim being made for costs by the mortgagee, who refused to execute the transfer unless the sum was paid, the assignee, with the sanction of the mortgagor, paid the sum claimed under protest:—Held, that the mortgagor might recover the excess as a payment made involuntarily under undue pressure; and that the mortgagor was not estopped from setting up his claim by the recital in the assignment, that the sum paid was due for principal, interest and costs; because, a recital, although an estoppel to the parties to the deed, where the matter of the deed itself is in dispute, is not so in a matter which is collateral to the deed. *Fraser* v. *Pendlebury*, 31 L. J., C. P. 1; 10 W. R. 104.

By a deed between a railway company and contractors, claims by the latter (specified in a schedule), under the contract, for losses by reason of delay in obtaining possession of the land, were referred. The deed recited that, with the exception of the claims contained in the schedule, the company and the contractors had "settled, adjusted and mutually satisfied every other account, claim, or demand which the parties had against each other arising out of the contract, or any other account, matter, or thing whatsoever, as the company and the contractors thereby admitted and acknowledged":—Held, that this recital was not an estoppel to an action by the company on a bond entered into by the contractors, conditioned for the performance of their original contract, alleging as a breach the non-execution and completion of tunnels according to the contract. *S. E. Ry.* v. *Warton*, 6 H. & N. 520; 31 L. J., Ex. 515.

A., mortgagor, and B., mortgagee, before 22 & 23 Vict. c. 35, jointly demised to C., with a proviso that either might re-enter if C. assigned without the consent of the mortgagor. Various assignments took place with A.'s consent. Before the expiration of the term, A. and the last assignee jointly conveyed to D., by a lease, reciting the former one, and containing a condition that A. should re-enter if the premises were assigned without the mortgagor's consent:—Held, that the second lease did not create an estoppel on D., to prevent him showing that A. was not the reversioner; and, therefore, A. could not enforce the condition. *Saunders* v. *Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115; 11 Jur. (N.S.) 665; 13 W. R. 814.

Recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed, but collateral to it. *Morgan, Ex parte, Simpson, In re*, 45 L. J., Bk. 36; 2 Ch. D. 72; 34 L. T. 329; 24 W. R. 414.

When Creating an Estoppel.]—When a person claims a benefit under any document, he cannot be heard to say he was ignorant of any fact noticed in it, or which he might, when his title thereunder was acquired, have discovered by enquiries, to which he would naturally have been put, if he had known of the existence of the document, and seen it then. *Joyce* v. *Rawlins*, 40 L. J., Ch. 105; 11 L. R. Eq. 153; 23 L. T. 756; 19 W. R. 217. And see *Steele* v. *Mitchell*, 1 Dr. & Wal. 568; 3 Ir. Eq. R. 1.

A recital in a lease, professing it to be made under a leasing power in a will devising an estate tail, does not estop the person accepting the lease from shewing that the estate tail was barred. *Blackhall* v. *Gibson*, 2 L. R., Ir. 49.

Assignment.]—An assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease. *Nash* v. *Turner*, 1 Esp. 217.

—— **By Husband and Wife.**]—Where husband and wife assign a share of an ascertained fund, in which the wife has a vested interest in remainder expectant on the death of a tenant for

life, who outlives the husband, if the wife, after her husband's death, executes an assignment of the fund, which recites the former assignments, and purports to be made subject to them, she does not thereby recognise or confirm them. *Honner* v. *Morton*, 3 Russ. 65 ; 27 R. R. 15. S. P., *Watson* v. *Dennis*, 3 Russ. 90.

—— **Insolvent, by—Deed Voluntary or for Value.**]—An insolvent having several executions in his house, at the suggestion of one of his creditors, executed an assignment to him of all his effects for the benefit of such creditors as should come in and sign the deed. The deed recited that the insolvent had proposed the assignment. The execution creditors were accordingly paid their claims, and the assignee, taking possession of the goods and premises, carried on the business for some time, when he sold the whole concern for a larger amount than it would have realised if it had been disposed of by the sheriff. The deed was signed by several of the execution creditors. The insolvent, within three months from the assignment, went to prison, and afterwards obtained his discharge under the Insolvent Act :—Held, that this deed was not voluntary within 7 Geo. 4, c. 57, s. 32, and that the assignee was not estopped by the recital in the deed of assignment from contending that the deed was not voluntary. *Knight* v. *Fergusson*, 2 H. & H. 59 ; 5 M. & W. 389.

—— **Possibility—Deed Conveying.**]—Where the truth appears by recitals in a deed, professing to convey a possibility, the party conveying is not barred by estoppel, although he has received the purchase-money. *Doe* d. *Lumley* v. *Scarborough* (*Earl*), 4 N. & M. 724 ; 3 A. & E. 2 ; 4 L. J., K. B. 172. See *S. C.*, 3 A. & E. 897—Ex. Ch.

There may be an estoppel by matter of recital. *Bowman* v. *Taylor*, 2 A. & E. 278 ; 4 N. & M. 264 ; 4 L. J., K. B. 58.

Recitals in other Deeds.]—But a party to a deed of conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived. *Doe* d. *Shelton* v. *Shelton*, 4 N. & M. 857 ; 3 A. & E. 265 ; 1 H. & W. 287 ; 4 L. J., K. B. 167.

Recital Unilateral or Agreed.]—Where a recital in an instrument under seal is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all, whether they are parties to the deed by executing it, or only by accepting it. But when it is intended to be the statement of one party only, the estoppel, though all have executed the deed, is confined to that party. The intention is to be gathered from construing the instrument. *Stroughill* v. *Buck*, 14 Q. B. 781 ; 19 L. J., Q. B. 209 ; 14 Jur. 741.

Devise — Recital — Effect of.]—In 1869 G. mortgaged lands in fee to O. In 1877, on the death of O., the trustees for sale under O.'s will by assignment of the mortgage of 1869, conveyed the lands to C. G. (who had, in 1872, demised them to H. for ten years, from 1870 to 1880), joining in the deed as a granting and confirming party. After 1880 H. continued in possession, paying the old rent to G. In March, 1887, C. demanded possession, and served a writ to recover possession of the land on the title. At the trial C. failed to prove the will of O., but proved the deed of 1877, which contained a recital of the devise to trustees for sale contained in O.'s will :—Held, that the recital of the devise by O. to trustees contained in the deed of 1877 was sufficient evidence of that devise, and that H., claiming through G., was estopped from denying that recital. *Clarke* v. *Hall*, 24 L. R., Ir. 316—C. A.

Mortgage — Settlement.]—A husband mortgaged property which was afterwards put into settlement. The settlement executed by the husband and his wife contained a recital that the mortgage debt was 1,200*l*., whereas it was in fact 1,400*l*. The wife had admitted the error and acted on the assumption that the true sum was 1,400*l*. After the death of the mortgagee and his wife :—Held, that parties claiming under the husband were not estopped by his execution of the settlement from disputing its accuracy. *Scholefield* v. *Lockwood*, 9 Jur. (N.S.) 738 ; 8 L. T. 409 ; 11 W. R. 555.

Transfer of Mortgage — Receipt for Costs — Taxation.]—A third mortgagee took a transfer of the first and second mortgages, the transfer containing a recital that a gross sum was due in respect of the mortgage securities. A receipt for the money was given, which specified that a certain sum, part of the gross sum, was paid in respect of costs ; "the accounts thereof to be hereafter adjusted." The solicitor of the first and second mortgagees, who had also acted as the solicitor for the mortgagor, afterwards delivered his bill of costs, containing items which were properly chargeable against the mortgagor only. The third mortgagee applied to have the bill taxed :—Held, assuming his right to relief, that he was upon this application estopped by the deed from disputing the amount. *Forsyth*, *In re*, 11 Jur. (N.S.) 213 : 11 L. T. 616 ; 13 W. R. 307. Affirmed, 12 L. T. 687 ; 13 W. R. 932—L.JJ.

Covenant for Title—Fraud.]—By an indenture after reciting that the testator, of whose real estate the defendants were the trustees, being at the date of his will, and so continuing till the time of his death, seised in fee simple, free from incumbrances, of certain real estate, of which the plot thereby granted formed part, made his will, and thereby devised his real estate unto the defendants, their heirs and assigns, upon certain trusts, and also reciting that the testator died without having revoked or altered his will, and also reciting that the defendants in exercise of a power in the will, had agreed with T. for the absolute sale to him of the plot of land and premises intended to be thereby granted, and the inheritance thereof, in fee simple in possession, free from incumbrances, at a certain price, and also reciting that H., one of the defendants, as beneficial owner of the plot of ground subject to the power of sale, had agreed to concur in the indenture, it was witnessed that the defendants did grant and convey, and the defendant H. did grant and confirm, the plot of ground unto and to the use of T., his heirs and assigns, for ever. The indenture contained a covenant that the defendants and the defendant H. respectively had not incumbered, and also a covenant that the defendant H., together with the defendants, had good right to convey :—Held, that the statements as to title were not sufficiently precise to raise an estoppel

against the defendants so as to prevent them from denying that in fact they had no title to convey and from setting up the true facts. *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1; 41 W. R. 53—C. A.

Undisclosed Mortgage—Solicitor Trustee.]—Two trustees, one of whom was a solicitor, advanced money on mortgage. The mortgagor, with the concurrence of the solicitor trustee, sold part of the mortgaged property without disclosing the mortgage. Regular conveyances in fee to the purchasers were executed by the mortgagor, containing a recital that he was seised or otherwise well and sufficiently entitled in fee simple. The solicitor trustee received the purchase-money, and retained it. Eleven years afterwards both trustees executed a reconveyance of the property so sold, the other trustee believing, on the representation of the solicitor trustee, that the property was then about to be sold by the mortgagor. Soon afterwards the solicitor trustee absconded, and the other trustee then filed a bill against the mortgagor and the purchasers, praying for foreclosure against them:—Held, that under the form of conveyance adopted, neither the plaintiff nor the mortgagor was estopped from denying that the legal estate had passed by the conveyance to the purchasers. *Heath* v. *Crealock*, 44 L. J., Ch. 157; L. R. 10 Ch. 22; 31 L. T. 650. Affirming 23 W. R. 95.

Deed intended to be Executed but not Recognised.]—R., after some negotiations, contracted with the assignees of Messrs. E. for the purchase of certain claims of the bankrupts against the estate of G. He represented that he acted on behalf of himself and M., who was clearly cognisant of the negotiations and contract. Several documents passed between the parties, and finally a draft of a deed was prepared, which recited that the contract was a joint purchase by R. and M. This was submitted to M., who approved of it; and at that time he was willing to adopt the contract, but subsequently, upon an alteration of circumstances, M. objected to the contract, and refused to join in the purchase:—Held, that there was no evidence that M. had entered into any agreement, or that R. acted as his agent; and that the recital of an agreement in a document intended to be executed would not bind a party who had done nothing to recognise it, though at one time it was apparent that he was willing to execute it, and the bill was dismissed against M. with costs; but as R. admitted the plaintiff's case, a decree was made against him without costs. *Foligno* v. *Martin*, 22 L. J., Ch. 502.

In Settlement.] — A marriage settlement contained a recital that B. was "seised of or otherwise well entitled to" certain messuages, the whole deed shewing the meaning to be that B. was entitled in one shape or other to the fee simple of all the property therein conveyed:—Held, a sufficient estoppel as to the part of the property in which at the date of the settlement B. had no interest whatever, but as to which her interest accrued subsequently. *Horton, In re, Horton* v. *Perks*, 51 L. T. 420.

4. Landlord and Tenant.

In what Cases.]—Action on a lease, yielding rent to the lessor, his heirs and assigns, with a covenant for payment of the rent to the lessor, his heirs and assigns, by the devisee of the reversion against the lessee, alleged that the reversion of and in the demised premises belonged to the lessor and his heirs. Plea, that the reversion of and in the premises did not belong to the lessor and his heirs. Replication, by way of estoppel, that the lease was an indenture executed by the defendant, and that he entered and enjoyed the premises by virtue of the indenture; that it did not appear by the indenture that the lessor was not seised in fee, or that he had any estate or interest other than a fee simple; nor did the indenture contain anything to shew that the reversion did not belong to the lessor and his heirs:—Held, that the plea was good, as traversing a material allegation, in the declaration, and that the replication was bad, as it did not shew any estoppel. *Weld* v. *Baxter*, 1 H. & N. 568; 26 L. J., Ex. 112; 3 Jur. (N.S.) 91; 5 W. R. 113—Ex. Ch.

If a copyholder makes a lease for years which is not according to the custom of the manor, the lease is good between the lessor and the lessee, and all others except the lord of the manor. *Doe* d. *Tressider* v. *Tressider*, 1 Q. B. 416; 10 L. J., Q. B. 160.

A lessee who executes the counterpart of a lease cannot dispute its validity on the ground of the original not being stamped. *Paul* v. *Meek*, 2 Y. & J. 116; 31 R. R. 559.

A lessee, after executing a lease, cannot dispute the title of either of his lessors. *Wood* v. *Day*, 1 Moore, 389; 7 Taunt. 646.

But he may shew that his landlord's title has expired. *Neave* v. *Moss*, 1 Bing. 360; 8 Moore, 389; 2 L. J. (O.S.) C. P. 25; 25 R. R. 650.

Upon non est factum pleaded, the lessee in possession cannot controvert the title of his lessor to demise. *Friend* v. *Eastabrook*, 2 W. Bl. 1152.

The defendant held, as tenant from year to year to the plaintiff, two distinct holdings—one at a rent of 63*l.* and the other of 21*l.*—the gale days of both being the same; the plaintiff granted his estate by way of mortgage, but continued in possession and receipt of the rents, and, afterwards, in his rent-books consolidated the two holdings into one, at an increased bulk rent of 103*l.*, which was paid by the defendant. The plaintiff served notice to quit in his own name alone and brought an ejectment in his own name, without joining the mortgagee:—Held, that these facts afforded no evidence of the creation, after the mortgage, of a new tenancy, so as to estop the defendant from shewing that the plaintiff's title had passed from him to the mortgagee. *Delmege* v. *Mullins*, Ir. R. 9 C. L. 209—Ex. Ch.

In 1864, A. granted to B. a lease for twenty-one years of a house "together with all edifices . . . lights . . . easements, advantages and appurtenances thereto belonging, or therewith held, used, or enjoyed." At the date of the lease A. held, for the residue of a term expiring at Christmas, 1868, an adjoining house, over which most of the light came to the back windows of the house leased to B. On the expiration of his lease A. purchased a fee simple of the adjoining house, and in 1872 he pulled down that house with the intention of rebuilding it to a greater height than its former height. B., whose lights were not ancient lights, filed a bill to restrain A. from raising the new house to a greater height than the old house:—Held, that the lease to B. only amounted to a grant of the light coming over the adjoining house during A.'s term in it, and that on subsequently acquiring

the fee simple of the adjoining house A. was not estopped either at law or in equity from dealing with the house in such a way as to interfere with B.'s lights. *Booth* v. *Alcock*, 42 L. J., Ch. 557; L. R. 8 Ch. 663; 29 L. T. 231; 21 W. R. 743.

A tenant covenanted in a lease to deliver up, at the expiration of his term, certain fixtures on the premises. The term expired on the 1st April. On the 10th, the landlord demanded possession. On the 13th, the tenant received notice from a mortgagee that he was entitled to possession, and that he demanded payment of the rent; and on the same day the tenant bought the mortgagee's interest. The landlord having afterwards brought an action for breach of the covenant, in not delivering up the fixtures:—Held, that the tenant was not estopped from denying the landlord's title to the fixtures. *Watson* v. *Lane*, 11 Ex. 769; 25 L. J., Ex. 101; 2 Jur. (N.S.) 119; 4 W. R. 293.

A lessor in an ejectment brought to recover a cellar, is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. *Doe* d. *Freeland* v. *Burt*, 1 Term Rep. 701; 1 R. R. 367.

Lease — Nuisance — Derogation from Grant.]—Where a lessor by working engines on land adjoining premises demised by him to a tenant has caused such vibration as to destroy a house standing on and demised with those premises, it is no defence to an action by the lessee for a nuisance to shew that the house was at the time of its destruction, and also at the date of the demise, in a weak and unstable condition. The lessor is estopped from setting up such a defence, because to give effect to it would be to allow him to derogate from his own grant. *Grosvenor Hotel Co.* v. *Hamilton*, 63 L. J., Q. B. 661; [1894] 2 Q. B. 836; 71 L. T. 362; 42 W. R. 626.

—— **Rent—Mutuality.**]—The estoppel which enables a landlord who is mortgagor without the legal estate to sue for rent, is mutual, and renders him liable on the covenants in the lease. *Harteup* v. *Bell*, 1 Cab. & E. 19.

—— **Gavelkind — Lease by Co-parcener of whole of Land—Tenant estopped from denying Title of Heir of Lessor who is privy in Blood—Deduction of Title.**]—Where a person entitled as co-parcener to a portion of the rents and profits of land makes a lease of the whole, under which the tenant enters and pays rent as for the whole until the lessor's death, the tenant is estopped from denying that the heir and privy in blood to the lessor is entitled to the whole of the land. H., J. and M., three brothers, were entitled as coparceners in gavelkind to a garden and messuage. H. being in possession made a lease of the whole to the defendant, who entered and paid rent to H. as for the whole up to the latter's death. J. having also died, M. claimed the land as heir-at-law of his brothers, H. and J., and of his father. The defendant, except as to one-third of the property, H.'s share, set up the Statute of Real Property Limitation, under which he claimed to be entitled to the shares of J. and M., to which they had made no claim for over twelve years:—Held, that the defendant would have been estopped from denying the title of H. to the whole of the land, and was equally estopped from denying that of M., the heir and privy in blood to H.:—Held, further, that the mode of finding a privy in blood is not affected by the 3 & 4 Will. 4, c. 106, s. 2, which makes descent traceable from the last purchaser. Deduction of title is one thing. Privity in blood is another. *Weeks* v. *Birch*, 69 L. T. 759.

—— **Assignee.**]—An assignee of a void lease, who has, on coming into possession, had notice that the lease was held under a particular person, to whom the former tenant has paid rent, is estopped from disputing the title of that person in replevin. *Johnson* v. *Mason*, 1 Esp. 89.

Lands were demised in 1861 by lease, with a covenant against alienation or sub-letting without the consent of the landlord. A deed, purporting to assign the tenancy to A., was executed by the personal representatives of the lessee, but the consent of the landlord to such assignment was not obtained. A. afterwards sub-let the premises to the defendant, as tenant from year to year, who came into and continued in possession of the lands. The rent, under this sub-letting, being in arrear, an ejectment was brought against A. and others claiming under him, for non-payment of rent, in which the defendant, the sub-tenant, took defence, denying that there was any subsisting tenancy in respect of the lands between himself and the plaintiff or any other person:—Held, first, that as the assignment to A. was void and no estate passed to A. thereunder, his sub-tenant (the defendant) was estopped from disputing A.'s title, and that it was no defence, to shew that the term of the lease so ineffectually assigned had expired after the sub-letting and before the commencement of the action. *Wogan* v. *Doyle*, 12 L. R., Ir. 69.

Lease by Parole—Assignment by Deed.]—R., who had possession, but no title, let lands by parole to the defendant for a term of two years, within which period R. by deed assigned the lands to the plaintiff, who, before the expiration of the two years, demanded possession from the defendant and brought an ejectment against him:—Held, that the defendant was estopped from denying the title of R., under whom the plaintiff derived his title, and that the plaintiff was entitled to recover. *Ward* v. *Ryan*, Ir. R. 10 C. L. 17—Ex. Ch.

An assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor* v. *Needham*, 2 Taunt. 278; 11 R. R. 572.

Where A. claimed to hold lands under B. as a security for a debt:—Held, that he could not defend an ejectment by the assignees of B. after his bankruptcy on the ground that the grant under which B. derived his title from the Crown was void. *Doe* d. *Biddle* v. *Abrahams*, 1 Stark. 305.

Ejectment—Person defending as Landlord.]—In ejectment, a person defending as landlord is bound by the same estoppel as the tenant in possession. *Doe* d. *Manvers* v. *Mizen*, 2 M. & Rob. 56.

If B. claiming under A. lets land for a year to C. and dies, and A. afterwards brings an ejectment against C., C. cannot dispute the title of A. *Barwick* d. *Richmond Corporation* v. *Thompson*, 7 Term Rep. 488; 4 R. R. 499. And see *Bryan* d. *Child* v. *Winwood*, 1 Taunt. 208; 9 R. R. 751.

Tenant with Notice.]—Where a tenant occupied apartments in a house belonging to a wife, and paid rent to the husband, who subsequently granted a lease of the whole house to the plain-

tiff.—Held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title. *Rennie* v. *Robinson*, 1 Bing. 147; 7 Moore, 539; 1 L. J. (O.S.) C. P. 30; 25 R. R. 604.

Attornment to Party from whom Possession not received.]—A tenant who attorns to a party from whom he did not receive possession, is not estopped from shewing want of title in such party. *Cornish* v. *Searell*, 1 M. & Ry. 703; 8 B. & C. 471; 6 L. J. (O.S.) K. B. 254. See *Gravenor* v. *Woodhouse*, 7 Moore, 289; 1 Bing. 38; 25 R. R. 582.

See also LANDLORD AND TENANT.

5. MORTGAGES AND DEBENTURES.

Fictitious Deeds — Legal Estate — Incumbrancers without Notice.]—In 1873, D., in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September, 1875, conveyed by a mortgagee to H. in trust for M., and in March, 1876, by H. to M. M. was alleged to have been an accomplice of and trustee for D. In August, 1874, in pursuance of this scheme, T., claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in March, 1870, by a merely fictitious freeholder (an agent and accomplice of D.), demised the property by way of mortgage to A. In November, 1874, M., claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated March, 1870, and purporting to be granted to him by T., demised the property by way of mortgage to B., the mortgage deed being executed by M. only. In January, 1877, M. (to whom the legal estate had been conveyed in March, 1876) deposited the genuine title deeds of the property with C., upon a memorandum charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to M. and D., who came forward and stated that M. was merely a trustee for him of the property. In 1878, D., M. and T. were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and C., as equitable mortgagee, entered into possession. In an action by A. to settle the priorities of himself, B. and C. as encumbrancers on the property:—Held (1), that, assuming T. to have been the agent of D., so that his representations to A. of having a good title were binding on D., such representations, followed by the acquisition of the property beneficially by D., did not bind the estate so as to give A. a prior equitable charge as against subsequent purchasers for value without notice; (2) that the like representations of M. to B., followed by the acquisition, first, of the equitable, and afterwards of the legal estate by M., did not put B. in any better position, and that the doctrine of estoppel did not apply so as to convert the fictitious title acquired by B. from M. in November, 1874, into a valid legal title ab initio upon the conveyance of the legal estate to M. in March, 1876; (3) that as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. and B. *Keate* v. *Phillips*, 50 L. J., Ch. 664; 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710.

Description that Premises Unincumbered.]—Where a conveyance to a mortgagee describes the premises as unincumbered, in the absence of fraud, it is conclusive evidence to shew that the amount of a prior mortgage was paid. *Jones* v. *Williams*, 2 Stark. 52.

How far an Estoppel.]—One of the canons of the Queen's chapel of St. George, at Windsor, demised by way of mortgage for ninety-nine years, if he should so long live and continue a canon, to the plaintiff, "all that the canonry of him, R. A. M. of the Queen's free chapel of St. George, at Windsor, and all glebe and other lands, messuages, tenements and hereditaments belonging thereto; and all the rights, rents, emoluments and appurtenances to the canonry belonging." On ejectment by the mortgagee:—Held, that he was not estopped by the mortgage deed from shewing that the house in question did not belong to the canonry. *Doe* d. *Butcher* v. *Musgrave*, 1 Man. & G. 625; 1 Scott (N.R.) 451; 9 L. J., C. P. 318.

A., having an equitable fee in lands, mortgaged the same to B. by lease and release. The release recited that A. was legally or equitably entitled to the premises conveyed; and the releasor covenanted, that he was lawfully or equitably seised in his demesne of and in, and otherwise well entitled to, the same. The legal estate was subsequently conveyed to A., and he afterwards for a valuable consideration conveyed the same to C. Upon ejectment brought by B. against C.:—Held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him, after the execution of the release. *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 278.

Held, secondly, that the release did not operate as an estoppel by virtue of the words "granted, bargained, sold, aliened, remised, released," &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal title in the premises at the time of the release. *Ib.*

Held, thirdly, that this case did not fall within the rule, that a mortgagor cannot dispute the title of his mortgagee, because C. claimed as a purchaser for a valuable consideration without notice of a legal interest which was not in A. at the time of the mortgage to B., A. having only then an equitable interest, which passed to B., whose title as to that was not disputed. *Ib.*

—— **Termors.**]—An owner in fee of land, prior to mortgaging it for a term of years, put A. into possession. A. occupied for twenty-five years without payment of rent or written acknowledgment of the mortgagor's title. A. then conveyed in fee to the plaintiff, and after attorning to him as his tenant gave up possession for a sum of money to B., the representative of the mortgagor, and to C. the executor of the mortgagee (whose mortgage had been kept alive by payment of interest). B. and C. afterwards joined in a conveyance of the premises to the defendants:—Held, in ejectment, first, that the defendants were not estopped from setting up their title to the premises; secondly, that they were persons claiming under a mortgage within 7 Will. 4 & 1 Vict. c. 28, and consequently that the 3 & 4 Will. 4, c. 27, did not operate to bar their title. *Ford* v. *Ager*, 2 H. & C. 279; 32 L. J., Ex. 269; 9 Jur. (N.S.) 804; 8 L. T. 46; 11 W. R. 1073.

Proviso that one Party a Surety only.]—A., B. and C. executed to D. a mortgage of B.'s lands (comprised in the petition for sale), and of C.'s lands, to secure 2,914*l.* 9*s.* 9*d.*, of which 900*l.* was B.'s debt, and the remainder C.'s debt. The mortgage contained a proviso that, as between A., B. and C., A. was a surety only, and that B. and C. respectively were sureties only for portion of the said sum; yet, with regard to D., they were to be considered as principal debtors, so as not to be released by time being given to any other or others of them, or by any act or omission of D., whereby, as sureties only, they would be released. B. subsequently executed to D. two other mortgages of the lands comprised in the petition. A. having paid D. the full amount of the debt secured by the first mortgage, claimed to stand in D.'s place for 900*l.*, being B.'s debt, and the moiety of 2,014*l.* 9*s.* 9*d.*, being C.'s debt, for which both he and B. were joint sureties, and to be placed on the final schedule on foot of, and in the priority of, the first mortgage:—Held, that A.'s claim was valid, and that he was not estopped by the special proviso of the mortgage from relying on his equitable rights of surety. *Kirkwood's Estate, In re*, 1 L. R., Ir. 108.

Covenant for Title — Mortgage — Fraud — Innocent Misrepresentation.]—The owner in fee by purchase from the defendants of certain land mortgaged it. He subsequently by fraud obtained a second conveyance from the defendants of the same land, containing the usual covenant for title (the bona fides of the defendants being unquestioned), and again mortgaged the land to the plaintiffs. In an action for breach of the covenant for title:—Held, that the statements as to title in the second conveyance were not sufficiently precise to raise an estoppel and prevent the defendant from setting up the true facts; that the defendants were not liable to the plaintiffs on the grounds—(i.) that the plaintiffs were in no better position as against the defendants than the mortgagor, and (ii.) that the misrepresentation by the defendants was an innocent one; and that the defendants could not have set up a plea of non est factum. *Onward Building Society* v. *Smithson*, 62 L. J., Ch. 138; [1893] 1 Ch. 1; 2 R. 106; 68 L. T. 125; 41 W. R. 53—C. A.

Covenants for Title.]—The covenants for title in a mortgage of a freehold estate, whether read in connection with the word "grant" or not, do not amount to that precise averment that the mortgagor is seised of the legal estate, which is necessary to create an estoppel as against him and persons claiming under him. *General Finance, Mortgage and Discount Co.* v. *Liberator Permanent Benefit Building Society*, 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

Recitals, Absence of.]—A., by deed, purported to grant a freehold estate to B. by way of mortgage. The deed contained no recitals, but there were the usual mortgagor's covenants for title, including a covenant that the mortgagor "had power to grant the premises in manner aforesaid." The mortgage was accepted by B. on the faith of certain forged title deeds produced and handed to him by A. At the date of the mortgage A. had not the legal estate nor any interest whatever in the property. Subsequently, however, A. acquired the legal estate and mortgaged it to C.:—Held, that, inasmuch as the mortgage to B. contained no precise averment that A. was seised of the legal estate, no estoppel had been created in favour of B. as against C. *Ib.* *See also* MORTGAGE and col. 427.

Debentures — Validity of Issue — Right of other Holders.]—The secretary of a company, by direction of the directors, caused debentures payable to bearer to be prepared, sealed and stamped. They were then placed in a box that was kept at the company's London office, which was also the office of T., one of the directors. Some of the debentures were delivered to an agent, N., with instructions to issue them to the public. After the commencement of the winding-up of the company, N., who had been unable to issue the debentures, returned them to T., who, previously to the commencement of the winding-up had made large advances to the company. T. gave some of the debentures to R. and Co., his creditors (in satisfaction of their claims), and they took them, supposing that they had been regularly issued to T.:—Held, that the holders of valid debentures were not estopped from disputing the validity of those held by R. and Co. *Mowatt* v. *Castle Steel and Iron Works Co.*, 34 Ch. D. 58; 55 L. T. 645—C. A. *And see* COMPANY.

Son Covenanting as to Father's Title.]—A son who, under a voluntary settlement executed by his father, was entitled in remainder to an estate for life with remainder to his first and other sons in tail, subsequently to his marriage joined his father in two mortgages, which recited that his father was seised in fee, and covenanted that he was so seised; the father and the two mortgagees executed a subsequent mortgage in fee (to pay them off and raise a further sum), which the son did not execute, but was aware of and joined in a collateral deed for the purpose of barring all possible estates tail and vesting the fee in his father; part of the money raised by all the mortgages being for, and applied to, the use of the son:—Held, that he was estopped from setting up against his own acts any estate which he had at the time of the mortgages, and that, therefore, the mortgage was a good charge on his life estate. *Guardian Assurance Co.* v. *Avonmore*, 6 Ir. Eq. R. 391.

Married Woman.]—A married woman restrained from anticipation cannot by an admission raise an estoppel against herself so as to bind her interest. *Bateman (Lady)* v. *Faber*, 66 L. J., Ch. 721; [1897] 2 Ch. 223; 77 L. T. 71. *See* HUSBAND AND WIFE.

6. IN OTHER CASES.

By Description.]—A party having executed a bond describing himself as "T. B. of C., in the county of N., Esq.":—Held, on judgment of outlawry and error assigned thereon, that by his own description of himself in the bond he was estopped from saying that he was not properly described in the writ, "of a town, hamlet, or place," within the words of the Statute of Additions, 1 Hen. 5, c. 5. *Bonner* v. *Wilkinson*, 1 D. & R. 328; 5 B. & Ald. 682.

For the purposes of stamp duty it is requisite to ascertain the legal effect and meaning of an instrument, and the description of it given by the parties thereto is immaterial, and there can be no estoppel. *Limmer Asphalte Paving Co.* v. *Inland Revenue Commissioners*, 41 L. J., Ex. 106; L. R. 7 Ex. 211; 26 L. T. 633; 20 W. R. 610.

Valued Policy, how far an Estoppel.]—For the purpose of the contract of insurance, and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive. Whenever it is sought to set up an estoppel, founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it; therefore, for every other purpose collateral to the contract, there is no reason for holding the valuation to be conclusive between the parties—per Selborne, L.C. *Burnand* v. *Rodocanachi*, 51 L. J., Q. B. 548; 7 App. Cas. 335; 47 L. T. 277; 31 W. R. 65.

Lease and Release.]—A conveyance by lease and release does not operate by estoppel. *Right* d. *Jeffreys* v. *Bucknell*, 2 B. & Ad. 278; overruling *Bensley* v. *Burdon*, 2 Sim. & S. 519; 4 L. J. (o.s.) Ch. 164; 25 R. R. 258. See *Lloyd* v. *Lloyd*, 4 Dr. & W. 354; 2 Con. & L. 592 (Ir.).

Validity of Securities]—By an act for improving a town, commissioners were empowered to raise money by a rate, and to borrow money upon the credit of the rate. The act gave a form of mortgage security, and for the transfer of such security by the holder. No person while a commissioner was capable of entering into contracts with the body of the commissioners, but in 1835 H., who was one of them, agreed to supply the rest of the body with a quantity of bricks, which were required for building purposes. It was arranged that he should receive securities for 100*l.* each in consideration of the supply of bricks. The transaction was carried out, and he received securities in the form given by the act, and which respectively purported to be granted "in consideration of 100*l.* advanced and lent by" D. Subsequently these securities were transferred in the manner provided by the act, and were assigned to the plaintiff, who took proceedings upon them, demanding that the commissioners should apply the money in their hands that had been raised by rates, or which should thereafter be so raised, in payment of the interest payable on the securities:—Held, that the commissioners were estopped from disputing the validity of the securities, and that they could not set up as a defence that they had been granted in consideration of the bricks supplied, instead of, as they purported to be, in consideration of money advanced and lent. *Webb* v. *Herne Bay Commissioners*, 39 L. J., Q. B. 221; L. R. 5 Q. B. 642; 22 L. T. 745; 19 W. R. 241.

Barring Entail.]—A son who, under a voluntary settlement executed by his father, was entitled in remainder to an estate for life with remainder to his first and other sons in tail, subsequently to his marriage joined his father in two mortgages, which recited that his father was seised in fee, and covenanted that he was so seised; the father and the two mortgagees executed a subsequent mortgage in fee (to pay them off and raise a further sum), which the son did not execute, but was aware of, and joined in a collateral deed for the purpose of barring all possible estates tail and vesting the fee in his father; part of the money raised by all the mortgages being for, and applied to, the use of the son:—Held, that he was estopped from setting up against his own acts any estate which he had at the time of the mortgages, and that, therefore, the mortgage was a good charge on his life estate. *Guardian Assurance Co.* v. *Avonmore* (*Viscount*), Ir. R. 6 Eq. 391.

Forgery—One Joint Holder Estopped—Right of other to Sue.]—One of two executors, at various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that though the fraudulent executor was estopped by his own action from denying the validity of the transfers, such estoppel did not affect his innocent co-executor; and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton* v. *North Staffordshire Ry.*, 57 L. J., Ch. 800; 38 Ch. D. 458; 58 L. T. 549; 36 W. R. 75.

By Negligence.]—B., a trustee, advanced trust money to A. in 1851, on a legal mortgage of lands held by A. in fee, the mortgage deed reciting the trust. By collusion with B., A. in 1856 obtained the title deeds, and also a re-conveyance of the legal estate, containing a reference to the mortgage, and then, suppressing the mortgage and re-conveyance, conveyed, as under his original title, the legal estate to C., by way of mortgage. In a suit by B.'s cestui que trust:—Held, that C., although he acted bonâ fide, and was wholly unaware of the dealings between A. and B., and, in fact, never heard of the mortgage or re-conveyance till after the commencement of the suit, could not be heard to aver ignorance of the facts which he would have discovered upon inquiries, to which he would have been put if he had seen the deeds of mortgage and re-conveyance before he advanced his money, inasmuch as he was obliged to rely upon those deeds for his legal title; therefore that the plaintiff's mortgage had priority over C.'s. *Joyce* v. *Rawlins*, 40 L. J., Ch. 105; L. R. 11 Eq. 53; 23 L. T. 756; 19 W. R. 217. *And see* col. 474.

Trustee not Estopped.]—The owner of the equity of redemption in a mortgaged estate demised the estate to a trustee for a term, upon certain trusts, and afterwards devised the same estate in fee. The devisees having contracted to sell the estate to a purchaser, paid off the mortgage, took a re-conveyance to the uses of the will, and conveyed the estate to the purchaser, who had no notice of the term. A bill filed by the cestui que trust under the demise against the trustee of the term and the purchaser for administration of the trust was dismissed by James, V.-C., on the ground that there was no term by estoppel in the trustee, and on appeal the Lord Chancellor affirmed the decision, but without prejudice to any question that might be raised at law, being of opinion that the question of estoppel was a question for a court of law, and that there

was no equity against the purchaser if the legal estate was in him. *Clemow* v. *Geach*, 40 L. J., Ch. 44; L. R. 6 Ch. 147; 19 W. R. 53.

Vendor when able to prove Non-payment of Purchase-money.]—In an action for unpaid purchase-money, the acknowledgment in the deed of conveyance of payment of the purchase-money does not, in the absence of a plea of estoppel, preclude the vendor from shewing that the purchase-money had not in fact been paid; although the deed is given in evidence by himself as proof of the fact of the sale and conveyance. *Potts* v. *Nixon*, Ir. R. 5 C. L. 45.

Effect of Recital on Covenants in Conveyance.]—A conveyance, after reciting that it had been agreed that 1,400*l.*, part of the purchase-money, should be paid to a mortgagee of the premises, and that the residue of the purchase-money, 460*l.*, should be paid to the vendor, witnessed that in consideration of the 1,400*l.* paid to the mortgagee at or before the sealing and delivery of the deed, the receipt whereof the mortgagee acknowledged, and from the mortgage-money and every part thereof acquitted and discharged the vendor; and also in consideration of the 460*l.* paid to the vendor as before mentioned, the receipt whereof and also the payment of the mortgage-money, making in the whole 1,860*l.*, the vendor thereby acknowledged, and from the same and every part thereof acquitted, released and discharged the purchaser: — Held, to be no estoppel upon the vendor, the release by the word "as before mentioned," &c., referring to, and being qualified by, the recital, which stated an agreement to pay the 460*l.*, and not an actual payment. *Bottrell* v. *Summers*, 2 Y. & J. 407; 31 R. R. 613. *And see* col. 427.

Patent—Denying Validity of.]—A declaration stated that letters-patent had been granted to the defendant for improvements in purifying gas, and that other letters had been granted to the plaintiff for an improved mode of manufacturing gas, and that parts of the plaintiff's invention intended to be secured had been claimed in the specification, that disputes had arisen between the parties as to their rights under the letters-patent to the use of oxides of iron for the purpose of purifying gas, and that to put an end to such disputes the parties covenanted by deed with each other for a mutual right of using the patents on the terms of giving notice to use the same; breach, want of notice. Plea, that the plaintiff's patent was not a good and valid patent, in this, that it was not new, and the plaintiff was not the true and first inventor:—Held, that the intention of the deed was to prevent disputes between the parties, and that the defendant was estopped by the deed from denying the validity of the patent, its novelty, and that the plaintiff was the true and first inventor. *Hills* v. *Laming*, 9 Ex. 256; 23 L. J., Ex. 60.

Shares—Certificate of Registration—Transfer — Refusal to Register—Damages.]—A company which issues a share certificate stating that the person therein named is the proprietor and duly registered owner of a specified number of shares in the company is estopped from afterwards denying his title to the shares, and is liable for damages for refusing to register a transfer from him. *Bahia and San Francisco Ry., In re* (L. R. 3 Q. B. 584) followed; *Simm* v. *Anglo-American Telegraph Co.* (5 Q. B. D. 188) and *Ashbury Railway Carriage and Iron Co.* v. *Riche* (L. R. 7 H. L. 653) distinguished. *Balkis Consolidated Co.* v. *Tomkinson*, 63 L. J., Q. B. 134; [1893] A. C. 396; 1 R. 178; 69 L. T. 598; 42 W. R. 204—H. L. (E.) *See* COMPANY, and col. 468.

—— **Demise of Shares—Estoppel as to Title.**]—A., by indenture, demised to B. for ten years the dividends to be declared on certain railway shares, at a yearly rent payable half-yearly. In an action by A. against B. upon this deed, the declaration alleged that A. was a member of the company, and as such was possessed of or entitled to shares therein; the declaration set out the indenture, and alleged a breach of covenant to pay the rent. B. pleaded that A., at the time of the making of the indenture, was not possessed of, or entitled to, the shares:—Held, that B. was estopped by his deed from so pleading. *Beckett* v. *Bradley*, 7 Man. & G. 994; 8 Scott (N.R.) 843; 2 D. & L. 586; 14 L. J., C. P. 3.

Trover for Goods — Delivery Denied.] — In trover for paper it appeared that the plaintiff and the defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed which recited that it had been agreed that the business of paper manufacturer should belong exclusively to the defendant, and the business of an iron merchant to the plaintiff, but that the plaintiff should receive out of the stock paper to the value of 898*l.* 4*s.* 11*d.*, which should remain in the paper-mill for a year at his option. The deed also recited that in performance of that arrangement, paper to the value of 898*l.* 4*s.* 11*d.* had been delivered to the plaintiff, and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed that in the performance of the arrangement the plaintiff and the defendant dissolved partnership, and the plaintiff assigned to the defendant the stock-in-trade of the business of a paper manufacturer, except the 898*l.* 4*s.* 11*d.* worth of paper so delivered to the plaintiff as aforesaid, and the defendant assigned to the plaintiff the stock-in-trade of the business of iron merchants. There were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock:—Held, that the parties were estopped by the deed to say that no such delivery had taken place. *Wiles* v. *Woodward*, 5 Ex. 557; 20 L. J., Ex. 261.

Goods belonging to Licensee of Tenant.]—A third person not claiming possession to the land who has brought goods on to the land by the licence of the tenant is not estopped from disputing the lessor's title. *Tadman* v. *Henman*, [1893] 2 Q. B. 168; 5 R. 479; 57 J. P. 664.

Recovery — Technical Defect.] — Where a tenant in tail has entered into a contract for the sale of his estates of value, and in order to convey them to the purchaser, has suffered a recovery which turns out to be technically defective at law, the court will not allow persons claiming under him to take advantage of the flaw. *Howard* v. *Shrewsbury* (*Earl*), L. R. 3 Eq., 218.

Patentee disputing Validity of Patent.]—H. in 1873 took out a patent for improvements in bobbin-net and twist-lace machines; in his speci-

fication he claimed not only the whole combination but also three subordinate combinations. In 1877 H. became bankrupt, and his trustee assigned the patent to C. In 1880 H. took out another patent for improvements in bobbin netting and twist lace, and shortly afterwards entered into partnership with S. C. brought an action against H. & S. for infringing his patent. H. & S. delivered a defence containing a denial of the infringement, and of the validity of C.'s patent. C., by his reply, stated that H. & S. were estopped from denying the validity of his patent. H. & S. obtained leave to sever in their defence and to deliver particulars of objections, without prejudice to any question at the trial as to their being estopped from objecting to the validity of C.'s patent. The court having decided that C.'s patent was bad, on the ground that the original patentee had claimed, not only for the whole combination, but also for three subordinate combinations, one of which was not novel, allowed the appeal of S., who had taken that objection to the patent:—Held, as to H., that he was not estopped from disputing the validity of the patent granted to himself and assigned by his trustee in bankruptcy. *Smith* v. *Cropper*, 55 L. J., Ch. 12; 13 App. Cas. 249; 53 L. T. 330; 33 W. R. 753—H. L. (E.)

—— **Licensee of Patentee.**]—A licensee under another's patent is not estopped thereby from contesting the novelty of such patent. *Dangerfield* v. *Jones*, 13 L. T. 142. *But see* col. 465.

Deposit Note of Society given by Directors.]—The directors of an unincorporated building society which had no borrowing powers borrowed money for the benefit of the society and gave to the lender as security the promissory notes of the directors. The society was afterwards incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and acquired borrowing powers. The appellant, who was the representative of the lender, applied to the society for repayment of the loan, but ultimately agreed to refrain from legal proceedings against the society on the directors giving him a deposit note for the amount due. The directors accordingly gave him a deposit note under the seal of the society, stating that the money was lent by the appellant on the date of the deposit note, and he thereupon gave up to them the promissory notes above mentioned:—Held that the deposit note was not binding on the society. *Sheffield Building Society, In re Watson, Ex parte*, 57 L. J., Q. B. 609; 21 Q. B. D. 301; 59 L. T. 401; 36 W. R. 829; 52 J. P. 742.

Release of Legacies — Other Property falling in.]—A testatrix by her will bequeathed 4,000*l.* upon trust for investment for her niece for life, and in case the niece should die without issue, the testatrix directed that the sum should fall into her residuary estate. She also bequeathed several other pecuniary legacies, and the will contained also a residuary bequest. The estate proved insufficient to pay the pecuniary legacies in full, and the pecuniary legatees (including the niece) executed a deed of release, to which the residuary legatees were not parties, by which they acknowledged the receipt of dividends upon the legacies in discharge of the amounts of the several legacies, and released the executors and also the estate of the testatrix from all further claims and demands. The niece afterwards died without issue, and the sum which thus fell into the estate was sufficient to pay the balances on the pecuniary legacies in full. The legacy of 4,000*l.* was fully recited in the deed of release:—Held, that as the release could not have been intended to enure for the benefit of the residuary legatees, the pecuniary legatees were not estopped by the release from claiming to have the balances of their legacies made up out of the fund that had thus fallen in. *Ghost's Trusts, In re*, 49 L. T. 588.

Sale of Ship—Dock Duty.]—Upon the sale of a ship the vendor covenanted "that the said hereby bargained premises and every part thereof are now and so from henceforth for ever shall remain free and discharged of or from all bargains, gifts, sales, incumbrances and the like." At the time of the date of the deed the vessel was in B. docks. Vessels entering the B. docks were subject to a duty of 10*d.* on each ton of cargo, but the owners of the ship in question had compounded for a rate of 1½*d.* per ton on an undertaking that on the vessel leaving the whole duty should be paid. After the sale of the vessel the vendee took her to L., where she received her cargo, returning to the B. docks for her passengers, on leaving which the full duty of 10*d.* per ton was demanded and paid, but the deed was not delivered until the time when the vessel was at L.:—Held, that the language of the deed spoke from the time of delivery; that at that time the ship being at L., it was in consequence of the voluntary act of the vendee that the duty attached, and that there was therefore no breach of the covenant. Quære, whether if the deed had been delivered at the time the ship was at the docks there would have been a breach of the covenant. *Taylor* v. *M'Calmont*, 4 W. R. 59.

7. Pleading.

Necessity for.]—Estoppels by deed must, in order to make them binding, be pleaded if there be an opportunity; otherwise the party omitting to plead it waives the estoppel, and leaves the issue at large, on which the jury may find according to the truth. *Freeman* v. *Cooke*, 2 Ex. 654; 6 D. & L. 187; 18 L. J., Ex. 114; 12 Jur. 777.

D. By Matter in Pais.

1. General Principles.

What Acts.]—The acts in pais, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed; as, for instance, livery, entry, acceptance of an estate, and the like. *Lyon* v. *Reed*, 13 M. & W. 285; 13 L. J., Ex. 377; 8 Jur. 762.

Wilful Representation—Intention to Induce Another—Acting on Inducement.]—Where a person wilfully makes a representation, intended to induce another to act upon the faith of it or where (whatever is his intention) a reasonable man in the situation of that other, would believe that it was meant that he should act upon it, and in either case that other does act upon it as true, and alters his position, there is an estoppel in pais to conclude the former from averring against the latter a different state of things as existing at the same time, and conduct by negligence or omission, where there is a duty cast upon the person to disclose the truth, may often have the same effect. *Freeman* v. *Cooke*, 6 D. & L. 187; 2 Ex. 654; 18 L. J., Ex. 114; 12 Jur. 777.

But unless the statement was intended to induce the other to act on the faith of it, or was such that a reasonable person would act on the faith of it, there is no estoppel, although the other did in fact believe the statement, and was in fact induced to alter his position accordingly. *Ib.*

The language used by the Court of Queen's Bench in *Pickard* v. *Sears*, 6 A. & E. 469; 2 N. & P. 488; and *Gregg* v. *Wells*, 10 A. & E. 90; 2 P. & D. 296, must be understood with this qualification. *Ib.*

In trover by assignees of a bankrupt against a sheriff, for the conversion of the bankrupt's goods seized under a fi. fa. against C. and D., it appeared that immediately before the seizure the bankrupt told the officer that the goods were the property of C., and immediately afterwards he contradicted the statement, and said they were the goods of D. The jury found that the goods were in reality the bankrupt's, but also that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them:—Held, that, under the plea of not possessed, this finding did not estop the bankrupt and the assignees from complaining of the seizure of the goods as their own. *Ib.*

If A. deliberately makes an assertion to B., intending it to be acted upon by B., and it is acted upon by B., A. is estopped from saying that it was not true. If it turns out to be false, A. is answerable for the damage which may have accrued to B. from having acted upon it, and B. is entitled, in respect of anything done in the belief that it was true, to object to any denial of its truth by A. *Piggott* v. *Stratton*, 1 De G. F. & J. 33, 49; 29 L. J., Ch. 1; 6 Jur (N.S.) 129; 1 L. T. 111; 8 W. R. 13.

It is a universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. *Cairncross* v. *Lorimer*, 3 Macq. H. L. 829; 7 Jur. (N.S.) 149; 3 L. T. 130.

Nobody ought to be estopped from averring the truth or asserting a just demand, unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he has said or done, or omitted to say or do. *Adamson, Ex parte, Collie, In re*, 47 L. J., Ch. 106; 8 Ch. D. 817; 38 L. T. 920; 26 W. R. 892.

One recognised proposition as to estoppel in pais is, that if a person by words or conduct wilfully endeavours to cause another to believe in a certain state of things which such person knows to be false, and if the other believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not, in fact, exist. *Carr* v. *L. & N. W. Ry.*, 44 L. J., C. P. 109; L. R. 10 C. P. 307; 31 L. T. 785; 23 W. R. 747.

Another recognised proposition as to estoppel in pais is, that if a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, such person is estopped from denying the existence of such a state of facts. *Ib.*

A third recognised proposition as to estoppel in pais is, that if a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that he was intended to act upon it in a particular way, and if he with such belief does act in that way to his damage, such person is estopped from denying that the facts were as represented. *Ib.*

A fourth recognised proposition as to estoppel in pais is, that if, in the transaction itself which is in dispute, A. has led B. into the belief in a certain state of facts by conduct of culpable negligence calculated to have the result, and such culpable negligence has been the proximate cause of leading and has led B. to act by mistake upon such belief to his prejudice, A. cannot be heard afterwards as against B. to shew that the state of facts referred to did not exist. *Ib.*

—— **Company — Ultra Vires.**]—A company cannot be bound by estoppel to do something beyond its powers. *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 56 L. J., Q. B. 449; 18 Q. B. D. 714; 57 L. T. 833; 35 W. R. 590; 52 J. P. 150. *Bishop* v. *Balkis Consolidated Co.*, 59 L. J., Q. B. 563; 25 Q. B. D. 512; 63 L. T. 601; 39 W. R. 99; 2 Meg. 292.

But a borrower from a company which has lent its funds ultra vires is estopped when sued from setting up the invalidity of the contract. *Coltman* v. *Coltman*, 51 L. J., Ch. 3; 19 Ch. D. 64; 45 L. T. 392; 30 W. R. 242.

Mistake—No Intention to deceive.]—Where a person's acts or declarations induce another to act in a particular way, he will be bound by the consequences if injurious to that other, though he may himself have been under a mistake, and may have had no intention to mislead or deceive. *Sarat Chunder Dey* v. *Gopal Chunder Lala*, 56 J. P. 741—P. C.

Materiality of Representation.]—When a party has practised a deception, with a view to a particular end, which has been attained by it, he cannot be allowed to deny its materiality. The onus probandi that the end was not so attained lies on the party who used the deception. *Smith* v. *Kay*, 7 H. L. Cas. 750.

As to an Existing Fact.]—Estoppel by representations applies only where the representation is as to a fact existing at the time, not where it is as to something yet to come or as to matter of future intention. *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*, 43 L. J., Ch. 269; L. R. 6 H. L. 352; 22 W. R. 194.

The principle of estoppel in pais arising from a person's conduct, has no application where the state of things which it was sought to conclude that person from denying was a future state of things. *M'Evoy* v. *Drogheda Harbour Commissioners*, 16 W. R. 34.

I have always understood it to have been decided that the doctrine of estoppel by repre-

sentation is applicable only to representations as to some state of facts alleged to be at the time actually in existence, and not to promises de futuro, which, if binding at all, must be binding as contracts—per Selborne, L.C. *Maddison* v. *Alderson*, 52 L. J., Q. B. 737; 8 App. Cas. 473; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

Party must be prejudiced.]—If A. makes a certain representation to B., who in consequence of that representation has done something which has altered his position, A. would be bound by the representation, though ignorantly and innocently made. *Horsfall* v. *Halifax and Huddersfield Union Banking Co.*, 52 L. J., Ch. 599.

Disavowal of.]—If an estoppel makes A. and B. liable and the facts make B. and C. liable, neither the estoppel nor the facts, nor any combination of the two can possibly make A., B. and C. jointly liable. Therefore, if the creditor chooses to go upon the facts and make B. and C. liable, he entirely disavows the estoppel and can no longer set it up—per Selborne, L.C. *Scarf* v. *Jardine*, 51 L. J., Q. B. 612; 7 App. Cas. 350; 47 L. T. 258; 30 W. R. 893.

No Intention that Representations should be acted on.]—If any person, by actual expressions, or by a course of action, so conducts himself that another may reasonably infer the existence of an agreement or a licence, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. *Cornish* v. *Abington*, 4 H. & N. 549; 28 L. J., Ex. 262; 7 W. R. 504.

Acting on Faith of Representations.]—Statements by one of two persons that another is his partner, he not being so in fact, will not be evidence to render the other liable as an ostensible partner, the statements not having been made to the person who seeks to render the other liable, and not having come to his knowledge as a matter of notoriety, and it not being shewn that he has acted on the faith of such statements. *Edmundson* v. *Thompson*, 31 L. J., Ex. 207; 8 Jur. (N.S.) 235; 5 L. T. 428; 10 W. R. 300.

Inferences of Law.]—In an action for goods sold there was a plea of payment, and it appeared that both the plaintiff and the defendant employed G. as factor. G. sold the goods to the defendant, knowing he was factor. On a balance of accounts G. was indebted to the defendant. The plaintiff, who knew the state of accounts between G. and the defendant, petitioned the Court of Bankruptcy to make G. a bankrupt, and alleged in his affidavit that G. owed him a sum of money for goods sold by G., as factor of the plaintiff, to the defendant, and for which he received payment by means of goods sold by the defendant to G. The plaintiff having afterwards sued the defendant for the price of the goods:—Held, that the statement in the affidavit was not conclusive evidence, estopping the plaintiff from denying that the defendant had paid for the goods, the allegation as to payment so explained not being an allegation of fact, but of an inference of law drawn by the plaintiff. *Morgan* v. *Cruckman*, 14 C. B. 101; 2 C. L. R. 53; 23 L. J., C. P. 36; 2 W. R. 59.

Mistake as to Legal Liability.]—The general doctrine that a party is at liberty to prove that an admission made by him was mistaken or untrue, and that he is not estopped by it unless another person has been induced by it to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of matters of fact. *Newton* v. *Liddiard*, 6 Railw. Cas. 42; 12 Q. B. 925; 18 L. J., Q. B. 53.

Between what Parties.]—Mandamus to complete a railway, pursuant to an act incorporating 8 & 9 Vict. c. 18. Return, that the undertaking was one to be carried into effect by means of a capital to be subscribed by the promoters, and that the capital had not been subscribed for under a contract, pursuant to 8 & 9 Vict. c. 18, s. 16, nor could the company at any time procure it to be subscribed for. A plea, by way of estoppel, that the company had taken the lands of a third party named, on a part of the line, in exercise of the compulsory powers, is bad, as the matter disclosed by it is res inter alios acta. *Reg.* v. *Ambergate Ry.*, 1 El. & Bl. 372; 22 L. J., Q. B. 191; 17 Jur. 668.

Person intrusted with Public Duties cannot be Estopped.]—Claim: That the plaintiff was vicar of a parish; that a chapel was erected within it, and endowed and consecrated for the administration of the sacraments and the performance of all other divine offices according to the rites of the Church of England; that the plaintiff as such vicar was entitled to nominate and present, and had nominated and presented, a clerk to the chapel, but another clerk had been licensed, instituted and admitted by the defendant bishop on the nomination and presentation of certain other defendants, who thereby hindered the plaintiff in the exercise of his right; and he claimed to have his right established and declared. Defence of the last-mentioned defendants: That certain freeholders had erected the chapel and conveyed it to the ecclesiastical commissioners, and applied to them, under 14 & 15 Vict. c. 97, to declare the right of nomination to be in the defendants who had endowed the chapel, and that before making such declaration, a copy of the application was according to the act sent by the commissioners to the plaintiff, he being both patron and incumbent of the parish; that if he had ceased to be patron he stood by and knowingly allowed those defendants to endow the chapel and procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent, as required by the act, and the plaintiff was therefore estopped from denying that he was patron; and that the right of nomination had been declared to be in those defendants who afterwards nominated. On demurrer to the allegation of estoppel:—Held, that it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual and other duties in which his parishioners were interested, and he could not therefore waive or divest himself of those rights and duties by the conduct imputed to him. *MacAllister* v. *Rochester (Bishop)*, 49 L. J., C. P. 114; 5 C. P. D. 194; 42 L. T. 22.

Liquidator Estopped.]—Lloyd's bonds payable in three years, with interest in the

meantime, were given by the company to their contractor as compensation for the surrender of the contract. Two of these bonds were purchased for value from the contractor, without notice of the arrangement between him and the company. The bonds and the transfers were registered in the company's books. The transferee sued the company for eighteen months' interest, and recovered the amount due. Subsequently proceedings at law were taken against the company to recover principal and interest, and judgment was entered up by consent against the company, which was then ordered to be wound up:—Held, that, whether the bonds were valid or invalid in the hands of the contractor, the official liquidator was precluded by the subsequent conduct of the company from questioning their validity in the hands of a purchaser for value without notice. The transferee was therefore admitted as a creditor of the company for principal, interest, and costs. *South Essex Estuary Co., In re, Chorley, Ex parte*, 40 L. J., Ch. 153; L. R. 11 Eq. 157; 19 W. R. 430.

In Equity.]—The common-law doctrine of estoppel was resorted to in order to obtain powers which the Court of Chancery exercised without any foreign assistance; the doctrine is therefore purely legal, and has no place in courts of equity. *Keate* v. *Phillips*, 50 L. J., Ch. 664; 18 Ch. D. 577; 44 L. T. 731; 29 W. R. 710.

Equitable Estoppel by Representation—Contract of Indemnity—Implied Abandonment of Claim.]—The appellant became surety on behalf of the respondent, who died during the pendency of the action, for an advance made by a bank, the respondent undertaking by letter to hold the appellant harmless. Both parties forgot the existence of this indemnity, and by an agreement made between them and the bank the debt was discharged by equal payments by each of them. The appellant, subsequently discovering the letter of indemnity, brought an action at law against the respondent to enforce it. The respondent then, by a suit of equity, prayed for a declaration that the indemnity had been discharged, and for an injunction against the continuance of the action:—Held, that the appellant was entitled to enforce the indemnity under the doctrine laid down in *Jorden* v. *Money* (23 L. J., Ch. 865; 5 H. L. Cas. 185), that "where a person possesses a legal right a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation, and that of his attempt to enforce it, he has made representations of his intention to abandon it." *Chadwick* v. *Manning*, 65 L. J., P. C. 42; [1896] A. C. 231—P. C. And see *Davies* v. *Davies*, 6 Jur. (N.S.) 1320; and *Low* v. *Bouverie*, col. 473.

Bill of Sale—Knowledge by Creditor of Non-registration.] — The fact that an execution creditor was, at the time when his debt was contracted, aware that his debtor had given a bill of sale of chattels, does not prevent his availing himself of the objection that it has not been registered. *Edwards* v. *Edwards*, 45 L. J., Ch. 391; 2 Ch. D. 291; 34 L. T. 472; 24 W. R. 713.

Trustee under Liquidation permitting Possession of Furniture by Debtor.]—A trustee under a liquidation, who, with the authority of the creditor, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after-acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation. *Meggy* v. *Imperial Discount Co.*, 47 L. J., Q. B. 119; 3 Q. B. D. 711; 38 L. T. 309; 26 W. R. 342—C. A.

2. Acts of Agents.

When Principal bound by.]—The Queensland Constitution Act, 1867, by s. 6, enacts that any person who shall, directly or indirectly, hold or enjoy any contract for or on account of the public service, shall be incapable of sitting or voting as a member of the legislative assembly; and s. 7 imposes a penalty on any person so disqualified so sitting or voting. The respondent, being part-owner of a ship which had been chartered by the government, sat and voted as a member of the legislative assembly. The respondent had instructed his agents, who were also part-owners, not to charter the ship to the government, and that if they did, the contract should be made with such part-owners only who should be held to have chartered the respondent's share at a rate fixed independently of such contract. The government had no knowledge that the respondent was a part-owner:—Held, that under these circumstances the respondent was not liable to the penalties imposed by the act. *Freeman* v. *Cooke* (2 Ex. 654) approved. *Miles* v. *McIlwraith*, 52 L. J., P. C. 17; 8 App. Cas. 120; 48 L. T. 689; 31 W. R. 591—P. C.

Where a director of a company purports to do as managing director an act, the doing of which it is, under the articles of association of the company, within the powers of his co-directors to delegate to him, persons dealing with him bonâ fide, and in the ordinary course of business, may assume that he has the power which he professes to have, and are not bound to inquire whether or no it has been in fact delegated to him, and will not be affected by any informality in the delegation of which they had no notice. *Biggerstaff* v. *Rowatt's Wharf*, 65 L. J., Ch. 536; [1896] 2 Ch. 93; 74 L. T. 473; 44 W. R. 536—C. A. And see *Wilson* v. *West Hartlepool Ry.*, 24 Beav. 187.

W., having intrusted P., his solicitor, with 7,700*l.* for investment on mortgage on his behalf, was informed by his clerk, in conversation, that "P. proposed to invest the money on mortgage of leasehold property at Camden Town at 5 per cent.," and subsequently received a letter from P. stating "that the money was put on 5 per cent. mortgage as arranged by my clerk with you." On P.'s death it was found that no mortgage existed in favour of W., but that P. had advanced 100,000*l.* to a firm of builders on a mortgage of their leasehold property at Camden Town:—Held, that P. and those claiming under him were bound by the representation made by him, and were estopped from denying that the 7,700*l.* formed part of the 100,000*l.* so invested. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39; 4 Ch. D. 49; 35 L. T. 608; 25 W. R. 94.

Who are Agents to make Admissions.]—*See* Evidence (*Admissions*).

Representations made to Agent.]—M. purchased of the defendant, who was a corn dealer, with his warehouse next adjoining a railway station, eighty quarters of barley, which were not specifically appropriated to him, and for which he did not pay. Subsequently M. sold sixty quarters of such barley to the plaintiff, and sent a delivery order to the station-master for such barley to the plaintiff, and the plaintiff himself inclosed such order in a letter under his own hand requesting the station-master to confirm the transfer and to send him samples. The station-master thereupon saw the defendant, and showed him both documents, when the defendant said, "All right, when you get the forwarding-note I will put the barley on the line." After this the plaintiff gave a forwarding-note to the station-master for the sixty quarters of barley to be sent to Cambridge, which he presented to the defendant; but M. having in the meantime become a bankrupt, and not having paid the defendant for the barley, the defendant refused to deliver the barley. Upon an action of trover by the plaintiff against the defendant:—Held, that the defendant by his statement to the station-master had estopped himself from denying that he held the barley for the plaintiff. *Knights* v. *Wiffen*, 40 L. J., Q. B. 51; L. R. 5 Q. B. 660; 23 L. T. 610; 19 W. R. 244.

Agent cannot Set up his own Breach of Trust.]—The defendants were brewers, and employed F. as their "malting agent." The regular course of business between the defendants and F. was as follows: F. occupied the malting premises, and took out the necessary licences. It was his duty to buy barley in his own name as principal for cash, to send into the defendants certain periodical accounts of the barley so bought from time to time, and the prices of the same; to submit samples to the defendants, and if the barley was approved of by them to malt it, and deliver the malt to the defendants, receiving a commission upon the quantity of barley steeped. The quantity of malt required by large brewers being very great, the brewers, and not the malting agents, provide the capital for the purchase of the barley. In the present case the defendants kept accounts at certain provincial banks, upon which F. was empowered to draw, and from time to time the defendants paid in lump sums to the credit of those accounts, in accordance with current requirements, as shown by the accounts sent in by F. of barley purchased; but these sums were not intended to, nor did they, represent any payments for any specific barley. F.'s business was to act as malting agent for the defendants exclusively. The defendants paid the duty as the same became payable upon the malt in F.'s premises. F. had fraudulently departed from the regular course of business. Instead of buying barley for cash and applying the balances at the provincial banks in payment for the same he had been in the habit of sending in to the defendants fictitious accounts of barley purchased, misapplying the sums paid in for his own purposes, and providing the malt needed for the defendants' purposes by purchasing barley or ready-made malt upon credit. He likewise from time to time sold barley which had been brought on to the maltings, to raise money for his own purposes. The defendants believed, in consequence of the fictitious accounts and other false representations of F., that barley was from time to time purchased for cash in accordance with the regular course of business, and on the faith thereof continued to pay sums of money into the banks for the purpose of paying for such barley, which they believed were so applied. F. subsequently absconded, leaving upon his premises barley to the value of about 22,000*l.*, and malt to the value of about 35,000*l.*, upon part of which duty had been paid by the defendants. The value of such malt and barley was less than the amount drawn from the banks and misappropriated by F. He absconded and thereby committed an act of bankruptcy. Between the time of F.'s absconding and the time when he was adjudged a bankrupt, the defendants seized the barley and the malt left on his premises. The plaintiff, trustee in F.'s bankruptcy, sued the defendants for the value of the same:—Held, that F. could not have set up his own breach of trust, or have been heard to allege that the barley was bought otherwise than according to the authority given to him by the defendants; and that the plaintiff, as F.'s trustee in bankruptcy, could not in this respect stand in a better position than F. himself. *Harris* v. *Truman*, 51 L. J., Q. B. 338; 9 Q. B. D. 264; 46 L. T. 844; 30 W. R. 533—C. A.

Creditor Dealing with Agent as Principal.]—Where a party who has dealt with an agent has, by his conduct, led the principal to believe that he looked to the agent alone for payment, and thereby induced the principal, after the debt has become due, either to pay the agent the amount, or allow him to retain it out of the principal's money in his hands, the party so acting cannot afterwards resort to the principal. *Macfarlane* v. *Giannacopulo*, 3 H. & N. 860; 28 L. J., Ex. 72.

A., owner of a ship, applied to a broker to effect an insurance on it; the broker signed a policy on behalf of B., an underwriter. The ship was lost, and A., having applied to the broker for payment, received from him a credit note. It was usual to pay credit notes at a month from their date. Both at the time of signing the policy, and of the adjustment, the broker had money of B. sufficient to pay the loss. Nearly three months after the credit note was given the broker stopped payment, when A. applied to B. for the amount of the loss:—Held, that there was no injury to B. by the conduct of A., which rendered it unjust to call on him for payment, and therefore the case did not fall within the above rule of law. *Ib.*

Where there is a choice of debtors, and a liability is sought to be created by estoppel, and the remedy over against the person who ought to pay is likely to be imperilled by delay, the rule that an election should be made within a reasonable time ought to be strictly applied. And while the indication of intention to elect must be clear and unequivocal, an act of a creditor (who has the right of election) by which he materially affects the position of the co-creditors of one of his debtors, is such clear and unequivocal act of election to proceed against that particular debtor. *Fell* v. *Parkin*, 52 L. J., Q. B. 99; 47 L. T. 350.

Agent Estopped by Account Furnished.]—Agents and brokers in London furnished coals to a foreign steamer for several voyages made by the steamer in 1856. As agents of the ship they received the freights payable in London, and out of the proceeds furnished supplies and paid the expenses incurred by the steamer in England, making out a debit-and-credit account upon each

voyage, which accounts they forwarded to the owners:—Held, that the agents having appropriated in their accounts moneys actually received in payment of specific items, including the coals supplied on each voyage, they were estopped by the accounts they had furnished, from appropriating the receipts to a previous agency account for the ship, and from suing for the coals as necessaries supplied and unpaid for. *Van Hasselt* v. *Sack*, 13 Moore, P. C. 185.

Policy in Hands of Insurance Broker.]—A shipbuilder in London employed an insurance broker to effect a policy upon a ship at Lloyd's, and after the happening of a loss, gave him the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in the broker's name, and he retained possession of it. An adjustment having taken place, the loss was settled, in accordance with a usage prevailing at Lloyd's which was found to be generally known to merchants and shipowners, but which was not known to the shipbuilder, who had merely left the policy in the broker's hands for safe custody, by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—Held, that, assuming that he was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy in money, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement. *Sweeting* v. *Pearce*, 9 C. B. (N.S.) 534; 30 L. J., C. P. 109; 7 Jur. (N.S.) 806; 5 L. T. 79; 9 W. R. 343—Ex. Ch.

Insurance Agent—Condition—Statement as to effect of.]—A life policy was subject to a condition making it void if the assured went beyond the limits of Europe without licence. An assignee of the policy, on paying the premium to a local agent of the assurance society at the place where the assurance had been effected, informed him that the assured was resident in Canada. The agent stated that this would not avoid the policy, and received the premiums until the assured died:—Held, that the society was precluded from insisting on the forfeiture. *Wing* v. *Harvey*, 5 De G. M. & G. 265; 23 L. J., Ch. 511; 18 Jur. 394; 2 Eq. R. 533; 2 W. R. 370.

Banker — Forged Endorsement of Bill of Exchange—Genuine Acceptance—Negligence of Customer.]—The respondent's clerk, by forging letters of advice and preparing and filling in forged drafts, in which he inserted the name of a foreign correspondent of the respondent as being that of the drawer, and the names of a foreign firm who were existing persons and actual correspondents of the respondent as being the names of the payees, procured his employer's acceptance of these forged instruments and obtained payment for them across the counter from the appellant bank. The clerk appropriated the moneys to his own use, which were thus lost to the bank:—Held, that the loss incurred on the forged bills must fall upon the respondent. *Robarts* v. *Tucker* (16 Q. B. 560) explained and distinguished, *Bank of England* v. *Vagliano*, 60 L. J., Q. B. 145; [1891] A. C. 107; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676—H. L. (E.)

A representation made directly to a banker by a customer upon a material point, untrue in fact, though believed by the customer to be true, and on which the banker acts by paying money which he would not otherwise have paid, ought to be an answer to the primâ facie case that the banker's authority was only to pay to the order of the payee named upon the bill. *Ib.* By the Earl of Selborne.

Agreement by Manager of Company.]—C. proposed to H., the general manager of the M. & O. Bank, that the bank should advance him 8,300*l.*, to enable him to conclude a contract for the purchase of an unpaid vendor's interest in a colliery. H. had authority to make the advance. An agreement between C. and the bank, providing for the loan of the money by the bank, and the mortgage of the interest in the colliery to be purchased to the bank to secure repayment of the loan and charges, was prepared by a solicitor on H.'s instructions and signed by C. H. then declined to make the agreement without consulting the directors, and obtained C.'s signature to a document to the effect that the agreement was subject to the approval of the directors. On the same day, after a meeting of the directors, H. told C. that the directors approved, and that the bank would advance the money. The agreement was never signed by anybody on the part of the bank. Subsequently H. told C. he ought to be more firmly bound to take the money from the bank, and induced him to sign a document to the effect that, in consideration of the bank's agreeing to carry out the arrangements mentioned in the agreement, he agreed to pay the bank charges named therein, whether the bank carried through the transaction or not. In fact, the directors did not approve of the agreement, and H. acted under an erroneous impression that they did. The bank refused to find the money, and C. was in consequence unable to complete his contract:—Held, that the bank was estopped from denying such an agreement. *Manchester and Oldham Bank* v. *Cook*, 49 L. T. 674.

Action against Owner by Estoppel and Real Owner.]—Goods had been supplied to the M. Mansions upon the order of the housekeeper. The vendor sued the owner and secretary for payment. The secretary had previously paid for goods supplied by the plaintiffs by cheque, signed "M. Mansions account":—Held, that the doctrine of *Scarf* v. *Jardine* (7 App. Cas. 345) applied, and that the plaintiff could not sue the secretary, whose liability depended only on estoppel, at the same time as the real owner. *Jones* v. *Ashwin*, 1 Cab. & E. 159.

Postmaster-General — Authority of Clerk — Telegrams.]—Where a certain sum is charged for a telegram and the sender is afterwards called upon to pay an increased sum:—Held, that he is bound to pay the amount so claimed, as the Postmaster-General is in no way estopped from suing, and is not bound by inaccurate representations made by a clerk in his employ. *Postmaster-General* v. *Green*, 51 J. P. 582.

Set off.]—Whether the doctrine that on a contract with an agent for an undisclosed principal the buyer can set off against the principal a debt due from the agent, is founded on estoppel, quære. *Cooke* v. *Eshelby*, 56 L. J., Q. B. 505; 12 App. Cas. 271; 56 L. T. 673; 35 W. R. 629—H. L. (E.)

Authority of Agent—Loan—Mortgage of Debenture-Stock by Agent.]—If a company intrusts its agent with a certificate of debenture-stock issued by itself, it will be assumed in favour of a purchaser or mortgagee, in whose name the certificate is made out, and who has no notice to the contrary, that the agent had authority to deal with it to the full extent of its face value. *Robinson* v. *Montgomeryshire Brewery Co.*, 65 L. J., Ch. 915; [1896] 2 Ch. 841; 3 Manson, 279.

A company being desirous of borrowing 3,000*l.*, requested its brokers to negotiate the loan. The brokers applied to G. to advance not 3,000*l.*, but 6,000*l.*, which he agreed to do upon having a debenture-stock certificate for 8,000*l.* deposited at his bank by way of security. The certificate was made out in the name of G., and stated that he was the registered holder of 8,000*l.* debenture-stock in the company, and G. advanced the 6,000*l.* and paid the same to the brokers, but only 3,000*l.* of this sum was handed to the company:—Held, that G. was not bound to inquire what were the relations between the brokers and the company, but had a right to assume that the brokers had authority from the company to deal with the certificate; and therefore he was, as regards the company and other debenture-holders, in the position of a bonâ fide purchaser for value to the extent of his advance, and entitled in the liquidation of the company to prove for the full amount of 8,000*l.* until he obtained dividends not exceeding the amount due in respect of his loan of 6,000*l.* *Ib.*

Directors—Expiration of Term of Office—No Re-election—Continuing to Act—Authority.]—The provisions of s. 67 of the Companies Act, 1862, for curing defects in the appointment or qualification of directors, do not operate to render good the authority of former directors, who without being re-elected continue after the expiration of their term of office to discharge the duties of directors, well knowing they had not been re-elected. And the receipt of payments made by these as directors by one aware of their true position does not estop that person from subsequently questioning their legal authority to demand as directors payments from him. *Tyne Mutual Steamship Insurance Association* v. *Brown*, 74 L. T. 283.

Appropriation of Money by Agent.]—Agents and brokers in London furnished coals to a foreign steamer for several voyages made by the steamer in 1856. As agents of the ship they received the freights payable in London, and out of the proceeds furnished supplies and paid the expenses incurred by the steamer in England, making out a debit-and-credit account upon each voyage, which accounts they forwarded to the owners:—Held, that the agents, having appropriated in their accounts moneys actually received in payment of specific items, including the coals supplied on each voyage, they were estopped by the accounts they had furnished from appropriating the receipts to a previous agency account for the ship, and from suing for the coals as necessaries supplied and unpaid for. *Van Hasselt* v. *Sack*, 13 Moore, P. C. 185.

And see PRINCIPAL AND AGENT.

3. BILLS OF EXCHANGE, &c.

Adoption of Forged Signature by Silence.]—A person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees that the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way altered or prejudiced, can be held to be an admission or adoption of liability, or an estoppel. The names of A. and B. appeared on a bill as drawers and indorsers to the B. L. Co. The B. L. Co.'s Inverness bank discounted it for C., who signed it as acceptor. They had had no previous dealings with A. or B. Being dishonoured when due, notice to that effect was sent to A. and B., and received late on a Saturday, but they did not communicate with the bank. On the following Monday, being the 14th of April, C. brought to the B. L. Co. a blank bill with A. and B.'s names as drawers and indorsers, apparently in the same handwriting as the previous bill. It was agreed to accept it as a renewal of the previous bill, but for a less amount, the difference being paid in cash by C. Three days before it was due, notice was sent to A. and B., and again when it was dishonoured, and then through the B. L. Co.'s law agent. A fortnight after the first notice the B. L. Co. were informed for the first time that A. and B.'s signatures were forgeries, and they declined to pay the amount in the bill. A. alleged that he called on C. on the 14th of April about the first bill, that C. admitted that he had forged his name, handed him the bill, and solemnly assured him that it had been taken up by cash; and so assured he did not think it necessary to communicate with the bank. He admitted that on that day he drank with C. and borrowed 4*l.* of him. He denied positively any knowledge of the second bill until he received the bank notices. C. was convicted of the forgery. The B. L. Co. charged A. with payment of the bill, on the ground that he had either authorised the use of his name, or had subsequently adopted and accredited the bill, and therefore was estopped from denying his liability:—Held, that on the facts proved A. had neither authorised nor assented to the use of his name; nor did the circumstances of the case raise any estoppel against him. Dictum of Parke, B., as to estoppel in *Freeman* v. *Cook* (2 Ex. 654), approved of. *M'Kenzie* v. *British Linen Co.*, 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477—H. L. (Sc.)

Forged Cheques—Liability of Bank—Customer—Estoppel.]—A customer of a bank was debited with the amount of certain cheques, forged by one of the bank's clerks. On discovering the entry he communicated the fact to one of the officers, whom the jury, by a finding not objected to, found to be an agent of the bank, and who knew of the forgery, and produced a written confession of the forger. At the request of this agent, the customer forebore from informing the directors, being assured that if he did so the bank would lose all chance of recovering the money, which, however, was not recovered. In an action against the bank by the customer, the jury found that the customer did not arrange with the forger to withhold information from the bank; that the person whom he informed of the forgery was the bank's agent, and that he kept silence in order to enable the forger to repay the money; that the forger left the colony, and that the customer acted with a view solely to the bank's benefit. These findings were not objected

to by the bank. The jury also found that the plaintiff's silence did not prejudice the bank; that the bank waived the negligence, if any, of the plaintiff, and that the bank ratified the action of their agent. These findings were objected to. Judgment was entered for the customer, but on motion for a new trial the full court set aside the findings which had been objected to, and entered judgment for the bank:—Held, that the conduct and silence of the appellant did not constitute a legal wrong upon which the bank could rely by way of estoppel. *Mackenzie* v. *British Linen Co.* (6 App. Cas. 82) distinguished. *Ogilvie* v. *West Australian Mortgage and Agency Corporation*, 65 L. J., P. C. 46; [1896] A. C. 257; 74 L. T. 201—P.C.

Agreement as to Indorsement.]—C., who had been managing clerk to B., a deceased merchant, sold a part of B.'s personal estate to D., with the consent of A., who claimed an interest therein; and by agreement between A., C. and D., C., in the name of B., drew a bill of exchange for the price on D., and in the like name indorsed it to A., who retained it till his death. D. accepted the bill after it had been so indorsed. After A.'s death A.'s executor put the bill in suit against D., declaring on it as on a bill drawn and indorsed by B. The plea denied the indorsement by B.:—Held, that D. was by his own agreement estopped from denying that the bill was indorsed as alleged. *Aspitel* v. *Bryan*, 3 B. & S. 474; 33 L. J., Q. B. 328; 11 L. T. 221; 12 W. R. 1082—Ex. Ch.

Description of Drawer.]—In an action on a promissory note, to which the defendant pleaded her coverture, the note being signed by her as "widow":—Held, that such representation did not bind her by way of estoppel. *Cannam* v. *Farmer*, 3 Ex. 698.

Indorsement to Party Indorsing.]—A declaration alleged that P. drew a bill of exchange payable to his own order, and indorsed it to the defendant, who indorsed it to the plaintiff; and that the bill was dishonoured, and the defendant did not pay it. A plea, denying the indorsement to the defendant, is bad, the defendant being estopped, by his admitted indorsement, from traversing the indorsement to himself. *MacGregor* v. *Rhodes*, 6 El. & Bl. 266; 25 L. J., Q. B. 318; 2 Jur. (N.S.) 834; 4 W. R. 483.

Acceptor Disputing Drawer's Writing.]—The acceptor of a bill of exchange cannot, in an action against him by an indorsee, dispute the handwriting of the drawer; and, if he does so by plea, the plaintiff may reply the acceptance by way of estoppel. *Sanderson* v. *Collman*, 4 Man. & G. 209; 4 Scott (N.R.) 638; 11 L. J., C. P. 270.

Acceptor supra protest—Payee Fictitious.]—In an action by an indorsee against an acceptor supra protest for the honour of the drawer, he cannot plead that the name of the payee was fictitious, and that he was ignorant of the fact when he accepted the bill. *Phillips* v. *Im Thurm*, 18 C. B. (N.S.) 694; 11 Jur. (N.S.) 489; 13 W. R. 750.

Negligence.]—A bill of exchange, with a blank for the drawer's name, and the defendant's name written across it as acceptor, was placed by the defendant in a drawer in his chambers, from which it was stolen. A drawer's name was forged, and subsequently the bill came into the hands of the plaintiff as bonâ fide holder for value. In an action on the bill:—Held, that the defendant was not liable. By Bramwell, L. J., because his negligence, if any, was not the proximate or effective cause of the loss, and therefore did not estop him from denying the validity of the bill. By Brett, L. J., because the bill was drawn without the authority of the defendant, and he had been guilty of no negligence. *Baxendale* v. *Bennett*, 47 L. J., Q. B. 624; 3 Q. B. D. 525; 26 W. R. 899—C. A.

—— **Fraud.**]—A bill for 500*l.* was presented for acceptance with a stamp of much larger amount than was necessary, and with spaces left. The acceptor wrote his acceptance and handed the bill to the drawer, who fraudulently filled up the spaces and turned it into a bill for 3,500*l.* Being sued on the bill by a bonâ fide holder, the acceptor paid 500*l.* into court:—Held, that the acceptor owed no duty of precaution to the plaintiff, and was guilty of no negligence, and was entitled to judgment. *Scholfield* v. *Londesborough* (*Earl*), 65 L. J., Q. B. 593; [1896] A. C. 514; 75 L. T. 254; 45 W. R. 124—H. L. (E.)

Payment under Mistake of Fact as to Bill having been Met—Action for Repayment.]—A., the indorsee of a bill of exchange, resident abroad, indorsed it to the defendants, his agents in London, for the purpose of collection. The defendants indorsed the bill to the plaintiffs, and sent it to them for the same purpose, and they forwarded it to their agents. The plaintiffs, under a misunderstanding, informed the defendants that the bill had been paid, and sent them a cheque for the amount. Thereupon the defendants intimated the same to A., and credited him with the amount of the bill. It was decided by Mathew, J., on the authority of *Skyring* v. *Greenwood and Cox* (4 B. & C. 281), that, as the plaintiffs had wrongfully informed the defendants that the bill had been paid, they could not recover the amount of the bill when the defendants had nothing to do with the mistake of fact; and also that the plaintiffs were estopped by the representation which they had made to the defendants, and upon which the defendants had acted. On appeal:—Held, that the action failed. *Deutsche Bank* v. *Beriro*, 73 L. T. 669—C. A.

Ratification of Forged Signature.]—J. indorsed to the plaintiff a promissory note, bearing a signature which he stated to be the defendant's, but which was a forgery. Shortly before the note became due, the plaintiff, hearing from the defendant that the signature was a forgery, threatened to prosecute J.; whereupon the defendant, to prevent his doing so, said that he would pay the money, and signed a memorandum to the effect that he held himself responsible for the note, describing it as bearing his signature. The plaintiff having sued the defendant upon the note, the judge ruled that the defendant had ratified the forged signature, and directed a verdict for the plaintiff:—Held (per Kelly, C. B., Channell, B., and Pigott, B., dissentiente Martin, B.), that this ruling was wrong, because the defendant's arrangement was not a ratification of a signature, written by an agent claiming to have authority from the defendant in that behalf, but an agreement upon the defendant's part to become liable on the bill in consideration of the

plaintiff's forbearing to prosecute J., which agreement was void as against public policy; and also because no act in its inception illegal and void, such as a forgery, can be ratified by matter subsequent; and that the defendant was not estopped from setting up the forgery as a defence to the action. *Brook* v. *Hook*, 40 L. J., Ex. 50; L. R. 6 Ex. 89; 24 L. T. 34; 19 W. R. 508. *See also* BILLS OF EXCHANGE and col. 468.

4. CARRIERS AND BAILEES.

Carriers—Advice Notes.]—C. entered into a contract with A. for the purchase of bleaching powder, and immediately afterwards into a contract for the sale thereof to other persons. Owing to a mistake of C.'s vendor, a railway company was induced without culpable negligence on their part to advise C. that they had received fifteen casks of bleaching powder, marked and numbered in a particular manner, and that they held the same to his order as warehouseman. The railway company never had received the casks, and afterwards informed C. of the error; at a subsequent time, owing to another mistake, C. paid the railway company a sum of money as warehouse rent for the fifteen casks supposed to have been received by them. The mistake having been subsequently made known to all parties, C.'s vendees bought in fifteen casks of bleaching powder at a loss to him:—Held, that these facts did not create an estoppel in pais; that the railway company was not estopped from showing that the fifteen casks had never been received by them; and that the company was not liable to C. in trover or any other form of action. *Carr* v. *L. & N. W. Ry.*, 44 L. J., C. P. 109; L. R. 10 C. P. 307; 31 L. T. 785; 23 W. R. 747. *And see* col. 462.

—— **That Thief not Servant.**]—Pictures above the value of 10*l.* were delivered to a railway company to be carried, and were by them placed in a van in their yard preparatory to their transmission. A man by representing himself to be C. (who was a driver in the employ of M., the sub-contractor of the company), obtained from their delivery clerk a pass and other documents, which enabled him to take the van from the yard and so to steal the pictures. An action having been brought for their value, the material issue was whether they were lost through the felonious act of the servants of the company:—Held, that the company was not estopped from denying that the thief was their servant. *Way* v. *G. E. Ry.*, 45 L. J., Q. B. 874; 1 Q. B. D. 692; 35 L. T. 253.

—— **Title to Goods.**]—A carrier is not estopped from disputing the title of the person from whom he has received goods to carry; and it is an answer to trover against the carrier by such person, that the goods have been delivered to the real owner, on his claiming them. *Sheridan* v. *New Quay Co.*, 4 C. B. (N.S.) 618; 28 L. J., C. P. 58; 5 Jur. (N.S.) 248.

—— **Passengers' Tickets.**]—A master took tickets for himself and three servants, keeping the tickets in his own care, but telling the guard that he had the servants' tickets, and the servants were allowed to enter the train without each having or showing his own ticket:—Held, that by so doing the company was estopped from pleading as a defence to an action by the master against the company for afterwards expelling the servants from the train and refusing to carry them, the by-law "No passenger will be allowed to enter any carriage or travel therein without having paid his fare and obtained a ticket, which ticket such passenger is to show when required, and to deliver up before leaving the company's premises." *Jennings* v. *G. N. Ry.*, 35 L. J., Q. B. 15; L. R. 1 Q. B. 7; 12 Jur. (N.S.) 331; 13 L. T. 231; 14 W. R. 28.

Wharfingers.]—A wharfinger, who has agreed to hold goods under a delivery order, cannot resist an action for the conversion of those goods, on the ground that they have not been separated from the bulk, and that no property passed to the person who lodged the order. *Woodley* v. *Coventry*, 2 H. & C. 164; 32 L. J., Ex. 185; 9 Jur. (N.S.) 548; 8 L. T. 249; 11 W. R. 599.

Negligent Representation of Wharfinger.]—Goods were in 1875 stored by brokers with wharfingers, who issued a warrant for the same. In 1885 the servants of the defendant, who had taken over the wharf and business, delivered the goods by mistake to certain persons instead of goods to which they were entitled, and the defendant was not made aware of the mistake. The warrant had been negotiated, and was in January, 1886, in the possession of B. and E. In that month, no rent having been paid for the goods since 1880, the defendant wrote two letters to the plaintiff, who had previously taken over the business of the brokers and carried it on under their name, informing him, as the supposed holder of the warrant, and as the person presumedly interested in the goods, that the goods were in hand, that rent was due, and that, unless it was paid, the goods would be sold to cover the amount due. The plaintiff made no reply, but afterwards, and in consequence of receiving these letters, he bought the warrant from B. and E. and applied to the defendant for the goods, when the defendant first discovered that they were no longer in his possession. In an action to recover damages for a wrongful conversion of the goods:—Held, that the defendant was liable, being estopped from denying that he had the goods specified in the warrant, because he had by his negligent misrepresentation led the plaintiff to believe that the goods were in his possession, and such misrepresentation was the cause of the plaintiff's loss, the plaintiff having purchased the warrant in consequence of the same. *Seton* v. *Lafone*, 56 L. J., Q. B. 415; 19 Q. B. D. 68; 57 L. T. 547; 35 W. R. 749—C. A.

Acceptance of Bailment after Notice of Adverse Claim.]—Although in certain cases a bailee may set up the jus tertii, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor. After the filing of a liquidation petition the holder of a registered bill of sale executed by the debtors instructed an auctioneer to take possession of the chattels comprised in it. The auctioneer took possession, and advertised the goods for sale on behalf of the bill of sale holder. The sale was stopped by injunction, and the auctioneer remained in possession of the goods on behalf of the receiver under the petition. On the appointment of a trustee the auctioneer held possession for him,

and ultimately by his directions advertised the goods for sale, the advertisements and the catalogues of the goods being headed "In liquidation. By order of the trustee." The goods were sold, and the proceeds of sale were received by the auctioneer. The bill of sale holder gave him notice not to pay them to the trustee, and he declined to pay them over. The trustee applied to the Court of Bankruptcy for an order for payment to him, serving notice of his motion on the auctioneer only. On the hearing of this motion an order was made by consent that the money should be paid into court, and the hearing adjourned, notice being meanwhile given to the bill of sale holder. Notice was served on him, but not a four days' notice as required by r. 50 of the bankruptcy rules, 1870, and he did not appear on the adjourned hearing. He had meanwhile commenced an action against the auctioneer for the proceeds of sale:—Held, that the Court of Bankruptcy ought to exercise its jurisdiction under s. 72 of the Bankruptcy Act, 1869, and that the money must be paid out to the trustee, on the ground that the auctioneer had, with full knowledge of the adverse claim, deliberately elected to sell the goods for the trustee, and was, therefore, estopped from denying his title. *Biddle* v. *Bond* (6 B. & S. 225) distinguished. *Davies, Ex parte, Sadler, In re*, 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237—C. A. *See further*, BAILMENT.

5. DELIVERY ORDERS AND BILLS OF LADING.

Delivery Orders.]—The defendants sold to B. & Co. 100 tons of zinc (unappropriated) upon certain terms of payment, giving them at the time of the contract four several documents to the following effect:—"We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents, the plaintiffs bought of B. & Co., and paid for, fifty tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendants refused to deliver the zinc:—Held, that the giving of these delivery orders or undertakings did not estop the defendants from setting up, as against the vendees of B. & Co., their right as unpaid vendors to withhold delivery. *Farmiloe* v. *Bain*, 45 L. J., C. P. 264; 1 C. P. D. 445; 34 L. T. 324.

—— **Effect of, as creating Estoppel.**]—The defendant being possessed of a quantity of barley, sold eighty quarters to M., who afterwards, on June 27, sold sixty of the eighty quarters to the plaintiff, who on the same day paid the price and forwarded M.'s delivery order for the sixty quarters to the defendant, who assented to the same on the 29th. The barley remained in bulk in the defendant's possession until July 7, on which day the plaintiff sent a forwarding order to the defendant, which the latter refused to comply with, on the ground that M. had in the meantime become bankrupt, and that the barley purchased by him was unpaid for:—Held, that the defendant, by assenting to the delivery order for the sixty quarters, was estopped from denying the plaintiff's right thereto, notwithstanding that the price of the barley was paid to M. contemporaneously with the forwarding of the delivery order to the defendant. *Knights* v. *Wiffen*, 40 L. J., Q. B. 51; L. R. 5 Q. B. 660; 23 L. T. 610; 19 W. R. 244.

A delivery order given by the vendor of goods is a mere promise to do something in futuro, and is not a representation upon which to found an estoppel. *Gillman* v. *Carbutt*, 61 L. T. 281; 37 W. R. 437—C. A.

Advice Notice—Negligence in Issuing Two Notes.]—The defendants having received a consignment of wheat, sent to the consignees an advice note, which described the consignment as "sacks wheat, four trucks," and did not contain any details as to weight, rates or charges, but across the printed form was written, "account to follow." The consignees gave B. a delivery order in respect of this wheat, and he obtained an advance from the plaintiffs upon it; the plaintiffs sent this delivery order to the defendants, and they accepted it. On the following day the defendants sent to B. another advice note on a printed form similar to the one already sent, but across the upper part was written the words, "charges only"; the invoice number was different; the consignment was described as 151 sacks of wheat; the weight, the rate and the amount of charges were filled in. B. filled up the delivery order at the bottom in favour of the plaintiffs, produced it to them, and obtained a second advance from them, as they believed it to relate to a second parcel of wheat. The plaintiffs delivered this order to the defendants, who accepted it, and who allowed the plaintiffs on both occasions to take samples of the wheat. There was, in fact, only one parcel of wheat, and the two advice notes related to the same parcel. B. went into liquidation, and the plaintiffs having lost the amount of one of the advances so made by them, sued the defendants for the amount:—Held, that the plaintiffs were entitled to recover the amount claimed, for that the defendants had so dealt with the wheat and advice notes as to lead the plaintiffs to believe that there were in fact two consignments of wheat, and that they were in consequence estopped from afterwards alleging that there was in fact but one consignment of wheat. *Coventry* v. *G. E. Ry.*, 52 L. J., Q. B. 694; 11 Q. B. D. 776; 49 L. T. 641—C. A.

Bills of Lading.]—In an action for freight, the master is at liberty, notwithstanding the terms of the 18 & 19 Vict. c. 111, s. 3 (Bills of Lading Act), to show that the cargo actually received by him differs in weight from that signed for in the bill of lading; at all events where the weight mentioned in the bill of lading is a mere matter of measurement. *Blanchet* v. *Powell's Llantivit Collieries Co.*, 43 L. J., Ex. 50; L. R. 9 Ex. 74; 30 L. T. 28; 22 W. R. 490.

When a bill of lading described the goods shipped as "thirteen packages books, woodwork, whalebones, Dutch clocks, shoes and linen goods," and was also stamped by the master with the words "value, weight and contents unknown":—Held, that although the freight charged for linen goods was lower than that for silk stuffs, the shippers were not estopped from proving the delivery of silk stuffs to the shipowners. *Lebeau* v. *General Steam Navigation Co.*, 42 L. J., C. P. 1; L. R. 8 C. P. 88; 27 L. T. 447; 21 W. R. 146.

Bills of lading signed by the master are primâ facie evidence that the quantities named therein were received on board by him; the onus of rebutting this presumption, and of showing that a less quantity than that specified was received,

lies on the shipowner. *M'Lean* v. *Fleming*, L. R. 2 H. L. Sc. 128 ; 25 L. T. 317.

A shipowner is not estopped by the signature of the bill of lading by the master from showing that the goods or some of them were never actually put on board. *Brown* v. *Powell Duffryn Steam Coal Co.*, 44 L. J., C. P. 289 ; L. R. 10 C. P. 562 ; 32 L. T. 621 ; 23 W. R. 549. See also *Tully* v. *Terry*, 42 L. J., C. P. 240 ; L. R. 8 C. P. 679 ; 29 L. T. 36.

A bill of lading, stating goods to have been shipped in good order and condition, but indorsed by the master with the words, "quality and quantity unknown," does not admit as against the shipowner that the goods were shipped in good order and condition. *The Ida*, 32 L. T. 541—P. C.

There is no rule of law by which the consignee of goods under a bill of lading, stating goods to have been shipped in good order and condition, but containing the words "quantity and quality unknown," is bound to show that the goods were shipped in good order and condition. *The Prosperino Palasso* (29 L. T. 622) disapproved. *Ib.*

A company owned a line of steamers called "The Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods in a steamer at New York, and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of Steamships." At London an overside release for the goods was signed and given by the company's agents to A., and the freight received by them from A. :—Held, in an action by A. against the company for non-delivery of the goods, that the company were estopped from saying that the contract of shipment was not made with them. *Herman* v. *Royal Exchange Shipping Co.*, 1 Cab. & E. 413. Affirmed in C. A. *See* also cases sub tit. SHIPPING (BILL OF LADING).

6. INSURANCE.

Policy—Mutual Insurance Society.]—E. had an equitable interest in a ship, and afterwards received a transfer of the legal interest from the registered owner, who was a member of an insurance society. The owner insured the ship with the society in E.'s name by a policy incorporating the rules of the society, and providing among other things that every insurance effected should be valid and binding from noon on that day until noon on the 1st January then next following. By the rules persons became members only by signing the articles, and none but members could insure their ships. The rules also required certain notice upon sale of a ship or shares thereof. E. had never signed the articles nor given notice of the transfer to him of the legal interest, but had paid contributions claimed from him as owner by the society. Upon loss of the ship, E. was refused his claim upon this policy :—Held, that the society was estopped from disputing E.'s interest in the policy, and his right as member to claim upon it. *Edwards* v. *Aberayron Mutual Ship Insurance Society*, 1 Q. B. D. 563 ; 34 L. T. 457—C. A.

Underwriter—Estoppel by Conduct.]—Where the assurer discovers the concealment of a material fact between the initialing of the slip and the issuing of the stamped policy, but issues the policy without protest, he is not estopped from disputing his liability, nor is the burden of proof thrown on him to show that the assured was not misled into treating the contract as still subsisting. *Morrison* v. *Universal Marine Insurance Co.*, 42 L. J., Ex. 115 ; L. R. 8 Ex. 197 ; 21 W. R. 774—Ex. Ch.

Underwriters accepting abandonment cannot afterwards rely on a breach of the warranty. *Hudson* v. *Harrison*, 3 Moore, 288 ; 3 Br. & B. 97. See also *Provincial Insurance Co. of Canada* v. *Leduc*, 43 L. J., P. C. 49 ; L. R. 6 P. C. 224 ; 31 L. T. 142 ; 22 W. R. 929.

Rules of Mutual Insurance Society.]—See *Jones* v. *Bangor Mutual Shipping Insurance Society*, 61 L. T. 727 ; 6 Asp. M. C. 450.

7. MORTGAGE.

Misrepresentation to Mortgagee by Tenant for Life.]—A son, who, under a voluntary settlement executed by his father, was entitled in remainder to an estate for life with remainder to his first and other sons in tail, subsequently to his marriage joined his father in two mortgages, which recited that his father was seised in fee, and covenanted that he was so seised ; the father and the two mortgagees executed a subsequent mortgage in fee (to pay them off and raise a further sum), which the son did not execute, but was aware of and joined in a collateral deed for the purpose of barring all possible estates tail and vesting the fee in his father ; part of the money raised by all the mortgages being for, and applied to, the use of the son :—Held, that he was estopped from setting up against his own acts any estate which he had at the time of the mortgages, and that, therefore, the mortgage was a good charge on his life estate. *Guardian Assurance Co.* v. *Avonmore* (*Viscount*), Ir. R. 6 Eq. 391.

Investment by Solicitor for Client—Representation as to.]—W., having entrusted P., his solicitor, with 7,700*l.* for investment on mortgage on his behalf, was informed by his clerk, in conversation, that "P. proposed to invest the money on mortgage of leasehold property at Camden Town at 5 per cent.," and subsequently received a letter from P. stating "that the money was put on 5 per cent. mortgage as arranged by my clerk with you." On P.'s death it was found that no mortgage existed in favour of W., but that P. had advanced 100,000*l.* to a firm of builders on a mortgage of their leasehold property at Camden Town :—Held, that P. and those claiming under him were bound by the representation made by him, and were estopped from denying that the 7,700*l.* formed part of the 100,000*l.* so invested. *Middleton* v. *Pollock, Wetherall, Ex parte*, 46 L. J., Ch. 39 ; 4 Ch. D. 49 ; 35 L. T. 608 ; 25 W. R. 94.

8. PATENTS, BY ASSIGNMENT OR USE OF.

Denial of Validity.]—Action for a sum agreed to be paid to the plaintiff for each ton of an article manufactured and sold by the defendants, by the permission of the plaintiff to them given at their request, the plaintiff having letters-patent for the sole manufacture and sale of that article. A plea, that the letters-patent were void, and that the defendants had a right

to make and sell the article without the plaintiff's permission, is bad; for, the invention having actually been used by the permission of the plaintiff, and there being no allegation of fraud, or of anything equivalent to eviction, the defendants were not at liberty to set up as a defence that the patent was void. *Lawes* v. *Purser*, 6 El. & Bl. 930; 26 L. J., Q. B. 25; 3 Jur. (N.S.) 182; 5 W. R. 43.

An assignor of a patent, who has sold it as valid, cannot, as between himself and the assignee to whom he sold it, raise any question as to the patent being void for want of novelty. *Walton* v. *Lavater*, 29 L. J., C. P. 275; 8 C. B. (N.S.) 162; 6 Jur. (N.S.) 1251; 3 L. T. 272.

If a patentee, in consideration of a royalty, grants to another a licence to use the patent invention, and the latter uses it, he cannot plead, as a defence to an action for the royalty, that the invention was not new, or that the patentee was not the first inventor. *Noton* v. *Brooks*, 7 H. & N. 499; 8 Jur. (N.S.) 155; 10 W. R. 111.

On an action for infringement of a patent, the plaintiff, to a plea that he was not the first and true inventor, replied, that on another charge by the plaintiff against the defendant of infringement of the same patent, the question was referred by consent, and the arbitrator found that the letters-patent were not illegal and void:—Held, that the record did not show an estoppel. *Newhall* v. *Elliot*, 1 H. & C. 797; 32 L. J., Ex. 120; 9 Jur. (N.S.) 359; 7 L. T. 758; 11 W. R. 438.

C. was owner of patents for carpet manufactures, and agreed with D. to supply D. with machines embodying all the latest improvements, in consideration of D. paying the price, and a royalty for the use of the machines. D. bought the machines, and had paid the royalty for several years. Latterly, D. bought elsewhere other machines which were identical in construction and principle with C.'s machines, and used the same, and thus was using both sets of machines. C. having filed a bill in the Court of Chancery for an account of royalty in respect of both sets of machines, whereupon D. disputed the validity of C.'s patents:—Held, that while the licence continued, D. was estopped from disputing the validity of C.'s patent, and the only way in which C. could do so, was by putting an end to the agreement to take a licence, which he would do at his peril. *Crossley* v. *Dixon*, 10 H. L. Cas. 293; 1 N. R. 426; 32 L. J., Ch. 617; 9 Jur. (N.S.) 607; 8 L. T. 260; 11 W. R. 716—H. L.

To a declaration by a patentee of an invention for manufacturing wire rope, against a licensee by deed indented, for authority to use the invention, upon the latter's covenant to pay a royalty on every ton of the article so manufactured, it is a bad plea (as amounting to non est factum) to plead that the plaintiff did not give, nor did the defendant take, such exclusive licence, as by the deed was provided for. *Smith* v. *Scott*, 6 C. B. (N.S.) 771; 28 L. J., C. P. 325; 5 Jur. (N.S.) 1356.

A licensee under a patent, cannot, in any way, question its validity during the continuance of his licence. But he may show that what he has done (in respect of which patent royalties are claimed from him) does not fall within the limits of the patent, but is something extraneous to it. *Clarke* v. *Adie*, 46 L. J., Ch. 598; 2 App. Cas. 423; 37 L. T. 1; 26 W. R. 45—H. L. (E.)

A licensee under a patent is in a situation analogous to a tenant, who, during the tenancy, cannot dispute the title of the lessor to any of the land held under the lease; but who is, nevertheless, at liberty to show that part of the land he actually occupies is really not comprised within the lease, but belongs to himself under some other right. *Ib.*

The rule that an assignor of a patent is estopped from disputing its validity does not prevent his partner from separately raising that defence to an action for infringement. *Heugh* v. *Chamberlain*, 25 W. R. 742. *See further*, sub tit. PATENT (LICENCES).

Conduct of Patentee—Infringement.]—In an action by P., a patentee, for infringement, against persons who had bought machines from B., it was proved that P. had asked the purchasers to try his machine, saying that it was a better machine than B.'s, but gave no intimation that he considered B.'s machine an infringement of his patent, though he admitted that at the time he did consider it to be so:—Held, that as the purchasers did not depose that when they bought B.'s machines they were ignorant of P.'s patent, nor was there any reason to believe that they were ignorant of it, or that P. supposed them to be so; P. had not, on the ground of estoppel, lost his right to sue them for an infringement in using B.'s machines, it not being the duty of a patentee to warn persons that what they are doing is an infringement, and P.'s conduct not amounting to a representation that it was not an infringement. *Proctor* v. *Bennis*, 57 L. J., Ch. 11; 36 Ch. D. 740; 57 L. T. 662; 36 W. R. 456—C. A.

9. SALE.

As to Title.]—A person who has purported to sell goods is estopped from saying that the goods were not his at the time. *Edmands* v. *Best*, 7 L. T. 279.

By Auction.]—Property was put up for sale by public auction under the order of the Court of Chancery, and it was knocked down as unsold, there being no bid up to the reserved price. Before the auctioneer had left the desk, C. agreed to purchase the property at the reserved bidding, and signed the contract and paid the deposit:—Held, that he was estopped from disputing the sale as not being a sale by auction, and that he could not repudiate his purchase. *Else* v. *Barnard*, 6 Jur. (N.S.) 621; 2 L. T. 203.

Sale of Goods—Invoice.]—It is competent to a party, whose name appears at the head of an invoice as the vendor of certain goods, to show that he was not the seller, and that the invoice was only made out in those terms, and included those goods, for the convenience of the real parties to the contract. *Holding* v. *Elliott*, 5 H. & N. 117; 29 L. J., Ex. 134; 1 L. T. 381; 8 W. R. 192.

—— **Validity.**]—A., a trader, who was in difficulties, and apprehensive that his goods would be taken in execution, entered into an agreement with B. that A. should leave his place of business, and B. should take possession of it and his goods, A. giving him an invoice of them as upon a sale, and also a receipt for the supposed purchase-money. This having been done accordingly, B. took the goods, and afterwards converted them to his own use. A. having brought trover:

—Held, that he was not estopped from showing the nature of the transaction, and that there never had been any real sale to B. *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262; 4 Jur. (N.S.) 95; 6 W. R. 257.

—— **Concurrence in.**]—The plaintiff, being a widow, but not representative of her deceased husband, was in possession of goods which had belonged to him. She married B., supposing him to be single, and lived with him in the house in which the goods were. The goods being distrained for rent, B. sold to the defendant so many of them as sufficed to pay off the distress, and the plaintiff authorised the sale. A month afterwards B. was convicted of bigamy: —Held, that the plaintiff could not recover in an action against the defendant for the value of the goods, first, because she had no title to them; and, secondly, because she was bound by her concurrence in the sale. *Waller* v. *Drakeford*, 1 El. & Bl. 749; 22 L. J., Q. B. 274; 17 Jur. 853.

Sale of Land—Deposit—Abstract—No Valid Contract in Writing.]—A purchaser deposited a certain sum on a contract for the sale of a leasehold shop. The agreement was signed by the auctioneer "as agent for the vendor," and by the purchaser: subsequently the purchaser obtained an abstract of the title, which was examined by her solicitors, who made certain requisitions as to title "without prejudice to any question which may arise as to the contract for the purchase of the premises." Afterwards the purchaser declined to complete the purchase, on the ground that the contract was void, as the parties to it were not sufficiently described:—Held, that although the memorandum might be insufficient under the Statute of Frauds, yet, as the purchaser had paid the deposit and received the abstract of title, well knowing that the vendor's name did not appear in the memorandum, and while the vendor was ready to complete the contract, she was estopped from recovering her deposit. *Thomas* v. *Brown*, 45 L. J., Q. B. 811; 1 Q. B. D. 714; 35 L. T. 237; 24 W. R. 821.

—— **Title—Receipt—"Rent for Parish Land."**]—An information filed in equity on behalf of the poor of a parish, stated an agreement dated in 1634, by the Earl of Portland, which recited that there lay in his park at R. divers parcels of land, which contained about six and a half acres, and belonged to the poor of the parish, for which lands, lying dispersed in his grounds, being ordained for good and charitable uses, the earl was desirous to give a full yearly rent and satisfaction, and thereby agreed to pay to the churchwardens and overseers of the parish for the time being, yearly, the sum of 6*l.*, and the earl thereby agreed to make such further assurance thereof, as by counsel should be advised, and to set out sufficient land of a better value for performance thereof, which he would either tie for the payment of the yearly rent, or otherwise assure and convey to such person and persons and their heirs, as by the vestry of the parish should be nominated to be feoffees in trust for the same. No conveyance was shown to be made in pursuance of this agreement, but it was in evidence that the park of the earl, including the six and a half acres, originally consisted of 550 acres, of which the defendant was in possession of thirty-one, his predecessors in the estate having, since 1786, covenanted to indemnify the purchasers of the other portions of the park from the payment of the annual rent of 6*l.*, which, in all the conveyances since 1786, was described as an annual rent-charge paid to the parish, but which in the parish books was expressed to have been received for rent of parish land; in 1849, the defendant's ancestor had accepted a receipt for the 6*l.* as for "rent for parish land":—Held, that in order to make the payment operate as an estoppel so as to prevent the defendant disputing the fact that the six and a half acres formed part of his estate, it was essential to make out that the payments had been from time to time made by him and his predecessors as for rent for land of which he and they were tenants, and, therefore, having regard to the only evidence adduced by the relators, namely, the entries in the parish books, the defendant was not estopped from denying that he was possessed of the six and a half acres of land originally demised by the parish to the earl. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

Sale by Apparent Owner—Attempt to oust Purchaser.]—If a person, being sole next of kin, is in possession of a chattel term without letters of administration having been obtained, and there are no debts due by the deceased, or anything to prevent such next of kin from using the term as his own, then he, the beneficial owner, can sell the term; and if the purchaser goes into possession under the contract of sale, the vendor cannot afterwards, either by obtaining a grant of administration, or in any other way, disaffirm his own act, and annul the contract. *Hamill* v. *Murphy*, 12 L. R., Ir. 400.

Representation as to Value.]—In the absence of trick or contrivance, representations respecting the value of a thing for sale, made by the owner to a party who, relying on their truth, becomes the purchaser, do not estop the former from denying that the value was so great as that represented. *Martin* v. *Douglas*, 16 W. R. 268.

Therefore, where D., the owner of a house, represented to M., who afterwards purchased it, that any person building a house adjoining would have to pay the owner of the existing house 150*l.* for the use of the flank wall thereof: —Held, that D. was not thereby estopped from showing that the value of such user was less than 150*l.* *Ib.*

10. Shares and other Securities.

Sale of Shares—Certification of Transfer—Voucher of Title—Want of Title in Transferor.]—The defendants were a company, incorporated under the Joint Stock Companies Acts, who had issued the whole of their authorised share capital. Subsequently to the completion of such issue L. sold to the plaintiffs, through stockbrokers, a certain number of shares in the defendant company. The brokers took the document, by which it was intended to transfer such shares from L. to the plaintiffs, before it had been executed by the plaintiffs or the price had been paid, to the office of the defendants, and procured the defendants to place upon it (partly by means of a stamp, partly in writing) the following words:

"Certificate lodged. The Balkis Consolidated Company, Limited, J. V. Thomas, for secretary." The placing of such words upon a transfer was commonly known as "certification" of the transfer; and it was in the ordinary course of the defendants' practice to grant such certification, if required to do so and if satisfied that the transferor was entitled to the shares specified in the transfer. The brokers, having obtained such certification and acting upon the faith of it, as the agents of the plaintiffs, paid L. the price of the shares. The defendants subsequently discovered that L. had had no title to the shares specified in the transfer, and thereupon, notwithstanding their certification of the transfer, refused to recognise the plaintiffs' title to the shares. The plaintiffs having brought an action to recover the value of the shares:—Held, that such a certification could only be taken to amount to a representation by the defendants that a document or documents had been lodged with them apparently in order, and showing primâ facie that the transferor was entitled to the shares; but that such certification did not import a warranty of the transferor's title or of the validity of such document or documents; that it did not therefore estop the defendants from impugning the plaintiffs' title on the ground of the invalidity of the transfer to the plaintiffs' transferor, and that the plaintiffs could not therefore make a title to the shares against the defendants by estoppel. *Bishop* v. *Balkis Consolidated Co.*, 59 L. J., Q. B. 565; 25 Q. B. D. 512; 63 L. T. 601; 39 W. R. 99; 2 Meg. 292—C. A. And see *Concessions Trust, In re, McKay's Case*, 65 L. J., Ch. 909; [1896] 2 Ch. 575; 75 L. T. 298.

Shares Certified as Fully Paid-up—Allottee for Value—Misrepresentation.]—Where a man lends money to a company, and, by way of collateral security, accepts shares, on the certificate of which it is stated that each of them is fully paid up, the company and the liquidator in its winding-up are estopped from denying the truth of the allegation on the faith of which the money was advanced, and the lender is entitled to have his name removed from the list of contributories. It is no answer to the lender's claim that he might by inquiry or reflection have discovered that in fact nothing had been paid on the shares. *Bloomenthal* v. *Ford*, 66 L. J., Ch. 253; [1897] A. C. 156; 76 L. T. 205; 45 W. R. 449; 4 Manson, 156—H. L. (E.)

Debentures—Irregularity in Issue of—Company not permitted to set up Invalidity.]—A company, having power to issue debentures transferable at law, issued certain debentures to their contractor to enable him to obtain an advance for the purposes of the company. There was an irregularity in the issue of these debentures of which the contractor was aware, but the debentures on the face of them purported to be regularly issued for valuable consideration, and to be legally transferable. The debentures subsequently came into the hands of transferees for value who had no notice of their irregularity, but whose transfers were never registered:—Held, that as the original conduct of the company in issuing the debentures was such that the public was justified in treating it as a representation that the debentures were legally transferable, there was an equity on the part of the equitable transferees to restrain the company from pleading their invalidity, although the irregularity in their issue might have been a defence at law to an action against the company by their transferors. *Romford Canal Co., In re, Carew's, Pocock's and Trickett's Claims*, 52 L. J., Ch. 729; 24 Ch. D. 85; 49 L. T. 118.

Recognition of Transfer by the Company.]—C. transferred 510 shares in a cost-book mining company to A. for 5*l*. The transfer was registered. The company, having suspicions as to A.'s means, asked for information about him, but got none. They made calls upon him, and on non-payment recovered judgment for the amount, but obtained nothing. About two years afterwards the company was ordered to be wound up. The liquidator sought to put C. upon the list of contributories on the ground that the transfer was fraudulent within s. 35 of the Stannaries Act, 1869:—Held, that the court could only act in the winding-up as the company could have acted if there had been no winding-up, and that, as the company would have been estopped by having recognised the transfer with knowledge, the court could not set it aside. *Wheal Unity Wood Mining Co., In re, Chynoweth's Case*, 15 Ch. D. 13; 42 L. T. 636; 28 W. R. 897—C. A.

Blank Transfer sent to Broker.]—A. was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A., being shares in another company, and by means of a duplicate key, which he had procured to be made without the knowledge of A., obtained certificates from a box of A.'s necessary to perfect the transfer; and he also forged the names of the attesting witnesses:—Held, that the acts of A. were not such as estopped him from showing that the deed of transfer was a forgery. *Swan* v. *North British Australasian Co.*, 2 H. & C. 175; 32 L. J., Ex. 273; 10 Jur. (N.S.) 102; 11 W. R. 862—Ex. Ch.

Negotiability of Scrip and Scrip Certificates.]—Scrip was issued in England by the agent of a foreign government, and such scrip purported to entitle the bearer, upon payment of 100*l*. in instalments, to receive a definitive bond for 100*l*. G. purchased scrip on the open Stock Exchange, and intrusted it to a broker, who pledged it to his bankers as a security for his private debt. All the instalments of the 100*l*. had been paid. In an action of trover by G. against the bankers for the value of the scrip:—Held, that he had, by purchasing the scrip and entrusting it to the broker, estopped himself from contending that it was not negotiable like a bank-note. *Goodwin* v. *Roberts*, 45 L. J., Ex. 748; 1 App. Cas. 476; 35 L. T. 179; 24 W. R. 987—H. L. (E.)

Scrip certificates, by which it was certified that, after the payment of certain instalments, the bearer would be entitled to be registered as the holder of shares in a banking company, were issued to the plaintiff, and by him deposited with a stockbroker for the purpose of paying the instalments remaining due, and dealing with such certificates as the plaintiff should direct. The broker, in fraud of the plaintiff, and without his authority, deposited the scrip with the defendants as security for an amount due from him, the broker, to the defendants. The defendants were not aware of the fraud. It was proved that the usage among bankers, discounters, money

dealers and on the Stock Exchange, had been for many years to treat such scrip certificates as negotiable instruments transferable by mere delivery:—Held, that the defendants were entitled to the scrip certificates as against the plaintiff, on the ground that the plaintiff, by depositing with his broker instruments purporting to be transferable by delivery to a bonâ fide holder for value, was estopped from denying that they were so transferable. *Rumball* v. *Metropolitan Bank*, 46 L. J., Q. B. 346; 2 Q. B. D. 194; 36 L. T. 240; 25 W. R. 366.

Negotiable Securities—Deposit of Securities by Broker—Authority of Broker—Bonâ fide Holder for Value.]—The plaintiff employed H., a stockbroker in speculative transactions on the Stock Exchange, in which it was the custom for H. to advance money to the plaintiff for the purchase of shares from time to time, and to keep the shares in his hands as security, with power also to transfer the benefit of this security. H. was accustomed to obtain money as he required it from the defendants, and deposited with them as security certain stocks and shares belonging to various clients. H. failed to meet his liabilities: the defendants then held certain stocks and shares of the plaintiff which had been deposited with the bank by H. The plaintiff claimed to be entitled to redeem on paying to the defendants the amount due from him to H.:—Held, that the defendants must be treated as bonâ fide holders without notice, and that they were entitled to hold the securities until payment of what was due to them from H. *Bentinck* v. *London Joint Stock Bank*, 62 L. J., Ch. 358; [1893] 2 Ch. 120; 3 R. 120; 68 L. T. 315; 42 W. R. 140.

Forged Transfer of Stock.]—C. owned stock in a company incorporated under the Companies Act, 1862. His clerk, P., contracted to sell stock in the company to S., who was the nominee of B. In order to carry out the contract, P. forged a transfer from C. to S., which was left by S. at the office of the company for registration. The company sent a letter to C. inquiring whether the transfer was correct: as they received no answer from him, they registered the transfer. B. borrowed money from a bank, and by way of security for the loan the stock was transferred by S. at the request of B. to I. as trustee for the bank, and the company registered I. as owner and issued a certificate accordingly. The money borrowed by B. was afterwards repaid by him to the bank, and the stock was held by I. as a bare trustee for B. The forgery was discovered, and the company then refused to acknowledge I. as the holder of the stock. In an action brought by B. and I. to compel the company to recognise their title:—Held, that although I., as trustee for the bank, might have acquired a good title by estoppel against the company, yet that title ceased when the loan by the bank was paid off, and that no estoppel existed in favour of B. against the company; for B. in contracting, through S., to buy the stock belonging to C. had acted on the faith of the forged transfer, and had not relied upon any act of the company, and by sending the forged transfer to the company had induced them to recognise his nominee as the holder, and that the action would not lie. *Bahia and San Francisco Ry., In re* (L. R. 3 Q. B. 585); *Hart* v. *Frontino, &c. Gold Mining Co.* (L. R. 5 Ex. 111); *and Knights* v. *Wiffen* (L. R. 5 Q. B. 660), discussed. *Simm* v. *Anglo-American Telegraph Co.*, 49 L. J., Q. B. 392; 5 Q. B. D. 188; 42 L. T. 37; 28 W. R. 290; 44 J. P. 280—C. A.

New Shares—Validity—Receipt of Dividends.]—By the deed of settlement of a company, it was provided that the capital of the company should be 100,000*l.*, in 1,000 shares of 100*l.* each, and that it should be competent to any general meeting of the company to create additional shares of 100*l.* each. The company at a general meeting created 1,500 new half shares of 50*l.* each, some of which the defendant purchased, executed the deed of settlement, and received the dividends declared on the shares. It was afterwards resolved, at a special general meeting, that the company be wound up, and the defendant was sued for calls made by the directors and the liquidators of the company:—Held, that he was estopped from denying that the 50*l.* shares were valid shares. *Hull Flax Co.* v. *Wellesley*, 6 H. & N. 38; 30 L. J., Ex. 5.

Confirmation of Allotment of Shares.]—The plaintiff company was constituted by seven persons signing the memorandum of association. Afterwards they all were summoned to attend a meeting, but only four attended and they elected three directors. These three elected three other directors. The three original directors resigned, and afterwards one of the remaining directors sent in his resignation. The defendant then applied for fifty shares. The two remaining directors resolved that fifty shares should be allotted to the defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. The defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution, that the shares allotted to himself should be paid up in full forthwith. The defendant subsequently withdrew his application and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body:—Held, that the defendant was liable to pay the amount of the shares. *York Tramways Co.* v. *Willows*, 51 L. J., Q. B. 257; 8 Q. B. D. 685; 46 L. T. 296; 30 W. R. 624—C. A.

Calls—Acting as Member of Company.]—Where a member of a mutual insurance company, afterwards converted into a limited company, has vessels on its books as insured, and pays calls and otherwise acts as if he were a member of the company, he is, in any action brought against him by the limited company for calls on losses, estopped from denying his liability, and from setting up either any irregularity in the transfer from the one company to the other, or that the losses were paid without any stamped policies being entered into in contravention of 30 Vict. c. 23, s. 7. *Barrow Mutual Ship Insurance Co.* v. *Ashburner*, 54 L. J., Q. B. 377; 54 L. T. 58; 5 Asp. M. C. 527—C. A. *And see* COMPANY, col. 1384.

—— Invalidly made—Liability of Director.]—The articles of association of a company provided that the board of directors should consist

of not less than three directors, but when a call was made there were only two directors remaining, one of whom was the defendant, who assisted in passing the resolutions for the call. In an action against the defendant for calls:—Held, that he by his conduct was estopped from disputing the validity of such resolutions, and was liable to pay the amount of the call. *Faure Electric Accumulator Co.* v. *Phillipart*, 58 L. T. 525.

—— **Issue of Fully-paid Shares.**]—When a company issues shares to directors as fully paid-up shares, and afterwards endeavours to recover a call on such shares:—Held, that the company was prevented by estoppel from recovering the amount of such calls. *Christchurch Gas Co.* v. *Kelly*, 51 J. P. 374. *See* col. 469, and COMPANY.

Fraud—Repudiation.]—In an action for calls by a company against a shareholder, in which the jury have found that the contract to take the shares was induced by fraud, the defendant is not estopped from setting up the plea of fraud merely on the ground that he did not, immediately on the discovery of the fraud, repudiate the contract. *Aaron's Reefs, Limited* v. *Twiss*, 65 L. J., P. C. 54; [1896] A. C. 273; 74 L. T. 794—H. L. (Ir.)

11. TRUSTEE.

Representations by, as to Incumbrances on Life Interest—Mortgage of Trust Fund.]—In answer to an inquiry addressed by an intending mortgagee to the trustee of a fund whether the life tenant had encumbered his interest, the trustee enumerated certain specific charges on the life interest. At this date the trustee had received notice of several other incumbrances, but he had forgotten their existence. In an action by the mortgagee against the trustee to recover the loss arising from the insufficiency of the mortgage:—Held, that the trustee was not liable in the absence of estoppel, and that his answer did not amount to a positive representation that there were no other incumbrances on the life interest so as to create an estoppel against him. *Low* v. *Bouverie*, 60 L. J., Ch. 594; [1891] 3 Ch. 82; 65 L. T. 533; 40 W. R. 50—C. A.

12. IN OTHER CASES.

Allowing Person to Carry on Business in his own Name.]—By a deed, W., a horse contractor and jobber, assigned, until such time as all his then debts should be paid off, all his stock-in-trade, &c., to trustees for the benefit of his creditors, to hold upon certain trusts; that, so long as W. should observe the orders of the trustees, he was to be allowed to carry on and conduct the business, subject to the orders of the trustees; that, if he refused to comply with those orders, the trustees might immediately determine such permission; that the trustees should have power to sell any portion of the stock they pleased; that all moneys received in the business were to be paid to the account of the trustees, and all moneys paid by their cheques; and that W. was to receive a weekly salary for carrying on the business. The creditors also agreed to advance a large sum of money for the purpose of the business. This sum was advanced, and the business was carried on for some time under the terms of the deed; but W. having refused to comply with certain orders of the trustees, the trustees on the 22nd July, 1847, determined the permission to W. to carry on the business, and W. thereupon admitted in writing that the trustees had his leave to assume possession of the stock-in-trade, &c. Several of the horses used in the business were at that time let out on hire to various persons, and the trustees on that day served notice upon each of those persons that the horses in their possession belonged to them as trustees. On the 24th July, W. committed an act of bankruptcy. Upon an interpleader issue to try the title to these horses as between the trustees and the assignees:—Held, that by allowing W. to carry on the business in his own name, the trustees were not estopped from relying upon their own title to the property under the deed, as against the assignees. *Price* v. *Groom*, 2 Ex. 542; 17 L. J., Ex. 346.

Allowing Person to have Possession of Furniture.]—A trustee under a liquidation, who with the authority of the creditors, permits the debtor to remain in possession of his furniture as apparent owner, does not, in the absence of knowledge that the debtor was holding himself out as the real owner and dealing with it as such, forfeit his right to it so long as there has been no closing of the liquidation or order of discharge; and his right to it and to any after-acquired property cannot be defeated by a bill of sale given by the debtor subsequently to the liquidation. *Meggy* v. *Imperial Discount Co.*, 47 L. J., Q. B. 119; 3 Q. B. D. 711; 38 L. T. 309; 26 W. R. 342—C. A.

Directors—Dealing with Insufficient Board.]—The deed of association of a joint stock company provided that the business of the company should be transacted by six directors; four directors conducted such business for a considerable time, and had various dealings with a third party as agent of the company:—Held, that it was not competent to such third party to object on a suit against him that the four directors did not sufficiently represent the company. *Benson* v. *Hadfield*, 4 Hare, 32.

Conduct of Business in other Person's Name.]—When a person grants authority to another to conduct a business in his name, in which business, in point of fact, he has no interest, and third persons enter into transactions with the firm under the belief, induced by the misrepresentation, that they are contracting with the person in whose name the business is being conducted, the latter will be estopped as against such third persons from assuming any position inconsistent with that which he so held himself out as occupying. *Miles* v. *Furber*, 42 L. J., Q. B. 41; L. R. 8 Q. B. 77; 27 L. T. 756; 21 W. R. 262.

By Negligence.]—Negligence in the custody of a draft or in its transmission by post will not disentitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it. *Arnold* v. *Cheque Bank*, 45 L. J., C. P. 562; 1 C. P. D. 578; 34 L. T. 729; 24 W. R. 759.

Negligence, to amount to an estoppel, must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party or to the general public. *Ib.*

The plaintiffs, merchants at New York, desiring to transmit 1,000*l.* to W. & Co., of Bradford, purchased of S. & Co., in New York, a draft for that amount drawn by S. & Co. on Smith, Payne & Co., London, payable to the order of the plaintiffs on demand. The plaintiffs indorsed the draft specially to W. & Co. or order, and inclosed it in a letter addressed to them which was placed in a letter-box in their office to be posted in the usual way. The letter was stolen by one Hecht, a clerk in the employ of the plaintiffs, who forged an indorsement of W. & Co., and procured the defendants, bankers in London, to present the draft and obtain the money, which was placed by them to the account of a person acting in concert with Hecht, upon whose cheques the money was almost immediately drawn out. In an action for money had and received, the defendants, in order to show that the negligence of the plaintiffs in the custody and transmission of the draft afforded facilities for the fraud, and so estopped them from suing for the money, tendered evidence that it was a usual and almost invariable practice amongst merchants sending large remittances from abroad to send, besides the letter containing the remittance, a letter of advice by the same or the next mail. This evidence was rejected, on the ground that the alleged negligence was collateral only to the transaction giving rise to the action:—Held, that the plaintiffs' right to the draft, and to sue for its proceeds in the hands of the defendants as money received to their use, was not affected by the felonious act of Hecht; and that the evidence tendered was properly rejected. *Ib.*

B., a trustee, advanced trust money to A. in 1851, on a legal mortgage of lands held by A. in fee, the mortgage deed reciting the trust. By collusion with B., A. in 1856 obtained the title deeds, and also a reconveyance of the legal estate, containing a reference to the mortgage, and then, suppressing the mortgage and reconveyance, conveyed, as under his original title, the legal estate to C., by way of mortgage. In a suit by B.'s cestui que trust:—Held, that C., although he acted bonâ fide, and was wholly unaware of the dealings between A. and B., and, in fact, never heard of the mortgage or reconveyance till after the commencement of the suit, could not be heard to aver ignorance of the facts which he would have discovered upon inquiries, to which he would have been put if he had seen the deeds of mortgage and reconveyance, before he advanced his money, inasmuch as he was obliged to rely upon those deeds for his legal title; therefore that the plantiff's mortgage had priority over C.'s. *Joyce* v. *Rawlins*, 40 L. J., Ch. 105; L. R. 11 Eq. 53; 23 L. T. 756; 19 W. R. 217.

H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the docks. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H. being the ostensible owner of the tobacco fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh warrants from the dock company:—Held, that H. was not intrusted by the plaintiff as his factor or agent with the documents of title, within 6 Geo. 4, c. 94, s. 2; and that the conduct of the plaintiff, in leaving the indicia of title in H.'s hands and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover its value from the defendants. *Johnson* v. *Crédit Lyonnais Co.*, 47 L. J., C. P. 241; 3 C. P. D. 32; 37 L. T. 657; 26 W. R. 195—C. A. *See* 40 & 41 Vict. c. 39.

Negligence, to operate as an estoppel, must be the proximate cause of the loss. *Swan* v. *North British Australasian Co.*, 2 H. & C. 175; 32 L. J., Ex. 273; 10 Jur. (N.S.) 102; 11 W. R. 862—Ex. Ch. *And see* col. 458.

Negligence of Mortgagee.]—The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants:—Held, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants. *Hall* v. *West End Advance Co.*, 1 Cab. & E. 161.

Negligence—Proximate Cause of Loss.]—A company incorporated under a charter granted by Charles II. were possessed of a common seal, and also of a certain amount of stock which stood in their names in the books of the defendants. The seal was intrusted to the custody of their clerk, in whom implicit confidence was placed, and who managed the affairs of the company without being subject to any control or supervision. The clerk affixed the seal of the company in the presence of two witnesses, who were not corporators, to two powers of attorney for the transfer of the stock belonging to the company. These transfers were lodged with the defendants, who in due course paid over to the clerk the proceeds of the sale of the stock. The clerk was subsequently tried and convicted of fraud in affixing the seal to the transfers without the authority of the company, and of appropriating the proceeds of the sale of the stock to his own use. In an action for a declaration that the company were entitled to have the stock stand in their names in the defendants' books, and that they might be ordered to replace the stock in the plaintiffs' names:—Held, upon the authority of *Bank of Ireland* v. *Trustees of Evans' Charities* (5 H. L. Cas. 389), that even assuming the company were negligent in intrusting the seal to the custody of their clerk, the negligence necessary to entitle the defendants to insist that the transfers were invalid must be negligence in or immediately connected with the transfers themselves, and that, inasmuch as the forgery committed by the clerk, and not the negligence of the company in intrusting him with the seal, was the proximate cause of the loss, the defendants were liable to replace the stock. *Merchants of the Staple* v. *Bank of England*, 57 L. J., Q. B. 418; 21 Q. B. D. 160; 36 W. R. 880; 52 J. P. 580—C. A.

The plaintiff's clerk, G., had by a series of frauds obtained the plaintiff's acceptance to certain bills

of exchange, of which he (the clerk) received payment from the defendants. G. having forged a letter of advice from V., a correspondent of the plaintiff, with reference to a bill, would place it amongst the ordinary correspondence of the firm. There being nothing on its face to suggest doubt as to its genuineness, it in due time passed into the hands of another clerk who kept the "bills payable" book, and the particulars contained in the letter would be entered. G. then —sufficient time having elapsed, and having prepared and filled in a forged draft, inserting V. as drawer and P. & Co. as payees—would drop it into the bill box, whence it would be taken with the genuine bills, compared with the "bills payable" book, and, being found in order, would be accepted and placed in a portfolio in G.'s room, from which he could easily take it, and thus possess himself of a genuine acceptance to a forged draft. He then forged the indorsement of P. & Co., adding what professed to be their stamp. The payees, P. & Co., were real and existing persons, actual correspondents of the plaintiff. All the forged bills were cashed at the defendants' bank across the counter:— Held, that although there was negligence on the part of the plaintiff in leaving a clerk in G.'s position without any effective control or supervision over his proceedings, yet such negligence was not the proximate cause of the loss sustained by the defendants, and was no defence to the plaintiff's claim even if there were no negligence on the part of the defendants. *Vagliano* v. *Bank of England*, 58 L. J., Q. B. 357; 23 Q. B. D. 243; 61 L. T. 419; 37 W. R. 640; 53 J. P. 564 —C. A.

Representations inducing Person to act as Servant without Wages.]—An intestate induced a woman to serve him as his housekeeper without wages for many years and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land, and afterwards signed a will, not duly attested, by which he left her the life estate:— Held, that there was no contract, and that even if there had been and although the woman had wholly performed her part by serving till the intestate's death without wages, yet her service was not unequivocally and in its own nature referable to any contract, and was not such a part performance as to take the case out of the operation of the Statute of Frauds, s. 4; and that she could not maintain an action against the heir for a declaration that she was entitled to a life estate in the land. *Loffus* v. *Maw* (3 Giff. 592) disapproved. *Maddison* v. *Alderson*, 52 L. J., Q. B. 737; 8 App. Cas. 467; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821—H. L. (E.)

A man, when in advanced years and ill health, induced his niece to reside with and continue valuable services to him, on the faith of his representations that by so doing she would become entitled to the benefit of property for life at his death; and by a codicil to his will, which was read over and explained to her, trusts were created in her favour:—Held, that he could not revoke the trusts. *Loffus* v. *Maw*, 3 Giff. 592; 8 Jur. (N.S.) 607; 6 L. T. 346; 10 W. R. 513.

Representations or Undertakings.] — The defendants sold goods to B. & Co., and at the same time handed to B. & Co. two documents, each as follows: "We hereby undertake to deliver to your order indorsed hereon twenty-five tons merchantable zinc off your contract of this date." Before delivery B. & Co. became insolvent and unable to pay the defendants, whereupon they retained the goods by virtue of their lien as unpaid vendors of insolvent purchasers. B. & Co. resold the goods to the plaintiffs and indorsed and handed to them the two documents above referred to. In an action by the plaintiffs against the defendants for refusing to deliver the goods:—Held, that inasmuch as the defendants were entitled to set up their lien as against B. & Co., and inasmuch as the two documents were only undertakings to do something, and not representations of any fact, the defendants were not estopped by them from setting up their lien as against the plaintiffs, and were therefore entitled to retain the goods. *Farmiloe* v. *Bain*, 45 L. J., C. P. 264; 1 C. P. D. 445; 34 L. T. 324.

—— **As to Retainer.**]—A declaration stated that the plaintiff and the defendant were attorneys; that the defendant falsely represented to the plaintiff that he, the defendant, was authorised by F. to bring an action in F.'s name against C. and B., and that he was authorised by F. to retain the plaintiff to bring the action; that the plaintiff brought the action; that the defendant was not so authorised, and that the plaintiff was compelled to discontinue the action and to pay costs. Plea, that the plaintiff was not employed, and did not act as such attorney. Replication, that the defendant ought not to be admitted to plead the plea, because a judge's order was made for taxing the plaintiff's bill of fees in the action, delivered to the defendant and O. and J., and for the Master to certify what was due; that the defendant and J. should be at liberty to dispute their retainer; that the Master allowed 196*l.* 13*s.* 5*d.*; that the plaintiff sued the defendant, O. and J. for determining the question of the retainer and recovering the 196*l.* 13*s.* 5*d.*; that the question of the retainer being referred to the Master, he certified that such retainer by the defendant, O. & J. was proved, whereupon the plaintiff signed judgment against the three parties for 247*l.* 3*s.* 10*d.*; and that the plaintiff's bill was for fees due to him for work done by him in bringing the action in the declaration mentioned:— Held, that the replication did not state a case of estoppel, and was bad. *Callow* v. *Jenkinson*, 6 Ex. 666; 20 L. J., Ex. 321.

Receipt.]—A receipt is not an estoppel, it is only primâ facie evidence that the money has been paid, and is open to explanation. *Skaife* v. *Jackson*, 5 D. & R. 290; 3 B. & C. 421. S. P., *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262; 4 Jur. (N.S.) 95; 6 W. R. 257. *See* EVIDENCE (RECEIPT).

Payment.]—A. contracted to build a shed for B. Terms, everything to be completed to the satisfaction of B.'s engineers, payment 90 per cent. on completion of works, 10 per cent. to be held over for six months to answer defects in work. A. sent in his bill in February as for a completed shed with a letter containing these words, "as the shed will be completed before the close of the month," and was paid 90 per cent. of the price. In October, B., who had done repairs to the shed, which A. declined to do, offered to pay the residue, after deducting

the cost of such repairs. In an action by A. for the whole of the residue:—Held, that the defendants were not estopped by the payment in February from showing that the work was not completed, nor from going into the amount of the defective work. *Moss* v. *L. & N. W. Ry.*, 22 W. R. 532.

Pleadings—Contents of.]—When a declaration shows substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203; 28 L. T. 713; 21 W. R. 609.

A sheriff having a writ commanding him to arrest A., took B., who represented herself to be the person named in the writ:—Held, that though B. might be estopped by her misrepresentation from suing the sheriff for the original taking, he could not justify detaining her after he had notice that she was not the real party. *Dunston* v. *Paterson*, 2 C. B. (N.S.) 495; 26 L. J., C. P. 267; 3 Jur. (N.S.) 982.

A., in the custody of the sheriff, and confined in the gaol at Bombay under a writ of execution issued against him upon a judgment of the supreme court, was permitted by the sheriff, with the sanction and authority of the judgment creditors, by reason of illness, to go out of prison and temporarily reside outside the precincts of the gaol, upon the condition that he should continue under the surveillance of the sheriff's officers, and to which condition A. agreed, and continued for a time to reside out of gaol at a private house, where he was constantly under such surveillance. Upon his becoming convalescent, the sheriff, at the instance of the judgment creditors, took him back to gaol. Upon application by A. to the supreme court to discharge him out of custody, on the ground that the writ of execution was satisfied:—Held, that A. having agreed to the condition imposed on him by the judgment creditors, of continuing in the custody of the sheriff's officers while out of gaol, was estopped from saying that he was out of the sheriff's custody when he was permitted to leave the gaol, and that a change of the place of imprisonment did not amount to a discharge out of custody. *Haines* v. *East India Co.*, 11 Moore, P. C. 39; 5 W. R. 159.

—— **Misnomer.**—A defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself is no party to the recognizance. *Meredith* v. *Hodges*, 2 Bos. & P. (N.R.) 453. S. P., *Anon.*, Lofft, 82.

If a person whose real name is William is asked before process issues against him, whether his name is not John, and he says it is, he cannot maintain trespass for what is done in execution of the process against him by the wrong name. *Price* v. *Harwood*, 3 Camp. 108.

So, where a different name is written over a shop door. *Ib.*

Where A., having two christian names, has omitted one of them in his dealings with B., he cannot, in an action by B., make the same omission a ground for setting aside the proceedings. *Walker* v. *Willoughby*, 2 Marsh. 230; 6 Taunt. 530.

A warrant of attorney executed by J. S. L. was filled up J. Stone L., and a fi. fa. issued against the party by that name. It appeared that the second name was Stowe. The sheriff seized goods which he afterwards relinquished, on a wrong supposition that they belonged to some trustees, and returned nulla bona. In an action for the false return:—Held, that as the party by executing the warrant of attorney was estopped from objecting to the incorrectness of the names, the sheriff could not make it a defence to the action. *Reeves* v. *Slater*, 7 B. & C. 486; 1 M. & Ry. 265; 6 L. J. (O.S.) K. B. 77; 31 R. R. 259.

Where a party is sued by a wrong name, and suffers judgment to go against him, without attempting to rectify the mistake, he cannot afterwards, in an action against the sheriff for false imprisonment, complain of an execution issued against him by that name. *Fisher* v. *Magnay*, 6 Scott (N.R.) 588; 1 D. & L. 40; 5 Man. & G. 778; 12 L. J., C. P. 276.

Arbitration—Award not made within Time.]—Where a cause was referred to an officer of the court under the compulsory powers of 17 & 18 Vict. c. 125, and the award was not made within three months, and the time was not enlarged by the court or a judge, or by the written consent of the parties, as required by s. 15, but they continued to attend before the arbitrator after the expiration of the three months without objection:—Held, that the party against whom judgment had been signed upon the award was estopped from alleging that there had been no written consent to the enlargement. *Tyerman* v. *Smith*, 6 El. & Bl. 719; 25 L. J., Q. B. 359; 2 Jur. (N.S.) 860.

Trial before Commissioner.]—A cause was tried without a jury before a commissioner of nisi prius, not a judge of the superior courts. The parties consented, and the judge in open court sanctioned this course; but there was neither a judge's order nor a consent in writing. The unsuccessful party having moved for a new trial:—Held, that the commissioner having general jurisdiction to try, the parties were precluded by their conduct from questioning the verdict on account of the absence of these preliminaries. *Andrews* v. *Elliott*, 6 El. & Bl. 338; 25 L. J., Q. B. 336; 2 Jur. (N.S.) 663; 4 W. R. 527.

Bankrupt holding himself out as a Trader.]—A man, not a trader, fraudulently contracted a debt, representing himself to the creditor to be a trader. He subsequently became a trader, and the debt was proved under his bankruptcy. The commissioner refused him his certificate, on the ground of his fraudulent conduct:—Held, that having represented himself as a trader in the transaction, he could not be heard to say that he was not so for the purpose of protecting himself from the consequences. *Leslie, Ex parte*, 25 L. J., Ch. 37; 2 Jur. (N.S.) 822; 4 W. R. 706—L.J.

Of Judgment Creditor.]—A judgment creditor is not bound by an estoppel precluding the judgment debtor from claiming the goods seized under the judgment. *Richards* v. *Johnson*, 4 H. & N. 660; 1 F. & F. 447; 28 L. J., Ex. 322; 5 Jur. (N.S.) 520.

M. stood by and allowed H. to assign goods as his own to the plaintiff, H. having and still continuing to retain possession. The goods were then

seized by the defendant, under a judgment against M. On an interpleader issue between the plaintiff and the defendant, whether the goods were the plaintiff's as against the defendant, the jury found that there was no transfer from M. to H.: —Held, that the defendant was not estopped, and that, as against him, the goods were M.'s when seized. *Ib.*

Of Sheriff.]—Declaration alleging an imprisonment in the remand ward of the Queen's prison. Plea justifying under two writs of execution to the sheriff of York, and a habeas corpus, by which plaintiff was turned over to the defendant as keeper of the Queen's prison. New assignment, that the plaintiff, while in the custody of the sheriff, petitioned the Insolvent Debtors Court; that the petition was referred to the county court, and an order of adjudication made, and a warrant in pursuance thereof delivered to the gaoler of York Castle, ordering that the plaintiff should be discharged, as to the detainer, on the 12th April, 1852; that he was afterwards committed by habeas corpus, with the warrant, to the custody of the defendant, with the detainer; and that, after the 12th April, the defendant imprisoned the plaintiff in the remand ward. Plea, that the plaintiff was not committed to the custody of the defendant with the warrant, and that the defendant had not in his possession the order of adjudication or warrant. It appeared that the plaintiff had caused himself to be removed by habeas corpus to the Queen's prison, a copy only of the warrant being sent with the plaintiff to the keeper of the Queen's prison. The defendant told the plaintiff that he should require an order for his discharge on the 12th April. The plaintiff accordingly applied to the county court judge and a judge at chambers, who refused to make such an order, as being unnecessary: and three days after the 12th April he was discharged without any order. The jury found that the defendant had a copy of the warrant, and acted upon it as his sole authority for the plaintiff's imprisonment, and led the plaintiff to believe that he had, and had acted on, the original warrant:—Held, that the rule of law which prevents a party who makes a wilful misrepresentation, and induces another to act upon a belief in the truth of it to his prejudice, from afterwards proving the truth, did not apply so as to prevent the defendant from proving that he had received only a copy of the warrant, and had acted upon it. *Howard* v. *Hudson*, 2 El. & Bl. 1; 22 L. J., Q. B. 341; 17 Jur. 855; 1 W. R. 325.

The sheriff of a colony is liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of capias ad respondendum, for the damage which results to the plaintiff therefrom. Such return was conclusive at that stage of the proceedings as to the truth of the alleged rescue by the plaintiff, whom it rendered liable to attachment for a contempt of court without being allowed to shew that the facts returned were untrue, and constituted a misfeasance by a public ministerial officer in the discharge of his duties. *Brasyer* v. *Maclean*, 44 L. J., P. C. 79; L. R. 6 P. C. 398; 33 L. T. 1.

S. having obtained a judgment against F., issued a fi. fa. and placed it in the hands of the sheriff for execution, who, on proceeding to make a levy, found the goods claimed by his brother under a bill of sale; S. being informed of this, requested the officer to remain on the premises, which he did until after the goods were sold under the bill of sale, and then at S.'s request withdrew. The sheriff being ruled to make a return to the writ, returned that he had seized the goods and chattels of the debtor and kept them safely until ordered by S. to withdraw from possession. S. thereupon brought an action against the sheriff for not levying, and for making a false return thereto, but on the trial gave no evidence of having sustained any damage by the sheriff's neglect. The defence set up was the validity of the bill of sale, and the jury found that it was valid, and returned a verdict for the sheriff:—Held, that the sheriff was not estopped by the admission in his formal return from setting up as a defence that the goods were not the goods of the debtor at the time of the attempted seizure, and that consequently he had not sustained actual damage, and that the facts were not such as from which the law would imply damage necessarily resulting. *Stimson* v. *Farnham*, 41 L. J., Q. B. 52; L. R. 7 Q. B. 175; 25 L. T. 747; 20 W. R. 183.

A sheriff seized goods to satisfy a fi. fa. upon a judgment of nonsuit for 67*l.*: a person claimed possession of the goods from the sheriff, but the officer refused to give them up except on payment of 97*l.* (the additional 30*l.* being claimed for poundage, expenses, &c.); which sum was paid. The sheriff being ruled to return the writ, returned that he had levied the sum of 67*l.*; in an action brought by the alleged owner of the goods against the sheriff to recover back the 30*l.*: —Held, that the sheriff was not estopped by his return from saying that the excess beyond the 67*l.* was not the plaintiff's money. *Scarfe* v. *Halifax*, 7 M. & W. 288; 10 L. J., Ex. 332.

The defendant having recovered judgment against H., on the 25th of April lodged a writ of fi. fa. with the sheriff. The sheriff neglected to execute the writ until the 11th of May, when he seized the goods of H. and assigned them to the defendant by a bill of sale, which stated the consideration to be 256*l.* paid by the defendant to him. He then returned the fi. fa. Before the seizure the defendant had notice of an act of bankruptcy committed by H. before the 25th of April, upon which a fiat issued in August, and assignees were appointed, who recovered from the sheriff the value of the goods seized, whereupon he brought an action to recover back the money so paid:—Held, that the plaintiff was not estopped by his return from saying that the then title of the debtor was defeated by matter subsequent. *Standish* v. *Ross*, 3 Ex. 527; 19 L. J., Ex. 185.

Direction to Tenant to Pay Rent to Third Person.]—By deed of settlement a farm was conveyed, subject to a term for 1,000 years, to A. for life, with power of leasing for three lives, and with a remainder over which ultimately became vested in the defendants as tenants in tail. The term for 1,000 years had been created for securing a sum of money, and was, at the time of such settlement, vested in two trustees, one of whom was A., the tenant for life under the settlement. A., in exercise of the power of leasing, made a lease of the farm for three lives, under which lease the plaintiff became tenant, subject to the rent which was thereby reserved, and which rent he paid to the defendants or their attorneys, R. & D., upon the defendants coming into possession of the property. Afterwards R. & D., acting as their attorneys, wrote a letter to the plaintiff,

representing to him that the legal estate was in C. under the term for 1,000 years, and directing the plaintiff, as tenant, to pay the rent to C. In consequence of such letter the plaintiff allowed C. to recover judgment against him for rent under one lease. The defendants having afterwards distrained for rent:—Held, that as the term for 1,000 years had merged as to one moiety in A., and the defendants had therefore a right to distrain for a moiety of the rent, the effect of the representation by R. & D. would not estop the defendants from recovering rent which the plaintiff had not paid in consequence of such representation, or had not thereby made himself liable to pay under the judgment obtained against him by C. *Greenish* v. *White*, 11 C. B. (N.S.) 209; 31 L. J., C. P. 93; 8 Jur. (N.S.) 563.

Bill of Sale treated as Valid—Declared to be Invalid.]—Where the grantor of a bill of sale which is afterwards found to be invalid has derived advantage from treating it as valid, he cannot set up its invalidity for the purpose of obtaining a further advantage. *Roe* v. *Mutual Loan Fund Association*, 19 Q. B. D. 347; 56 L. J., Q. B. 541; 35 W. R. 723—C. A. See also *Gandy* v. *Gandy*, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803—C. A.

Accounts Rendered.]—It was the duty of a surveyor to the trustees of turnpike roads to make all contracts, and pay the amounts due, for labour and materials required for the repair of the roads, he being permitted to draw on the treasurer to a certain amount. His expenditure was not strictly limited to that amount, and in the yearly accounts, which it was his duty to present to the trustees, a balance was generally claimed as due to him, and was carried to the next year's account. He rendered accounts for 1856, 1857 and 1858, shewing certain balances due to himself. These accounts were audited, examined and allowed by the trustees at their general annual meeting, and a statement, based on them of the revenue and expenditure of the trust was published as required by 3 Geo. 4, c. 126, s. 78. The trustees, believing the accounts correct, paid off with moneys in hand a portion of their mortgage debt. He afterwards claimed a larger sum in respect of payments which had, in fact, been made by him, and which he ought to have brought into the accounts of the above years, but knowingly omitted. He also rendered an account for 1859, which, on inquiry by the trustees, he stated did not include all the payments, and he subsequently rendered another account for that year, in which he claimed a larger sum as due to him:—Held, first that he was estopped from recovering the sums omitted in the accounts for 1856, 1857 and 1858, since the trustees had acted upon the faith that those accounts were true. *Cave* v. *Mills*, 7 H. & N. 913; 31 L. J., Ex. 265; 8 Jur. (N.S.) 363; 6 L. T. 650; 10 W. R. 471.

Held, secondly, that he was entitled to recover the sums omitted in the account for 1859, since it was not accepted by the trustees as true. *Ib.*

Where the paymaster of a regiment gave credit in a running account with an officer on a foreign station for sums of money, as increased pay and allowances, to which, from a misconstruction of a general order, he supposed the officer was entitled, and after having been apprised by the board of ordnance that such sums would not be allowed, suffered the officer to remain in ignorance of this fact for four years:—Held, in an action by the officer's personal representatives, for pay remaining due, that the paymaster was concluded by the account in which he had erroneously given credit for the increased allowance. *Skyring* v. *Greenwood*, 6 D. & R. 401; 4 B. & C. 281; 1 Car. & P. 517; 28 R. R. 264.

And see *Deutsche Bank* v. *Beriro*, 73 L. T. 669—C. A.

Action on Contract—Fraud of Plaintiff.]—A declaration stated that the plaintiff bought of the defendant divers lots of timber trees, to be felled and removed under certain conditions, and that the defendant would not permit the plaintiff to fell or remove a certain remainder of the lots pursuant to the sale and conditions. The defendant pleaded, first, that before breach the plaintiff felled and carried away and converted divers other trees of the defendant in substitution of the remainder; and, secondly, that before breach the plaintiff fraudulently felled and removed other trees of the defendant not comprised in the lots sold, and to which the plaintiff had no right, and which exceeded in number and value the remainder; that the plaintiff fraudulently pretended that the trees which he so took were the trees which he had purchased; that they were taken in fraudulent substitution of the remainder, and that the plaintiff converted them to his own use:—Held, that these pleas were bad; that they shewed no rescission of the contract, and that the plaintiff was not estopped by his own fraud and trespass from bringing his action on the contract. *Lewis* v. *Clifton*, 14 C. B. 245; 2 C. L. R. 1350; 23 L. J., C. P. 68; 18 Jur. 291; 2 W. R. 230.

Accounts of Bankers—Appropriation.]—A., B. & Co., country bankers, had a cash account with C. & Co., London bankers, who were in the habit of transmitting to the former monthly statements of mutual debits and credits. A. died, leaving a large balance due from himself and B. & Co. to C. & Co., who for two months afterwards made no alteration in their own books as to the mode of keeping the account, but continued it as before. In the interval money was transmitted to C. & Co. from the country bank, sufficient to pay off the balance due from the firm at the time of A.'s death. During the two months no accounts were transmitted to the country bank, but at the end of that time two separate accounts were sent:—Held, that this did not estop C. & Co. from suing the heirs of A., as the entries in their books did not amount to a complete appropriation. *Simson* v. *Ingham*, 3 D. & R. 549; 2 B. & C. 65; 1 L. J. (O.S.) K. B. 234; 26 R. R. 273.

Building Erected on another's Land.]—If a man stands by and allows another to erect a building on his ground, and he afterwards agrees as to the rent to be paid for it, neither the owner of the land, nor any person claiming under him, can dispute the right of the builder to use the land. *Mold* v. *Wheatcroft*, 27 Beav. 510.

In an action for the recovery of land, when the plaintiff endorses a claim for mesne profits, a plea that the defendant never entered into and is not in possession of the land sought to be recovered is a good defence. In an action for the recovery of land, the defendant pleaded that he, several years ago, "by and with the knowledge, approbation and consent of the plaintiff," built a wall for the purpose of making a boundary-

wall between the plaintiff's land and his own, and that the portion claimed was included within the said boundary-wall on his side :—Held, on demurrer, that the plea should be construed as impliedly alleging that the plaintiff had represented to the defendant that the site of the wall was the boundary; and that such representation having been made with the intent of being acted upon, and the defendant having acted upon it by building the wall, the plea was a good defence by way of estoppel. *Sheridan* v. *Barrett*, 4 L. R., Ir. 223.

Misrepresentation that Change of Company only Change of Name.]—T., P. and D., three directors of a company, gave a joint guarantee to bankers to secure the balance which might be due at the closing of their account to the extent of 2,000*l*. In September, 1880, the company went into voluntary liquidation, and immediately recommenced business under the same directors, but as a new company with the addition of the word "manufacturing" to their former title. The termination of the old company was not disclosed to the bankers, who continued their business with the company without intermission, merely putting the addition to the name on the cheques and in their books. P. died in December, 1880. In November, 1881, the new company was wound up, when it was indebted to the bankers, who commenced an action upon the guarantee for the amount due to them :—Held, that T. and D. by not having given notice to the plaintiffs upon the death of P. that they declined to be answerable for any other amount than that which was due at P.'s death, and by their concealment of the fact that a new company had been formed, and by the tenor of their conduct in carrying on the business as before, were estopped from denying their liability upon the guarantee, and were liable to the full amount thereby secured. *Ashby* v. *Day*, 54 L. T. 408; 34 W. R. 312—C. A. Affirming 54 L. J., Ch. 935.

Notice to Treat—Validity.]—The commissioners of sewers, acting under the powers of 57 Geo. 3, c. 29, gave the plaintiff notice to treat for the purchase of his property for the purpose of widening a street. The whole of the property was not required for that purpose, and it appeared that the improvement contemplated was rather lowering the level of, than widening the street. The plaintiff negotiated with the commissioners during eight months on the basis of the notice, and endeavoured to obtain from them as large a price as he could for the property. On his failing to obtain so large a price as he desired he brought an action for an injunction to restrain the commissioners from proceeding on the notice to treat. On motion for an injunction :—Held, the plaintiff during the negotiations had not such knowledge that the commissioners did not bonâ fide want his houses for purposes within their compulsory powers as to preclude him now from objecting to their taking the houses. *Lynch* v. *Sewers Commissioners*, 55 L. J., Ch. 409; 32 Ch. D. 72; 54 L. T. 699; 50 J. P. 548—C. A.

Invalidity cannot be set up when Person takes under Document.]—A tenant by the curtesy of an estate of freehold of inheritance died in 1820, after making a will by which he devised the freehold to trustees in trust for his daughter, Rebecca for life, and after her death to his grandson, B. Annuities were payable under the will, and were paid by Rebecca. The testator died in 1855, and at and after his death Rebecca remained in possession. In 1849 the plaintiff bought of B., the remainderman, all his interest in the freehold. In 1863 Rebecca sold the freehold to the defendant, and in 1872 she died, whereupon the plaintiff demanded possession, and brought an action of ejectment against the defendant to recover possession :—Held, that Rebecca having taken under the will, and having acted under it, would have been estopped from asserting that it was invalid, and that by reason of her possession for twenty years she was entitled to the fee; that the defendant, who claimed through her, was estopped in like manner, and that consequently the plaintiff, who had purchased from B., the remainderman, was entitled to recover from the defendant. *Board* v. *Board*, 43 L. J., Q. B. 4; L. R. 9 Q. B. 48; 29 L. T. 459; 22 W. R. 206.

Semble, where a widow takes under a devise durante viduitate, with remainder to another in fee, and marries, her husband, who enters after the marriage into possession of the same land and continues to occupy it with her, is estopped from denying the title of the devisor to the land. *Asher* v. *Whitelock*, 35 L. J., Q. B. 17; L. R. 1 Q. B. 1; 11 Jur. (N.S.) 925; 13 L. T. 254; 14 W. R. 26.

Notice as to Mode in which Expenses to be Paid.]—The 150th section of the Public Health Act, 1875, permits an urban authority in certain cases to give notice to the owners of premises fronting, adjoining or abutting on such parts of a street as in the judgment of such urban authority require to be sewered, requiring them to do what is necessary within a time to be specified in the notice, and, in the event of non-compliance with the notice, to execute the works themselves; and the same section also provides that such urban authority "may recover in a summary manner the expenses incurred by them in so doing from the owners in default, . . . or may by order declare the expenses so incurred to be private improvement expenses." By s. 213 et seq., a private improvement rate may be levied for expenses declared to be private improvement expenses, and certain advantages are given to owners. A notice given to the appellants, who were owners of premises fronting a street within the meaning of the 150th section, requiring them to do certain sewering works within a prescribed period, and stating that if such works were not executed the urban authority would execute the same themselves at the appellants' expense, thus concluded : "And the said urban authority will thereupon also proceed to declare all costs, charges and expenses paid, expended or incurred by them in consequence of such neglect or default, to be private improvement expenses, and to enforce payment according to law" :—Held, that even assuming the notice to have been good, the concluding portion could not be treated as surplusage, and that it was not, therefore, competent for the urban authority, after their declared intention to treat the expenses incurred as private improvement expenses, to proceed against the appellants summarily for the recovery of such expenses. *Gould* v. *Bacup Local Board*, 50 L. J., M. C. 44; 44 L. T. 103; 29 W. R. 471; 45 J. P. 325.

Permitting User of Easement.]—By indenture of lease of the 23rd of September, 1878, one

Berridge demised to Brett a public-house at Hampstead, "together with all ways, waters, watercourses, drains, cellars, vaults, paths, passages, lights, easements, profits, privileges, commodities, advantages and appurtenances whatsoever to the said premises belonging or in any wise appertaining." At the rear of the premises was a path across the garden to a doorway in the boundary-wall which opened on to a private road (the property of Berridge) leading to Hampstead Heath. On the 1st of October, 1878, Berridge (pursuant to an agreement of November, 1867) granted to the defendant Clowser a lease for ninety-nine years of land which comprised the private road leading from the back of the public-house to Hampstead Heath; and on the 9th of October in that year Clowser built up the doorway in the boundary-wall. This way had, by special agreement between himself and his lessor Clowser, for several years been used by one Haughton, a former tenant of the public-house, whose tenancy had been determined in June, 1878:—Held, that the defendant Clowser was not estopped from denying the existence of the alleged right of way by having allowed Haughton to use it whilst he was the occupier of the public-house. *Brett* v. *Clowser*, 5 C. P. D. 376.

Shipping—Register, Flag and Pass.]—The register, flag and pass of a ship carry with them a presumption that they are true and correct, and the owner is estopped from averring against them. *The Laura*, 2 Moore, P. C. (N.S.) 181; 12 L. T. 685; 13 W. R. 369.

Copyholder and Lord.]—If the heir-apparent of a copyholder in fee surrenders in the lifetime of his ancestor and survives him, the heir of such surrenderor is not estopped by that surrender of his ancestor from claiming against the surrenderee. *Goodtitle* d. *Faulkner* v. *Morze*, 3 Term Rep. 365; 1 R. R. 719.

A copyholder who has been admitted to a tenement, and done fealty to the lord of a manor, is estopped, in an action by the latter for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. *Doe* d. *Nepean* v. *Budden*, 1 D. & R. 243; 5 B. & Ald. 626; 24 R. R. 504.

Receipt of Dividend on Composition—Action for Balance.]—The plaintiffs, who were creditors of the defendant, a trader in insolvent circumstances, took an active part in procuring the acceptance of a scheme of composition of the defendant's affairs, and obtained proxies from the debtor's other creditors. At a meeting of the creditors the plaintiffs withdrew the proof of their debt against the estate of the defendant on the ground that, owing to a fraudulent statement on his part on an earlier occasion, they had been induced to forbear to press their claim against him. They, however, proposed a resolution that a composition of 11*s.* 3*d.* in the pound should be accepted in satisfaction of the debts due from the debtor, and by using the proxies held by them they carried the resolution. A dividend of 11*s.* 3*d.* in the pound was received by the plaintiffs on their proof. They subsequently brought their action in the county court for the unpaid balance of their debt, and the county court judge gave a verdict and judgment for the amount claimed. The defendant obtained a rule nisi to set aside the verdict and judgment and for a new trial:—Held, on the argument of the rule, that the plaintiffs, having acted as they had done, had assented to the composition otherwise than by proving their debt and accepting a dividend on it, and that they could not maintain an action for the unpaid balance of their debt, and that judgment should be entered for the defendant. *Thorp* v. *Dakin*, 52 L. T. 856.

Receipt of Money under Deed bars Repudiation of Execution.]—Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to $73,531, and it appeared that subsequently thereto they received a sum of money from the trustee by virtue of their execution of the deed:—Held, that the plaintiffs were bound, and that, as they had received payment under the deed, they could not be heard to repudiate it, and deny their execution. *Yarmouth Exchange Bank* v. *Blethen*, 10 App. Cas. 293; 54 L. J., P. C. 27; 53 L. T. 537; 33 W. R. 801—P. C.

Jus tertii — Payment of Rent.]—Where a person claiming to be assignee of the reversion receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is primâ facie evidence of title, and the tenant can only defeat that title by shewing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion, and entitled to maintain ejectment. *Carlton* v. *Bowcock*, 51 L. T. 659.

—— Execution Debtor—Claimant in Interpleader.]—A mere estoppel, which precludes the execution debtor from denying the title of the claimant in an interpleader proceeding, confers no title upon the claimant as against the execution creditor. *Richards* v. *Johnson* (28 L. J., Ex. 322), followed. *Richards* v. *Jenkins*, 56 L. J., Q. B. 293; 18 Q. B. D. 451; 56 L. T. 591; 35 W. R. 355—C. A.

Agreement by Rector as to Tithes.]—A rector, having come to an agreement with his parishioners for tithes, cannot in equity set up his own non-residence to avoid the agreement. *Atkinson* v. *Folkes*, 1 Anst. 67; 3 R. R. 548.

Fictitious Legal Title—Priorities.]—In 1873, D., in order to carry out a fraudulent scheme, obtained a transfer to himself of mortgages of freehold property, and after various dealings with it the legal estate was, in September, 1875, conveyed by a mortgagee to H. in trust for M., and in March, 1876, by H. to M. M. was alleged to have been an accomplice of and trustee for D. In August, 1874, in pursuance of this scheme, T., claiming to be entitled to this property under a fictitious lease for ninety-eight years, purporting to have been granted to him in March, 1870, by a merely fictitious freeholder (an agent and accomplice of D.), demised the property by way of mortgage to A. In November, 1874, M., claiming to be entitled to the same property under a fictitious lease for ninety-nine years, also dated March, 1870, and purporting to be granted to him by T., demised the property by way of mortgage to B., the mortgage deed being executed by M. only. In January, 1877,

M. (to whom the legal estate had been conveyed in March, 1876) deposited the genuine title deeds of the property with C., upon a memorandum charging his estate and interest in the lands comprised in the deeds and a statutory declaration of title; and further advances were made to M. and D., who came forward and stated that M. was merely a trustee for him of the property. In 1878 D., M. and T. were convicted and sentenced to penal servitude for forgery and fraud in connection with this property, and C., as equitable mortgagee, entered into possession. In an action by A. to settle the priorities of himself, B. and C. as incumbrancers on the property:—Held, (1) that assuming T. to have been the agent of D., so that his representations to A. of having a good title were binding on D., such representations, followed by the acquisition of the property beneficially by D., did not bind the estate so as to give A. prior equitable charge as against subsequent purchasers for value without notice; (2) that the like representations of M. to B., followed by the acquisition, first of the equitable, and afterwards of the legal estate by M., did not put B. in any better position, and that the doctrine of estoppel did not apply so as to convert the fictitious title acquired by B. from M., in November, 1874, into a valid legal title ab initio upon the conveyance of the legal estate to M. in March, 1876; (3) that as purchaser for value without notice by deposit of the genuine title deeds, C., though subsequent in date, was entitled in priority over A. and B. *Keate* v. *Phillips*, 50 L. J., Ch. 664; L. R. 18 Ch. D. 560; 44 L. T. 731; 29 W. R. 710.

Admission of Annuity by Grantor—Devisee of Grantor.]—The grantor of an annuity had admitted, in his answer to a bill in chancery, that the annuity was a subsisting charge on his estates, and the decree and proceedings in the suit had treated the annuity as valid. Under those circumstances the grantor's devisee was restrained from proceeding at law to set aside the annuity for want of a memorial. *Roberts* v. *Madocks*, 13 Sim. 549.

Creditor suppressing his Debt.]—Creditor, by suppressing his debt inducing another person to enter into a contract, not permitted to set up the debt, even against the person in whose favour and at whose instance he made the suppression. *Dalbiac* v. *Dalbiac*, 16 Ves. 125.

Estate sold subject to Lease—Seller impeaching Lease.]—Quære, whether, if an estate be sold subject to a lease, the seller can afterwards impeach the lease, unless he can at the same time impeach both the sale and the lease. *Muskerry* v. *Chinnery*, Ll. & G. t. Sugd. 185. *Sheehy* v. *Muskerry*, 7 Cl. & F. 1; Macl. & R. 493; Ll. & G. t. Plunk. 568.

Cost-book Mine — Forfeiture of Shares — Laches.]—At a meeting of the partners in a cost-book mine, held in 1874, it was stated that the mine was 2,003*l.* in debt, and a call of 25*l.* was made upon each of the six shares in the mine. Two of the partners did not pay this call, and were in arrear for other calls. At subsequent meetings in June, 1874, the shares of these partners were declared to be forfeited. These two partners took no steps as to the mine until July, 1879, when they made a claim, and in September, 1880, they brought an action, alleging that the shares had not been regularly forfeited, and claiming to be still partners. It appeared that the mine was in debt in 1878:—Held, that even assuming the shares not to have been regularly forfeited, the plaintiffs, under the circumstances, could not, after lying by for more than six years, successfully assert their claim to be partners. *Clarke* v. *Hart* (6 H. L. Cas. 633) distinguished. *Rule* v. *Jewell*, 18 Ch. D. 660; 29 W. R. 755.

13. Pleading.

When Necessary.]—Matter of estoppel in pais may be pleaded. *Sanderson* v. *Collman*, 4 Man. & G. 209; 4 Scott (N.R.) 638; 11 L. J., C. P. 270.

An estoppel in pais in general need not be pleaded to make it obligatory, and it binds the jury as well as the parties, whatever be the form of pleading. *Freeman* v. *Cooke*, 6 D. & L. 187; 2 Ex. 654; 18 L. J., Ex. 114; 12 Jur. 777.

A replication by way of estoppel may be replied to a plea of liberum tenementum; and if the plaintiff does not avail himself of that liberty, but merely joins issue on the plea, the matter, which might have been so replied, is not conclusive evidence in his favour, but is merely evidence to go to the jury. *Faversham* (*Lord*) v. *Emerson*, 11 Ex. 385; 24 L. J., Ex. 254; 3 C. L. R. 1379.

Contents.]—A committee of a company was empowered, by a deed executed by the defendant and others, to certify what sum was necessary for discharging the debts of the company, and their certificate was to be conclusive as to the amount. The committee certified that the sum of 17,986*l.* was necessary, and that the sum of 529*l.* was the defendant's proportion, which he was called on to pay to the plaintiff, as trustee under the deed; of the 529*l.*, the defendant had paid 150*l.*, under a former certificate to the same effect, and he was told that credit would be given him for that payment. In an action for the 529*l.*, the plaintiff having joined issue on a traverse of an allegation, that "the committee had certified, as the fact was," that the sum of 17,986*l.* was required for payment of the debts of the company:—Held, that the defendant was not estopped from shewing that by reason of this payment of the 150*l.*, the fact was not that 17,986*l.* was required as aforesaid. *Wilson* v. *Butler*, 4 Bing. (N.C.) 748; *S.C.*, 6 Scott, 540; 1 Arn. 333; 8 L. J., C. P. 143.

Admission in Defence in another Action.]—An admission contained in a defence in one action cannot properly be treated as conclusive in other proceedings between the same parties, but on a different issue. *Walters, In re, Neison* v. *Walters*, 61 L. T. 872. Reversed on a different point 63 L. T. 328—C. A.

Declaration of Contract and Tender.]—When a declaration shews substantially a contract, and a tender in compliance with it, the plaintiff is not estopped from contending for the true interpretation of the contract by the fact that he has also set out in his declaration an alternative case of a tender which would not have been a compliance. *M'Connel* v. *Murphy*, L. R. 5 P. C. 203.

E. ESTATES BY.

Agreement to sell Land not Property of Vendor.]—Effect of an agreement to sell land, not then the property of the vendor, but which afterwards became his. *Morse* v. *Faulkner*, 3 Swanst. 429. And see *Carne* v. *Mitchell*, 15 L. J., Ch., 287; 10 Jur. 909, and col. 466.

J. S., under the belief that he had the fee simple in an estate subject to a life interest in his mother, conveyed all his interest to trustees, for the benefit of his creditors. The conveyance contained covenants for title and for further assurance. It turned out, that at the time of the conveyance the mother had the fee simple, which upon her death descended to J. S. as her heir-at-law:—Held, that though no estate passed by the conveyance, yet the transaction amounted to a contract for sale of the specific estate, and that J. S., unless he could set aside the contract for fraud, was in equity compellable to carry it into execution. *Smith* v. *Baker*, 1 Y. & Coll. C. C. 223.

Contract by Trustees under Power of Sale.]—Contract by trustees under power of sale, though by subsequent events it cannot be executed under the power, shall be made good in equity by the effect of the interest acquired on the estate bound by the contract. *Mortlock* v. *Buller*, 10 Ves. 315. Affirmed 2 Dow, 518.

Agreement to grant Lease.]—A. made an equitable mortgage to B., and afterwards agreed to grant a lease to C., who had notice of the mortgage. B. afterwards purchased the equity of redemption with notice of C.'s agreement, and took a conveyance to himself:—Held, that B. was bound out of his whole interest to grant the lease to C. *Smith* v. *Phillips*, 1 Keen, 694; 6 L. J., Ch. 253.

If a person of age grants a lease, having nothing in the premises, and the lands afterwards descend to him, the lease shall enure by way of estoppel. Sed secus in the case of an infant. *Smith* v. *Low*, 1 Atk. 489.

Replacing Destroyed Interest by New.]—A contingent remainderman conveyed his interest to secure his debt; the remainder was afterwards destroyed by the tenant of the prior estate. The remainderman afterwards acquired a new interest in the property under the will of that tenant:—Held, that it was available to the creditor. *Noel* v. *Bewley*, 3 Sim. 103.

Conveyance by way of Lease and Release.]—A conveyance by lease and release does not operate by way of estoppel. *Stackpoole* v. *Stackpoole*, 2 Con. & L. 489; 4 Dr. & War. 320; 6 Ir. Eq. R. 18. S. P., *Loyd* v. *Loyd*, 2 Con. & L. 592; 4 Dr. & War. 354.

Conveyance by lease and release will operate as an estoppel, and where the releasee can have the benefit of the conveyance at law. A court of equity will not interfere in his behalf. *Bensley* v. *Burdon*, 2 Sim. & S. 519; 4 L. J. (o.s.) Ch. 164. Affirmed 8 L. J. (o.s.) Ch. 85.

Fine.]—Lands are devised to A. and B., and to the heirs of the survivor in trust to sell; though the inheritance be in abeyance, yet the trustees, by a fine, may make a good title by estoppel. *Vick* v. *Edwards*, 3 P. W. 372.

Forged Deed of Title.]—S. agreed with E. for the purchase from him of lands sold in the Irish Incumbered Estates Court, but not yet conveyed. Part of the consideration for the purchase was to be a bill of exchange, accepted by a bank. S. forged a conveyance from the Incumbered Estates Court to persons from whom he traced title to himself, and executed a conveyance to W., reciting the forged conveyance, as if genuine. Afterwards, the Incumbered Estates Court executed a conveyance to S., reciting the purchase money to be E.'s:—Held, that under the genuine deed, an interest in the land passed by estoppel to W., and that E. had not a lien for the amount of the bill of exchange. *Eyre* v. *Sadleir*, 15 Ir. Ch. R. 1.

Demise of Term on Trusts—Subsequent Devise of Fee.]—The owner of the equity of redemption in a mortgaged estate demised the estate to a trustee for a term, upon certain trusts, and afterwards devised the same estate in fee. The devisees, having contracted to sell the estate to a purchaser, paid off the mortgage, took a reconveyance to the uses of the will and conveyed the estate to the purchaser, who had no notice of the term. A bill filed by the cestui que trust under the demise against the trustee of the term and the purchaser for administration of the trust, was dismissed by the vice-chancellor on the ground that there was no term by estoppel in the trustee; and on appeal the Lord Chancellor affirmed the decision, but without prejudice to any question that might be raised at law, being of opinion that the question of estoppel was a question for a court of law, and that there was no equity against the purchaser if the legal estate was in him. *Clemow* v. *Geach*, 40 L. J., Ch. 44; L. R. 6 Ch. 147; 19 W. R. 53.

E. M.

ESTOVERS.

See COMMON—WASTE.

ESTREAT.

See CRIMINAL LAW (RECOGNIZANCE).

EVIDENCE.

BY J. RITCHIE.

I. ADMISSIONS, DECLARATIONS AND ENTRIES.

1. *Admissions.*
   - *a.* By Parties Themselves.
     - i. In what Capacity, 498.
     - ii. By Conduct, 499.
     - iii. On what Occasions, 502.
     - iv. Extent and Effect of, 505.
   - *b.* By Wife, 508.
   - *c.* By Agents and Servants.
     - i. Capacity, 510.
     - ii. Letters of, 513.
   - *d.* By Persons referred to, 515.
   - *e.* By Counsel, 516.
   - *f.* By Solicitors, 517.
   - *g.* By Co-Defendant, 518.
   - *h.* By Executor, 519.

i. By Co-Trespassers or Co-Conspirators, 519.
j. Admissions without Prejudice, 519.

2. *Declarations.*
a. In General, 520.
b. Of Deceased Persons, 521.
c. Representative Parties, 527.
d. Testators, 528.
e. Of Parties formerly Interested, 530.
f. Of Attesting Witnesses, 532.
g. In Questions of Pedigree.
i. Who may make Declarations, 533.
ii. Post litem motam, 538.
iii. For what Purpose, 540.
h. Reputation as to Boundaries and Easements, 542.
i. Reputation as to Individuals, 548.
j. Dying Declarations—*See* CRIMINAL LAW.

3. *Entries.*
a. Of Deceased Persons generally, 549.
b. Particular Persons.
i. Tradesmen and Merchants, 553.
ii. Solicitors, 554.
iii. Partners, Clerks and Agents, 556.
iv. Stewards, Receivers and Collectors, 559.
v. Parties formerly Interested, 563.
vi. Other Persons, 564.

II. PRESUMPTIONS.
1. *Right to Land, Easements, &c.*, 566.
2. *As to Identity*, 573.
3. *Of Birth, Legitimacy, Sanity and Life*, 575.
4. *Of Death and Survivorship*, 576.
5. *As to Documents.*
a. Stamp, 588.
b. Execution, 589.
c. Date, 590.
d. Erasures, Alterations and Interlineations, 590.
6. *Acting in Offices*, 592.
7. *As to other Matters*, 593.
8. *Matters Judicially Noticed*, 599.

III. DOCUMENTARY EVIDENCE.

a. Public and Official Documents.

1. *Journals and Acts of Parliament*, 603.
2. *Gazettes*, 604.
3. *Acts of State*, 605.
4. *Foreign, Colonial and Indian Documents and Laws*, 606.
5. *Certificates*, 613.
6. *Ancient Surveys and Terriers*, 616.
7. *Parish Registers*, 620.
8. *Non-Parochial Registers*, 622.
9. *Registrar-General's Certificates of Births, Deaths and Marriages*, 624.
10. *Foreign Registers of Births, Deaths and Marriages*, 624.
11. *Other Registers.*
a. Trade Marks, 625.
b. Patents—*See* PATENT.
c. Ships—*See* SHIPPING.
d. Land—*See* DEEDS.
12. *Parish Books*, 626.
13. *Orders of Poor Law Commissioners*, 628.
14. *Books of Quarter Sessions*, 629.
15. *Bankers' Books*, 629.
16. *Books of other Companies and Corporations*, 632.
17. *Probate and Letters of Administration*, 635.
18. *Log Books*, 637.
19. *Lighthouse Journals*, 638.
20. *Court Rolls*, 638.
21. *Revenue Books*, 641.
22. *Other Public Books*, 642.
23. *Other Public Documents*, 644.
24. *Examined and Certified Extracts an Copies*, 646.

b. Judicial Documents.

1. *Proceedings at Law.*
a. Judgments, 648.
b. Verdicts, 650.
c. Records, 651.
d. Rules and Orders of Court, 652.
e. Writs, Warrants and Returns, 653.
2. *Proceedings in Chancery.*
a. Decrees and Orders, 655.
b. Bills and Answers, 658.
c. Depositions, 663.
3. *Proceedings in County Courts*, 669.
4. *Proceedings before Magistrates.*
a. Orders, 669.
b. Commitments and Convictions, 670.
c. Depositions, 672.
d. Statements of Parties, 673.
5. *Proceedings in other Courts*, 673.
6. *Inquisitions*, 675.
7. *Depositions before Commissioners — See* post VII. 14.

c. Other Documents.

1. *Letters.*
a. Date, 677.
b. Posting and Delivering, 678.
c. Contents, 681.
d. Putting in and Reading, 682.
e. Copies and Drafts, 685.
f. Construction, 687.
g. Proof by Antiquity, 688.
2. *Brief and Case of Counsel*, 688.
3. *Cheques and Counterfoils*, 688.
4. *Receipts*, 689.
5. *Advertisements*, 695.
6. *Family Writings and Papers*, 696.
7. *Mural and Monumental Inscriptions*, 698.
8. *Ancient Leases, Agreements and Title Deeds*, 699.
9. *Plans and Maps*, 701.
10. *Wills*, 705.
11. *Deeds*, 709.
12. *Telegrams*, 714.
13. *Historical, Literary and Scientific Books*, 714.
14. *Photographs*, 715.
15. *Newspaper Reports*, 715.
16. *Account Books*, 715.

d. Parol Evidence to Explain Documents

1. *Ambiguity*, 718.

2. *Particular Words, Terms and Phrases*, 725.
3. *Reference to other Documents*, 730.
4. *As to Subject-matter of Contracts*, 732.
5. *As to Parties*, 735.
6. *To Vary or Explain Operation of Contracts*, 738.
7. *As to Consideration*, 746.
8. *Usages and Customs of Country*, 749.
9. *Usages and Customs of Trade.*
   a. Principle of Admissibility, 752.
   b. What Customs, 754.
   c. As to Parties to Contracts, 756.
   d. Mode, Amount and Time of Payment, 759.
   e. Quality and Description of Goods, 761.
   f. Invoices, Bills of Lading, Charter-parties and Insurance Policies, 762.
10. *As to Terms of Deed*, 770.
11. *Judicial Proceedings and Records*, 773.
12. *Erasures or Alterations*, 774.

e. Secondary Evidence as to Documents.

1. *When Originals Necessary*, 774.
2. *When Originals Lost or Destroyed*, 779.
3. *Proof of Search*, 783.
4. *Proof of Stamp*, 787.
5. *Originals not Capable of Production*, 787.
6. *What is Good Secondary Evidence*, 789.

IV. PRODUCTION AND ADMISSION OF EVIDENCE.

1. *In General.*
   a. Function of Judge, 797.
   b. Facts in Issue or Relevant to the Issue, 800.
   c. Burden of Proof, 809.
   d. In Reply, 812.
   e. Summing up, 814.
2. *Where Evidence in Writing*, 815.
3. *Notice to Produce Documents.*
   a. When Necessary, 819.
   b. Proof of Identity or Character of Document, 822.
   c. Form of Notice, 823.
   d. Service of Notice, 823.
   e. Documents in Hands of Third Party, 827.
   f. Consequence of Production, 829.
   g. Consequence of Non-Production, 830.
4. *Notice to Admit*, 832.
5. *Putting in Documents*, 835.
6. *Admissibility of Unstamped Documents.*
   a. Generally, 835.
   b. On Payment of Penalty, 839.
   c. Secondary Evidence, 840.
   d. Time of Stamping, 843.
   e. Objections and Proof, 844.
   f. Decision as to, 846.
7. *Attesting Witnesses to Documents.*
   a. When necessary, 847.
   b. Witness denying Attestation, 851.
   c. Witness Dead, Absent, or Incapacitated, 851.
   d. Where Party Claims an Interest, 852.
   e. After Notice to Produce, 853.
   f. What must be Proved, 853.
   g. Declarations of—*See* ante, I. 2, f.
8. *Impounding Documents*, 854.

V. ATTENDANCE OF WITNESSES.

1. *Process.*
   a. Subpœna generally, 854.
   b. Witness in Scotland or Ireland, 856.
   c. Prisoners, 857.
   d. Crown Office, 858.
   e. Issuing from Quarter Sessions, 858.
2. *Service*, 858.
3. *Subpœna duces tecum.*
   a. Generally, 859.
   b. In Case of Solicitors, 864.
4. *Order for Attendance of Witnesses*, 868.
5. *Order for Attendance to Produce during Proceedings*, 869.
6. *Expenses and Conduct-money.*
   a. Tender and Payment, 870.
   b. Remedy of Witness, 872.
7. *Allowance on Taxation of Costs.*
   a. Parties, 874.
   b. Professional Witnesses, 876.
   c. Foreign Witnesses, 879.
   d. Material or Otherwise, 880.
   e. Expenses, 886.
8. *Remedy for Non-Attendance.*
   a. Attachment, 889.
   b. Action, 892.
   c. Assessment of Recompense by Court, 894.
9. *Protection from Arrest*, 894.

VI. EXAMINATION OF WITNESSES.

1. *Competency.*
   a. Want of Reason or Religion, 895.
   b. Parties, 896.
   c. Husband and Wife, 896.
   d. Other Cases, 897.
2. *Sufficiency*, 898.
3. *Swearing*, 902.
4. *Examination*, 905.
5. *Ordering out of Court*, 908.
6. *Refreshing Memory*, 909.
7. *Opinion.*
   a. In General, 912.
   b. As to Handwriting, 916.
8. *Privilege.*
   a. Legal Professional Confidence.
      i. Counsel, 923.
      ii. Solicitors, 923.
   b. Tendency to Criminate, 936.
   c. Public Policy, 942.
   d. Other Grounds, 945.
9. *Leading Questions*, 947.
10. *As to Contents of Written Documents*, 947.
11. *Cross Examination*, 950.
12. *Recalling*, 956.
13. *Re-Examination and Reply*, 957.
14. *Impeachment of Credit.*
   a. Generally, 959.
15. *Perjury*, 969.
   b. Evidence in Contradiction, 959.
   c. Evidence as to Character, 964.
   d. Party's own Witness, 966.

VII. Examination of Witnesses under Commission or Mandamus.
1. *Jurisdiction generally*, 969.
2. *Writ of Mandamus.*
a. In General, 970.
b. To India under 13 Geo. 3, c. 63, s. 40, 970.
3. *When Witness Abroad.*
a. When Granted, 972.
b. Time of Application, 979.
c. Stay of Proceedings 981.
d. Form of Application and Order, 981.
4. *When Witness within Jurisdiction.*
a. Examination De Bene Esse.
i. General Principles, 986.
ii. In what Cases, 986.
iii. Order for, 990.
iv. At what Stage, 993.
v. Publication and user of Depositions, 994.
b. Examination Pro Interesse Suo, 996.
5. *The Commissioners.*
a. Who may be, 997.
b. Examination of, 1000.
c. Fees, 1001.
d. Misconduct, 1002.
e. Oath and Qualifying, 1003.
6. *Form of Commission*, 1003.
7. *Compelling Attendance of Witnesses*, 1005.
8. *Execution of Commission*, 1006.
9. *Notice of Proceedings*, 1013.
10. *Return of Commission.*
a. In General, 1015.
b. Form, Signature and Amendment, 1015.
c. Time for, 1016.
11. *Quashing, Abatement and Discharge of Commission*, 1017.
12. *Second Commission*, 1018.
13. *Lost Commission*, 1020.
14. *Depositions.*
a. Form, Title and Signature, 1020.
b. Admissibility, 1023.
c. Amendment of, 1031.
d. Suppressal of.
i. For Irregularity, 1032.
ii. Where Answers Prepared before Examination, 1034.
iii. Other Grounds, 1036.
iv. Practice on, 1037.
15. *Costs*, 1038.

VIII. Perpetuation of Testimony.
1. *General Principles*, 1040.
2. *Action for, when Proper*, 1041.
3. *Taking Evidence*, 1043.
4. *Publication and user of Depositions*, 1045.
5. *Pleading*, 1047.
6. *Dismissal of Action for want of Prosecution*, 1048.

IX. Evidence on Affidavit.
1. *Before whom Taken.*
a. In England, 1050.
b. In Scotland, 1053.
c. In Ireland, 1053.
d. Abroad, 1054.
2. *By whom Made*, 1057.
3. *Title*, 1058.
4. *Contents.*
a. Certainty, 1062.
b. Information and Belief, 1065.
c. Addition and Description of Deponent, 1066.
d. Signature, 1069.
5. *Jurat*, 1069.
6. *When Stale*, 1073.
7. *Of Merits*, 1074.
8. *Filing*, 1075.
9. *Taking off File*, 1081.
10. *Exhibits*, 1084.
11. *Office Copies*, 1085.
12. *User of.*
a. Generally, 1086.
b. Notice to Read, 1090.
c. Leave to Read, 1090.
d. Containing Irrelevant or Scandalous Matter, 1093.
e. Fresh Evidence and in Reply, 1094.
f. Consent to Trial by, 1098.
g. Cross-Examination, 1099.
h. Other Cases, 1109.

X. Costs of Evidence.
1. *Of Witnesses—See* supra V. 6 and 7; VII. 7.
2. *Of Preparation for Trial*, 1111.

I. ADMISSIONS, DECLARATIONS AND ENTRIES.

1. Admissions.

a. By Parties Themselves.

i. *In what Capacity.*

Trustee.]—A defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, although such plaintiff appears to be only trustee for a third person. *Bauerman* v. *Radenius*, 7 Term Rep. 663; 2 Esp. 653. And see *Lane* v. *Chandler*, 3 Smith, 73; *Duke* v. *Aldridge*, 7 Term Rep. 665; 11 East, 584, n.

Cestui que Trust.]—In an ejectment by a trustee in fee, and by a cestui que trust for life, the question was as to parcel or no parcel; no evidence was offered on the demise by the cestui que trust, but the defendant tendered in evidence, a deed by the cestui que trust (who had been in possession), as an admission by a party substantially interested in the suit:—Held, that as the deed was not clearly and unambiguously against the interest of the cestui que trust, and as it appeared by it that she obtained an advantage under the deed, there was a balance of interest, and her declaration was admissible. *Doe* d. *Rowlandson* v. *Wainwright*, 3 N. & P. 598; 8 A. & E. 691; 1 W. W. & H. 508; 7 L. J., Q. B. 222; 3 Jur. 7.

In order to let in the declarations of a cestui que trust as evidence against his trustee, in an action in which the trustee is the plaintiff on the record, it must clearly appear that the action is brought for the benefit of such cestui que trust. *May* v. *Taylor*, 6 Man. & G. 261; 6 Scott (N.R.) 974; 12 L. J., C. P. 314; 7 Jur. 515.

A declaration made by a person who afterwards assumes and is sued in the character of administratrix cannot be used in equity as an admission made by a party in the cause; and this although she may combine the character of cestui que trust

with that of administratrix. *Legge* v. *Edwards*, 25 L. J., Ch. 125 ; 4 W. R. 71.

Guardian.]—Where a minor sues by his guardian, the declaration of the guardian is not evidence against the plaintiff. *Cowling* v. *Ely*, 2 Stark, 366 ; 20 R. R. 694.

Neither are declarations of a prochein amy, made before action, admissible for the defendant. *Webb* v. *Smith*, R. & M. 106 ; 1 Car. & P. 337.

Representation.]—The declarations of a party suing as a representative of others, made before he became such, are evidence. *Smith* v. *Morgan*, 2 M. & Rob. 257. Contra, *Fenwick* v. *Thornton*, M. & M. 51 ; and *Huntley* v. *St. George's Insurance Co.*, 7 W. R. 51. And see *Metters* v. *Brown*, 1 H. & C. 691 ; 32 L. J., Ex. 138, 140 ; 9 Jur. (N.S.) 416 ; 7 L. T. 795 ; 11 W. R. 429.

In an action against several, a statement made by one is receivable, as the plaintiff may proceed by steps to fix each separately. *Whitford* v. *Tutin*, 6 Car. & P. 228 ; 4 M. & Scott, 166 ; 10 Bing. 395 ; 3 L. J., C. P. 106.

Substituted Defendant.]—An action was brought against A., who was a shareholder in a company, to recover the price of goods supplied to the company, to which he pleaded the general issue. After the action an order was made under 11 & 12 Vict. c. 45, for the dissolution and winding-up of the company, and B. was appointed official manager. The plaintiff having obtained leave from the Court of Chancery to take proceedings at law, a judge's order was made to substitute B. as the defendant in the action instead of A. ; and a suggestion was entered on the record accordingly, which stated that "the action was commenced and had thence hitherto been prosecuted against A., as a person authorised to be sued as the nominal defendant on behalf of the company :—Held, that acts and declarations of A., while he was the defendant on the record, were not receivable on the trial. *Armstrong* v. *Normandy*, 5 Ex. 409 ; 19 L. J., Ex. 343 ; 14 Jur. 579.

Where Defendant not Called.]—Although, where there is no evidence in itself to affect a defendant, the mere fact that he is not called as a witness is not sufficient to sustain a verdict against him ; yet if there is some evidence against him (as an implied admission on his part), then the circumstance that he is not called to explain it may be enough to turn the scale and sustain the verdict. *M'Kewen* v. *Cotching*, 27 L. J., Ex. 41 ; 6 W. R. 16.

In an action for conversion of a bill of exchange, it being proved that the defendant had said, in answer to a demand for it, that he could not give it up because it had been burnt, and he not being called as a witness :—Held, that the case was rightly left to the jury, and that their verdict for the plaintiff was justified by the evidence. *Ib.*

ii. *By Conduct.*

Admitting Validity of Award.]—A trespasser inclosed and occupied a piece of land, part of the waste at a roadside. Before he had been in possession twenty years an inclosure act was passed, and an award made, by which the piece of land was treated as part of the waste of the manor, and allotted to the owner of the adjoining freehold, who admitted the validity of the award, by entering upon other lands part of the same waste under the award :—Held, that such admission, being against the interest of the person making it, was evidence that the land in question had been part of the waste of the manor, and that, therefore, the prescription by which the trespasser and his successors could claim the land against the adjoining owner ran from the date of the award, and not from the date of the trespass. *Redman* v. *Gery*, or *Gery* v. *Redman*, 45 L. J., Q. B. 267 ; 1 Q. B. D. 161 ; 24 W. R. 270.

In an action for work, to which the defendant pleads the general issue, a statement made by the plaintiff that the claim which forms the subject of the action was referred to an arbitrator, who found, by his award, that nothing was due to the plaintiff, is evidence against him under the issue raised by that plea. *Murray* v. *Gregory*, 5 Ex. 468 ; 19 L. J., Ex. 355 ; 14 Jur. 555.

Requesting Witnesses to make False Statements.]—The fact that one of the parties to an action, who is not himself examined as a witness, has requested other persons to make false statements at the trial, may be proved as evidence against his whole case, as being equivalent to an admission by him that it is not a good and genuine case. And it makes no difference that the party thus attempting to procure false testimony is bringing the action not on his own account, but for injuries done to his wife. *Moriarty* v. *L. C. & D. Ry.*, 39 L. J., Q. B. 109 ; L. R. 5 Q. B. 314 ; 22 L. T. 163 ; 18 W. R. 625.

In an action by husband and wife, for an injury to the wife by the negligence of a railway company, witnesses were called by the company, who proved that the husband and a clerk in the office of the plaintiff's attorney had joined in requesting them to give evidence in support of their case, although they knew that the witnesses were not present at the accident :—Held, that the evidence ought to be received, as amounting to an admission, by conduct, that the plaintiff's case was not a good and genuine one. *Ib.*

Statements within Hearing.]—A statement made in the plaintiff's hearing, although not in her presence, is evidence against her. *Neile* v. *Jakle*, 2 Car. & K. 709.

The plaintiff brought two actions against the defendant, one for breach of promise of marriage, the other for money laid out in the purchase of dresses at the request of the defendant. The verdict in the former action passed for the defendant, the plaintiff failing to prove the promise. The second action was referred, and in her evidence on the reference, the plaintiff made certain statements in the presence of the defendant tending to prove the supposed promise, and which he was not called to contradict :—Held, that this could not be considered as legitimate evidence against him in the way of implied admissions in the action for breach of promise of marriage. *Thomas* v. *Shirley*, 11 W. R. 21.

Receiving Letters.]—Letters making a demand on the defendant, which he did not answer, but in an interview with the writer gave an unsatisfactory account of the demand made in them, admissible against him, though they contain statements of fact shewing how the demand arose. *Gaskill* v. *Skene*, 14 Q. B. 664 ; 19 L. J., Q. B. 275 ; 14 Jur. 597.

A letter received from a third person and given by the plaintiff to the defendant, is not evidence against the plaintiff. *Cottle* v. *Champion*, 2 Peake, 45.

But letters found in a bankrupt's possession are evidence to shew that he received information that the fact mentioned in the letters took place. *Cotton* v. *James*, M. & M. 277 ; 3 Car. & P. 505.

The plaintiff and J. were engaged in some work for which they contended defendant was liable. T., son of J., wrote a letter to defendant, which he signed for plaintiff and J. Defendant addressed a reply to J. Plaintiff admitted having seen it :—Held, that this reply was properly admitted against him. *Carne* v. *Steer*, 5 H. & N. 628 ; 29 L. J., Ex. 281 ; 2 L. T. 198.

So a letter from the plaintiff's attorney to the defendant, coupled with the fact that it has not been answered, may be evidence against him. *Keen* v. *Priest*, 1 F. & F. 314.

The plaintiff having written a letter to the defendant, which the latter did not answer, the plaintiff's counsel at the trial called for it under a notice to produce, and wished to give evidence of its contents :—Held, that such evidence was not admissible ; but that if by the letter the plaintiff demanded a certain sum, so much only of the copy of it might be read as stated the sum demanded. *Fairlie* v. *Denton*, 3 Car. & P. 103.

Sanity of Testator.]—Upon a question as to the general sanity of a devisor, letters addressed to him in his lifetime, by persons since dead, who were well acquainted with him, and found amongst his papers after his death, with the seals unbroken, and in which he is addressed as a person of sound mind, are not evidence, unless it is shewn that the devisor answered such letters, or did some other act in relation to them. *Doe* d. *Tatham* v. *Wright*, 6 N. & M. 132 ; 1 H. & W. 729 ; 5 L. J., K. B. 124. *S. C.*, 7 A. & E. 313 ; 7 L. J., Ex. 340—Ex. Ch.

Payment of Money.]—Payment of money, though evidence against the payer, of the title of the party receiving it, is not evidence against the receiver, that the payer was the party bound to pay it. *James* v. *Biou*, 2 Sim. & S. 600.

Payment into Court.]—There is no difference as to the extent of an admission by the payment of money into court under the old practice with a plea of non-assumpsit as to the remainder, and a payment of money into court as pleaded under the new rule, with a denial that plaintiff suffered damage beyond the sum so paid in, and concluding with a verification. *Lucey* or *Lucy* v. *Walrond*, 3 Bing. (N.C.) 841 ; 5 Scott, 49 ; 6 L. J., C. P. 290.

Presence at Meeting.] — In an action by the plaintiffs for work done, as engineers for a railway company, of which the defendant was a member of the provisional committee, the plaintiffs gave in evidence certain resolutions of the committee made at meetings, at which the defendant was present. The defendant offered in evidence a resolution, to the effect that engineers should be employed, but that the members of the provisional committee were not to incur any personal responsibility ; but at that meeting the plaintiffs were not present :—Held, that the resolution was not receivable. *Rennie* v. *Clark*, 5 Ex. 292.

On the winding-up of a company a committee of inquiry was appointed, and the defendant had handed to him the minute-book, containing resolutions entered by the secretary :—Held, that he was sufficiently a party to such resolutions as to make them evidence against him. *Ashpital* v. *Sercombe*, 5 Ex. 147 ; 6 Railw. Cas. 224 — Ex. Ch.

Mistake in Law.]—The effect of an admission may be altered if the admission arises from a mistake in law. *Newton* v. *Liddiard*, 6 Railw. Cas. 42 ; 12 Q. B. 925 ; 18 L. J., Q. B. 53.

The general doctrine, that a party is at liberty to prove that an admission made by him was mistaken or untrue, and is not estopped by it unless another person has been induced by it to alter his condition, is applicable to mistakes in respect of legal liability as well as in respect of facts. *Ib.*

iii. *On what Occasions.*

Subscribing Deed.]—The merely having subscribed any paper writing as a witness is not sufficient to charge the witness with notice, unless it is proved that he knew the contents. *Harding* v. *Crethorn*, 1 Esp. 57 ; 5 R. R. 719. S. P., *Sweeting* v. *Asplin*, 7 M. & W. 172 ; 1 H. & W. 6.

In the absence of evidence to the contrary, there is a legal presumption that a man knows the contents of the deed which he executes. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862 ; 20 Ch. D. 611 ; 47 L. T. 89 ; 30 W. R. 648.

Recitals.] —Recitals in documents are no evidence of what is there recited, though actual possession in conformity therewith would constitute a primâ facie title. *Bristow* v. *Cormican*, 3 App. Cas. 641—H. L. (Ir.)

Recitals in a deed tendered but not executed were held admissions by the parties on whose behalf the deed was prepared, but capable of being rebutted. *Bulley* v. *Bulley*, 44 L. J., Ch. 79 ; L. R. 9 Ch. 739 ; 30 L. T. 848 ; 22 W. R. 779.

By a memorandum, the trustees of turnpike-roads agreed to let, and H. agreed to take, a lease of tolls, with an undertaking by H. and his sureties for the due accounting therefor. "Witness the hands of E. W. D. and E. F., two of the trustees of the turnpike-roads, and of W. F. and his sureties" :—Held, in an action by the clerk to the trustees against one of the sureties, who was proved to have signed the instrument, that the recital in the instrument and the witnessing clause were evidence against him that the parties who signed were trustees. *Willington* v. *Browne*, 15 L. J., Q. B. 23 ; 9 Jur. 971. See *Beckley* v. *Bradley*, 2 D. & L. 586 ; 8 Scott (N.R.) 843.

An abstract of title, stating the recitals in certain deeds and relied upon by the defendant when before a master in chancery, in a suit in which he was plaintiff, is admissible against him in an action as evidence of the matters recited without producing the deeds. *Pritchard* v. *Bagshawe*, 11 C. B. 459 ; 20 L. J., C. P. 161.

Indorsing Copy.]—The following memorandum, signed by the plaintiff, was indorsed upon the registered copy of the deed of settlement of a company of which the plaintiff was a member, produced by the defendant in an action by the plaintiff against him for contribution towards the payment of the debts of the company : "We do hereby certify that the within-written deed is the deed of settlement of the Universal Gas Light Company, and that, to the best of our

knowledge, the particulars therein contained are correctly set forth" :—Held, that the copy was primary evidence against the plaintiff of the contents of the deed. *Boulter* v. *Peplow*, 9 C. B. 493 ; 19 L. J., C. P. 190 ; 14 Jur. 248.

Negotiating Bill.]—In a suit instituted against A. and B., to have bills of exchange, which have been negotiated from A. to B., delivered up on the ground that it was a fraud in A. to negotiate them, and that B. was a party to the fraud, the admissions of A., while the bills were in his possession, that he was not entitled to negotiate them, are admissible in evidence. *Lee* v. *Harrison*, 5 L. J. (O.S.) Ch. 30.

Even if evidence is read without any objection being taken at the time, its admissibility may be objected to in the course of the argument. *Ib.*

Agreement to Transfer Shares.]—In an action to recover goods supplied to a mine, in order to shew that the defendant was a shareholder, a document was produced by which A. certified that he had for the consideration expressed in a deed, transferred certain shares to the defendant, who on his part agreed to accept them. The purser of the mine stated that those persons only were considered shareholders in the concern, whose names were entered in a book ; that the usual mode of transferring shares was by documents similar to the above ; and that, on receiving it from the defendant, he had entered his name in the book as a shareholder :—Held, that this document was receivable as an admission by the defendant that he was a shareholder in the company. *Toll* v. *Lee*, 4 Ex. 230 ; 18 L. J., Ex. 364 ; 13 Jur. 614.

Effect of, in Letters.]—When a plaintiff has not offered himself as a witness, admissions by him contained in letters to a third party may be received in evidence. *Steuart* v. *Gladstone*, 47 L. J., Ch. 423 ; 38 L. T. 557 ; 26 W. R. 657.

A letter written by a party is not admissible in his own favour, except as a notice or a demand. *Richards* v. *Frankum*, 9 Car. & P. 221.

A letter written by a party may be read against him, without producing that to which it purports to be an answer. *Mortimer* v. *Wright*, 6 M. & W. 482 ; 9 L. J., Ex. 158 ; 4 Jur. 465.

So, letters of a party are evidence of themselves to prove a promise to pay, without producing those to which such letters are answers. *Barrymore* v. *Taylor*, 1 Esp. 326.

In trover for goods the question was whether the plaintiffs sold the goods to A. on his own account (through whom the defendant claimed), or to A. as agent for G. & Co., who, however, never authorised the purchase. At the time of the bargain A. referred the plaintiffs to B. for inquiry as to the responsibility of G. & Co., the plaintiffs alleging that the reference was required and given as to their responsibility as buyers, the defendant alleging that it was merely as to their responsibility as shippers on behalf of A. The plaintiffs wrote to their agent as follows :—" We wish you to call and see B., and inquire as to the trustworthiness of G. & Co., and also of A., who is making a rather large purchase of goods for the above party, and who refers us to B. ; write by return." An answer was received, but not in evidence :—Held, that the letter was admissible as evidence for the plaintiffs, on the ground that it was part of the res gestæ, and that they were entitled to have the whole of it read and submitted to the consideration of the jury. *Milne* v. *Leisler*, 7 H. & N. 786 ; 31 L. J., Ex. 257 ; 8 Jur. (N.S.) 121 ; 5 L. T. 802 ; 10 W. R. 250.

Executed Agreement for Compromise.]—An agreement for adjusting differences admitted in evidence, notwithstanding the rule that admissions during treaties for compromise of suits cannot be received for the purpose of fixing the party intended to be charged with the debt, that rule not extended to executed agreements. *Frogsell* v. *Lewelyn*, 9 Price, 122.

Proposal to Refer.]—Where a proposal to refer was connected with an admission sustaining a plea of set-off :—Held, that it ought to have been received in evidence. *Thomson* v. *Austen*, 1 L. J. (O.S.) K. B. 99 ; 2 D. & R. 359.

Before Arbitrator.]—An admission made by a party before an arbitrator may be used as evidence on the trial of another cause, and is not to be considered as an admission made with a view to a compromise. *Doe* d. *Lloyd* v. *Evans*, 3 Car. & P. 219.

Even admissions of particular articles before an arbitrator are good evidence. *Westlake* v. *Collard*, Bull. N. P. 233. S. P., *Gregory* v. *Howard*, 3 Esp. 113 ; *Murray* v. *Gregory*, 5 Ex. 468.

Committee of the House.]—The evidence which a person has given before a committee of the House of Commons is afterwards admissible against him on a criminal charge. *Rex* v. *Merceron*, 2 Stark. 366.

During Legal Proceedings.]—So, admissions which a defendant would be obliged to make in his answer to a bill in equity are evidence. *Slack* v. *Buchannan*, Peake, 5.

The examinition of a person taken in shorthand when examined as a witness is evidence against him in an action, though he was stopped in giving his testimony, and might have added to or explained what he had said. *Collett* v. *Keith* (*Lord*), 4 Esp. 212.

Any admission of a demand, or a confession to that effect, made by a person when he is arrested, and is ignorant whether he is bound by law to the payment of the demand or not, is inadmissible to charge him. *Rouse* v. *Redwood*, 1 Esp. 155.

In an action against assignees of a bankrupt to try the right to the property in goods which have been delivered before the bankruptcy to a bailee for a specific purpose, the declarations made by the bankrupt to the bailee subsequently to the delivery of the goods are admissible, though they are offered with a view of shewing the property to have been in the bankrupt himself. *Sharp* v. *Newsholme*, 8 Scott, 23 ; 5 Bing. (N.C.) 713 ; 3 Jur. 581 ; 9 L. J., C. P. 211.

The statements in a special plea on which judgment has been given for the plaintiff, on demurrer, cannot be used at the trial of the cause as an admission on the record by the defendant ; but the case must be tried on the general issue, without any reference to the special plea at all. *Firmin* v. *Crucifix*, 5 Car. & P. 98.

Defence in another Action.]—An admission contained in a defence in one action, cannot

properly be treated as conclusive in other proceedings between the same parties, but on a different issue. *Walters, In re, Neison* v. *Walters*, 61 L. T. 872. See *S. C.*, 63 L. T. 328.

Entry Invalid—Contemporaneous Admission.]—To prove the defendant's admission of a debt due, the plaintiff produced a book containing a written entry signed by the defendant, but which, being couched in the terms of a promise to pay, was rejected for want of a stamp:—Held, that a verbal admission by the defendant of the amount of the debt due from him to the plaintiff, and made before or contemporaneously with his signing the entry, was properly admitted. *Singleton* v. *Barrett*, 2 Tyr. 409; 2 C. & J. 368; 1 L. J., Ex. 134.

Accident—Surgeon's Estimate.]—The carriage of P. was driven against the carriage of M., whereby M.'s thigh was broken. On the trial of an action by M. against P. for this, S., a surgeon, was called as a witness for M., who recovered 600*l.* damages against P. S. afterwards brought an action against M. for his services as a surgeon in attending M. after his thigh was broken. The counsel of S. proposed to go into evidence to shew what S. stated as to the amount of his charge for attendance on M. in giving his evidence on the trial of the action by M. against P.:—Held, that such evidence was not admissible. *Sutherland* v. *M'Laughlin*, Car. & M. 429.

Previous Belief—Parliamentary Oaths Acts.]—Statements and avowals of a defendant as to his belief in a Supreme Being, and as to whether an oath, as an oath, has any binding force upon his conscience, are admissible in the trial at bar of an action for penalties under the Parliamentary Oaths Act, 1866, even though such statements or avowals were made before he was elected a member of the parliament in which he sat and voted. *Att.-Gen.* v. *Bradlaugh*, 54 L. J., Q. B. 205; 14 Q. B. D. 667; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500.

iv. *Extent and Effect of.*

An admission by a party concerned in matters of fact is stronger than if they had been determined by a jury, and facts are as properly concluded by admission by a trial; therefore, where parties come incidentally before the court, and an incident is admitted, the court may determine it, and hold the parties to their admission, although the court could determine the points adversely; and there is no difference between the parties admitting things proper to be determined by the court in which the admission is made, and an admission of things cognizable in another court, for both are equally binding. *Sheffield* v. *Bucks (Duchess)*, 1 Atk. 630.

Primâ Facie Evidence.]—In a cause there was no direct evidence of the acts complained of against one defendant:—Held, that an allusion, in the admissions, to these acts as stated in the bill was sufficient primâ facie evidence to enable the court to grant the relief prayed against that defendant, giving him an opportunity to deny those statements. *Bell* v. *Wilson*, 6 N. R. 81.

In Writing.]—It is the duty of an attorney in an action to see that all admissions are in writing; and where there has been an express admission made in the usual formal way, the court will not extend it on oral evidence nor imply any further admission from previous correspondence, nor will they grant a new trial on the ground of surprise, merely because the attorneys on each side have misunderstood each other as to the extent or effect, of some supposed agreement for admission. *Holford* v. *Hughes*, 10 W. R. 60.

By Parol.]—A parol admission by a party may be sufficient for a cause of action, without proof of the debt to which the admission relates. *Harris* v. *Chapman*, 17 L. T. 517.

The plaintiff gave evidence of an admission of the defendant, that he owed 147*l.* on a bill of exchange which had been returned dishonoured:—Held, that such acknowledgment was admissible, though no notice to produce the bill had been given. *Fryer* v. *Brown*, R. & M. 145.

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods. *Newhall* v. *Holt*, 6 M. & W. 662; 9 L. J., Ex. 293; 4 Jur. 610.

A parol admission by a party to a suit is always receivable as primary evidence against him, although it relates to the contents of a deed or other written instrument, and even though its contents are directly in issue in the cause. *Slatterie* v. *Pooley*, 6 M. & W. 664; 1 H. & W. 16; 10 L. J., Ex. 8; 4 Jur. 1038.

An admission by a party that he is in possession of certain premises, is no evidence of his possession on any day antecedently to that on which the admission is made. *Tindal* v. *Whitrow*, 1 Car. & P. 22.

Parol evidence of a debt is receivable, although such admission and a promise to pay the same be immediately reduced into writing and signed by the party making it. *Singleton* v. *Barrett*, 2 C. & J. 368; 2 Tyr. 409; 1 L. J., Ex. 134.

Parliamentary Agreement.]—Certain landowners had withdrawn their opposition to a bill authorising a railway company to make certain works, in consideration of an agreement in writing, by which the company undertook that the claim of the landowners to compensation should not be barred by the fact that the company did not propose to take any of their land:—Held, that this did not amount to an admission that the landowners were entitled to compensation in any event. *Caledonian Ry.* v. *Walker's Trustees*, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676—H. L. (Sc.)

Surrender of Tenancy.]—In an action of trespass to premises which had been held by the plaintiff under a tenancy from year to year, determinable by notice of surrender:—Held, that in order to prove a surrender before the acts complained of, evidence was admissible on behalf of the defendant of oral admissions made by the plaintiff, and made in his presence by his son, who had been acting as his manager, that notice of surrender had been given by the plaintiff. *Slatterie* v. *Pooley* (6 M. & W. 664) followed. *Martin* v. *Doherty*, 6 L. R., Ir. 194.

Of Balance Due.]—Where the confidential agent for the defendants at A., in rendering his accounts to I., the authorised agent at B., claimed a sum less than the balance, according to the

statements of I., and was afterwards allowed by the latter portion of such excess as made up the amount, and which was sanctioned by the defendants:—Held, in a subsequent suit to recover the remainder, that the allowance, as to a part, was not a binding admission of the correctness of I., so as to dispense with all proof by the plaintiff of the remainder being in fact due to him. *Farquhar* v. *East India Co.*, 8 Beav. 260.

Of Arrest for Debt.]—An admission by the defendant, that he cannot pay, but will give a bill, and that he has been arrested will entitle the plaintiff to a verdict of 10*l.* as there could have been no arrest for a smaller amount. *Braithwaite* v. *Churchill*, 2 Car. & P. 341.

Whole Transaction must be taken.] — The whole of the account which a party gives of a transaction must be taken together, and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to himself, and that not merely as evidence that he made such a counter-claim, but as admissible evidence of the existence of the matter in his discharge, which he asserts. *Randle* v. *Blackburn*, 5 Taunt. 245.

The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts. *Smith* v. *Blandy*, R. & M. 257.

If a person who has numerous dealings with a bankrupt, on being examined before the commissioners, does not bring his books with him, but while under examination consents that the accountants to the commission shall make extracts from them, these extracts cannot be used as evidence against him, without also reading his examination. *Yates* v. *Carnsew*, 3 Car. & P. 99.

Selection by Plaintiff.]—In courts of equity, the plaintiff may select a particular admission; and when that is read, defendant is obliged to prove the other facts stated in his answer by other evidence. *Anon.*, Gilb. Evid. 52. *But see* Peake's Evid. 56, *notes*.

Qualified Admissions — Relevancy.] — An admission in a letter of a state of things—e.g. a partnership having existed up to a certain date—accompanied by a statement that it had then ceased, may, together with other facts occurring subsequently, be left to a jury as evidence from which the continued existence of the state of things said to have ceased may be inferred. *Brown* v. *Wren*, 64 L. J., Q. B. 119; [1895] 1 Q. B. 390; 15 R. 239; 72 L. T. 109; 43 W. R. 351.

Of Execution of Deed.]—A. having made a deposit of deeds to B., on an equitable mortgage, gave a schedule of the deeds in which he described one as the deed of C.:—Held, that in an ejectment brought by B. against a person who came in under A., this admission by A. did not dispense with proof of the execution of this deed. *Doe* d. *Graham* v. *Penfold*, 8 Car. & P. 536.

The parties agreed to admit in the cause certain facts, in the same manner as if they had been proved by proper and legal evidence, and among others that a certain exhibit was the notice, and a certain other exhibit was a true copy of the lease:—Held, that the notice was not evidence of the lease so as to relieve the defendant from the necessity of calling the attesting witness. *Mounsey* v. *Burnham*, 1 Hare, 15.

Held, also, that the admission as to the copy of the lease substituted the copy for the original, but did not place the copy in a better situation than the original, if it had been produced. *Ib.*

Repeated admissions (even an oath), by a party sued on a deed, that he had executed it, allowed to be explained, and evidence that he had in fact executed a deed, but for a different amount, and mistook it for the deed in question, is sufficient to account for the admissions. *Painter* v. *Abel*, 3 F. & F. 518.

Conclusiveness—Evidence of Mistake.]—Held, that a director who had been plaintiff in an action against a stranger, in which the declaration stated an undertaking to have been given by the directors, that in the event of the act for the incorporation of the company not being obtained, they would return the whole of the deposits to the subscribers without deduction, and who had been a defendant to a suit in chancery instituted by the stranger, and had by his answer admitted to the same effect, had not thereby conclusively adopted the undertaking, but might adduce evidence to shew that the admission in the answer was made by mistake. *Londesborough's (Lord) Case*, 4 De G. M. & G. 411; 23 L. J., Ch. 738; 18 Jur. 863. And see *Painter* v. *Abel*, supra.

b. By Wife.

Verbal Statements.]—Where a husband permits his wife to act for him in any department of business, her admissions or acknowledgments are evidence to charge him. *Emerson* v. *Blonden*, 1 Esp. 142; 5 R. R. 725. S. P., *Anderson* v. *Saunderson*, 2 Stark. 204; Holt, 591; 17 R. R. 681; 19 R. R. 703.

Admissions made by a wife, who served in her husband's shop, and conducted his business in his absence, may be given in evidence against her husband, on an application to pay for goods sold and delivered at the shop. *Clifford* v. *Burton*, 8 Moore, 16; 1 Bing. 199; 1 L. J. (O.S.) C. P. 61; 25 R. R. 614.

Where a wife carried on, in her husband's absence, the business of a shop, and by his authority attended to all the receipts and payments:—Held, in replevin by the husband, that a statement made by the wife to the landlord, on the occasion of her paying him rent for another person, that she would pay the rent of the shop on a future day, and admitting its amount, was not evidence against the husband of the terms of the tenancy. *Meredith* v. *Footner*, 11 M. & W. 202; 12 L. J., Ex. 183.

In an action for board and lodging supplied to the defendant's wife, if the defence is the adultery of the wife, a statement made by her, confessing her adultery, which statement was made immediately previously to her husband turning her out of doors, is admissible on the part of the husband; and so are letters from different men found by him at that time in her writing-desk. *Walton* v. *Green*, 1 Car. & P. 621.

Where, in an action by a trustee, founded on an agreement of separation brought against the husband for the recovery of the arrears of a weekly sum which he agreed to allow his wife; her declarations were received at the trial, to

shew that she had been living in adultery previously to and at the time the demand was made, and the jury found a verdict for the defendant, the court granted a new trial. *Scholey* v. *Goodman*, 1 Bing. 349 ; 8 Moore, 350 ; 1 Car. & P. 36.

Where an action is brought by the orders of a wife in the name of her husband to recover a sum of money taken from her, on the ground that it was the produce of goods she had been concerned in stealing : what she afterwards said in her husband's absence respecting the money, when examined on the charge of being concerned in the robbery, is evidence for the defendant. *Carey* v. *Adkins*, 4 Camp. 92.

In an action by husband and wife in right of the wife as executrix, no declarations of the wife can be given in evidence by the defendant. *Alban* v. *Pritchett*, 6 Term Rep. 680.

In an action by husband and wife for a debt due to the wife dum sola, any admission respecting it made by the wife after her marriage, is inadmissible as against her husband. *Kelly* v. *Small*, 2 Esp. 716.

The declarations of a married woman during coverture, of the non-payment of money lent to her before marriage, are admissible for the plaintiff, in an action against her husband as her administrator. *Humphreys* v. *Boyce*, 1 M. & Rob. 140.

Observations made by a wife are admissible in evidence, where she acts as the agent of her husband. *Pratt* v. *Baker*, 1 L. J., K. B. 12.

Memorandum.]—In an action against the indorser of a bill of exchange, a memorandum in writing, made by his wife, of the receipt of notice of dishonour at the place from which the bill was dated (he himself not having been resident there at the time) is admissible, after the death of the wife, to prove that her husband had due notice of dishonour. *Wharton* v. *Wright*, 1 Car. & K. 585.

Letters.]—After the trial of an action on a policy of assurance in which the widow and administratrix of the deceased was plaintiff, a letter was discovered which had been written by plaintiff, during her husband's lifetime, to his physician as to his state of health, and which (if admissible) was relevant to a plea of fraudulent concealment of a disease with which it was alleged he was affected at the time the policy was entered into. The court refused to set the verdict aside on the ground of the discovery of this fresh evidence, the evidence of physicians at the trial having negatived the existence of any such disease. Quære, whether the evidence was admissible. *Huntly* v. *St. George Insurance Co.*, 7 W. R. 51.

The court has no jurisdiction to control the discretion of a commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the court intimated its opinion that a letter written by the bankrupt's wife to a third party, in whose possession it remained, though it could not in any way afford direct evidence of the act of bankruptcy (unless it was also proved that she was authorised by her husband to write it as his agent), she not being examinable as a witness upon that point, yet might be ordered to be produced, to be used only as a clue to the procurement of other evidence as to the act of bankruptcy. *Groom, Ex parte, Chambers, In re*, 4 Deac. & C. 640 ; 2 Mont. & Ayr. 143 ; 4 L. J. Bk. 22.

Maintenance of Child.]—In an action for educating a child, who had been placed with the plaintiff by the defendant's wife (who was her aunt), evidence is admissible to shew that the wife was in the habit of ordering domestic articles, which were paid for by the defendant, in order to shew her agency. *M'George* v. *Egan*, 7 Scott, 112 ; 5 Bing. (N.S.) 196 ; 1 Arn. 462 ; 3 Jur. 266.

Answer of in Chancery.]—Semble, the separate answer of feme covert may be read against her. *Le Neve* v. *Le Neve*, 3 Atk. 648.

Admissions in the answer of a feme covert, joining with her husband in answering the bill, will not be permitted to be read against her. *Hodgson* v. *Merest*, 9 Price, 563.

Lord Chancellor Manners held, that an answer put in by husband and wife relating to wife's property, could not be read against her or the defendant, who claimed under her ; though she survived her husband, and did move to put in a new answer. *Sanders* v. *Allen*, 2 Moll. 329.

The admissions in a joint answer by the husband and wife are no evidence against the wife, such joint answer being considered as the answer of the husband alone. *Elston* v. *Wood*, 2 Myl. & K. 678.

The answer of a married woman may be read to shew that she has property settled to her separate use when the object of the suit is to establish a demand against her separate estate. —— v. *Bailie*, 5 L. J. (O.S.) Ch. 105.

Reading the answer of a feme covert against her, in matters touching her separate estate. *Bailey* v. *Jackson*, C. P. Cooper, 495.

Baron and feme defendants to a bill, the feme must answer, though the answer cannot be read against the husband, but may probably be read against her if she survives. But in no case is a feme bound to answer to a bill subjecting her to forfeiture, though the husband has submitted to answer. *Wrottesley* v. *Bendish*, 3 P. W. 238. S. P., 2 Ch. Ca. 39, 173.

And see HUSBAND AND WIFE.

c. By Agents and Servants.

i. *Capacity.*

Scope of Authority.]—An agent or a servant can only act within the scope of his authority ; therefore declarations made by him as to a particular fact are not admissible unless they fall within the nature of his employment as such agent or servant. *Schumack* v. *Lock*, 10 Moore, 39 ; 3 L. J. (O.S.) C. P. 57.

The declarations of an agent are only admissible against the principal where they form part of the contract which he has entered into, and is employed to negotiate on behalf of the principal. *Betham* v. *Benson*, Gow, 45.

Though an agent may, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts, evidence of his declarations is confined to what is either by the statement itself, or as tending to determine the quality of contemporary acts, the foundation of or inducement to the agreement. *Fairlie* v. *Hastings*, 10 Ves. 123.

What is said by an agent respecting a contract or other matter in the course of his employment, which contract or matter is the foundation of the action, is good evidence to affect the principal. Aliter, what is said by him on another occasion. *Peto* v. *Hague*, 3 Esp. 134.

In an action on the warranty of a horse sold by the son of the defendant as the agent of his father, a part of the defence being that the son had no authority to warrant, it was proposed to ask a witness whether, on the day on which the the sale took place, the defendant's son did not, in answer to a question put by the witness as to the price of the horse, say that he would warrant the horse:—Held, inadmissible, as being a conversation with a stranger; but that if the defendant's son, in offering the horse for sale, had offered a warranty, it might have been otherwise, as that would have been a statement accompanying an act done in the course of his agency. *Allen* v. *Denstone*, 8 Car. & P. 760.

In an action against a body corporate, for negligently pulling down a house which belonged to them, whereby the plaintiff's house was injured, a letter written to the plaintiff respecting the pulling down of the house, by the defendant's surveyor, who had the management of all their buildings, is to be presumed to have been written by him in that capacity, and is, therefore, evidence against them. *Peyton* v. *St. Thomas's Hospital*, 3 Car. & P. 363. *S. C.*, nom. *Peyton* v. *London Corporation*, 9 B. & C. 725; 4 M. & Ry. 625.

Admissions by the under-sheriff not accompanying an act done in his official character, are not receivable to charge the sheriff. *Snowball* v. *Goodriche*, 1 N. & M. 234; 4 B. & Ad. 541; 2 L. J., K. B. 53.

Statements made by the shopman of a pawnbroker, who is left in the shop to answer in his master's absence, can only be received in an action against the master, when they relate to transactions which are strictly within the business of a pawnbroker; and are not receivable if they relate to an advance of money not within the terms of the Pawnbrokers Act. *Garth* v. *Howard*, 1 M. & Scott, 628; 8 Bing. 451; 5 Car. & P. 346; 1 L. J., C. P. 129.

If an alteration has been made in the plaintiff's pass-book with his bankers, by some person there, if he inquires why it was done, the answer he receives from a person acting in the banking-house as a clerk is evidence in an action against the bankers. *Price* v. *Marsh*, 1 Car. & P. 60.

In an action against a railway company for not conveying cattle to market within a reasonable time, a county court judge allowed evidence to be given of a conversation which took place, a week after the alleged cause of action arose, between the plaintiff and a night inspector at one of the company's stations, whose duty it was to forward the cattle in which the latter, in answer to a question as to why he did not send the cattle on, stated that "he had forgotten them":—Held, that such evidence was improperly admitted, it not being within the scope of the man's authority to make admissions as to bygone transactions. *G. W. Ry.* v. *Willis*, 18 C. B. (N.S.) 748; 34 L. J., C. P. 195; 12 L. T. 349.

In an action against a railway company for the loss of a parcel of money above the value of 10*l.*, the issue being whether the loss was occasioned by the felonious act of one of the company's servants, who had absconded at the time of the parcel being missed, it is allowable to call a police officer to prove instructions which he received from the station-master, tending to shew that he, the station-master, had suspicions that the servant had stolen the parcel. *Kirkstall Brewery Co.* v. *Furness Ry.*, 43 L. J., Q. B. 142; L. R. 9 Q. B. 468; 30 L. T. 783; 22 W. R. 876.

Of Negligence.]—An admission by a servant of a negligent act is not evidence as against his master. *Johnson* v. *Lindsay*, 53 J. P. 599.

By Manager of Bank in another Action.]—A bank manager had in a previous action by another plaintiff, given evidence of the practice of the bank in making loans to customers:—Held, that the manager being a person authorised to make admissions on the part of the bank, his evidence might be read on the part of the plaintiff in this action so far as relevant to the matters now in question. *Simmons* v. *London Joint Stock Bank*, 62 L. T. 427.

Chairman of Company.]—A shareholder in a company applied to have his name removed from the register of members on the ground that he had been induced to become a shareholder by a material misrepresentation in a prospectus issued by the company. The only evidence of the untruth of the representation was a statement made by the chairman of the company in a speech addressed by him to a meeting of the shareholders:—Held, that the statement was not admissible evidence against the company, inasmuch as the chairman in making it was not acting as the agent of the company in a transaction between them and a third party, but was making a confidential report to his own principal. *Meux's Executor's Case* (2 De G. M. & G. 522) distinguished. *Devala Provident Gold Mining Co., In re, Abbott, Ex parte*, 52 L. J., Ch. 434; 22 Ch. D. 593; 48 L. T. 259; 31 W. R. 425.

Partner.]—Declarations of one partner, as to the payment, subsequently to a dissolution, of a debt due to the partnership, are admissible against the other partner. *Pritchard* v. *Draper*, 1 Russ. & M. 191; Taml. 332.

Between Principal and Surety.]—A. was clerk to B. from 1829. In 1832, C. gave a bond for the faithful conduct of A. as such clerk. After that B. dismissed A., and, after his dismissal, A. made an admission of various sums that he had not accounted for:—Held, that in an action on the bond, this admission was not evidence against C., as A. was living at the time of the trial, and might have been called as a witness:—Held, also, that it appearing that one item in the admission was of a sum received by A. before the date of the bond, C. would not be liable to the amount of the admission, although it had been shewn to him, and he had said that B. must get what he could of A. and he, C., would pay the rest. *Smith* v. *Whittingham*, 6 Car. & P. 78.

Affidavits of.]—In an action against the sheriff for taking the goods of the plaintiff, an affidavit made by the officer under the Interpleader Act respecting the goods is admissible to prove that the officer who seized the goods is the servant of the sheriff. *Brickhill* v. *Hulse*, 2 N. & P. 426; 7 A. & E. 454; 7 L. J., Q. B. 18.

An affidavit of an agent cannot be used to prove a fact against his principal, where he can himself be called; but where the principal has used an affidavit of the agent in an application to the court, in which a particular fact is stated, the affidavit of the agent may be used as evidence of the fact. *Johnson* v. *Ward*, 6 Esp. 47.

Where a petitioning creditor having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat:—Held, that

the deposition then made was evidence of the act of bankruptcy as against such creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue. *Gardiner* v. *Moult*, 10 A. & E. 464; 2 P. & D. 403; 8 L. J., Q. B. 270.

ii. *Letters of.*

When Admissible.]—A letter written by an agent or a broker, by whom a contract has been made, is not evidence where such agent or broker can be called as a witness. *Maesters* v. *Abraham*, 1 Esp. 357.

A letter signed by procuration is admissible, if unexplained, to prove an admission of the authorship of a former letter. *Gauntlett* v. *Whitworth*, 2 Car. & K. 720.

Where a person was in the habit of employing his son to write letters in his name, a letter without signature, but in the son's handwriting, and bearing a postmark, is inadmissible. *Barton* v. *Hutchinson*, 2 Car. & K. 712.

Letters of an agent to his principal, in which he is rendering him an account of the transactions he has performed for him, are not admissible against the principal. *Langhorn* v. *Allnutt*, 4 Taunt. 511; 13 R. R. 663.

Letters written by an agent in making a contract, which form part of the contract, or of the res gestæ, are admissible against the principal. *Ib.*

The defendants' agents abroad by their order received money on their account, and stated the fact in a letter to them:—Held, that the agents' letter, coupled with the defendants' reply, by which they acknowledged the receipt of the money and directed its disposal, was admissible to charge the defendants with the receipt of the money. *Coates* v. *Bainbridge*, 5 Bing. 58; 2 M. & P. 142; 6 L. J. (O.S.), C. P. 220.

Letter by an agent is not evidence against the principal of a pre-existing agreement, though it may be of an agreement contained in that letter. *Fairlie* v. *Hastings*, 10 Ves. 123, 128.

—— **From Captain to Owners.**]—A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated; but the opinion of the master in such a letter is not evidence. *The Solway*, 54 L. J., P. 83; 10 P. D. 137; 53 L. T. 680; 34 W. R. 232; 5 Asp., M. C. 482.

—— **By Deceased Agent.**]—Letters written by a deceased agent to his principal subsequently to the date of an agreement alleged to have been made by him on behalf of the principal, detailing conversations with the other party, are not admissible on behalf of the principal to prove that no such agreement was entered into, or that the agent was not authorised to make it, and that the principal never knew of or ratified it. *Turner* v. *Hutchinson*, 3 L. T. 815.

A local agent, whose duty it was to advise his principals of all his transactions on their account, wrote them a letter, in which were these words: "I enclose draft of B., which he sent to-day with three large cases to the office. I enclose his invoices for your perusal. He leaves shipment of his goods to your judgment. He will renew . . . I consider him a perfectly safe man, should there be any reclamation. He draws for 75 per cent.":—Held, that this letter could not be used by the principals after his death, to prove the nature of the transaction to which it referred, as it was neither a record of the transaction, which it was the specific duty of this agent to make, nor an entry against his interest. *Smith* v. *Blakey*, 8 B. & S. 157; 36 L. J., Q. B. 156; L. R. 2 Q. B. 326; 15 W. R. 492.

Insurance Cases.]—The letters of an agent of the assured in a foreign country, stating the contents of letters from another agent of the assured, are not evidence against the principal. *Kahl* v. *Jahnsen*, 4 Taunt. 565.

Letters written to the assured by his agent or correspondent on the continent, are not admissible against him. *Reyner* v. *Pearson*, 4 Taunt. 662; 13 R. R. 723.

Where letters between parties shewed that an insurance broker had considered himself as dealing with one of the owners of a ship only, and as having insured for him alone:—Held, conclusive against the broker, as fixing him with an agency for his correspondent solely. *Roberts* v. *Ogilby*, 9 Price, 269; 23 R. R. 671.

A letter written by an agent (though not known to be such by the party to whom the letter was written), speaking of a ship as his own ship, is not conclusive against him in an action on a policy of insurance, in which the question of ownership is raised: he may still prove that he is only an agent, and that others are in fact the owners of the vessel. *Tulloch* v. *Boyd*, Holt, N. P. 487; 18 R. R. 546.

Scope of Authority.]—Letters forged by the defendant's confidential clerk, purporting to contain an authority to indorse bills of exchange, are not admissible to shew he had no authority to make the indorsement on which the plaintiff sued. *Prescott* v. *Flynn*, 9 Bing. 19; 2 M. & Scott, 18; 1 L. J., C. P. 145.

The letters of a person who in one year acted as the agent of a company, are not evidence to affect other persons who were members of that company in the preceding year, but who were not proved to be members of it at the time when the letters were written. *Jones* v. *Shears*, 4 A. & E. 832; 2 H. & W. 43; 6 N. & M. 428; 5 L. J., K. B. 153.

Payments were made to A. purporting to be on account of the defendant, who took credit on account of them. A letter was written by the plaintiff to the defendant, which was answered by A. in a letter, stating that the defendant had handed the plaintiff's letter to him. A.'s letter contained an admission of the debt:—Held, that there was evidence of A.'s authority to make the admission. *Morel* v. *Harborough* (*Lord*), 1 Gale, 146.

In an action against an executor for a legacy, which it was alleged he was, by agreement with the legatee, to retain, and to pay interest upon, he pleaded the Statute of Limitations. It was proposed to take the case out of the statute by putting in letters written by the defendant's son, who assisted him in his trade, and received for him money due to him in the way of his business as a shoe manufacturer:—Held, that though this would be good evidence to shew that the son was his father's agent in matters relating to the father's trade, it was not such evidence of agency as would render the letters of the son admissible in this case. *Whitehouse* v. *Abberley*, 1 Car. & K. 642.

General or Particular Duty.]—It is not sufficient to make the entry or declaration of a

deceased person admissible, that it was made in the course of a general duty to the employer; but it must have been made in the discharge of some particular duty. *Smith* v. *Blakey*, 8 B. & S. 157; 36 L. J., Q. B. 156; L. R. 2 Q. B. 325; 15 W. R. 492.

It was the duty of a confidential clerk who managed a branch business of the plaintiffs', as general merchants, to keep them duly advised of all business transacted; in discharge of this duty he wrote them a letter, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent:—Held, that this letter was not admissible against the defendant after the clerk's death, as it was neither a declaration against direct pecuniary interest, nor an entry made in the discharge of a duty to do a particular act and make a record of it. *Ib.*

d. By Persons referred to.

Competency of Arbitrator to explain Award.]—An arbitrator may be called as a witness in an action to enforce his award. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration. *Ib.*

But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matter submitted to him. *Ib.*

Miner's Jury.]—In an action for insecurely keeping a mining shaft, issue was joined on the defendant's possession of the shaft. The defendant had stated, that if a miner's jury should say it was his he would remunerate the plaintiff. The miner's jury gave their verdict in writing, that the shaft was in the possession of the defendant:—Held, that the finding was admissible, on the principle on which admissions made by a third person to whom a party refers are admissible. *Sybray* v. *White*, 2 Gale, 68; 1 M. & W. 435; 1 Tyr. & G. 746; 5 L. J., Ex. 173.

Determination.]—Where a party agrees to be bound by what a third party says, what such third party says is evidence. *Daniel* v. *Pitt*, Peake's Add. Cas. 238; 6 Esp. 74; 1 Camp. 366, n.; 10 R. R. 706.

If a person says, "I'll pay you money if A. says it is due," and A. being applied to says it is due, but is dead at the time of the action, what he said respecting the debt is evidence. *Ib.*

Information.]—If A. refers B. for information upon any particular subject to C., what C. says concerning it, when applied to by B., or his agent, is evidence for B. in an action against A. *Williams* v. *Innes*, 1 Camp. 364; 10 R. R. 702.

A. received a forged note from B. and the inspector of notes proved that he carried back the note to B., who said if she paid it away she had it from C., and desired him to inquire of C. about it; the inspector was allowed to state what C. told him, as B. had referred to C. for information on the subject. *Broch* v. *Kent*, 1 Camp. 366, n.; 10 R. R. 706, n.

Instructions.]—If a person, on being applied to on a particular subject, writes an answer, mentioning another person, and saying on one occasion, "He is in possession of my sentiments, and will attend"; and on another, "I have written to him, and I refer you to him thereon"; such letters are sufficient to constitute the party referred to an agent in the business; and what he said at a meeting on the subject may be given in evidence against the principal. *Hood* v. *Reeve*, 3 Car. & P. 532.

A dispute having arisen between the plaintiff and the defendant as to whether or not the granite which had been prepared by the former for a work which was in the course of construction by the latter was according to contract, the plaintiff wrote to the defendant, "I have seen E., and he has kindly consented to see you on the subject of the granite for Merthyr Tydfil, and I have authorised him to do so, and, if possible, come to some amicable arrangement in the matter." E. having agreed with the defendant that the defendant should have the granite for 50*l.*, the contract price being 121*l.* 16*s.* 11*d.*:—Held, that it was not competent to the plaintiff afterwards to repudiate the act of E., on the ground that he had given him secret instructions not to settle for less than 100*l.* *Trickett* v. *Tomlinson*, 13 C. B. (N.S.) 663; 7 L. T. 678.

e. By Counsel.

When Made.]—A statement made by counsel at judge's chambers in the presence of his client's attorney, or the attorney's clerk acting for the attorney, in order to induce the judge to take a step in the cause, is, if relevant to the question in issue at the trial, admissible. *Haller* v. *Worman*, 3 L. T. 741; 9 W. R. 348. *S. C.*, at nisi prius, 2 F. & F. 165.

Quære, whether an admission by counsel in his address to the jury, that part of his client's demand had been satisfied, is receivable in evidence if his client heard it and made no objection to it at the time. *Colledge* v. *Horn*, 3 Bing. 119; 3 L. J. (O.S.) C. P. 184; 28 R. R. 606.

Authority.]—An order was made by consent in the presence of the defendant, his solicitor, and counsel. Upon an application by the defendant to set aside the order on the grounds that he had never consented to it; that his counsel had no authority to do so; that he had not himself understood it; and that so soon as he did understand it, he repudiated it; the court, being of opinion that the defendant had understood the order at the time it was made, refused to set it aside. *Holt* v. *Jesse*, 46 L. J., Ch. 254; 3 Ch. D. 177; 24 W. R. 879.

The general authority, both of counsel and solicitor, extends to the entering a stet processus, and a compromise by stet processus announced by counsel in open court in the presence of his client must be repudiated openly and at once by the client, or it cannot be set aside. *Rumsey* v. *King*, 33 L. T. 728.

Proof of Facts dispensed with.]—At the trial of an action counsel made an admission as to the law of Scotland, but the judge did not consider himself bound by that admission and received evidence upon the point:—Held, that as the question of Scotch law was one of fact, proof of which [like proof of other facts might be dispensed with by the admission of counsel, the judge was wrong in going into the matter. *Urquhart* v. *Butterfield*, 57 L. J., Ch. 521; 37 Ch. D. 357; 57 L. T. 780; 36 W. R. 376—C. A.

f. By Solicitors.

Fraud of Solicitor.]—Where a solicitor has put in a fraudulent defence for his client without the knowledge of the client, making admissions on which judgment was obtained against the client:—Held, that the court had jurisdiction to set aside the judgment and permit the client to withdraw the defence, and put in a fresh defence. *Williams* v. *Preston*, 51 L. J., Ch. 927; 20 Ch. D. 672; 47 L. T. 265; 30 W. R. 555—C. A.

Purpose of Cause.]—A statement made by the plaintiff's attorney to the defendant's attorney in conversations during the assizes, with respect to the nature of the claim in the action, such statement not being expressly made for the purpose of being used as evidence, is not admissible. *Petch* v. *Lyon*, 9 Q. B. 147; 15 L. J., Q. B. 393.

The admissions of the attorney in a cause are evidence against his client only where they are made with a view to obviate the necessity of proving the facts admitted at the trial. *Young* v. *Wright*, 1 Camp. 140.

Therefore, declarations made by the attorney of a party in conversation, are not evidence against his client. *Parkins* v. *Hawkshaw*, 2 Stark. 239; 10 R. R. 711. S. P., *Wilson* v. *Turner*, 1 Taunt. 398; 9 R. R. 797.

Written admissions, made for the purpose of a former trial, may be used on a new trial. *Elton* v. *Larkins*, 5 Car. & P. 385; 1 M. & Rob. 196.

If the party who made them wishes to withdraw them, he should take out a summons before a judge in order to obtain his permission. *Ib.*

Where the town agents of the defendant's attorney gave an admission to the plaintiff's attorney, that the printed copy of a private act of parliament should be receivable in evidence, without formal proof:—Held, that it was not necessary to prove the handwriting of such agents, the admission having been made bonâ fide, and under the sanction of the defendant's attorney. *Truslove* v. *Burton*, 9 Moore, 64; 2 L. J. (o.s.), C. P. 105. *See S. C.*, 10 Moore, 96.

An admission, signed by the defendant's attorney, consenting to admit the defendant to be editor of a periodical work, is no evidence that he was editor on a day subsequent to the date of such admission. *Macleod* v. *Wakley*, 3 Car. & P. 311.

Offers of Conditions.]—Where the defendant's attorney, without his client's knowledge, agrees to settle the action upon condition that the plaintiff's porter makes an affidavit of the facts, the defendant is bound by the affidavit when made. *Lloyd* v. *Willan*, 1 Esp. 178.

Offers made by a plaintiff's attorney in the hearing of a third person, to do an act relative to the defendant, which lay within the scope of his authority, are not admissible to affect the plaintiff with such offer. *Wilson* v. *Turner*, 1 Taunt. 398; 9 R. R. 797.

Otherwise, if the offers had been made to the defendant. *Ib.*

Effect of Appearance.]—In an action against the owners of a ship, it is sufficient primâ facie evidence of ownership to put in an undertaking to appear for them, given before the commencement of the action, by the person who subsequently acts as their attorney in defending it in which he describes them as owners, without further proof of agency. *Marshall* v. *Cliff*, 4 Camp. 133.

But a letter written to the plaintiff's attorney before action by the attorney who afterwards appears in the cause for the defendant, is not evidence of a fact admitted therein, without further proof that the defendant authorised the communication. *Wagstaff* v. *Wilson*, 4 B. & Ad. 339; 1 N. & M. 1. S. P., *Pope* v. *Andrews*, 9 Car. & P. 564.

To render criminally responsible.]—A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. But in order to make a client criminally responsible for a letter written by his solicitor it must be shewn that the letter was written in pursuance of the instructions of the client. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg.* v. *Downer*, 43 L. T. 445.

By Clerks.]—If the clerk of an attorney has the management of a cause, what he says is receivable in evidence, the same as if it had been said by the attorney himself. *Standage* v. *Creighton*, 5 Car. & P. 406.

Where an attorney's clerk admitted, on the taxation of costs before the master, that the suit in which the costs were taxed was conducted by his employer from motives of charity, on behalf of the plaintiff:—Held, that the clerk was such an agent as to bind his master by such admission. *Ashbourne* v. *Price*, D. & R., N. P. C. 48; 25 R. R. 787.

g. By Co-Defendant.

Bill by the obligee in a bond, who had delivered it up by mistake (as he alleged) to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it, but traversed the allegation as to mistake:—Held, that declarations made by the obligor to whom the bond had been delivered tending to prove the plaintiff's allegation were admissible against the co-obligor. *Crosse* v. *Bedingfield*, 12 Sim. 35; 10 L. J., Ch. 219; 5 Jur. 836.

Two defendants, A. and B., answered separately. A. admitted the possession of certain documents, but alleging that he had acted as solicitor of B., insisted they were privileged from production. B., by a separate answer, denied that he had employed A. as his solicitor. On a motion to produce, notice of which was given to both defendants:—Held, that the answer of B. could not be read in aid of the motion against the answer of A. *Blenkinsopp* v. *Blenkinsopp*, 11 Beav. 134. But see *S. C.*, 2 Ph. 607; 17 L. J., Ch. 343.

When plaintiff's case wholly fails, it cannot be aided by the gift or waiver of one defendant, as against his co-defendant. *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722.

Costs.]—Admissions between co-defendants under Ord. XXXII. r. 2, of the Rules of the Supreme Court, 1883, to which the plaintiff is not a party, cannot be entered as evidence against

the plaintiff, and therefore cannot be included in an order for taxation and payment of the general costs of the action. *Dodds* v. *Tuke*, 53 L. J., Ch. 598 ; 25 Ch. D. 617 ; 50 L. T. 320 ; 32 W. R. 424.

h. By Executor.

Of Money in his Hands—Order for Payment into Court.]—Admission by an executor, that the whole amount of the property is 40,000*l*., and that the whole is invested in India in public securities, either in his name or the name of the house in which he is a partner, and subject to his disposal, unless some part is in the hand of the said house at interest, which he believes may be the case, not a sufficient admission of money in his hands to order the payment into court of any part of it. *Freeman* v. *Fairlie*, 3 Mer. 39.

As against Co-executor.]—Semble, one co-executor's answer to interrogatories cannot be used as an admission against his co-executor. *Peek* v. *Ray*, 63 L. J., Ch. 647 ; [1894] 3 Ch. 282 ; 7 R. 259 ; 70 L. T. 769 ; 42 W. R. 498—C. A.

i. By Co-Trespassers or Co-Conspirators.

Trespassers' Motives.] — Evidence of an admission by one of several defendants, in an action of trespass, will not establish the others to be co-trespassers ; but if that is proved by other evidence, the declaration of the one as to the motives and circumstances of the trespass will be evidence against all who are proved to have combined together for the common object. *Rex* v. *Hardwick*, 11 East, 585.

Conspirators.]—Declarations of co-conspirators made in furtherance of a common plot, were received against their companions. *Rex* v. *Watson*, 2 Stark. 116.

Upon the trial of an indictment against B. and T. for conspiring to cause imported goods to be carried away from port without payment of duties, with intent to defraud the revenue, it was proposed to put in evidence against B. the butt or counterfoil of T.'s bank cheque-book (he having absconded before the trial), which had also been obtained from his counting-house, and which purported to shew that part of the duty of which the customs had been defrauded had been paid to B. :—Held, that this was no act done in pursuance of the conspiracy so as to make the entry evidence against B., and was no more than a declaration or statement by a conspirator to a third party as to the result of the conspiracy. *Reg.* v. *Blake*, 6 Q. B. 126 ; 13 L. J., M. C. 131 ; 8 Jur. 667.

Particeps criminis, in the case of fraud, is the most proper person to discover and prove it ; especially when what he so proves turns to his own prejudice. *May* v. *Harman*, 4 Bro. P. C. 156.

And see CRIMINAL LAW.

j. Admissions without Prejudice.

Cannot be Used.]—A letter sent by a debtor to a creditor, respecting a debt, which contains in the introductory part these words, "which is not to be used in prejudice of my rights now or in any future arrangement that may be made or instituted," cannot be given in evidence in an action for the debt, for the purpose of taking the case out of the Statute of Limitations. *Cory* v. *Bretton*, 4 Car. & P. 462.

If the plaintiff's attorney writes a letter to the defendant asking an apology, and states that he writes without prejudice, no part of it can be given in evidence. *Healey* v. *Fletcher*, 8 Car. & P. 388.

An offer of a specific sum by way of compromise is admissible, unless accompanied with a caution that the offer is confidential. *Wallace* v. *Small*, M. & M. 446.

A letter from the plaintiff's solicitors to the defendant, which was followed in a day or two by another letter guarding against prejudice to the plaintiff's legal and other rights, was not allowed to be used by the defendant as evidence for any purpose of his defence. *Peacock* v. *Harper*, 26 W. R. 109.

Where letters are written "without prejudice" with a view to compromise, they cannot be given in evidence. *Hoghton* v. *Hoghton*, 15 Beav. 278 ; 21 L. J., Ch. 482 ; 17 Jur. 99. *S. P.*, *Jones* v. *Foxall*, 15 Beav. 388 ; 21 L. J., Ch. 725.

Except in Favour.]—Where a letter is written "without prejudice," although it cannot be used against the writer, there is nothing to prevent the writer himself using it. *Williams* v. *Thomas*, 2 Drew. & Sm. 29 ; 31 L. J., Ch. 674 ; 8 Jur. (N.S.) 250 ; 7 L. T. 184 ; 10 W. R. 417.

Replies to.]—Where a letter is expressed to be written "without prejudice," it cannot be received in evidence, either for or against the party sending it ; neither can the reply thereto, though not similarly guarded. *Paddock* v. *Forrester*, 3 Scott. (N.R.) 734 ; 3 Man. & G. 903.

And see cases, post, cols. 683—685.

2. DECLARATIONS.

a. In General.

Nature of Act.]—A declaration accompanying an act is not admissible, unless the act itself is admissible. *Wright* v. *Latham* or *Tatham*, 5 Cl. & F. 676 ; 2 Jur. 461.

Declarations against Interest.]—At the trial of an action for an injunction for stopping up ancient lights, it was proved that there was an agreement for the payment of sixpence a year for the use of light, and that, in 1859 (within the period of twenty years), the agent of the owner of the alleged dominant tenement paid the owner of the alleged servient tenement the sum of sixpence, and made a verbal statement that it was for the lights of the house. The agent was now dead :—Held, that this was evidence of payment of the rent by the owner of the alleged dominant tenement. *Bewley* v. *Atkinson*, 49 L. J., Ch. 153 ; 13 Ch. D. 283 ; 41 L. T. 603 ; 28 W. R. 638—C. A.

—— **And Entries compared.**]—There is no reason in principle why there should be a distinction made between the written entries of a deceased person against his interest and his verbal declarations. Where the statements are merely verbal, there is reason for watching more carefully the evidence by which those declarations are proved ; but if you are satisfied that they were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and of the written entries.—Per Thesiger, L.J. *Ib.*

In Corroboration.]—Although hearsay evidence is not allowed as direct evidence, yet it may be admitted in corroboration of a witness's testimony, to shew that he affirmed the same thing before on other occasions. *Holliday* v. *Sweeting*, Bull. N. P. 294.

On a prosecution for perjury, where, on the part of the prosecution, the depositions of a deceased person were offered in evidence, and upon the cross-examination of the prosecutor's witness certain declarations of the deceased witness, not upon oath, were proved, for the purpose of corroborating the facts stated in his depositions, in a matter material to the defendant:—Held, that evidence of such declarations was not admissible. *Rex* v. *Parker*, 3 Dougl. 242.

Possession.]—If a person is seen felling timber in a wood, it is primâ facie evidence that he is the owner of it; and therefore anything that he says, at that or any other time, as to anyone else being the owner of it, is evidence. *Doe* d. *Stansbury* v. *Arkwright*, 5 Car. & P. 575.

A declaration by the party in possession, that his interest was less than a fee, e.g. for his own life only, would be primary evidence that it ceased to exist at his death. *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497.

Secus, where he declared that he held "for life interest," that statement being consistent with one or more life interests coming into existence at his death. *Ib.*

Where there is a right of entry given for an assigning or under-letting, if a person is found on the premises, the declaration of such person is evidence against the lessee of an under-letting. *Doe* d. *Hindly* v. *Rickarby*, 5 Esp. 4.

Knowledge of Circumstances.]—Declarations of a person in insolvent circumstances, tending to shew that he knew of his insolvency, are admissible to prove such knowledge, provided the fact of his insolvency is proved aliunde. *Thomas* v. *Connell*, 4 M. & W. 267; 1 H. & H. 189; 7 L. J., Ex. 306.

Intention.]—The declaration of a party is admissible in evidence to prove his intention. *Gale* v. *Halfknight*, 3 Stark. 56.

Wife barred from her right to be exonerated out of the assets of her husband, in respect of money raised by mortgage of her estate, and received by him, by telling executor she would not raise her claim; and no difference, whether legacies were paid before or after. Parol evidence of her declarations, admissible to prove that it was not applied for the husband's use, not to prove the transaction itself different from what it appears to be by the instrument, and the other evidence, as that it was intended as a gift to him. *Clinton* v. *Hooper*, 1 Ves. J. 173; 1 R. R. 102.

b. Of Deceased Persons.

When accompanying Sale of Land.]—Statements of a deceased vendor, made at the time of sale to indicate the property sold, are, for the purpose of its identification, admissible in evidence. *Parrott* v. *Watts*, 47 L. J., C. P. 79; 37 L. T. 755.

The plaintiff claimed, under a surrender of copyhold lands in 1845, to be in possession of a certain piece of waste land within a manor, purchased by him from B., the then tenant in possession, who was also the plaintiff's predecessor in title, and the surrenderor under the deed of surrender. In order to identify the land claimed with a parcel of land described in the deed of surrender as "the common piece on the Mind," the plaintiff stated that at the time of the purchase, B., since deceased, went over the land with him, and pointed out to him "the common piece on the Mind." On objection to this evidence:—Held, that it was admissible as a declaration accompanying and explaining an act. *Ib.*

In Course of Business.]—Discussion of the rules of evidence relating to declarations in writing by deceased persons made in the ordinary course of business. *Pickering* v. *Ely* (*Bishop*), 2 Y. & Coll. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

Against Pecuniary Interest.]—The only declarations of deceased persons receivable in evidence are those made against the proprietary or the pecuniary interests of the party making them, when the subject-matter of such declarations is within the peculiar knowledge of the party so making them. *Sussex Peerage Case*, 11 Cl. & F. 85; 8 Jur. 793.

The law does not recognise the apprehension of possible danger of a prosecution, as creating an interest which can bring these declarations within the rule in favour of their admissibility, upon the ground of their being declarations made against the interest of the party making them. *Ib.*

The declarations of a deceased clergyman to his son, to the effect that he had celebrated a marriage between a deceased peer and his alleged wife, are not receivable, as the declarations of a deceased party made against his own interest, such interest not being an interest of a pecuniary nature. *Ib.*

Principles on which the written statements of third parties (since deceased) are admissible as evidence, discussed. *Giffard* v. *Williams*, 38 L. J., Ch. 597; L. R. 8 Eq. 494; 21 L. T. 575; 17 W. R. 56.

The principle applicable to the admissibility in evidence of the declarations of deceased persons, is the same whether the declaration is against proprietary or pecuniary interest, and whether verbal or written; and a verbal declaration against proprietary interest is evidence not only of the particular fact which is against interest, but also of any other fact contained in the declaration, and substantially connected with the same subject-matter. *Reg.* v. *Birmingham Overseers*, 1 B. & S. 763; 31 L. J., M. C. 63; 8 Jur. (N.S.) 37; 5 L. T. 309; 10 W. R. 41.

A deed whereby a mortgagor mortgaged his life interest in real estate under the will of a person therein named is admissible after the mortgagor's death to shew that such a will existed, as the deed amounted to a declaration by the mortgagor against his interest as limiting his estate to an estate for life under a particular will. *Sly* v. *Dredge*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

Lands in C. were devised to trustees for absolute sale, to purchase other lands at A., and to permit D. to receive the rents of the so purchased lands for his life, with remainders over. D. granted an annuity arising out of certain lands (C. amongst others), and in the annuity-deed recited the will, that the trustees had not sold the lands in C., and that the trustees had per-

mitted him to receive the rents. In an ejectment by the trustees under the will, for the lands in C., D. having been shewn to have been in receipt of the rents and profits during his lifetime :—Held, that the annuity-deed was admissible, as containing a declaration by D. that he did not hold in fee. *Doe* d. *Shirreff* v. *Coulthred*, 2 N. & P. 165 ; 7 A. & E. 235 ; W. W. & D. 477 ; 7 L. J., Q. B. 52.

Declaration of F. deceased, that her husband made a will, and that he thereby gave her a life interest in his property and legacies to others amounting to 8,000*l.* or 9,000*l.*, admitted in evidence as being a declaration against pecuniary or proprietary interest made by a deceased person on the ground that F. would, if her husband had died intestate, have been entitled absolutely to a moiety of a certain sum mentioned in a marriage settlement. *Flood* v. *Russell*, 29 L. R., Ir. 91.

Upon the principle of written declarations being admissible, where they are against the pecuniary interest of a person making them, the accounts of a deceased trustee, containing acknowledgments of money received by him on behalf of his cestui que trust, and for which he was liable, held admissible against the cestui que trust. *Bright* v. *Legerton*, 29 L. J., Ch. 852 ; 6 Jur. (N.S.) 1179 ; 8 W. R. 678.

Parol evidence of declarations of the wife respecting her advancement made during coverture with first husband, admissible against the second. *Fawkner* v. *Watts*, 1 Atk. 407.

So also proofs of declarations by a husband, because against his interest ; secus, as to declarations by the father. *Ib.*

Plaintiff tendered a document in evidence dated 7 July, 1733, headed, "An account of weyers & nettes on the river Blackwater & in whose possession." It was found among the muniments of title of plaintiff, but was not signed by any person. The handwriting in which it was written was not proved, neither was it proved that the statements contained in it had been adopted by the person from whom plaintiff derived title, against whose interest they appeared to be, or that they had been made by his authority :—Held, that the document was not admissible either as a declaration against interest or as evidence of reputation. *Devonshire (Duke)* v. *Neill*, 2 L. R., Ir. 132.

—— **Of Testator as against his Representative.**]—In an action by an executor for a debt due to the estate, a parol statement by the testator against his pecuniary interest with reference to such debt is admissible. *Watson* v. *Sandford*, 40 L. T. 39.

Declarations made by a testator are evidence against a person claiming in the character of his administrator. *Smith* v. *Smith*, 7 Car. & P. 401.

At the trial of an action of detinue by the plaintiff, as administratrix of her deceased husband, for the recovery of a policy of insurance, effected by him on his own life, evidence was tendered by the defendants and admitted, that the policy had been given by the deceased in his lifetime to his mother, one of the defendants, with words to the effect that it was given to her for her own use and benefit ; and evidence of other conversations of the deceased to the same effect was also tendered by the defendant and admitted. The plaintiff, who questioned the truth of this evidence, tendered evidence of conversations between herself and her deceased husband, tending to shew that the deceased intended the policy as a provision for the plaintiff, or that she should share in it, but this evidence was rejected as inadmissible :—Held, that assuming the policy to have been given to the defendant as alleged and proved by her at the trial, it was no longer the property of the deceased, and any words of his tending to derogate from the validity of the gift were not admissible in evidence, and therefore the evidence tendered by the plaintiff to that effect was rightly rejected on the ground that the conversations in question were statements of the deceased in his own favour ; and that for the converse reason, the evidence of the defendant, objected to by the plaintiff, was rightly received as being admissions of the deceased against his own interest. *Rummens* v. *Hare*, 32 L. T. 428.

Of Person who if alive would be a competent Witness—Scots Law.]—See *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.) *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Sc.) post, cols. 552, 553.

Of Person in actual Possession of Land.]—To make a declaration against proprietary interest in lands evidence after the death of the declarant, he must have been at the time in actual possession. *La Touche* v. *Hutton*, Ir. R. 9 Eq. 166.

Semble, that the fact of his making a lease of the lands is, of itself, as an act of ownership, sufficient evidence of his being in possession, so as to render admissible against third parties a declaration against his proprietary interest contained in that lease. *Ib.*

A declaration made by a deceased occupier at the time of planting a tree to the effect that he did so to shew where the boundary of a road was when he was a boy :—Held, to be not receivable. *Reg.* v. *Bliss*, 2 N. & P. 464 ; 7 A. & E. 550 ; W. W. & D. 624 ; 7 L. J., Q. B. 4.

By Deceased Tenant for Life binding on Remainderman.]—In order that a declaration by a deceased tenant for life may be admissible in evidence against a remainderman, it must be accompanied by some act done by the tenant for life. Such a declaration accompanied by an act of a third party is not receivable. *Howe* v. *Malkin*, 40 L. T. 196 ; 27 W. R. 340.

Of Collector.] — Quære, whether a verbal statement made by a deceased collector of rents at the time of paying over to his employer moneys received by him from the tenants, as to the person from whom he received a particular sum entered by him in the rental, is admissible against that person. *Fursdon* v. *Clogg*, 10 M. & W. 572.

Of Tenant as to Rent.]—A declaration or a written entry by a deceased person when occupier of a house that he was tenant at so much rent, and had paid it, is admissible, as a declaration against proprietary interest, to prove the fact of the payment as well as of the tenancy, and so to shew that he had acquired a settlement, under 6 Geo. 4, c. 57, s. 2, by renting a tenement. *Reg.* v. *Exeter Guardians*, 10 B. & S. 433 ; 38 L. J., M. C. 126 ; L. R. 4 Q. B. 341 ; 20 L. T. 693 ; 17 W. R. 850.

As to Will.]—Declarations of a deceased person, claiming a limited interest under a particular will of property of which he was in

possession, are admissible to prove the fact that such will had a legal existence, and that certain persons were named executors therein. *Sly* v. *Dredge*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

As to Gift.]—In trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff. It appeared that the watch had formerly been the property of the father of the plaintiff and defendant, who were brothers. The defendant proved in evidence letters of administration of his father's effects, which had been granted to him:—Held, that the plaintiff, in answer to this evidence, was entitled to give evidence of conversations in which the deceased had stated that he had given the watch to the plaintiff. *Smith* v. *Smith*, 3 Bing. (N.C.) 29; 3 Scott, 352; 2 Hodges, 130; 5 L. J., C. P. 305.

—— **Purpose of.**]—A., the holder of a promissory note for 200*l.* and interest, expressed to be for value received, sued the executors and devisees of B., deceased, the maker of the note, for payment, and proved by the attesting witness that B. signed and gave the note. The devisees, by their answer, alleged that the note was given to A., at his request, to secure to him that amount out of the testator's assets after his decease:—Held, that the declarations by B. to that effect in the presence of A. were admissible in evidence, and that A. was not entitled to recover on the note. *Fritchley* v. *Williamson*, 7 Jur. 335.

As to Agreement for Purchase.]—On a question between the real and personal representatives of A. (who died intestate), whether A. had actually agreed in his lifetime for the purchase of an estate, the parol declarations of A. in his lifetime are not admissible evidence. *Perchard* v. *Benyon*, 1 Cox, 214.

Validity of Patent.]—On the trial of an action for the infringement of a patent, the novelty of which was disputed, the defendant gave evidence that O., then deceased, had, previously to the date of the plaintiff's patent, used a process identical with the plaintiff's, and had produced and sold a product exactly similar to that produced by the plaintiff's patent. The plaintiff called witnesses in reply; and a witness deposed that O. had, on a sale of the product subsequently to that of which the defendant had given evidence, and subsequently to the plaintiff's patent, stated that the article was new, and that he wished it to be kept secret:—Held, that the evidence was inadmissible. *Hyde* v. *Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126; 7 L. T. 823; 11 W. R. 433.

Insurance—As to Health.]—In an action by the husband upon a policy of insurance on the life of his wife, declarations by the wife made by her when lying in bed apparently ill, stating the bad state of her health at the period of her going to M. (whither she went a few days before in order to be examined by a surgeon, and to get a certificate from him of good health, preparatory to making the insurance) down to that time, and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible to shew her own opinion, who best knew the fact of the ill state of her health, at the time of effecting the policy, which was on a day intervening between the time of her going to M. and the day on which such declarations were made: and particularly after the plaintiff had called the surgeon as a witness to prove that she was in a good state of health when examined by him at M., his judgment being formed in part from the satisfactory answers given by her to his inquiries. *Aveson* v. *Kinnaird* (*Lord*), 6 East, 188; 2 Smith, 286; 8 R. R. 455.

The principle upon which such declarations are evidence is, that, when accompanying the act done, and tending to explain it, they are part of the res gestæ, and therefore admissible. *Ib.*

The written statements by a sick person to a medical man of the symptoms of his malady are not admissible, although the medical man has given advice upon the faith of such statements. *Witt* v. *Klindworth*, 3 Sw. & Tr. 143; 32 L. J., Mat. 179; 8 L. T. 175; 11 W. R. 154.

—— **As to Interest.**]—In an action by an administratrix on a policy of insurance on the life of the intestate, where the defence was that the policy was void under 14 Geo. 3, c. 48, on the ground that the intestate had no interest in it; the evidence of a witness that previously to the insurance the intestate consulted him about effecting a policy on his, the intestate's life, is admissible as an act, and is not objectionable as hearsay. *Shilling* v. *Accidental Death Co.*, 4 Jur. (N.S.) 244.

Personal Acts.]—A confession of forgery by a dead witness may be admissible. *Clymer* v. *Littler*, 11 W. Bl. 345. *S. C.*, nom. *Wright* d. *Clymer* v. *Littler*, 3 Burr. 1244.

But evidence of the declarations of a man since dead, as to a fact done by himself, is not admissible. *Garnons* v. *Barnard*, 1 Anstr. 298.

Evidence at Previous Trial.]—What a dead witness has sworn on a former trial, between the same parties, is evidence in the cause, and may either be read from the judge's notes, or proved upon oath by the notes or recollection of any person who heard it. *Doncaster Corporation* v. *Day*, 3 Taunt. 262; 12 R. R. 650. S. P., *Strutt* v. *Bovingdon*, 5 Esp. 36; 8 R. R. 834.

In ejectment, A. proposed to cross-examine a shorthand writer as to the evidence given in a former action by a witness who had since died. The former action was an ejectment by A.'s son, who claimed as A.'s heir-at-law, under the supposition that A. was dead, to recover the same land from the defendant's father:—Held, that there was no privity of estate between A. and the son, and that the evidence not being admissible against A., was not admissible for him. *Morgan* v. *Nicholl*, 36 L. J., C. P. 86; L. R. 2 C. P. 117; 12 Jur. (N.S.) 963; 15 L. T. 184; 15 W. R. 110.

Evidence given on oath, and subject to cross-examination on a former trial, is admissible in a subsequent action between the same parties, or those claiming under them, if it relates to the same subject, and the witness cannot be called. *Ib.*

In ejectment, where the question is devisavit vel non, evidence of the examination and cross-examination of one of the attesting witnesses to the will, who, upon the trial of an issue out of chancery between the same parties, and upon the same question, proved the execution of the will, and is since dead, is admissible; and, being admitted, is entitled to the same degree of weight as the vivâ voce evidence of an attesting witness.

Wright v. *Doe* d. *Tatham*, 3 N. & M. 268; 1 A. & E. 3; 3 L. J., Ex. 366.

A. being possessed of Blackacre and Whiteacre by the same title, conveyed Blackacre to B. Evidence given by witnesses since dead, in an action between C. and A. respecting the title to Whiteacre, brought subsequently to the conveyance from A. to B., is not admissible in an action between C. and B., as to the title to Blackacre. *Doe* d. *Foster* v. *Derby* (*Earl*), 3 N. & M. 782; 1 A. & E. 783; 3 L. J., K. B. 191.

In ejectment, *Doe* d. *H.* v. *R.*, M., a witness of A., since deceased, was examined under a commission. In a second ejectment, *Doe* d. *H.* v. *P.*, to recover the same property, it was proved that before the examination R. agreed to defend the former ejectment for P.:—Held, that on the trial of the second ejectment M.'s deposition was receivable in evidence for P., as the two ejectments were substantially between the same parties, and that it need not be shewn that at the time of the examination H. knew that B. was defending for P. *Doe* d. *Hulin* v. *Powell*, 3 Car. & K. 323.

At Previous Stage.]—Where, upon an issue between parties, the testimony of a witness since deceased has been received, which either of those parties might use against the other, that evidence may be used between the same parties in any subsequent proceedings on the same issue. *Lawrence* v. *Maule*, 4 Drew. 472; 28 L. J., Ch. 681; 7 W. R. 314.

Dying Declarations.]—*See* CRIMINAL LAW, ante, vol. 4, col. 1528.

c. Representative Parties.

Trustee.]—A defendant may give in evidence the declarations of the plaintiff on the record to defeat the action, although such plaintiff appears to be only a trustee for a third person. *Bauerman* v. *Radenius*, 7 Term Rep. 663; 2 Esp. 653.

Guardian.]—But when a minor sues by his guardian, the declaration of the guardian is not admissible against the plaintiff. *Cowling* v. *Ely*, 2 Stark. 366; 20 R. R. 694.

Nothing in answer of guardian can be read against the ward. *Leigh* v. *Ward*, 2 Vent. 72.

Infant's answer cannot be read against him, nor excepted to, and may be amended when he comes of age. *Savage* v. *Carroll*, 1 Ball & B. 553. *See* 12 R. R. 32.

An infant's answer cannot be given in evidence against him, because it is not the answer of the infant, but of the guardian who is sworn, and not the infant. *Wrottesley* v. *Bendish*, 3 P. W. 237.

But where a defendant put in an answer to a bill brought by an infant who did not reply to it, in such case the answer was taken to be true, in regard to the defendant for want of replication was deprived of an opportunity of examining witnesses to prove his answer, and he ought not to suffer for such omission in the plaintiff, sed quære. *Ib.*

Next Friend.]—Neither are declarations of a prochein amy, made before action, admissible for the defendant. *Webb* v. *Smith*, R. & M. 106; 1 Car. & P. 337.

Assignee.]—Declarations of an assignee of a bankrupt suing as such, made before he was chosen assignee, are not admissible against him. *Fenwick* v. *Thornton*, M. & M. 51. Contra, *Smith* v. *Morgan*, 2 M. & Rob. 257. And see *Metters* v. *Brown*, 1 H. & C. 691; 32 L. J., Ex. 138.

If A. is seeking to recover possession of a leasehold house in ejectment, and it appears that after his lease was granted to him he became bankrupt, he cannot in anticipation of a supposed defence that the defendant claims under his assignees, give in evidence declarations of the assignees that they have no interest in the lease. *Doe* d. *Colnaghi* v. *Bluck*, 8 Car. & P. 464.

Executor.]—In an action by a special administrator, under 38 Geo. 3, c. 87, the declarations of the executor named in the will, made by him while he was the acting executor, are not admissible against the plaintiff. *Rush* v. *Peacock*, 2 M. & Rob. 162.

Guardian of Superannuated Person.] — The answer of superannuated person put in by guardian shall be read against him as an answer of one of full age. Secus, of an infant who is to have a day to show cause. *Leving* v. *Caverly*, Pre. Ch. 229.

The court will not permit the answer of the guardian ad litem of a superannuated person to be read against him, nor make a decree against him thereon, but will require the case to be proved against him. *Freeman* v. *Grady*, 8 Ir. Eq. R. 137.

Committee of Lunatic.]—Quære, whether the answer of a lunatic by her committee can be read against her, or, after her decease, against her estate. *Percival* v. *Caney*, 14 Jur. 1056. And see *Stanton* v. *Percival*, 5 H. L. Cas. 257; 24 L. J., Ch. 369; 3 W. R. 391.

d. Testators.

Will Lost—Proving Contents.]—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. *Sugden* v. *St. Leonards* (*Lord*), 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 372; 24 W. R. 860—C. A.

Declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents. *Ib.*

Omission.]—The declaration of a testator will not be admitted to explain an omission in a will, although evidence of surrounding circumstances will. *Sullivan* v. *Sullivan*, Ir. R. 4 Eq. 457.

Execution—What included in Will at Time of.] —Oral and written declarations of a testator, whether made before or after the date of execution of a will, are admissible in evidence for the purpose of shewing what were the constituent parts of the will at the time of execution. M. R. made and duly executed her last will on the 1st of August, 1872. On her death, in 1879, the will was found in an envelope in her writing-desk. It was contained in two sheets of note-paper stitched together bookwise. The will was all in the handwriting of the testatrix (with the exception of the attestation clause, which was filled in by one of the attesting witnesses), and, commencing with the first page of the outer sheet, it ran: "I appoint my nephews, R. J. G. and R. G. L., to be my joint executors to carry my will into effect. I appoint my nephew,

R. J. G., to be my executor and sole residuary legatee.—M. R. And placed with my will the 1st day of August, 1872." The following page was a blank, and the will was continued on the inner sheet, which was paged 1, 2, 3, 4: "The last will and testament of me," &c., and concluded with the attestation clause on the fourth page. The next, the third page of the outer sheet, was a blank, and the last contained the indorsement, "The will of M. R., August 1, 1872." The attesting witnesses were unable to say what were the contents of the will, or whether it was contained in one or two sheets of paper:—Held, that declarations of intention by the testatrix before the execution of the will, and declarations by her subsequent to the execution, shewing the belief that she had effected her intention, were admissible in evidence, with the view of shewing what were the constituent parts of the will at the time of its execution. *Gould* v. *Lakes*, 49 L. J., P. 59; 6 P. D. 1; 43 L. T. 382; 29 W. R. 155; 44 J. P. 698.

As to Devisee.]—Devise of lands "to J. A., the grandson of my said brother T., his heirs and assigns for ever," charged with the payment of 100*l.* "to each and every of the brothers and sisters of the aforesaid J. A." The testatrix's brother T. had two grandsons, each named J. A., but one of these (the lessor of the plaintiff) had several brothers and sisters, the other, the defendant, had only one brother and one sister:—Held, that notwithstanding this circumstance, evidence of declaration of testatrix made some months after the date of the will that she had left the property to the defendant, was receivable. *Doe* d. *Allen* v. *Allen*, 12 A. & E. 451; 4 P. & D. 320; 9 L. J., Q. B. 395.

Fraud.]—The declarations of a testator are admissible when a will is disputed on account of fraud, circumvention, or forgery. *Doe* d. *Ellis* v. *Hardy*, 1 M. & Rob. 525.

Attempted Destruction.]—In ejectment by an heir against a devisee, evidence may be given on the part of the heir of declarations made by the testator, that he had attempted to destroy his will. *Doe* d. *Reed* v. *Harris*, 7 Car. & P. 330.

A will was found, the signature to which had been cut out, but gummed on to its former place. The will had been in the custody of the testator up to the time of his death. Declarations of the testator made subsequently to the date of the will were proved of an intention to benefit his wife by will. No other will was forthcoming:—Held, that the presumption that the testator had cut out the signature animo revocandi was not rebutted, and that the gumming on the signature in its original place did not revive the will. *Bell* v. *Fothergill*, L. R. 2 P. 148; 23 L. T. 323; 18 W. R. 1040.

A will, which had remained in the custody of the testator since the time of its execution, was not forthcoming at his death. A draft was propounded, and evidence of declaration was admitted to shew an intention to adhere to the will. On the other side evidence was offered to shew that the testator did not intend to leave his property in the manner in which it was disposed of by his will, and that he had destroyed it by burning it:—Held, that such declarations were admissible, not as evidence of destruction, but of intention not to adhere to the will. *Keen* v. *Keen*, 42 L. J., P. 61; L. R. 3 P. 105; 29 L. T. 247. *See further*, WILL.

e. Of Parties formerly Interested.

Deceased Vendor.]—Statements of a deceased vendor, made at the time of sale to indicate the property sold, are for the purpose of its identification, admissible in evidence. *Parrott* v. *Watts*, 47 L. J., C. P. 79; 37 L. T. 758.

Declarations respecting the subject-matter of a cause by a person who, at the time of making them, had the same interest in such matter as one of the parties now has, are admissible against that party, though the maker of them is alive and might be called as a witness. *Woolway* v. *Rowe*, 3 N. & M. 849; 1 A. & E. 114; 3 L. J., K. B. 121.

Upon a trial where the question was whether the chapelry of St. H. was a legal parochial chapelry, a case stated by a deceased incumbent of St. H., for the opinion of a proctor, with his opinion thereon, is admissible, on the same principle as a statement of a deceased occupier, which qualifies his estate, is admissible. *Carr* v. *Mostyn*, 5 Ex. 69; 19 L. J., Ex. 249.

Upon an issue between A. and B., whether C. died possessed of certain property, evidence may be given of declarations made by C. that she had assigned the property to A. *Ivat* v. *Finch*, 1 Taunt. 141; 9 R. R. 716. See *Smith* v. *Smith*, 3 Scott, 352; 3 Bing. (N.C.) 29; 2 Hodges, 130; 5 L. J., C. P. 305.

Tenants.]—Declarations by tenants are admissible after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership on it, not resisted by contrary evidence, is decisive. *Davies* v. *Pierce*, 2 Term Rep. 53; 1 R. R. 419.

The declarations of a deceased occupier of land are admissible to shew of whom he held it. *Doe* d. *Majoribanks* v. *Green*, Gow, 227; 21 R. R. 829. S. P., *Uncle* v. *Watson*, 4 Taunt. 16; 13 R. R. 552.

Where a party claimed as devisee in remainder under a will made twenty-seven years before, under which there was no possession, declarations by the tenant in possession at that time, that he held as tenant to the devisor, are admissible evidence to prove the seisin of the devisor. *Holloway* v. *Rakes*, 2 Term Rep. 55. *See* 1 R. R. 421.

Statements of a deceased occupier touching his title are admissible generally, without reference to the particular effect they may produce in the cause. *Carne* v. *Nicoll*, 1 Bing. (N.C.) 430; 1 Scott, 466; 4 L. J., C. P. 89.

—— In derogation of Rights of Reversioner.]—The plaintiff claimed a right of common by prescription, in respect of a que estate in land, and also by thirty and sixty years' enjoyment by the occupiers of the land. The defendant offered evidence that A., now deceased, while tenant of the land for four years, had declared that he had no such right in respect of the land:—Held, that the declaration was not admissible, inasmuch as it was in derogation of the title of the reversioner. *Papendick* v. *Bridgwater*, 5 El. & Bl. 166; 24 L. J., Q. B. 289; 1 Jur. (N.S.) 657; 3 W. R. 490.

On an issue whether the plaintiff had an easement in the defendant's land, the declaration of a former occupier of the defendant's land is not admissible against him. *Scholes* v. *Chadwick*, 2 M. & Rob. 507.

Explanatory of Acts.]—Action for entering the plaintiff's garden. The plaintiff was tenant to W. L. of the garden, and the defendant was owner of premises comprising a cottage and yard, which had formerly been part of the estates of the L. family, with a privy in the yard abutting upon the garden, which privy had stood there sixty years. L., who died in 1811, was owner of the garden and the premises belonging to the defendant, and devised certain of his estates, including those premises, to H. L. in trust to sell. H. L. sold various lots, and, in 1812, W. became the purchaser of a lot which included those premises. In 1821, W. built the cottage, and on his death in 1849, the premises devolved upon the defendant in right of his wife, who was heiress of W. In 1823, S. became tenant of the garden, and continued so until 1857. In 1830 he walled up stones against the opening of the privy into the garden, and W. knocked them down. S. complained of that act to H. L., who went with his agent to look at the place, and met there S. and W. Declarations of W. and H. L. on that occasion were admitted in evidence at the trial. A low wall was accordingly built round, and a loose flagstone put at the top so as to form a cesspool, and the privy was cleaned out through the garden until about 1852. Under the will of L., the garden came to W. L. on his attaining twenty-one in 1817. After the declarations were given in evidence, it appeared that H. L. was trustee of W. L. during his minority, and subsequently by his request received his rents. In October, 1861, the tenant of the garden, by direction of W. L., built a wall to prevent the defendant going through it. The trespass for which the action was brought was committed on the 3rd of February, 1863, and the writ issued on the following day:—Held, that the declaration of W. was admissible as explanatory of acts about to be done by him, shewing the nature of the enjoyment of the way. *Bennison* v. *Cartwright*, 5 B. & S. 1.

Semble, that even taking H. L. as a stranger to the estate at the time of the conversation between him and S. and W., his declaration was admissible as part of the conversation. *Ib.*

The acts of successive tenants of an estate held not to be evidence to prove the existence of a certain covenant; but where the covenant was otherwise proved, they were evidence of the construction which the parties interested had put upon it. *Sadlier* v. *Biggs*, 4 H. L. Cas. 435. And see *Reg.* v. *Bliss*, post, col. 546.

Lords of Manor—Wastes.]—Declarations of a deceased lord of a manor, as to the extent of his rights over the wastes of a manor, are not admissible. Aliter, if spoken of the extent of the wastes only. *Crease* v. *Barrett*, 1 C. M. & R. 919; 5 Tyr. 458; 4 L. J., Ex. 297.

Of former Rector as to Modus.]—An answer by former rector to bill filed to establish modus of certain measure of meal, as to one farm, admitting that parish is exempt in consideration of a commutation of meal, is not only admissible but strong evidence to prove a district modus. *De Whelpdale* v. *Milburn*, 5 Price, 485.

Deceased Tenant for Life.]—In order that a declaration by a deceased tenant for life may be admissible in evidence against a remainderman, it must be accompanied by some act done by the tenant for life. Such a declaration accompanied by an act of a third party is not receivable. *Howe* v. *Malkin*, 40 L. T. 196; 27 W. R. 340.

Person in actual Possession.]—To make a declaration against proprietary interest in lands evidence after the death of the declarant, he must have been at the time in actual possession. *La Touche* v. *Hatton*, Ir. R. 9 Eq. 166.

Semble, that the fact of his making a lease of the lands is, of itself, as an act of ownership, sufficient evidence of his being in possession, so as to render admissible against third parties a declaration against his proprietary interest contained in that lease. *Ib.*

A. had, forty-five years back, inclosed a piece of ground from the waste, and built a cottage on part of it; he died twenty-nine years back; and, after that, his widow and daughter lived on the premises till the death of the former, a month before the trial:—Held, in ejectment by A.'s eldest son, that the declarations of the mother were evidence for lessor of the plaintiff, although she was not in the sole occupation of the premises, and, although she was not on the premises when such declarations were made. *Doe* d. *Pritchard* v. *Jauncey*, 8 Car. & P. 99.

A party claiming to have been owner of lands by virtue of a cession to him from A., since deceased, offered evidence, before any other proof of the cession, that A. actually managed the property, and while so managing declared that he did so in the name of the claimant:—Held, admissible. *De Bode's (Baron) Case*, 8 Q. B. 208.

Execution Debtor as to Property in Goods.]—On the trial of an issue directed to try whether goods seized under a fi. fia. against A. by defendant were the goods of plaintiff, declaration of A. as to the property of the goods are not receivable in evidence on the part of the plaintiff. *Stothert* v. *James*, 1 Car. & K. 121.

A. brought trover for goods, which had been seized at the house of B. by defendant, as sheriff of S., under a fi. fia. against B. A. claimed under a sale at auction, which was stated, at the time of the sale, to have been made under an assignment by B. for the benefit of his creditors. To shew that the sale was fraudulent, the defendant's counsel proposed to give evidence that when the execution went in, and while the goods remained in B.'s possession, B. said that the goods were his son's:—Held, that this evidence was not receivable. *Roberts* v. *Justice*, 1 Car. & K. 93.

Bankrupt.]—In an action for use and occupation by the assignees of a bankrupt, it was proved that defendant had said that he had been served with a writ for rent by the attorney of the assignees, but that the bankrupt was his landlord, and his attorney had sent an indemnification for the bankrupt to sign, which the bankrupt had signed:—Held, that the assignees were entitled to give in evidence statements made by the bankrupt, without any further proof of the nature and extent of the indemnity. *Arkle* v. *Wakeman*, 1 Car. & K. 516.

f. Of Attesting Witnesses.

Declarations made by a deceased attesting witness respecting the attested instrument, are not admissible, though admissions of fraud or

forgery on his own part, and though his handwriting has been proved as proof of the instrument. *Stobart* v. *Dryden*, 1 M. & W. 615; 2 Gale, 146; 5 L. J., Ex. 218.

Copy in Handwriting of.]—A copy of a will in the handwriting of one of the attesting witnesses, who was a solicitor's clerk, was found, after a lapse of fifty years, among the solicitor's papers tied up with other papers belonging to a client who was one of the executors named in the will:—Held, on proof of due search for the original will, that the copy was admissible. *Sly* v. *Dredge*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

Affidavit of.]—A will purported to have been executed in the presence of two attesting witnesses. One was abroad and the other in England. The executors, who propounded the will, applied for a commission for the examination de bene esse of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity, but described him as an elderly person. The court ordered the commission to issue, but intimated that if it was proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *M'Pherson* v. *Parnell*, 40 L. J., P. 30; 24 L. T. 742; 19 W. R. 784.

g. In Questions of Pedigree.

i. *Who may make Declarations.*

Deceased Parent.]—In a case of pedigree the declaration of a deceased father is admissible evidence of the illegitimacy of his child when the question in dispute is whether the father and mother were ever married. And such a declaration may outweigh evidence shewing that the father and mother were reputed to be husband and wife. *Murray* v. *Milner*, 48 L. J., Ch. 775; 12 Ch. D. 845; 41 L. T. 213; 27 W. R. 881.

Deceased Relations.]—Where the object is to connect A. with C., after proving that B., a deceased person, was related to A., it is competent to give in evidence declarations by B., in which he claimed relationship with C. *Monkton* v. *Att.-Gen.*, 2 Russ. & M. 147. *S.C.*, nom. *Robson* v. *Att.-Gen.*, 10 Cl. & F. 471.

Correspondence between members of the same family in which they respectively address one another as relatives, is admissible. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 442; 14 W. R. 694.

A conversation between a connection of a family and some of the members of the family on the subject of a marriage supposed to have taken place in that family, cannot be given in evidence without previous proof that the persons with whom the conversation took place are dead. *Butler* v. *Mountgarret* (*Viscount*), 7 H. L. Cas. 633.

Declarations of relations' evidence of pedigree, but inconclusive without shewing on what occasion, what led to them, &c. Whether a physician or servant who attended the family can be admitted as one of the family, quære. Object of taking evidence in secret to prevent attempts to support defective evidence already given; but further inquiry when necessary, not refused. *Walker* v. *Wingfield*, 18 Ves. 443; 11 R. R. 232.

Deliberate statements made by deceased members of a family, who, if alive, could have been competent witnesses, are generally admissible, but a statement by one member of a family that B., another member, did a certain act, which act, if done at all, was done before the deceased's birth, and there being nothing to shew what were his grounds of knowledge, and the fact not otherwise being proved, is not evidence that the particular act was done by anyone; and though the statement cannot be altogether rejected, yet it can only be received as mere family tradition. *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Sc.)

Declarations of deceased members of the family afford important evidence on questions of pedigree, if supported by entries and documents, but the court has been compelled to reject a case which depends exclusively on evidence of such declarations. *Webb* v. *Haycock*, 19 Beav. 342.

On a question of pedigree, witnesses cannot be received to prove the declarations of a relative whose deposition is read. *Gordon* v. *Gordon*, 3 Swanst. 465; 19 R. R. 230.

Handwriting of a relation deceased rejected as evidence of pedigree. *Edwards* v. *Harvey*, G. Cooper 39.

Connections.]—The declarations of a wife, as to the state of her husband's family, are equally admissible with the declarations of a husband as to the state of his wife's family. This admissibility does not extend to statements made by the wife's father. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

To prove a pedigree, the declarations of a husband of one of the family are admissible, though he was not otherwise related to the family. *Doe* d. *Northey* v. *Harvey*, R. & M. 297.

In a question of pedigree, declarations of a party connected by marriage are receivable. *Doe* d. *Futter* v. *Randall*, 2 M. & P. 20.

Hearsay evidence of declarations by a husband as to his wife's legitimacy are admissible, as well as those of relations by blood. *Vowles* v. *Young*, 13 Ves. 140; 9 R. R. 154.

A witness who deposes to declarations on the subject of pedigree need not be himself a member of the family. *Essex* (*Earl*) v. *Hodgson*, 15 W. R. 960.

Qualification as to evidence; tradition, even upon pedigree, must be from persons having such a connection with the party that it is natural and likely, from their domestic habits, that they are speaking the truth and could not be mistaken; upon that principle, descriptions in wills, monuments, Bibles, &c., are admitted. *Whitelocke* v. *Baker*, 13 Ves. 511; 9 R. R. 216.

An ancient mural inscription, giving an historical account of a family, and placed in a chancel which had formerly been used as a burying place of the family, and which formed part of the church of the parish where members of the family had long been resident proprietors, was held to be admissible evidence in a question of pedigree for the purpose of proving the facts stated in the inscription. *Slaney* v. *Wade*, 1 Myl. & C. 338. Affirming 7 Sim. 595. And see *Kidney* v. *Cockburn*, 2 Russ. & M. 147.

A recital that A. B. is a child of the marriage of the persons therein named, occurring in a deed by which the personal representative of the last

surviving trustee of the premises comprised in the deed assigns the premises to A. B., who is not related to the assignor, and whose sole title to the assignment is in the character of a child of such marriage, is not admissible as a declaration to prove the legitimacy of A. B. in a question of pedigree between third parties, semble. *Ib.*

Party having an Interest.]—Declarations ante litem motam are admissible in questions of pedigree, though the plaintiff's title was that which the party making such declarations would have had if living. *Doe* d. *Tilman* v. *Tarver*, 1 R. & M. 141.

Friends and Servants.]—Declarations of deceased servants and acquaintances, however intimate, are not admissible, as such declarations must be limited to relations, or members of the family. *Johnson* v. *Lawson*, 9 Moore, 183; 2 Bing. 86; 27 R. R. 558; 2 L. J. (o.s.), C. P. 136.

Heirship proved as a matter of reputation, by an intimate friend of the family at the time of the birth. *Bridger* v. *Huett*, 2 F. & F. 35.

Stranger.]—In proof of a pedigree, the dying declarations of A. as to the relationship of the lessor of the plaintiff to the person last seised, are not admissible. *Doe* d. *Sutton* v. *Ridgway*, 4 B. & Ald. 53.

Bastards.]—The declarations of an illegitimate member of a family respecting his illegitimate brothers are not admissible as reputation. *Doe* d. *Bamford* v. *Barton*, 2 M. & Rob. 28.

Weight of Evidence.] — In pedigree cases resting on the declaration of deceased persons, the court is compelled to regard with great suspicion the evidence of persons interested. *Webb* v. *Haycock*, 19 Beav. 342.

In pedigree cases the question usually mainly turns on one link in the pedigree. *Ib.*

Observations on the little reliance to be placed on the evidence of persons who strive to work out and sustain a particular pedigree. *Crouch* v. *Hooper*, 16 Beav. 182; 1 W. R. 10.

In pedigree cases, if one link be assumed, any two persons may be proved to be related; and therefore, in such cases, the difficulty usually consists in properly weighing and considering the evidence relating to the connecting link. *Ib.*

Where witnesses are once impressed with the belief of their relationship to a given individual, they are apt in time, by talking and discussing the matter, to bring themselves over to a conscientious belief of family conversations and declarations tending to support that relationship, but which never took place. *Ib.*

Evidence of conversations with deceased persons is not given under the ordinary worldly sanction, from the difficulty, in such a case, of convicting the witness of perjury. *Ib.*

The absence, unexplained, of the baptismal certificate of the party forming the material link of a pedigree, while those of the other sons are carefully and regularly entered, forms a difficulty almost insuperable in substantiating the alleged pedigree. *Ib.*

The evidence of "experts," as to the age of a document, and the character of the handwriting, may, in some cases, be valuable. *Ib.*

Where no Dispute.]—Statements in writing, by a deceased person, of facts within his knowledge relating to the state of his family, without a view to a suit or a claim of peerage, are admissible in proof of a pedigree. *Crawford and Lindsay Peerages*, 2 H. L. Cas. 534.

The rule as to receiving the declarations of deceased persons in questions of pedigree is that such declarations are admissible if emanating from a deceased member of the family whose pedigree is in question before any controversy has arisen touching the matter to which the declarations relate, and if the relationship of the declarant is proved independently of the declaration itself. *Smith* v. *Tebbitt*, 36 L. J., P. 35; L. R. 1 P. 354; 15 L. T. 594; 15 W. R. 562.

In an ejectment the defendant was entitled to a verdict if E. S., deceased, was legitimate or not; a certificate of the marriage of E. S.'s alleged father, J. D., to her mother, was produced by a witness, who said he received it from E. S. The question was then put, whether E. S. made at the time any statement respecting her mother's marriage:—Held, that this question was admissible, it having been proved before, to the satisfaction of the judge, that E. S. was a member of the family, and it not appearing that any dispute was at that time known to exist. *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314; 16 L. J., Q. B. 218; 11 Jur. 607.

A deed was put in, whereby E. S. conveyed the reversion of the property to E. J. It was signed by E. S., describing herself as "daughter and heiress of J. D.," and by E. J., who was an undoubted relation of J. D., and was tenant for life of the property:—Held, that the signatures were admissible as declarations, notwithstanding the interest which those parties might be supposed to have in E. S. thus representing herself, it not appearing that any dispute had then arisen. *Ib.*

A will of a deceased peer, made many years before his death, declaring, and in the most solemn form, the marriage and the legitimacy of his son (the claimant of the peerage), was proposed to be read as a declaration made by one of the parties; but it was rejected, because the date and certain expressions in it shewed it to have been written after a suit to annul the marriage of the deceased peer had been instituted by his father, and because there was nothing to shew that that marriage was not the very marriage in question. *Sussex Peerage*, 11 C. & F. 85; 8 Jur. 793.

In questions of pedigree, declarations tending to shew the person making them entitled to a remainder upon failure of the issue of the then possessor of an estate, were admissible for the plaintiff claiming under that person, ante litem motam. *Doe* d. *Tilman* v. *Tarver*, R. & M. 141.

A certain paper being found along with other papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its ever having been acted upon, or probate of it taken out, is yet evidence of its recognition by the party last seised, as the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that the ancestor acknowledged a brother of the name of Thomas to be older than another brother of the name of William; assuming the jury to be satisfied of the fact that the paper so found was kept there by the person last seised, with a

knowledge of its contents, and that no imposition was practised. *Doe* d. *Johnson* v. *Pembroke* (*Earl*), 11 East, 504; 11 R. R. 260.

As to Place.]—In a question of pedigree, when it is important to shew that the family had relatives living at a particular place, evidence may be given of declarations by a deceased member of the family that he was going to visit his relatives at that place. *Rishtone* v. *Nesbitt*, 2 M. & Rob. 554.

Family Writings.]—Family memorials to be admissible as evidence of pedigree must be spontaneous, and have originated before any question has been raised. Where, therefore, the document sought to be given in evidence was in the form of an affidavit, although not sworn, it was held to be ipso facto inadmissible. *Hill* v. *Hibbit*, 19 W. R. 250.

In questions of pedigree, entries of births and marriages of members of the family in a New Testament produced from the proper custody, are evidence without proof of the handwriting. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 442; 14 W. R. 694.

Family Reputation.]—Evidence of family reputation is not admissible to prove which of two trustees was the survivor, for the purpose of tracing the descent of the trust estate to a particular individual as heir-at-law of the surviving trustee. *Smith* v. *Smith*, Ir. R. 10 Eq. 273. Reversed, 1 L. R., Ir. 206—C. A.

—— **Whether Hearsay.**]—Evidence by a witness of reputation of marriage is admissible so long as it appears to be of a general reputation; so soon as it appears, however, on cross-examination or otherwise, that the witness is speaking from information given to him by some individual, even of the existence of a general reputation, such evidence is merely hearsay, and, as such, is inadmissible. *Shedden* v. *Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. 217; 6 Jur. (N.S.) 1163; 3 L. T. 592; 9 W. R. 285.

—— **As to Age.**]—Evidence of reputation is inadmissible to prove a person's age. *Colclough* v. *Smyth*, 15 Ir. Ch. Rep. 347; 10 L. T. 918.

Affidavit by father and uncle of time of birth, and of immediate baptism in a church, which had ceased to be a place of worship, and of which neither the register nor the clergyman could be found, and of subsequent baptism for the purpose of adding a name, in the certificate of which (which was produced) the names of the sponsors were by mistake written for those of the parents, an error which was corrected in the margin by the clergyman, admitted to prove age, the certificate of baptism which was produced not being of sufficient antiquity for the purpose. *Jamieson* v. *Vaile*, 1 Jur. 791.

The statement in a will of the date of a person's birth:—Held, to be primâ facie evidence of the age in a suit with reference to such will. *Valliamy* v. *Huskisson*, 3 Y. & Coll. 80; 2 Jur. 656.

Evidence partly erroneous.]—Observations on traditionary evidence in pedigree cases, and its fallibility. It is not to be wholly rejected because error is proved as to part. *Johnston* v. *Todd*, 5 Beav. 597.

ii. *Post litem motam.*

Inadmissible.]—In a petition for a legitimacy declaration the question was whether a marriage between the petitioner's grandfather and his wife was solemnised before 1784, the date of the birth of C., their eldest son, the petitioner's father, it was admitted that the only evidence of the marriage was reputation and family declarations. In 1800, C., the father of the petitioner, claimed property to which he would have been entitled, but which was then in the possession of his maternal uncle, and stated that his chief object was to establish his legitimacy. The maternal uncle replied that he was ready to defend any action that might be taken, and informed C.'s paternal uncle of the claim which had been made. No proceedings were taken. A controversy had arisen in 1800, between C. and his maternal uncle upon the very question involved in this litigation, and consequently declarations by members of the family, and recitals in deeds, made subsequently, when tendered were rejected as made post litem motam. *Frederick* v. *Att.-Gen.*, 44 L. J., Mat. 1; L. R. 3 P. 270; 32 L. T. 39.

B. married C. in facie ecclesiæ in 1851, had issue, and died in 1872. In an attempt by A. to set up a previous irregular Scotch marriage, a witness gave evidence that B. told him repeatedly after 1851, that A. was his wife, and not C.:—Held, that such evidence was not admissible. *Dysart Peerage Case*, 6 App. Cas. 419—H. L. (Sc.)

Effect of the statute 37 & 38 Vict. c. 64 (1874), held not necessary to decide. *Ib.*

Precognitions.]—In an attempt on the part of A. to set up an irregular marriage according to the law of Scotland, between herself and B., statements prepared by D., the plaintiff in an action against B. as the alleged husband of A., for A.'s board and lodging; which statements were signed—and in one case, corrected by interlineations—by deceased persons, who, if alive, would have been competent witnesses, were sought to be used as evidence:—Held, that they were not admissible. *Ib.*

What within the Rule.]—In 1806, it was referred to the master in chancery to report who was the proper person to be committee of G., a lunatic, and to certify who was her next of kin and heir-at-law, to whom it was directed that notice was to be given. S., maternal grandmother of G., made a deposition before the master, in which she stated the connections of the family. In 1854 G. died. In an ejectment in which the question was who was heir-at-law, ex parte paternâ, of G., the deposition of S., at that time deceased, was tendered as a declaration of a deceased relative on a matter of pedigree. No evidence was given either way as to whether, in 1806, there was any real dispute as to who was the heir of G. The evidence was objected to as being post litem motam, but received:—Held, that the evidence was properly received; the inquiry as to who was heir-at-law before the master not being in itself a controversy, or lis pendens, within the rule, and it being no objection that the declaration was upon oath. *Gee* v. *Ward*, 7 El. & Bl. 509; 3 Jur. (N.S.) 692; 5 W. R. 579.

A controversy in a family, though not at that

moment the subject of a suit, constitutes a lis sufficient to render inadmissible a letter written on the subject by one of the members of the family and addressed to another member of it. *Butler* v. *Mountgarret* (*Viscount*), 7 H. L. Cas. 633.

S. B., H. B. and P. B. were, in 1816 (in this order of succession), the expectant heirs of a person who was then childless. In that year S. B. wrote to P. B. a letter stating circumstances respecting a marriage of H. B. in 1811, which if true would have the effect of handing over the succession to P. B.'s children. The then holder of the property did not die till 1846 :—Held, in an ejectment afterwards, by the children of P. B., that this letter was not admissible. *Ib.*

The admissibility of declarations by members of the family terminates with the commencement of the controversy, and the termination of this admissibility is not effected by any knowledge or ignorance on the part of the declarant of the existence of that controversy; nor is it affected by its being shewn that such proceedings were fraudulently commenced with a view to exclude the possibility of any such declaration. *Shedden* v. *Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. 217; 6 Jur. (N.S.) 1163; 3 L. T. 592; 9 W. R. 285.

The commencement of the controversy, and not of the situation from which it springs, is the commencement of the lis mota and terminates the admissibility of family declarations. A declaration made expressly with a view to a probable future contest is admissible quantum valeat. *Ib.*

Not so, however, when made in a prior cause, on the same subject-matter. A prior cause carried on between the same parties will not be a lis so as to exclude declarations, unless the very point subsequently in dispute, upon which it is sought to bring such declaration to bar, was then in litigation. *Ib.*

A., in 1798, died possessed of property which many years afterwards B. commenced a suit to recover. In 1799, a relation of B. made a declaration, the effect of which was to shew that B. was the heir and next of kin of A. :—Held, that this declaration was not receivable : as the lis mota, or the commencement of a controversy, must be taken to be the arising of that state of facts on which the claim is founded, without anything more. *Walker* v. *Beauchamp*, 6 Car. & P. 552.

It is a rule of evidence that the declaration of deceased members of the family, post litem motam, are inadmissible; and anterior declarations are little to be regarded, unless corroborated by other circumstances. *Crouch* v. *Hooper*, 16 Beav. 182; 1 W. R. 10.

When a person leaves his native place and goes to another place to pursue a claim to an estate situated there, and on his return tells certain persons what was said to him by persons connected with the family while so pursuing his inquiries; these statements are not admissible evidence. *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Ir.)

Declaration remembered after Action.]—Slight reliance is to be paid to the declaration of deceased persons said to have been made before but remembered after the cause of litigation has arisen. Such evidence is usually given with minute particularity, but is subject to no worldly sanction. *Webb* v. *Haycock*, 19 Beav. 342. *And see cases* ante, cols. 533, 534.

iii. *For what Purpose.*

To Prove Legitimacy.]—General declarations, or the answer of a parent in chancery, are good evidence, after the death of such parent, to prove that a child was born before marriage; but not to prove that a child born in wedlock is a bastard. *Goodwright* d. *Stevens* v. *Moss*, Cowp. 591.

The declarations of an illegitimate member of a family respecting his illegitimate brothers, are not admissible as reputation. *Doe* d. *Bamford* v. *Barton*, 2 M. & Rob. 28.

A.'s title to property depended on his being a child of the marriage of B. and C., and the representative of a trustee conveyed the property to him by a deed reciting that he was such child:—Held, that the deed was evidence of B.'s legitimacy, although the suit did not relate to the property, and the parties to it were not parties to the deed. *Slaney* v. *Wade*, 7 Sim. 595; 1 Mylne & C. 338.

In an administration suit, the only question before the jury was whether D., through whom the defendant claimed, was legitimate. The defendant, after producing primâ facie evidence of the legitimacy of D., tendered his declarations. The plaintiff objected to the admissibility of these declarations, and tendered evidence on the voir dire to shew that declarant was not a member of the family. The court being of opinion that the defendant had made out a primâ facie case of declarant's legitimacy, admitted the evidence of the declarations, and rejected the evidence on the voir dire tendered by plaintiff. *Hitchens* v. *Eardley*, 40 L. J., Mat. 70; L. R. 2 P. 241; 25 L. T. 163.

P. died intestate, and the Crown claimed his property on the ground that he was illegitimate. The evidence which was relied on to prove illegitimacy was (1) declarations made and letters written by P. whilst alive, asserting his own illegitimacy; (2) absence of proof that the man whom P.'s next of kin asserted to be P.'s legitimate father was alive, at the date of P.'s conception; (3) family tradition and admissions by the next of kin now claiming the property :—Held, (1) that declarations made by a deceased person before his death as to his own illegitimacy were admissible in evidence; (2) that it lay on the claimant to prove that the man asserted by her to be the father of P. was alive at the date of P.'s conception, before it was necessary for the Crown to prove non-access by that man to P.'s mother at that date; and (3) that family tradition was admissible to corroborate P.'s declaration as to his own illegitimacy. *Perton, In re, Pearson* v. *Att.-Gen.*, 53 L. T. 707.

Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness-box. *The Aylesford Peerage*, 11 App. Cas. 1—H. L. (E.)

Declarations by a reputed father contained in business letters written by one of his daughters in his name and under his dictation were admitted as evidence after his death of the date of their birth upon the question of their legitimacy. *Turner, In re, Glenister* v. *Harding*, 29 Ch. D. 985; 53 L. T. 528.

Godson.]—Family repute is admissible to shew that a legatee was a godson of the testator. *Gregory, In re*, 34 Beav. 600.

Natural Son.]—On an issue whether the plaintiff was the natural son of H. C., declarations of the brother of H. C. were tendered as evidence of the relationship between the plaintiff and H. C. :—Held, that such declarations did not fall within the exception which admits declarations of members of the family in cases of pedigree. *Crispin* v. *Doglioni*, 3 Sw. & Tr. 44 ; 32 L. J., Mat. 109 ; 8 L. T. 91 ; 11 W. R. 500.

Birth and Death.]—A. and B. were married in 1806, and C., their daughter, was born in 1811. A. and B. were dead, and there was evidence that after the birth of C., B. had stated that she had had a son, who was older than C., and had died before the birth of the latter. The christian name of the son could not be ascertained, and there was no other evidence of his birth or death : —Held, that B.'s statements were admissible as a declaration by a deceased person on a question of pedigree, that the death of the son of A. and B., though his christian name was unknown, might be presumed to have occurred between 1806 and 1811, and that a grant of administration should be made, describing him by his surname with his christian name in blank. *Thompson, In goods of*, 56 L. J., P. 46 ; 12 P. D. 100 ; 57 L. T. 373 ; 35 W. R. 384.

Live Birth.]—An issue had been directed to inquire whether a child was born alive or not. At the trial evidence was received of declarations made by certain members of the family shortly after the death of the child :—Held, upon a motion for a new trial, that the evidence was properly received. The point of inquiry respecting the admissibility of such evidence is not the existence of a state of facts out of which a claim has arisen, but the existence of a controversy or dispute respecting that claim. (The case of *Walker* v. *Beauchamp* (*Countess*), 6 Car. & P. 552, considered). *Reilly* v. *Fitzgerald*, 1 Dr. 122 ; 6 Ir. Eq. R. 335.

Marriage — Incomplete Declaration.] — In questions of pedigree, the circumstance that a document containing a relevant declaration by a deceased declarant is not complete for its primary purpose does not affect the admissibility of the declaration. Thus, where the question was one as to the marriage of A. and B., both deceased, a declaration by A. that B. passed as his wife contained in a draft will in A.'s handwriting was held admissible, although such draft will was never executed by A. *Lambert, In re*, 56 L. J., Ch. 122 ; 56 L. T. 15.

Only received in Questions of Pedigree—Evidence of Infancy.]—The defendant to an action for goods sold, work done and money paid, set up the defence of infancy. In support of this defence an affidavit made by his father, since deceased, in an administration suit, to which the plaintiff in this action was not a party, containing a statement by the father as to the place and date of the defendant's birth, was tendered and received in evidence :—Held, that such a declaration was only receivable in questions of pedigree, and that no such question was raised in this case, so that the case did not fall within that exception to the general rule as to the inadmissibility of hearsay evidence. *Haines* v. *Guthrie*, 53 L. J., Q. B. 521 ; 13 Q. B. D. 818 ; 51 L. T. 645 ; 33 W. R. 99 ; 48 J. P. 756—C. A.

Quære, whether, to support a plea of infancy, declarations by defendant's father (since deceased) as to defendant's age are admissible. Semble, per Patteson, J., they are not. *Figg* v. *Wedderburne*, 11 L. J., Q. B. 45.

—— **Death.**]—Where a witness deposed that she had received a letter from her niece A. relating the fact of the death of A.'s father (which was material to the issue in the case), and that the family repute founded on that letter was that A.'s father was dead :—Held, that as family repute is only admissible in question of pedigree, the evidence should have been rejected. *Palmer* v. *Palmer*, 18 L. R., Ir. 192—C. A.

h. Reputation as to Boundaries and Easements.

Public or Private Rights.]—Evidence of reputation is admissible in questions relating to matters of public and general interest, notwithstanding that matters of private interest may also be involved in the inquiry. *Reg.* v. *Bedford*, 4 El. & Bl. 535 ; 3 C. L. R. 442 ; 24 L. J., Q. B. 81 ; 1 Jur. (N.S.) 208 ; 3 W. R. 205 ; 6 Cox, C. C. 505.

Therefore on the trial of an indictment against the inhabitants of a county for the non-repair of a bridge, to which they pleaded that A. was liable ratione tenuræ to repair a portion of the bridge, evidence of reputation that A. and his predecessors were liable to repair that part is admissible. *Ib.*

In the case of a public right, in proof of usage, traditional evidence as to it is admissible ; aliter, in case of private rights. *Withnell* v. *Gartham*, 6 Term Rep. 388 ; 1 Esp. 324 ; 3 R. R. 218.

Boundary of Manor.]—Evidence of reputation is admissible as to the line of boundary of a reputed manor. *Doe* d. *Molesworth* v. *Sleeman*, 9 Q. B. 298 ; 15 L. J., Q. B. 338 ; 10 Jur. 568.

The seashore between high and low water may be part of the adjoining manor ; and where, by an ancient grant of the manor, its limits were not defined, modern usage is admissible to shew that such seashore was part of the manor. *Beaufort* (*Duke*) v. *Swansea Corporation*, 3 Ex. 413.

—— **By Tenants and Others.**]—In an action by the lord of a manor against the owner of a freehold estate within the manor, for breaking and entering his close, the question being whether the close was part of the waste of the manor, or part of the adjoining estate of the owner of the freehold estate, it appeared that there were many lands and tenements held of the manor, the tenants whereof in respect of those lands had always exercised rights of common for all their commonable cattle on the waste of the manor :—Held, first, that the want of evidence of acts of enjoyment of the rights over the close did not affect the admissibility of evidence of reputation. *Dunraven* (*Earl*) v. *Llewellen*, 15 Q. B. 791 ; 19 L. J., Q. B. 388 ; 14 Jur. 1089—Ex. Ch.

Held, secondly, that declarations by deceased residents in the manor, not being tenants of it, were not inadmissible on the ground that they proceeded from persons who had not competent knowledge upon the subject. *Ib.*

Held, thirdly, that declarations of deceased tenants of the manor who had exercised rights of common on the waste of the manor, that the close was parcel of the waste, though not objectionable on the ground that they proceeded from interested persons, were not receivable, inasmuch as there was no common law right for every

tenant of a manor to have such right of common; and that the many private rights of common of the tenants of a manor, who had such right by virtue of their individual grants, and as incident thereto, did not compose one public right so as to render evidence of reputation as to the boundary of the waste admissible. *Ib.*

—— **Commissioners.**]—In the 13 Car. 1, a commission issued out of the duchy court of Lancaster reciting that the lords of the manors of A. and C. had petitioned the Crown, shewing that the boundaries between their two manors were uncertain, and that suits were likely to grow thereout, for preventing whereof it directed the commissioners to repair to the spot and impannel a jury for the purpose of setting out the boundaries. The return stated that the commissioners had inquired into the matter, being attended by the parties interested, and that a jury of the body of the county had been sworn to inquire and a true verdict give concerning the boundary, and thereupon the commissioners set out the boundary by marks and stones:—Held, that this was a proceeding in the nature of a verdict before a court of competent jurisdiction, and therefore admissible in a question of manorial boundary where reputation was admissible, and that it was not to be excluded on the ground that it had taken place post litem motam, or because it did not appear that any decree had been made. *Briscoe* v. *Lomax*, 3 N. & P. 308; 8 A. & E. 198; 7 L. J., Q. B. 1482; Jur. 682.

—— **Parts of Manor.**]—Reputation of lands being part of a manor and copyhold is good evidence. *Doe* d. *Jones* v. *Richards*, Peake's Add. Cas. 180; 4 R. R. 901.

In order to prove that a particular piece of land is part of the wastes of a manor, acts of ownership upon another piece of land lying along the same highway, but not continuous with the locus in quo, are admissible. *Simpson* v. *Dendy*, 18 C. B. 831; 2 Jur. (N.S.) 642—Ex. Ch.

Traditionary reputation is evidence of boundary between two parishes or manors, and this though the old persons deceased making the declarations claimed rights of common on the respective wastes which might be enlarged by such evidence. *Nichols* v. *Parker*, 14 East 331, n.; 12 R. R. 542. And see *Freeman* v. *Phillips*, 4 M. & S. 486; 16 R. R. 524.

—— **Estates in Parishes.**]—On a question of boundary between two estates, if evidence has been given that the boundary of the estates is the same as that between two hamlets, evidence of reputation as to the boundary of the hamlets may be adduced for the purpose of proving that of the estates, and the jury may be desired to take into consideration the latter evidence if they are satisfied with the first. *Thomas* v. *Jenkins*, 1 N. & P. 587; 6 A. & E. 525; 6 L. J., K. B. 163; 1 Jur. 261.

Where, in trespass, the question was, whether certain land was in the parish of A. or parish of B., the land in B. being tithe-free:—Held, that ancient leases granted by the ancestor of the plaintiff's landlord, in which the land was described as being in the parish of B., were admissible as evidence of reputation that the land was in that parish. *Plaxton* v. *Dare*, 10 B. & C. 17; 5 M. & Ry. 1; 8 L. J. (O.S.) K. B. 98.

Boundary of Counties.]—Reputation that a river was the boundary between two counties is some evidence that the land on one side of the existing stream belonged to the county on that side. *Ford* v. *Lacy*, 2 F. & F. 354.

—— **Entries in Book of Owner.**]—In ejectment to recover a house and premises forming part of twenty-two acres of land alleged to be parcel of the manor of H., the lessor of the plaintiff, who sought to trace his title through C. in order to prove a lease to H., and assignments by the latter to P., and by P. to C., and that the land in question was parcel of that manor, tendered in evidence an ancient book, found in the muniment-room of the family to whom, at the supposed date of that book, the reversion of the manor belonged. This book, amongst other entries and receipts contended to be in the handwriting of a person suggested to be the steward of the property, contained an entry dated 1610, which purported to be a memorandum of the terms of certain leases and deeds. It commenced with a lease from S. to H. from 1570, for fifty-one years, of land, including the premises in question, describing them as parcel of the manor of H., and stated the recitals of that lease as shewing that the lord of the manor of H. had in 1559 granted a lease for one hundred years to L., and that L. had underlet to S. The entry then added that H. had assigned to P., and P.'s widow to C., who claimed ten years yet to come in the premises. There was no proof, independent of the entry, of the existence of such a lease from S. to H.:—Held, that the entry was not admissible upon the ground of reputation, nor as an entry made in the course of business, nor as secondary evidence of the lease of which it purported to state the effect. *Witteomb* v. *Padwick*, 4 H. L. Cas. 425. Affirming 6 Ex. 601; 20 L. J., Ex. 297; 15 Jur. 778—Ex. Ch.

Two Estates.]—Evidence of reputation of a boundary between two estates was rejected. *Clothier* v. *Chapman*, 14 East, 331, n.; 12 R. R. 543.

—— **Reputation as to Facts.**]—To an action for cutting down and converting trees which the defendant justified as growing upon his soil and freehold, the plaintiff replied that the trees were his freehold and not the freehold of the defendant; and this was held to be proved by shewing that they grew on a certain woody belt fifteen feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that, from time to time, the plaintiff and his ancestors, at their pleasure, cut down for their own use the trees growing within the belt; and that the several owners of the different closes inclosing the belt never felled trees there, though they felled them in other parts of the same closes, and that when they made sale of their estates the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced. *Stanley* v. *White*, 14 East, 332; 12 R. R. 544.

Evidence that the tenants of the defendant's estate for thirty years and upwards had publicly and without interruption from the lord, and with his knowledge, cut and sold the planted wood on the estate in large quantities, is admissible; but evidence of reputation that the tenants of the

defendant's estate had the right of cutting and selling planted wood, is not admissible. *Blackett* v. *Lowes*, 2 M. & S. 494; 15 R. R. 324.

Where a person, between fifty and sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between whom and the devisee in fee of the son the question was whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or had been acquired by his own purchase; evidence of reputation that the land had belonged to S., and was purchased of him by the first testator, is not admissible, though coupled with corroborative parol evidence that the land had belonged to S. before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place, from the first testator to a younger son, about the same period, in which it was recited that the land thereby conveyed had been then lately purchased by the testator from S. *Doe* d. *Didsbury* v. *Thomas*, 14 East, 323; 12 R. R. 533.

Sheep-walk.]—Evidence of reputation is admissible on a question as to private rights, viz. whether a place is or is not parcel of a sheep-walk. *Davis* v. *Lewis*, 2 Chit. 535.

Public Rights—Common.]—Evidence of reputation is admissible to prove a right of common pur cause de vicinage. *Pritchard* v. *Powell*, 15 L. J., Q. B. 166; 10 Jur. 154.

Trespass quare clausum fregit; plea of prescriptive right of common over the locus in quo at all times for his cattle levant and couchant; replication prescribing in right of his messuage to use the locus in quo for tillage with corn, and until the taking in of the corn, to hold and enjoy the same in every year:—Held, that many persons besides the defendant having a right of common over the locus in quo, evidence of reputation as to the right claimed by the plaintiff was admissible: a foundation being first laid by evidence of the enjoyment of such right: and that the plaintiff's right might legally exist as a qualification of the defendant's right, and was not repugnant to it. *Weeks* v. *Sparke*, 1 M. & S. 680; 14 R. R. 546.

—— **Free Warren.**]—Reputation is admissible evidence of a claim of free warren by prescription over an entire manor. *Carnarron* (*Earl*) v. *Villebois*, 13 M. & W. 313; 14 L. J., Ex. 233.

On the same ground, the declarations of deceased copyholders, as to the existence of the franchise over all the copyholds, is admissible for the like purpose. *Ib.*

—— **Mines and Minerals.**]—Upon a question whether the lord of a manor was entitled to the coals under a freehold tenement within the manor, it is competent to him to shew by parol evidence that there was a known distinction within the manor between old and new land, and that in fact the plaintiff's lands lay within the boundary of the new land; and also to shew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's lands was in the lord. *Barnes* v. *Mawson*, 1 M. & S. 77; 14 R. R. 397.

Quære, whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, is admissible. Two judges against two; but one of those who held the affirmative thought it required other evidence of the right to be first laid as a foundation: it seems, however, that such evidence may be given as to a particular custom, though not as to a private prescription; by three to one. *Morewood* v. *Wood*, 14 East, 327; 12 R. R. 537.

—— **Fact—Inference.**]—Indictment for obstructing a highway. A witness stated, that about forty years before a deceased occupier of land over which the road passed, planted a willow near the road. The witness was then asked what the occupier said when he planted the willow. The witness answered, that the occupier said that he planted the willow to shew where the boundary of the road was when he was a boy:—Held, that the statement of the occupier was not receivable, on the ground that it was evidence of reputation, nor as a declaration accompanying an act done, nor as a declaration against the interest of the party making it. *Reg.* v. *Bliss*, 2 N. & P. 464; 7 A. & E. 550; W. W. & D. 624; 7 L. J., Q. B. 4.

Tolls.]—An old deed between a public body claiming tolls, and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls. *Brett* v. *Beales*, M. & M. 416. *See* 31 R. R. 744.

Repair of Roads.]—A document drawn up at a meeting of the inhabitants of a township, and signed by them under a resolution to resist the repairs of a road, is evidence of reputation. *Barraclough* v. *Johnson*, 3 N. & P. 233; 8 A. & E. 99; 7 L. J., Q. B. 172; 2 Jur. 839.

Landing-place.]—On an issue joined, whether a certain place situate on the bank of a river is a public landing-place for all the king's subjects, evidence may be given of reputation that it is not a public landing-place. *Drinkwater* v. *Porter*, 7 Car. & P. 181.

Ferry.]—A right of ferry is a matter in which the public are interested, and as to which, therefore, reputation is evidence. *Pim* v. *Curell*, 6 M. & W. 234.

Custom of Descent in Manors.]—Reputation of the custom of a manor, that, in default of sons, the eldest daughter, and, in default also of daughters, the eldest sister, and, in case of the death of all, the descendants of the eldest daughter or sister respectively of the person last seised, should take, is proper to be left to the jury, to prove the existence of such a custom as applied to a great nephew (the grandson of an eldest sister) of the person last seised: although the instances in which it was proved to have been put in use, extended no further than those of the eldest daughter and eldest sister, and the son of an eldest sister. The existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *Doe* d. *Foster* v. *Sisson*, 12 East, 62.

Rights of Chapel.]—Upon a trial where the question was, whether the chapelry of St. H. was a legal parochial chapelry:—Held, that the statement of a witness that he had heard from

a former incumbent of St. H. that the people of four townships and another parish came to the chapelry was admissible, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible. *Carr* v. *Mostyn*, 5 Ex. 69; 19 L. J., Ex. 249.

An allegation in an action for a false return to a mandamus, of a custom of payment by the chapelwardens of A. to the churchwardens of B., may be supported by evidence of a custom of payment to officers acting only for the township of B., not co-extensive with the parish of B., but who have always been described as the churchwardens of B. *Stead* v. *Heaton*, 4 Term Rep. 669.

Several Fishery.]—In an action for injuring the plaintiff's reversionary interest in a several fishery in an estuary of the sea, and in the soil of the bottom of the sea, both in the possession of F. as tenant, issues were taken on the plaintiff's right to the fishery and ownership of the soil. The controversy was, whether the soil belonged to the plaintiff or to G. The plaintiff gave in evidence proceedings in an action by F. against G. One count in such action was, for injuring F.'s fishery by tearing up the soil, described as being the soil of the now plaintiff, and thereby destroying fish. To this there was a plea of not guilty. The amount of damages was referred, and the arbitrator awarded nominal damages. It was proved that the act complained of in that action was committed in part of the same estuary, and that the soil there was claimed by the same title as the soil which was the subject of the present action, and that the defendant in the present action became tenant to G. subsequently to the award. The proceedings were admitted, and the plaintiff had a verdict: —Held, that they were improperly admitted, the award not being evidence of reputation, and the proceedings not being admissible for the plaintiff, who was not a party, or shewn to be privy to F., though the defendant was privy to G. *Wenman (Lady)* v. *Mackenzie*, 5 El. & Bl. 447; 25 L. J., Q. B. 44; 1 Jur. (N.S.) 1015; 3 W. R. 626.

Non-existence of Rights over Waste.]—The lord of a manor contracted to sell part of the waste, and furnished a statutory declaration that to the best of his information and belief no copyholder or free tenant had exercised any right of common for forty years and upwards, and that he did not know or believe that any copyholder or free tenant existed, and that no quit rents had been paid or services rendered or court baron held for forty, or, as the declarant believed, for sixty years and upwards. The means of knowledge of the declarant were not questioned; and he offered to add to his statutory declaration a statement negativing the existence of any commonable rights over the waste:—Held, that the title could be forced on the purchaser. *Bridges and McRae's Contract, In re*, 30 W. R. 539.

Farm Modus.]—Evidence of reputation as to the payment of a farm modus is inadmissible, on the ground that hearsay evidence is not admissible on a question of private right. And therefore, and in obedience to this rule, the evidence of old persons, who deposed to having heard their parents and relations, and other persons, since dead, state that a certain farm modus was payable in respect of a particular farm, was rejected. *Lonsdale* v. *Heaton*, Younge, 58.

—— **Reputation of Fact.**]—On an issue to try whether a farm modus of 2*l.* 19*s.* 8*d.* was payable for a certain farm, a former occupier of the farm cannot be asked what he has heard his deceased father say respecting this modus, although his father had also occupied the farm; because this would be evidence of the reputation of a fact. *Wells* v. *Jesus College, Oxford*, 7 Car. & P. 284.

i. Reputation as to Individuals.

Character.]—In an action for falsely representing that W., a tradesman, was trustworthy, the defendant called as a witness his counterman, who was acquainted with the transactions between the defendant and W., and asked him: "Was W. at the time of the representation trustworthy, to your belief?" The defendant also called four tradesmen of the same town, who were asked as to the general reputation of W. for trustworthiness:—Held, that the evidence was admissible. *Sheen* v. *Bumpstead*, 2 H. & C. 193; 32 L. J., Ex. 271; 10 Jur. (N.S.) 242; 8 L. T. 832; 11 W. R. 734—Ex. Ch.

Action for a libel alleging that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress. Defence: that the allegation was true in substance and fact:—Held, that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and evidence of particular facts and circumstances tending to shew the misconduct of the plaintiff as a theatrical critic, could not be admitted in reduction of damages. *Scott* v. *Sampson*, 51 L. J., Q. B. 380; 8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

Sanity.]—Evidence of the general reputation of the insanity of a person in the neighbourhood in which he resided is inadmissible to prove that a person was cognisant of that fact. *Greenslade* v. *Dare*, 20 Beav. 284.

Age.]—Evidence of reputation is inadmissible to prove a person's age. *Colclough* v. *Smyth*, 15 Ir. R. Ch. 347; 10 L. T. 918.

Live Birth.]—The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife, who was residing in the house. *Jones* v. *Ricketts*, 31 L. J., Ch. 753; 7 L. T. 43; 10 W. R. 576.

Settlement Cases.]—Hearsay evidence of the declaration of a deceased father, as to the place of birth of his bastard child, is not admissible to prove the birth-settlement of such child. *Rex* v. *Erith*, 8 East, 539. S. P., *Reg.* v. *Rishworth*, 1 G. & D. 597; 2 Q. B. 476; 11 L. J., M. C. 34.

Evidence of the declaration of a deceased parent as to the place of birth, or place of baptism, of the child is inadmissible. *Rider* v. *Malbon*, 8 L. J. (o.s.) M. C. 127.

A pauper's statement of what he has heard and believes as to the place of his birth, is within the rule excluding hearsay evidence, and insufficient to support an order for his removal. *Reg.* v. *Lydeard St. Lawrence*, 1 G. & D. 191; 11 A. & E. 616; 10 L. J., M. C. 147; 6 Jur. 32.

3. ENTRIES.

a. Of Deceased Persons Generally.

Admissible for what Purposes.]—When an entry in the handwriting of a deceased person is prima facie against his interest, it is admissible as evidence for all purposes, irrespectively of its effect or value when received. *Taylor* v. *Witham*, 45 L. J., Ch. 798; 3 Ch. D. 605; 24 W. R. 877.

The following entry in the handwriting of a deceased person, "J. W. paid me three months' interest," followed by other entries pointing to a loan to J. W., is admissible as evidence, whether or not the effect of it when admitted would be to establish the existence of a debt due to the testator. *Ib.*

During the trial of an action to establish the plaintiff's right to be indemnified by the two defendants, or one of them, in respect of 200 shares transferred into the plaintiff's name as trustee for the defendants, or one of them, the plaintiff desired to prove that the shares had been bought on the Stock Exchange for one of the defendants through his brokers, Messrs. G. & D. G. was dead, and the plaintiff tendered in evidence an entry in the day-book of the firm of a purchase of 200 shares by G. for the particular defendant; and, having proved that the entry was in the handwriting of G., that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, and that the ledger of the firm was made up from the day-book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; and, secondly, because it had been made in the ordinary course of business:—Held, that it was not admissible upon the first ground, because it might, according to the turn of the market, have been to the advantage of the deceased; nor upon the second ground, because it was not made in the performance of any duty. *Massey* v. *Allen*, 49 L. J., Ch. 76; 13 Ch. D. 558; 41 L. T. 788; 28 W. R. 212.

An entry by a deceased person, charging himself, is admissible against strangers, even though it appears that the facts stated in that entry were not known to him of his own knowledge. *Crease* v. *Barrett*, 1 C. M. & R. 919; 5 Tyr. 458; 4 L. J., Ex. 297.

On an issue as to the right of L. to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub-receiver, due from persons (of whom the sub-receiver was one), for fixing a net in the fishery, are evidence in support of L.'s right. *Percival* v. *Nanson*, 7 Ex. 1; 21 L. J., Ex. 1.

Certain variations in old entries of receivers' accounts as to a manorial customary payment, extending over three centuries, and uniform in amount:—Held, to be no objection to the validity of the claim. *Beaufort (Duke)* v. *Smith*, 4 Ex. 450; 19 L. J., Ex. 97.

An entry by a deceased person shewing (in contradiction to a deed evidencing a rightful payment by him) that the payment had been made in breach of trust to A., instead of to the trustees, is admissible, to shew the receipt by A., on the ground that such entry tended to charge the maker of it. *Orrett* v. *Corser*, 21 Beav. 52.

A bill of sale having been executed by a testator, and subsequently delivered to A., on a question whether it was intended as a gift, an entry in the testator's book, made between the periods of the execution and the delivery, is admissible evidence. *Ryle* v. *Haggie*, 1 Jac. & Walk. 234.

Bill by executors on loss of notes mentioned in a list written by the testator. Such a list not of itself evidence of the property, but left to be tried at law. *Glynn* v. *Bank of England*, 2 Ves. 38.

A person's own entry in books of account allowed, on inquiries before the master, as evidence of a claim made in his lifetime, but not as original or positive evidence of the fact. *Lefebure* v. *Worden*, 2 Ves. 54.

Against Interest.]—In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest. An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible evidence as against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors. *Edwards, Ex parte, Tollemache, In re*, 14 Q. B. D. 415—C. A.

An admission of a debt, contained in a bankrupt's statement of his affairs made after the commencement of bankruptcy proceedings, is not evidence as against his creditors of the existence of a debt, even though the statement was verified by his oath (without cross-examination), and he has since died. *Revell, Ex parte, Tollemache, In re*, 54 L. J., Q. B. 89; 13 Q. B. D. 720; 51 L. T. 376; 33 W. R. 288—C. A.

If a person has peculiar means of knowing a fact, and makes a declaration or a written entry of the fact, which is against his interest at the time, it is evidence of the fact, as between third persons, after his death, if he could have been examined to it in his lifetime; and, therefore, an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as paid, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. *Higham* v. *Ridgway*, 10 East, 109; 10 R. R. 235. *And see following cases.*

The fact that the balance on the foot of a debtor and creditor account is struck in favour of the party having made the entry and since deceased, does not prevent the entries in the account from being admissible as entries against interest. *Whaley* v. *Carlisle*, 17 Ir. C. L. R. 792—Ex. Ch.; 15 W. R. 1183.

An entry by deceased person, who had knowledge of a fact, whereby he charges himself or discharges another, upon whom he would otherwise have a claim, is admissible in evidence, even though the party could not have been examined as to the fact in his lifetime. *Short* v. *Lee*, 2 Jac. & Walk. 489.

Debt discharged by entry in the testator's hand, that the debtor pays no interest; nor should he (the testator) take the principal, unless greatly distressed, and upon evidence of his circumstances. *Eden* v. *Smith*, 5 Ves. 350; 5 R. R. 60.

An ancient roll found among the muniments of a manor containing the reeve's account of moneys received by him on account of the lord, followed by an account of moneys expended by him on account of the lord, was tendered as evidence of a fact noticed in one of the items of discharge, for which the reeve took credit in the account. This entry was rejected on the ground that it did not appear on the face of the account that the reeve gave credit for any sum applied to the discharge of that particular item:—Held, that the evidence was properly rejected. *Doe* d. *Kinglake* v. *Beriss*, 7 C. B. 456; 18 L. J., C. P. 128.

In an action by executors against a son of their testator to recover money received by him from his father, the debtor side of the testator's account book, containing entries of the receipt of interest from the son, was held to be admissible in support of the plaintiff's contention that the money had been lent, and not given, although the right of the plaintiff without consent to put in the other side, which contained no entries opposed to the advantage of the writer, was doubtful. *Peck* v. *Peck*, 21 L. T. 670; 18 W. R. 295.

—— **Parol Representation.**]—E., now dead, a clerk to the plaintiff, submitted to the plaintiff a book containing entries in the handwriting of F., which charged E. with the receipt of interest on a sum owing by R. and W. to the plaintiff:—Held, that evidence could be given of E.'s so doing, as of a parol representation made by him against his interest. *Kettlewell* v. *Watson*, 30 W. R. 402.

Against third Parties.]—An account stated between a judgment debtor and his creditor, in which the latter admits payments on account, and a balance is struck off the sum due, cannot, after the death of the parties, be made use of in evidence, as an admission against interest, to prove these payments against third persons. *Foster* v. *M'Mahon*, 11 Ir. Eq. R. 287.

Mode—In Course of Duty.]—If an entry is admissible as being against the interest of the party making it, it carries with it the whole statement. But if the entry is made merely in the course of a man's duty, it does not go beyond those matters which it was his duty to enter. *Percival* v. *Nanson*, 7 Ex. 1; 21 L. J., Ex. 1. S. P., *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

A written memorandum of an arrest, and the place where it occurred, made by a sheriff's officer, contemporaneously with effecting the arrest, sent immediately to the sheriff's office, and there filed in the course of business, is not admissible evidence of the place at which the arrest took place, after the death of the officer, in an action between third persons. *Chambers* v. *Bernasconi*, 1 C. M. & R. 347; 4 Tyr. 531; 3 L. J., Ex. 373.

An entry in the handwriting of a deceased person is not admissible when there was no duty imposed on him to make it, and when it is not against his interest. *Webster* v. *Webster*, 1 F. & F. 401.

Entries made by a deceased person in the ordinary course of business, but not contemporaneously with the facts entered, are not admissible. *Doe* d. *Kinglake* v. *Beriss*, 7 C. B. 456; 18 L. J., C. P. 128.

To make an entry in the handwriting of a person deceased evidence, it must be proved not only to have been made in the regular course of business, but to have been made at the time it bears date, or immediately afterward. *Ray* v. *Jones*, 2 Gale, 220.

On the trial of an appeal against an order of removal, an entry in the private memorandum-book of a deceased master was tendered to rebut a settlement by hiring and service, by shewing that the servant had not been hired for a year; the sessions rejected the evidence:—Held, that the sessions were right, and that this entry could not be admitted as an entry by a deceased person against his interest, or as an entry by a deceased person in the discharge of some duty, or as a contract between the master and the servant. *Reg.* v. *Worth*, 4 Q. B. 132; 3 G. & D. 376; 12 L. J., Q. B. 144; 7 Jur. 172. *Massey* v. *Allen*, supra, col. 549.

In an action to recover the balance on consignments of goods by the defendant to the plaintiffs, to be sold in India, it appeared that the transaction took place vivâ voce between him and B., the managing clerk of the plaintiffs, who carried on business in London, Liverpool and Calcutta. B., who had since died, managed their business at Liverpool. The contention of the defendant being that the transaction was a sale and not a consignment, the plaintiffs put in evidence a copy taken by a machine of a letter, which was lost, written in the course of business by B. to the plaintiffs, giving an account of the transaction, and inclosing invoices of the goods and a draft of the defendant. And in order to prove the balance they put in an account current of the sales prepared from the account sales received from their correspondents in India, which were lost:—Held, that the letter was not admissible, either as containing a declaration against pecuniary interest, or as being the entry of an act which it was the clerk's duty to do and to record. *Smith* v. *Blakey*, 8 B. & S. 157; 36 L. J., Q. B. 156; L. R. 2 Q. B. 325; 15 W. R. 492.

—— **Postage.**]—Neither proof of an entry made by a deceased person in the ordinary course of business in a postage-book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage. *Rowlands* v. *De Vecchi*, 1 Cab. & E. 10.

Of Person who if Alive would have been a Competent Witness—Scots Law.]—By the law of Scotland statements of a deceased person in relation to facts, which must presumably have been within his personal knowledge, and as to which, if alive, he could have been examined as a witness, may after his death be received as secondary evidence through the medium of writing, or through the medium of a living person who heard the statement. Where, therefore, a member of the family writes a note in a manuscript book to the effect that he has sent original letters to a certain person, and they cannot be found, the copies of such letters, the handwriting, and that the copies were from original letters being proved, the note and the copies of the letters are evidence of the truth of the statements within the writer's personal knowledge, and appearing to be so by the letters themselves. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

So also a statement, whether oral or written, is not vitiated if made with a purpose, where

the object was an obvious and legitimate one, and one supporting and not discrediting the presumption of truth. But the statement of a deceased person is not admissible as evidence when its terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth; and this rule should be applied with greater strictness in criminal cases. *Ib.*

The general rule of the law of Scotland is that hearsay of a deceased person, who if alive would have been a competent witness, is admissible evidence; but if the fact to which the deceased testified was such as he could not have had any special knowledge of it, it is not receivable; and this applies to written as well as oral statements. *Lovat Peerage, The*, 10 App. Cas. 763—H. L. (Sc.)

Payment reviving Statute-barred Debt.]—In 1884, a foreclosure action was brought by the representative of a mortgagee against the assignees of the equity of redemption of land mortgaged in 1863, and the equity of redemption in which was assigned to the defendants in July, 1878. The only evidence that interest had been paid since 1876 was an entry in the diary of the deceased mortgagee of 50*l.* paid by the mortgagor for principal and interest. The date of the entry was September, 1878:—Held, by North, J., that as the entry would prove the revival of a debt then statute-barred it was an entry in the interest of the mortgagee, and could not be received in evidence in favour of his representatives:—Held, on appeal, that whether the entry was admissible or not, it was not sufficient to take the case out of the Statute of Limitations, because it was only evidence of a payment made by the mortgagor after he had parted with his equity of redemption. This decision affirmed, not for the reasons given by that court, but because, without pronouncing any opinion on the question arising out of the Statute of Limitations and assuming the entry in question to be admissible, there was no evidence to connect the entry with the property in question. *Newbould* v. *Smith*, 14 App. Cas. 423; 61 L. T. 814—H. L. (E.) Affirming 55 L. J., Ch. 788; 34 W. R. 690—C. A.

b. Particular Persons.

i. *Tradesmen and Merchants.*

When deceased.]—A deceased tradesman's bill for repairs, with his receipt thereon, is not evidence of the work having been done for the person charged, though the paper is found amongst the other papers of the person charged. *Doe* d. *Gallop* v. *Vowles*, 1 M. & Rob. 261.

So in ejectment by parish officers to recover a cottage, entries in the books of a deceased tradesman of charges for the building of the cottage, which are there stated to have been paid by the lord of the manor, are not admissible on the part of the defendant. *Doe* d. *Haden* v. *Burton*, 9 Car. & P. 254.

Where it was the course of business for H., one of the workmen at a coal mine, to give notice to Y., the foreman, of the coal sold, and Y., not being able to write, employed B. to make entries of the sales in a book at the time from his, Y.'s, information:—Held, that H. and Y. being dead, the entries were not evidence in an action for the price of such coals. *Brain* v. *Preece*, 11 M. & W. 773.

To prove the delivery of goods in a shop of a trader, an entry made in the shop books by another, which a witness saw soon after it was made, and corresponding with the delivery which he also saw, is tantamount to an entry made by himself, and is admissible. *Digby* v. *Stedman*, 1 Esp. 328.

A book kept privately by the defendant, and made up from certain slips of paper, on which the daily transactions of his business were entered, and there being no proof that these were accurately copied by him, is not admissible for the defendant. *Ellis* v. *Cowne*, 2 Car. & K. 719.

Accounts between master and servant, tradesmen and shopmen, and bankers and customers, may under special cases and from the necessity of the case be admitted as evidence in favour of the party writing them. *Symonds* v. *Gaslight and Coke Co.*, 11 Beav. 283.

Shop books in testator's hand not evidence; entries by servants, after their death, allowed. *Glynn* v. *Bank of England*, 2 Ves. 43.

Bankers' Books.]—*See* post, cols. 629 et seq.

Connection of Entries.]—Where the plaintiff read in evidence an entry from the defendant's day-book:—Held, that the latter could not be permitted to read distinct entries in different parts of the book, unconnected with the entry so read by the plaintiff. *Catt* v. *Howard*, 3 Stark. 3; 23 R. R. 752.

The general rule of evidence, that if one side puts in evidence a document for the purpose of proving part of it, the other side has a right to have the whole put in, does not apply to merchants' or traders' books of account containing entries of receipts and payments; and, therefore, if one side puts in such books of accounts to prove certain items of receipts, that does not entitle the other side to put those books in evidence to prove payments, unless the different items are so mixed up together as to clearly form one transaction. *Reere* v. *Whitmore*, 2 Drew. & Sm. 446; 11 Jur. (N.S.) 722; 12 L. T. 724; 13 W. R. 913.

Although an entry of receipts is good evidence of such receipt as against the person making it, an entry of payment is not evidence of such payment in favour of such person. *Ib.*

ii. *Solicitors.*

Against Interest—Ordinary Course of Business.]—On a question relating to the rent paid for a particular property, a statement as to receipts from an agent, signed by a deceased principal, is, as being against interest, equally admissible in evidence with a statement by a deceased agent as to receipts from a tenant. But a rent-roll signed by a deceased solicitor who was paid to audit the accounts by testing the arithmetic, but not by examining with vouchers the truth as to alleged payments, is not admissible in evidence, either on the ground of a pecuniary interest, or on the ground of the audit having been made in the ordinary course of business. *Vivian* v. *Moat*, 44 L. T. 210; 29 W. R. 504.

Entries of charges made by an attorney in his books shewing the time when a certain lease prepared for a client of his was executed, which charges were shewn to have been paid, are evidence, after the attorney's death, to shew that

the lease executed under a power to lease in possession, and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term from the 29th of September then next ensuing, was not in fact executed till after the 29th of September, inasmuch as the charge for drawing and engrossing the lease was under the date of "October, 1770." *Doe* d. *Reece* v. *Robson*, 15 East, 32; 13 R. R. 361.

Entries in the books of a deceased attorney of the defendant were admitted as evidence for a plaintiff in a bill of foreclosure, to prove that the whole mortgage money had been paid to the defendant, and that there was no usury; such entries, though not against the interest of the attorney, being made in the usual course of his business. *Clark* v. *Wilmot*, 1 Y. & C. C. C. 53.

Entries in a deceased solicitor's books, in his handwriting, relating to a deed prepared by him, and executed by a deceased client are good evidence. *Rawlins* v. *Rickards*, 28 Beav. 370.

Entries made by a deceased attorney are not evidence of business done by him. *Gale* v. *Pukington*, M'Clel. & Y. 357.

Entries of a debtor and creditor account, in the books of a deceased attorney, are not admissible as evidence, merely because there are items on the other side of the account that are admitted. *Whaley* v. *Carlisle*, 17 Ir. C. L. R. 792; 15 W. R. 1183.

Evidence as against Third Parties.]—H., who employed Messrs. P. as his solicitors, was in the habit of leaving moneys of his in their hands for investment for his benefit. In 1878 Messrs. P., who had lent money of their own to V. and E., an engineering firm, on a mortgage of certain works, repaid themselves 11,000*l.*, part of the debt, out of the moneys of H. in their hands, and in their books entered the transaction as a "loan" by H. to V. and E. of 11,000*l.* at 5 per cent., the interest being paid to him during his life by Messrs. P. Messrs. P. became bankrupt, and a summons was taken out by H.'s representative, that she became, under declarations of trust by Messrs. P., sub-mortgagee for 11,000*l.* and interest, of the works, or part owner to that extent, and for other relief. As evidence in support of the summons, the claimant relied on the above-mentioned entry in Messrs. P.'s books: on entries in a cash account furnished to her by them of half-yearly payments of interest on the 11,000*l.*; on a tabular statement of mortgages in the residuary account of H.'s estate, prepared by them for the purposes of legacy duty; and on a letter written by Messrs. P. to her containing a similar tabulated statement of mortgages forming part of H.'s estate:—Held, that although the entries she relied on were not evidence as against third parties such as the company, yet as against Messrs. P. they established a declaration of trust of a mortgage for 11,000*l.* and interest extending to all the work of V. and E., at the place mentioned at the date of the letter. *Vernon, Ewens, & Co., In re*, 32 Ch. D. 165; 54 L. T. 365; 34 W. R. 606.

Although mere entries in a solicitor's books of business alleged to have been done by him or in a bill of costs and disbursements made out by him in the regular course of business would not be evidence against third persons, a solicitor's bill of costs made out to trustees, introducing the name of the cestui que trust as being personally present when the business was transacted, paid by the trustees and allowed in the settlement of accounts with the cestui que trust, are admissible against the cestui que trust, in a suit instituted by him, upwards of twenty years afterwards, against the trustees. *Bright* v. *Legerton*, 2 De G. F. & J. 606; 30 L. J., Ch. 338; 7 Jur. (N.S.) 559; 3 L. T. 713; 9 W. R. 239.

Letters.]—A letter of a deceased solicitor, purporting to be written on behalf of a client, is not evidence against him, unless there is proof of the solicitor having acted in that character. *Ib.*

Indorsement on Notice to Quit.]—Where it was the usual course of practice in an attorney's office for the clerks to serve notices to quit on tenants, and to endorse on duplicates of such notices the fact and time of service; and on one occasion the attorney himself prepared a notice to quit to serve on a tenant, took it out with him together with two others prepared at the same time, and returned to his office in the evening, having endorsed on the duplicate of each notice a memorandum of his having delivered it to the tenant, and two of them were proved to have been delivered by him on that occasion:—Held, on the trial of an ejectment after the attorney's death, that the indorsement so made by him was admissible to prove the service of the third notice. *Doe* d. *Pattoshall* v. *Turford*, 3 B. & Ad. 890; 1 L. J., K. B. 262.

Clerks.]—*See* post, iii.

iii. *Partners, Clerks and Agents.*

Relationship of Parties.]—The entries in a book containing a record of the proceedings of a society established under a deed of co-partnership produced at the meetings, and open to the inspection of all the members, are admissible against a person after he has been proved a member of the society. *Alderson* v. *Clay*, 1 Stark. 405; 18 R. R. 788.

Evidence against whom.]—A., the holder of a bill, deposited it with B., as a collateral security for the balance of accounts between them; B. indorsed the bill over to C. after it became due. In an action by C. against A., B.'s account-book is not evidence in diminution of the balance between A. and B. *Colleuridge* v. *Farquharson*, 1 Stark. 259.

A. undertook to act as the agent of B. in recovering the amount of an insured cargo, subject to the superior claim of C., who resided abroad. In an action by B. against A. to recover his proportion of the amount recovered by A., an invoice sent by C., but to which A. was not privy, is not admissible against A., in order to shew the extent of B.'s interest. *Mendham* v. *Thompson*, 1 Stark. 316.

Entries by Deceased Partner.]—During the trial of an action to establish the plaintiff's right to be indemnified by the two defendants, or one of them, in respect of 200 shares transferred into the plaintiff's name as trustee for the defendants, or one of them, the plaintiff desired to prove that the shares had been bought on the Stock Exchange for one of the defendants through his brokers, Messrs. G. and D. G. was dead, and the plaintiff tendered in evidence an entry in the

day-book of the firm of a purchase of 200 shares by G. for the particular defendant; and, having proved that the entry was in the handwriting of G., that it was made by him in the ordinary course of business at the time of the purchase as a memorandum of the transaction, and that the ledger of the firm was made up from the day-book, contended that it was admissible in evidence as a declaration made by a deceased person, first, because it was made against the pecuniary interest of the person making it; and, secondly, because it had been made in the ordinary course of business:—Held, that it was not admissible upon the first ground, because it might, according to the turn of the market, have been to the advantage of the deceased; nor upon the second ground, because it was not made in the performance of any duty. *Massey* v. *Allen*, 49 L. J., Ch. 76; 13 Ch. D. 558; 41 L. T. 788; 28 W. R. 212.

Clerks—Facts within Knowledge.]—The clerk in a solicitor's office, when speaking to facts within his own knowledge, may refer to the "office journal" in order to fix the dates of those facts; but cannot speak to facts (not within his knowledge) from entries in the journal, not in his handwriting. *Butlin* v. *Barry*, 1 Curt. 617.

Where the practice of the defendant's counting-house was that the clerk, after copying a letter into the letter-book, returned it to the defendant to seal, and that he or another clerk carried all letters to the post-office, but there was no particular place of deposit in the office for such letters, and neither of the clerks had any recollection of the particular letter offered in evidence, though they swore that they uniformly carried all letters given them to carry:—Held, that the entry in the clerk's writing in the letter-book of a letter to the plaintiff could not be read as proof of such letter having been sent to the plaintiff. *Toosey* v. *Williams*, 1 M. & Scott, 129.

—— **Where no Duty.**]—An entry in the diary of a solicitor's clerk, who had become lunatic, was not allowed to be read in evidence of a matter concerning which it was not the duty of the clerk to have made such entry. *Coleman* v. *Mellersh*, 2 Mac. & G. 309.

An entry of a tender and a refusal made by the deceased clerk of the plaintiff's attorney, in a day-book kept for the purpose of minuting his daily transactions, is admissible in evidence to prove the tender. *Marks* v. *Lahee*, 3 Bing. (N.C.) 408; 4 Scott, 137; 6 L. J., C. P. 69.

An entry in a diary kept by an agent is not admissible to prove a fact therein stated, unless it is shewn that it was the duty of the agent to make the whole entry. *Trotter* v. *Maclean*, 13 Ch. D. 574, 579; 42 L. T. 118; 28 W. R. 244.

—— **Proof of Handwriting.**]—An entry made in the books of the plaintiff, specifying the terms of an agreement, is not evidence where the person who made it is dead, by proving his handwriting. *Calvert* v. *Canterbury (Archbishop)*, 2 Esp. 646.

Where entries have been made by a clerk who is since dead, proof of his handwriting will not make such entries evidence. *Sikes* v. *Marshall*, 2 Esp. 705.

—— **Service of Interrogatories.**]—An indorsed memorandum of service in the handwriting of a clerk of the plaintiff's attorney (the writer being abroad), coupled with an affidavit by another clerk that the defendant's solicitor had admitted to him verbally the service of interrogatories:—Held, sufficient to justify the court in ordering an attachment to issue against the defendant for want of answer. *Sidebottom* v. *Adkins*, 3 Jur. (N.S.) 631; 6 W. R. 97.

Nature of Duty.]—J., who was usually employed to serve notices to quit, received instructions to serve a duplicate notice to quit on R. C., and on his return signed a memorandum, which had been prepared beforehand, "29th September, delivered a duplicate to R. C." In fact, he had served the father of R. C., and he stated that fact to his employer on his return. On ejectment after the death of J.:—Held, that the parol declaration was not admissible, because not made in the course of business or in the discharge of a duty. *Stapylton* v. *Clough*, 2 El. & Bl. 933; 2 C. L. R. 266; 23 L. J., Q. B. 5; 18 Jur. 60; 2 W. R. 60.

A local agent, whose duty it was to advise his principals of all his transactions on their account, wrote them a letter, in which occurred these words: "I enclose a draft of B., which he sent to-day with three large cases to the office. I enclose his invoices for your perusal. He leaves shipment of his goods to your judgment. He will renew. . . . I consider him a perfectly safe man, should there be any reclamation. He draws 75 per cent.":—Held, that this letter could not be used by the principals after the agent's death, to prove the nature of the transaction to which it referred, as it was neither the record of a transaction which it was the specific duty of the agent to make, nor an entry against his interest. *Smith* v. *Blakey*, 8 B. & S. 157; 36 L. J., Q. B. 156; L. R. 2 Q. B. 326; 15 W. R. 492.

In an action upon a bond given to bankers, conditioned for the fidelity of a clerk, entries of the receipts of sums of money made by the clerk in books kept by him in the discharge of his duty as clerk, are, after his death, evidence against his sureties of the fact of the receipt of money. *Whitnash* v. *George*, 8 B. & C. 556. See *Cooper* v. *Marsden*, 1 Esp. 1.

Clerk to Commissioners.]—Where claims to allotments, which were by an act of parliament directed to be in writing, were entered, by a deceased clerk of the commissioners, in a book, and were marked as allowed by their initials:—Held, that upon proof of the clerk's death, and of negative search for the original claims, the entries were admissible to shew the nature of the claim. *Doe* d. *Welsh* v. *Langfield*, 16 M. & W. 497. *S. C.*, nom. *Doe* d. *Padwick* v. *Skinner*, 3 Ex. 84; 18 L. J., Ex. 107.

Notary's Clerk.]—An entry of the dishonour of a bill of exchange, made in the usual course of business, at the time of the dishonour, in the book of a notary, by his clerk, who presented the bill, may be given in evidence in an action on the bill, upon proof of the death of the clerk who made the entry. *Poole* v. *Dicas*, 1 Scott, 600; 1 Bing. (N.C.) 649; 1 Hodges, 162; 7 Car. & P. 79; 4 L. J., C. P. 196.

Notice of Call—List of Names.]—In order to prove the service of a notice of a railway call in an action for the same, the company proved that it was the duty of C. to fill up the printed notices and direct them to the shareholders; that on the day of the call he had received

instructions to send out such notices; that he had been seen in the act of making out such notices and putting them into a basket ready to be posted, and that at that time he had a list in his hand. It was proved that all the letters in the basket were posted. C. was dead at the time of the trial, but a list containing the name of the defendant was produced in his handwriting, with an indorsement by him "letters sent out":—Held, that this list so indorsed was admissible, as it might reasonably be inferred that it was a contemporaneous entry. *Eastern Union Ry.* v. *Symonds*, 5 Ex. 237; 6 Railw. Cas. 578; 19 L. J., Ex. 287.

Servant.]—Entry by servant or agent usually employed in keeping accounts allowed as good evidence upon proof of his death. *Lefebure* v. *Worden*, 2 Ves. 54.

R. married N.'s widow, who was executrix of her husband, and kept a book of accounts relating to his estate: after she married R. the same book was continued. Afterwards R. went as governor to Barbadoes with his wife and the servant who kept the book; they all died there. It was proved in the cause, that the book was made up from vouchers, and that great part of the money was paid; and the witness believed the whole was paid. Upon exceptions to the master's report, the court adjudged the book should be allowed as a discharge, as well as a charge. *Daston* v. *Orford (Earl)*, Colles's P. C. 229. *S. C.*, differently stated, Pre. Ch. 188; 1 Eq. Abr. 10.

iv. *Stewards, Receivers and Collectors.*

Steward's Entries.]—Entries on the ancient roll of a manor of items in the accounts rendered by the reeve of the manor, by which he charges himself with the receipt of money, are admissible; but entries in the same account of disbursements of the money so received discharging the reeve are not admissible, unless they are referred to by the charging items, or are necessary to explain them. *Doe* d. *Kinglake* v. *Beriss*, 7 C. B. 456; 18 L. J., C. P. 128.

—— **Entry as to Recital of Lease—Hearsay.**]—In an ejectment the question was, whether lands known as Kingston Pastures were part of the manor of Hayling. The lands had been purchased from the Duke of Norfolk. An entry in a book found among the muniments of the Norfolk family was tendered for the purpose of proving the affirmative of the issue. The entry, which was made by a steward of that family, spoke of an indenture which "recited a lease made by the Earl of Arundel," and which, tracing the lands into the possession of R. H., went on to say that "R. H. demiseth unto, &c., all those pasture grounds lying in Kingston, in the parish of Portsea, parcel of the manor of Hayling":—Held, that this entry was a mere recital of some document which the writer had seen or heard of, and was not admissible either as an entry by a person in the discharge of his duty, or as entry against the interest of the person who made it, nor was it evidence of reputation to prove that the lands were parcel of the manor. *Doe* d. *Padwick* v. *Wittcomb*, 4 H. L. Cas. 425. Affirming 6 Ex. 601; 20 L. J., Ex. 297; 15 Jur. 778.

—— **Amount.**]—A paper signed by a deceased steward charged him with the receipt of a gross sum. In the same box was found an ancient rental in the same handwriting, but unsigned, containing an account of items which, added together, made up the gross sum with which the deceased steward so debited himself:—Held, admissible. *Musgrave* v. *Emmerson*, 10 Q. B. 326; 16 L. J., Q. B. 174. S. P., *Brune* v. *Thompson*, Car. & M. 34.

—— **Presumption.**]—Entries in a steward's book made more than thirty years ago, and coming from the proper custody, are admissible, without proving the handwriting of the steward. *Wynne* v. *Tyrwhitt*, 4 B. & Ad. 376.

—— **Privity of Estate.**]—In ejectment, it appeared that the lessor of the plaintiff, to entitle himself to the property as heir-at-law, must deduce title through E. The title relied upon by the defendant was that of a party to whom E. had devised his remainder in the property, which remainder had been devised by J. to E. Among other evidence to identify the property in question with that devised by J., a book was offered, containing entries of receipts of rent of the property in question by a deceased steward of E.:—Held, that the defendant was entitled to produce these entries in evidence against the plaintiff, each party claiming under or through E. The defendant claimed by purchase from the heir of a devisee under E.'s will. *Doe* d. *Strode* v. *Seaton*, 2 A. & E. 171; 4 N. & M. 81; 4 L. J., K. B. 13.

Where the right to the soil is in issue, entries written by a steward of a former owner, from whom title is derived, are admissible in evidence if the steward is dead. *Barry* v. *Bebington*, 4 Term Rep. 514; 2 R. R. 450.

—— **Balance in Favour.**]—It is no objection to the admissibility of an entry by which a deceased steward charges himself, that the balance of the account is in favour of the steward. *Williams* v. *Graves*, 8 Car. & P. 593.

Entries in a steward's book, made in his favour, and not connected with other entries made against him, are not evidence of the facts mentioned in such entries. *Knight* v. *Waterford (Marquis)*, 4 Y. & C. 283; 10 L. J., Ex. Eq. 57.

Quit Rent.]—Bill for quit rent and account produced; it must be proved to have been a steward or bailiff's, or it is not evidence in equity any more than at law. *Franks* v. *Curry*, 2 Atk. 140.

—— **Son of Steward.**]—In ejectment, a book, professing to contain yearly accounts between the lord of a manor and his steward, J. V., sen., was produced from the muniment-room of the lessor. The statement of the balance at the end of each year was signed by the lord of the manor and J. V., jun.; and in 1795 there was a statement, also signed by the lord and J. V., jun., of the balance due to J. V., sen., upon the general settlement of the preceding accounts, and an acknowledgment of the payment of it to J. V., jun.:—Held, that the entries in these accounts were receivable upon the same footing as entries by the steward for the time being. *Doe* d. *Ashburnham (Lord)* v. *Michael*, 17 Q. B. 276; 20 L. J., Q. B. 480; 15 Jur. 677.

—— **Nature of Accounts.**]—The rent-rolls of an estate unsigned, and drawn out in four columns: the first and second columns, containing the tenants' names, and the amount to be

paid by each, were in the handwriting of the owner of the estate; the third and fourth columns, containing the amount actually received of each tenant, and the date when received, were in the handwriting of a deceased steward:—Held, receivable as accounts of a deceased steward charging himself. *Doe* d. *Bodenham* v. *Colcombe*, Car. & M. 155.

Collector—Sums Received.]—It is no objection to the admissibility of a book, containing an account in which a deceased receiver charges himself with money paid to him, that, on the opposite side of the account, the receiver discharges himself to the same extent, or that the account (being in his handwriting) is not signed by him; or that the name of the party on whose account the money is received does not appear in the book, it being shewn aliunde that the person making the entry did not receive the money on his own account. *Rowe* v. *Brenton*, 3 M. & Ry. 268; 8 B. & C. 765.

A private book kept by a deceased collector of taxes, not as a matter of duty, but for his own convenience, containing entries by him acknowledging the receipt of sums of money in his character of collector, is admissible in an action against his surety; although the parties who made the payments were alive and might have been called as witnesses. *Middleton* v. *Melton*, 5 M. & Ry. 264.

In Tithe Suit.]—In a suit by rector for tithes, a book, in which the collector of a former rector had kept accounts of the receipts of tithes, cannot be proved vivâ voce, as, besides the handwriting, it would be necessary to prove that it came out of the proper custody, and that the writer was the collector of the tithes. *Lake* v. *Skinner*, 1 Jac. & Walk. 9.

Nothing to be proved vivâ voce that requires more than proof of handwriting, or that admits of cross-examination. *Ib.* 15.

—— **Approved Entries of Clerk.**]—Entries of the receipt of rent, made in the handwriting of a clerk of a treasurer of a charity, in a book produced by the treasurer at the audits of his accounts, and adopted by him, are evidence, after the death of the treasurer, to prove the payment of the sums therein mentioned. *Doe* d. *Graham* v. *Hawkins*, 1 G. & D. 551; 2 Q. B. 212; 10 L. J., Q. B. 285; 6 Jur. 215.

—— **Rate-book—Admissible in Action against Sureties.**]—A rate-collector's bond executed by him and sureties, was upon the conditions that the collector should collect the rates, and pay the amount so collected to the treasurer, that the collector should deliver true and proper accounts, and should, when required, deliver up his books and pay to the treasurer such money as upon the balance of any accounts should appear to be in his hands. The rate-collector absconded, and an action was commenced against the sureties, claiming 223*l.*; the only evidence of the receipt by the collector of this sum, was the entries made by him in his accounts:—Held, that these entries were admissible in evidence against the sureties. *Abbeyleix Guardians* v. *Sutcliffe*, 25 L. R. Ir. 332.

Signature.]—A deceased receiver of rents rendered to his employer annual accounts of the rents received from property at H. The accounts were not signed by any one. One of the accounts was in the handwriting of a deceased clerk, but on it was written, in the handwriting of the receiver, "H. rents"; another account was in the handwriting of the son of the receiver, who proved that he made it out by the authority of his father, and the account was rendered to the employer, and was in the usual course:—Held, that both these accounts were receivable as the accounts of a deceased agent charging himself to his principal. *Doe* d. *Sturt* v. *Mobbs*, Car. & M. 1.

Entries signed by a deceased agent, but not in his handwriting, but by which such agent charges himself, are receivable. *Doe* d. *Lichfield* (*Earl*) v. *Stacey*, 6 Car. & P. 139.

—— **Nature of Accounts—Proof of Audit.**]—In an action by the corporation of Exeter, for petty customs and port duties, payable on goods landed at Teignmouth, to shew the receipt of such dues in former times, they produced a series of accounts, purporting to be of the receipts by the receivers of the city. It was proved that the receivers' accounts were regularly audited, and that no one could at the time to which the evidence related be mayor till he had been receiver, and had his accounts audited. Down to a certain time the accounts were not signed at all: afterwards they were regularly signed by the auditors only. One entry of the latter class stated the receipt by B., a receiver, of a sum for town dues from W.: and with this entry was found a paper, stating that W. had received a sum for town dues, almost exactly corresponding with that stated in the entry, and at the time of which it bore date. No evidence was given as to the handwriting of the latter paper. B. and W. were both dead. The documents were more than thirty years old. No one of them stated the receipt to be "by me"; but the third person was used:—Held, that all the documents were admissible. *Exeter Corporation* v. *Warren*, 5 Q. B. 773; D. & M. 524.

—— **Receipts and Tolls.**]—In a colliery lease, the lessee covenanted to keep true accounts of all coal daily raised, and to make and deliver true copies thereof to the lessor. J., who was the account-keeper appointed by the persons who worked the colliery, but who was since dead, rendered to the lessor accounts of coals sold by him:—Held, that these accounts were receivable against the lessee; first, as being entries made by J., charging himself; and, secondly, as being admissions made by the lessee's agent. *Edwards* v. *Rees*, 7 Car. & P. 340.

Accounts of the receipts of tolls of a market, signed by a person since deceased, styling himself managing clerk of a deceased steward of the claimant's ancestor, are not evidence of title, although such accounts are found among the family muniments. *De Rutzen* v. *Farr*, 5 N. & M. 617; 4 A. & E. 53; 1 H. & W. 735; 5 L. J., K. B. 38.

In an action by the lessee of a corporation for tolls, it was proved that it had been the practice, as long as the witness, who was conversant with the subject, could remember, for the town treasurer to furnish the town clerk with information, from which he made out his (the treasurer's) accounts, and also for the treasurer to attend before the auditors, unless prevented by illness or by accident, and produce vouchers verifying the town clerk's statement. Entries in books of that description, commencing with 1766, were

tendered. Some of them were signed by the auditors as allowed, and to some of them appeared only an unsigned entry of their having been examined:—Held, that those which were signed by the auditors were admissible without proof of any attendance by the particular treasurer before the auditors, or of any entry in his writing charging himself, partly on the ground that there was reasonable evidence of his having made the town clerk his agent for the making out of the accounts. *Laneum* v. *Lovell*, 6 Car. & P. 441.

Upon a bond conditioned that a clerk shall account for all moneys received on account of his employers, and shall act with fidelity and punctuality in the matters entrusted to him, entries made by the clerk in the course of his employment, whereby he charges himself with the receipt of money on account of his employers, are after his death primâ facie evidence against his sureties, the obligors, of the receipt of such moneys. But it is open to the latter to shew, that the entries are incorrect, though by so doing they will render themselves liable as upon a breach of the second branch of the condition. *Whitmarsh* v. *Genge*, 3 M. & Ry. 42; 8 B. & C. 556; 7 L. J. (O.S.) K. B. 57.

By Executors.]—In an action by the executor of a payee against the maker upon a promissory note more than six years overdue, the plaintiff, in order to take the case out of the Statute of Limitations, produced a book in which he had, in 1844 and 1847, at the request of the testatrix, entered two payments, as for interest due upon the note, which she told him she had received from the defendant:—Held, admissible as entries against the interest of the party making them. *Bradley* v. *James*, 13 C. B. 822; 1 C. L. R. 494; 22 L. J., C. P. 193; 1 W. R. 388.

A book of accounts kept by a deceased executor, charging himself with the receipt of rents in his character of executor, is admissible for the purpose of shewing that he had received the rent on account of a particular tenement, notwithstanding that he took a remote contingent interest under the will. *Spires* v. *Morris*, 3 M. & Scott, 124; 9 Bing. 687; 2 L. J., C. P. 153.

v. *Parties formerly Interested.*

Payment of Rent.]—On appeal against an order of removal it was proved that the father of the pauper's mother had rented and occupied a tenement in the appellant parish for four years, ending at Midsummer, 1830; the pauper's mother was called to prove that she heard her father say that he had rented the house of B. at 22*l.* a year, and had paid the rent for it; and she produced a book containing entries in his handwriting stating that he had paid B. two sums amounting to 5*l.* 10*s.* for a quarter's rent due at Midsummer, 1830:—Held, first, that the declaration and the entries were admissible evidence as to the fact of payment of the rent. *Reg.* v. *Exeter Guardians*, 10 B. & S. 433; 38 L. J., M. C. 126; L. R. 4 Q. B. 341; 20 L. T. 693; 17 W. R. 850.

Held, secondly, that the undisturbed occupation by the tenant of the house for four years was presumptive proof of payment. *Ib.*

An entry in a rent-book in the handwriting of the plaintiff's deceased mother, who had managed his affairs, admitting the receipt of rent by her, amounts to a recognition by her that certain entries of payments, recorded in the preceding part of the same page in the handwriting of a person since deceased, of rent which ought to have been received by her, represented receipts for which she was accountable, and were consequently admissible in evidence. *Richards* v. *Gogarty*, Ir. R. 4 C. L. 300.

F. was tenant to C., with a promise of a lease for twenty-one years, from September, 1851, to September, 1872, at the rent of 84*l.* 16*s.* Afterwards C. entered F.'s name in his rent-book as the tenant of 128 acres, at 16*s.* an acre, at yearly rent of 102*l.* 8*s.*, less 4*l.* for county cess—98*l.* 8*s.* "Tenure, thirty-one years, from September, 1872, at rent of 16*s.* per acre, allowed 4*l.* for county cess." The entry was in C.'s handwriting:—Held, that it was admissible in evidence as a statement against the proprietary and pecuniary interest of C. *Conner* v. *Fitzgerald*, 11 L. R., Ir. 106.

Effect of.]—On the trial of an issue, under 6 & 7 Will. 4, c. 71, whether a modus had been, during the statutable period, payable by the occupiers of lands in a hamlet to the rector in lieu of tithes, an account book kept by a deceased rector, containing receipts and payments by him relative to the living, was received in evidence for the present incumbent:—Held, that the account book was properly admitted. *Young* v. *Clare Hall* (*Master*), 17 Q. B. 529; 21 L. J., Q. B. 12; 16 Jur. 81.

The entries by a tenant for life, in his book, of the receipt of the rent to the amount stated, are evidence of the fact. *Roe* d. *Brune* v. *Rawlings*, 7 East, 279; 3 Smith, 254; 8 R. R. 632.

But entries made by a third person, deceased, in his books of receipts of rent from his tenant for a particular estate, are not evidence to prove the identity of the land in a cause between two others. *Outram* v. *Morewood*, 5 Term Rep. 121; 12 R. R. 542.

A memorandum signed by a person deceased, who had been owner of a copyhold tenement, and had occupied a slip of garden ground adjoining, stating that no part of the garden ground belonged to the copyhold, but that he paid rent for the whole of it, is admissible for the lessor of the plaintiff in ejectment for this garden ground, to shew that it is not a part of the copyhold tenement. *Doe* d. *Baggalley* v. *Jones*, 1 Camp. 367.

Parson's receipts for tithes evidence for successor. *Glynn* v. *Bank of England*, 2 Ves. 38.

Answers of Tenants of Manor.]—Ancient answers of conventionary tenants of a manor, stating the rights of the lord of the manor, are admissible, even against the freeholders of the manor; but if they state facts only, e.g. that "the commons of the manor do belong to the tenants of the manor unstinted, who have always enjoyed the same under the yearly rent of 33*l.* 4*s.*, as by the records remaining with the auditor of the duchy appeareth; unto which, for the more certainty, we refer ourselves;" they are not admissible. *Crease* v. *Barrett*, 1 C. M. & R. 919; 5 Tyr. 458; 4 L. J., Ex. 297.

vi. *Other Persons.*

By Public Official.]—The report of a committee appointed by a public department in a foreign state, though addressed to that department and acted on by the government, is not necessarily admissible in the courts here as evi-

dence of all the facts stated therein. M., the consul in London for the then Genoese government, applied in 1789 to his government to receive the rank and employment of diplomatic agent here. The executive government (collegii) referred the application to a committee called the Giunta della Marina to inquire into the propriety of the proposed change of appointment, and into M.'s fitness for the post of diplomatic agent. The Giunta reported favourably on both points. In the course of the report the Giunta described him as "a native of Quarto, of about forty-five years of age." He was appointed in 1790, and died in England in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the Crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the Freccia family, who claimed to be next of kin, and whose claim was founded on an allegation that M. had been born at St. Ilario, near Genoa, in 1735. Other persons then claimed to be next of kin, asserting that M. had been born at Quarto in 1744. In a suit between these two sets of claimants, the report of the Giunta was tendered in evidence as fixing the real place and time of M.'s birth:—Held, that it was not admissible for that purpose. *Sturla* v. *Freccia*, 50 L. J., Ch. 86; 5 App. Cas. 623; 43 L. T. 209; 29 W. R. 217; 44 J. P. 812—H. L. (E.)

Per Lord Blackburn:—"A public document" means a document that is made for the purpose of the public making use of it, especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, all persons concerned in it, may have access to it. *Ib.*

Where entries purported to be made by commissioners of the land tax in 1827, and evidence was given that the persons making them had acted as such commissioners in 1828:—Held, that this was properly left as evidence to go to the jury that they were also commissioners in 1827. *Doe* d. *Hopley* v. *Young*, 8 Q. B. 63; 15 L. J., Q. B. 9; 9 Jur. 941.

Overseer.]—In a tithe suit by a vicar, an overseer's accounts, mentioning that a sum had been received from a vicar, in respect of a modus payable to him, are admissible for the defendants. *Ward* v. *Pomfret*, 5 Sim. 475; 2 L. J., Ch. 22.

In Log Book.]—Entries in a log by a deceased seaman in the course of his duty, but not contemporaneous with the facts entered, and not against his interest, are not admissible in evidence. *The Henry Coxon*, 47 L. J., Adm. 83; 3 P. D. 156; 38 L. T. 819; 27 W. R. 263.

Depositions of a deceased seaman taken by a receiver of wrecks in the course of his duty are not admissible as evidence in an action of damage. *Ib.*

By Chief Rabbi.]—In an action for taking the plaintiff's goods, with a plea of not possessed, it was proposed to shew that the goods were not his, by shewing that he was not twenty-one. To shew this, it was proved, that, by the custom of the law of the Jews, children are circumcised on the eighth day from their birth, and that it was the duty of the chief rabbi to perform this rite, and make an entry of it in a book. It was proposed to give in evidence the entry in this book of the plaintiff's circumcision, the entry being in the handwriting of a chief rabbi who was dead:—Held, that the entry was not receivable. *Davis* v. *Lloyd*, 1 Car. & K. 275.

Entry by Sexton.]—In order to prove the residence of a party at the time of his death, an entry made by a parish sexton in a book which, under the authority of a private act of parliament, he was required to keep for the purpose of entering burials and the burial fees, is admissible. *Lloyd* v. *Wait*, 1 Ph. 61; 6 Jur. 455.

Receipt of Church Rates.]—An entry made in a parish book, of the receipt of money by officers of a township from the officers of another township for a proportion of church-rates, is evidence to charge the latter officers with the same proportion in future. *Stead* v. *Heaton*, 4 Term Rep. 669.

Entries by Living Persons.]—The entries of a person still living against his interest are not evidence between other parties, though it is shewn that he is abroad, having absconded from a criminal charge, and altogether out of the power of a party to produce him as a witness. *Stephen* v. *Gwenap*, 1 M. & Rob. 120.

Memorandum of Agreement by Third Party.]—A witness called to prove the terms of a verbal agreement stated that he was in company with plaintiff and defendant when it was made, and referred to an entry made a few hours after, to refresh his memory. This entry was made by him from a paper written in pencil by the plaintiff during the interview between the parties, and read by him to the defendant as embodying the terms of their agreement. The defendant assented, but he neither signed nor was asked to sign it, nor was it shewn to him:—Held, that it was not necessary to produce this paper as constituting the real agreement. *Trewhitt* v. *Lambert*, 3 P. & D. 676; 10 A. & E. 470. See also *Rex* v. *Wrangle*, 4 N. & M. 375; 2 A. & E. 314; 1 H. & W. 41; 4 L. J., M. C. 43.

Of Payment of King's Silver.]—The entry of the payment of the king's silver is sufficient evidence of a fine having been duly levied, the fine being complete on such payment. *Marjoribanks* v. *Hovenden*, 8 Ir. Ch. R. 317.

II. PRESUMPTIONS.

1. Right to Land, Easements, &c.

General Principles.]—The principle regulating the presuming documents in support of beneficial enjoyment is, that where there has been a long enjoyment of any right which could have had no lawful origin except by deed, there, in favour of such enjoyment, all necessary deeds may be presumed, if there is nothing to negative such presumption. *Lyon* v. *Reed*, 13 M. & W. 285; 13 L. J., Ex. 377; 8 Jur. 762.

Grants presumed upon the principle of quieting possession. *Hillary* v. *Waller*, 12 Ves. 252.

Presumption of title need not be founded on what is believed to have happened, but what may have happened. *St. Mary Magdalen College, Oxford* v. *Att.-Gen.*, 3 Jur. (N.S.) 675.

Legal Origin.]—Where the possession of an estate can be referred to a good and valid title,

equity will not refer it to a title obtained by fraud or disseisin. *Conry* v. *Caulfield*, 2 Ball & B. 255.

The plaintiff as surviving feoffee of parish lands, alleged that from the time of legal memory a certain part of such lands had been vested in the feoffees upon trust for the vestry, subject to a rent-charge of 3*l.* 6*s.* 8*d.*, and that the defendant corporation had been tenants of the vestry at a rent of 150*l.* per annum since 1838, which tenancy had expired:—Held, that a legal origin of title was not impossible, and must therefore be presumed, for after such a possession it was plainly incumbent on the court to find a legal origin if such could be found. Held, also, that the omission of the land in question from the feoffments of the parish before 1838 was not sufficient to rebut the inference which the long possession compelled the court to draw. *Eliot* v. *Bristol Corporation*, 72 L. T. 752—C. A.

Where rights of common have been exercised for many years, the court will try to find a legal origin for those rights. *Warrick* v. *Queen's College, Oxford*, 40 L. J., Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098.

Freehold Tenure.]—An award by commissioners of lands in general terms, without stating their tenure, is primâ facie evidence of their being freehold. *Cattel* v. *Corral*, 4 Y. & Coll. 228; 9 L. J., Ex. Eq. 37.

Seisin in Fee.]—The fact of possession is primâ facie evidence of seisin in fee, per Mellor, J., in *Asher* v. *Whitelock*, 35 L. J., Q. B. 17; L. R. 10 Q. B. 1; 11 Jur. (N.S.) 925; 14 W. R. 26.

Proof of possession of land, and pernancy of the rents and profits, is primâ facie evidence of a seisin in fee. *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68; 15 R. R. 518.

The heir and executor of T. having disputed whether certain estates, of which T. died seised or possessed, were real or personal estate all that appeared was that P., the original owner, through whom both claimed, as far as was known, died seised of the freehold. The heir-at-law of P. having sued T., the litigation was compromised by a deed conveying to T. all the estate and right of such heir, and no other claim was ever heard of, nor was T. disturbed in possession:—Held, that, assuming that P. died seised of the fee, and that all the interests of other claimants were conveyed to T., the presumption was that T. also impliedly acquired the fee. *Tudury* v *Sachez de Pina*, 7 L. T. 115.

In 1586, property was, in consideration of 273*l.*; demised for 2,000 years at a small rent, and the lessor covenanted, if required by the lessee within seven years, to convey the fee to the lessees without further payment. In documents dated in 1664, 1681, and 1690, the property was treated by the persons claiming under the lessees as held in fee simple. But in documents dated in 1715 and 1758, it was considered doubtful whether it was freehold or leasehold, and in 1777 and 1778 it was treated as leasehold:—Held, that the presumption up to 1715 was, that it was fee simple; that such presumption was not destroyed by the subsequent doubts, and a purchaser in 1859 of the fee was held bound to take the title. *Jeffreys* v. *Machu*, 29 Beav. 344.

Unity of Possession.]—Unity of title is a primâ facie case of unity of possession. *Clayton* v. *Corby*, 2 G. & D. 174; 2 Q. B. 813.

Grant from Crown.]—The undisturbed occupation for thirty-nine years of lands forming an encroachment on the Forest of Dean raises a presumption of a grant from the Crown. *Goodtitle* v. *Baldwin*, 11 East, 488; 14 R. R. 674. See *Kingston-upon-Hull Corporation* v. *Homer*, Cowp. 102; Lofft. 576. *Chasemore* v. *Richards*, 7 H. L. Cas. 347; 29 L. J., Ex. 81; 5 Jur. (N.S.) 873; 7 W. R. 685.

Act of Parliament.]—After a long possession, the court will make great presumptions, including, in some cases, even an act of parliament, in order to protect a right. The court will not, however, adopt such presumption when the origin of the right or possession is clearly ascertained and negatives such presumption. *Att.-Gen.* v. *Ewelme Hospital*, 17 Beav. 366; 22 L. J., Ch. 846; 1 W. R. 523. *But see Chilton* v. *London Corporation*, post, col. 572.

Conveyance of Legal Interest by Trustees.]—Where a bare legal estate had been conveyed to a trustee in 1804, and in 1813 the estate was dealt with by the cestui que trust and other parties, without any reference to the existence of such outstanding legal interest, but it was to be implied from the terms of the latter deed that there had been some intermediate dealing with the property between 1804 and 1813:—Held, that there was evidence from which a jury might presume a conveyance by the trustee of the legal interest on behalf of the parties beneficially entitled. *Mathias* v. *Evans*, 5 W. R. 707.

Where no acts of ownership have been exercised by the party beneficially interested in an estate devised in trust, a reconveyance by the trustees cannot be presumed, as that would be a presumption against possession. *Doe* d. *Rees* v. *Williams*, 1 M. & W. 749; M. & H. 198; 6 L. J., Ex. 256; 1 Jur. 755.

Reconveyance.]—H., being seised in fee-tail in possession of premises, and being also seised of the immediate reversion in fee, enfeoffed his brother R. R. never took possession, and the deed of feoffment remained in the custody of the feoffor. The feoffor died in 1780, whereupon his son Robert entered, and the premises continued to be occupied by him and his lessees down to 1826, when he died, having in the meantime suffered a recovery of the premises, and devised them to the lessors of the plaintiff:—Held, that this long uninterrupted possession by the feoffor, and those claiming under him, warranted the presumption that the premises had been reconveyed to the feoffor. *Tenny* d. *Whinnett* v. *Jones*, 3 M. & Scott, 472.

Redemption of or Release from Rentcharge.]—When a rent, which was to cease upon payment of a certain sum of money, was charged upon, and payable out of, several denominations of land, and there was evidence to show that it had not been paid by or demanded from the owners of one of those denominations for upwards of a century: but there was nothing to show that it had not been regularly paid out of the other denominations:—Held, that the court would not presume, either that the redemption money was paid, or that that portion of the land had been released. *Warren* v. *Bateman*, Fl. & K. 448.

Mesne Assignments.]—To make good a title to the residue of an old term, mesne assign-

ments, which cannot be produced, will be presumed even at law. *White* v. *Foljambe*, 11 Ves. 350.

Reversionary Interest.]—In an action by the reversioners of a copyhold estate, for an injury to their reversion, they proved the payment to them of rent by the tenant; the defendants proved the surrender to, and admittance of, third parties to the estate, in 1821:—Held, that the payment of rent was sufficient primâ facie evidence of the reversion being in the plaintiffs, and that the surrender proved by the defendants did not cast the onus of proof upon the plaintiffs, to shew a reconveyance of the estate to them. *Daintry* v. *Brocklehurst*, 3 Ex. 207; 18 L. J., Ex. 57.

In an action for pulling down a messuage and premises in the possession and occupation of H., as tenant to the plaintiff, to the injury of his reversionary estate and interest, the defendant pleaded that the messuage and premises were not in the possession and occupation of H. as tenant to the plaintiff, nor did the reversion belong to the plaintiff. It appeared at the trial that H. held at a profit rent of the plaintiff, who had a limited interest in the premises, but that H. had given up possession to the defendant a short time before the act complained of, without, however, assigning away his interest:—Held, first, that the plea was substantially proved, the plaintiff's right to the reversion in the premises being the substantial question raised by it. *Hosking* v. *Phillips*, 3 Ex. 168; 5 Railw. Cas. 560; 18 L. J., Ex. 1; 12 Jur. 1030.

Where Contradiction.]—Where, under a plea of not possessed, in an action for obstructing the plaintiff's wharf, the plaintiff gave general evidence of user for a long period:—Held, that the jury was properly directed to find for the plaintiff on such evidence, though the defendant put in the lease under which the plaintiff claimed, and which granted to the lessees the use of the locus in quo "for a sawpit, and for laying timber upon." *Page* v. *Hatchett*, 8 Q. B. 187; 15 L. J., Q. B. 281; 10 Jur. 634.

Upon possession for many years, the origin of it not appearing, and no title, except as cestui que trust, under a term to raise a sum of money, the court would not presume any other title, and, therefore, decreed the plaintiff to be let into possession on payment of the charge, but with reluctance, and, upon the laches, refused an account of the rents even from the filing of the bill. *Acherley* v. *Roe*, 5 Ves. 565.

Ownership of Land.]—To prove a right to the soil, acts of ownership exercised by one party are conclusive evidence against a supposed title from boundaries which have never been ascertained. *Curson* v. *Lomax*, 5 Esp. 60.

Evidence that the plaintiff took the crops of grass, and that the defendant grazed the aftermath, is rather consistent with the ownership of the land being in the plaintiff than in the defendant. *Ford* v. *Lacy*, 2 F. & F. 354.

Land had been in the possession of the parish officers for nearly sixty years, and no evidence that it had ever been in the possession of any other person since the will of the testator, the date of which was unknown. There was some slight evidence of a house which once stood on it having been an almshouse. The court treated it as parish land, and directed a mortgage to be made to repay funds borrowed for its improvement. *Dixon's Trust, In re*, 1 W. R. 244.

Soil of Highway.]—Where a deed of conveyance of land contiguous to a highway described the parcels, giving the acreage to the thousandth part of an acre by reference to an ordnance map, and to a schedule and plan drawn on the conveyance, the measurements and corresponding numbers and colouring of which did not include any portion of the highway, and further contained a recital that the trees on the land to be sold had been valued and the amount of the valuation—which in fact did not include any of the trees upon the highway—formed part of the purchase-money:—Held, that the presumption of law that a moiety of the highway passed by the conveyance was rebutted. *Berridge* v. *Ward* (10 C. B. (N.S.) 400) distinguished. *Pryor* v. *Petre*, 63 L. J., Ch. 531; [1894] 2 Ch. 11; 7 R. 424; 70 L. T. 331; 42 W. R. 435—C. A.

The presumption that the soil of a highway belongs to the owner of the adjoining land, usque ad medium filum viæ, does not apply to ground which was intended to be used as a highway, but has never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway. *Leigh* v. *Jack*, 49 L. J., Ex. 220; 5 Ex. D. 264; 42 L. T. 463; 28 W. R. 452; 44 J. P. 488—C. A.

—— **Crown Grant of Rights in Town.**]—By a charter of 1215 King John granted to the corporation of Droitwich quicquid scilicet habemus in eadem villa to have and to hold to the burgesses for ever. There was no proof that certain streets in the borough ever were the property of the king in his demesne:—Held, that the presumption that the soil of these streets was vested in the adjoining owners was not rebutted by such grant. *Salt Union* v. *Harvey*, 61 J. P. 375.

Mines and Minerals.]—Primâ facie the owner of land is entitled to the surface itself, and all below it ex jure naturæ; who seek to derogate from that right must do so by virtue of some grant or conveyance. *Rowbottom* v. *Wilson*, 8 H. L. Cas. 348.

No presumption of a grant of mines against an express reservation on a sale many years ago, merely from permitting expenditure without claim. *Norway* v. *Rowe*, 19 Ves. 156. *See* 12 R. R. 157, and 21 R. R. 469.

Underground Water.]—No length of enjoyment of water percolating underground to a deep well raises a presumption of a grant of a right to the water from adjoining owners of the ground under which the water percolates. *Chasemore* v. *Richards*, 7 H. L. Cas. 349; 29 L. J., Ex. 81; 5 Jur. (N.S.) 873; 7 W. R. 685. And see *Ewart* v. *Belfast Poor Law Guardians*, 9 L. R., Ir. 172—C. A.

Commons.]—Where user is shewn for sixty years and upwards, the law presumes a grant in accordance with that user. *Sewers Commissioners* v. *Glasse, Epping Forest Case*, 44 L. J., Ch. 129; L. R. 19 Eq. 134; 31 L. T. 495; 23 W. R. 102.

When user is shewn for sixty years and upwards, the law presumes a grant in accordance

with that user; but the person over whose soil the user is proved to have been exercised may defeat the presumption by documentary evidence to approve against common of turbary and estovers. *Lascelles* v. *Onslow* (*Lord*), 46 L. J., Q. B. 333; 2 Q. B. D. 433; 36 L. T. 459; 25 W. R. 496.

In order to make a right of pasture over common or lammas lands appurtenant to particular lands there must be some relation between the enjoyment of the right and the enjoyment of the particular lands; that is, there must be some connection between the beasts used on those particular lands and the number or description of beasts that may be depastured on the common or lammas lands; as, for instance, where the right claimed is for the beasts which plough the particular lands: or, for every beast used on such lands not exceeding a certain number. In an action claiming rights of pasture, or rights of a like nature, it is the duty of the court, as far as possible, to attribute a legal origin to such rights, where there is evidence of long-continued user, but that duty can only be discharged at the trial. *Baylis* v. *Tyssen-Amhurst*, 46 L. J., Ch. 718; 6 Ch. D. 500; 37 L. T. 493.

The freehold tenants of a manor must have in common some rights over the waste as against the lord; and therefore one freehold tenant, claiming by prescription on a presumed grant, can sue on behalf of himself and all the other freehold tenants to protect their rights over the waste of the manor as against the lord. Where rights of common have been exercised for many years, the court will try to find a legal origin for those rights. *Warrick* v. *Queen's College, Oxford*, 40 L. J., Ch. 780; L. R. 6 Ch. 716; 25 L. T. 254; 19 W. R. 1098.

—— **Crown Grant.**]—A right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or haskets of the underwood growing upon a common belonging to the lord of the manor cannot exist by custom, prescription or grant, unless it is a Crown grant which incorporates the inhabitants. *Rivers* (*Lord*) v. *Adams*, 48 L. J., Ex. 47; 3 Ex. D. 361; 39 L. T. 39; 27 W. R. 381.

Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time. *Ib.*

Such a presumption would, moreover, be wholly unreasonable in a case where at the time when the corporation was supposed to be in existence and entitled to the right, the tenants of the manor were exercising inconsistent rights and asserting their entire control over the underwood. *Ib.*

The user must be connected with the right claimed. *Ib.*

A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally. *Ib.*

—— **Act of Parliament.**]—A right of lopwood, lying within a manor, that is, a right in the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom or prescription, or otherwise than by Crown grant or act of parliament. *Chilton* v. *London Corporation*, 47 L. J., Ch. 433; 7 Ch. D. 735; 38 L. T. 498; 26 W. R. 474.

Semble, a grant to the "inhabitants" of a parish lying within a manor of a profit à prendre out of the manorial waste, means a grant to the inhabitants of houses lawfully erected within the parish, and does not extend to the inhabitants of houses which, through having been erected on the waste, illegally interfere with the right claimed. *Ib.*

The court will not presume a non-existent act of parliament as an origin for an alleged right. *Ib.*

—— **Pasture.**]—A claim of exclusive right of common for cattle, sheep and other commonable animals, levant and couchant, is not conclusive that the right claimed is in its nature appurtenant, but such right may have had its origin in a grant in gross. *Johnson* v. *Barnes*, 42 L. J., C. P. 259; L. R. 8 C. P. 527; 29 L. T. 65—Ex. Ch.

If such right is shewn to have existed in gross without question for a long period of time, it ought to be sustained. *Ib.*

The recognition and repetition of releases from the sixteenth century downwards without question, is evidence that the right admitted of severance by its original grant. *Ib.*

—— **Allotment of.**]—Where a conveyance was, inter alia, of four acres and a half, dispersed in the common field of A., in 1784, and a subsequent conveyance was made in 1818, reciting an allotment under an act passed in 1801, for inclosing part of the parish of A., in lieu of five acres of common field lands:—Held, that, in the absence of anything to raise the presumption of the allotment having been made in respect of other lands, the court would assume it to have been made in respect of the common lands comprised in the deed of 1784, and the title in 1841 to be unobjectionable. *Major* v. *Ward*, 5 Hare, 604. *And see* COMMON.

Fishing Mill-dam.]—Where a mill-dam has been standing for more than 110 years, and had been used for over sixty years in the same manner continuously:—Held, that a presumption was raised that the adjoining proprietors along the river bank had granted a right for its erection. *Leconfield* (*Lord*) v. *Lonsdale* (*Earl*), 39 L. J., C. P. 305; L. R. 5 C. P. 657; 23 L. T. 155; 18 W. R. 1165.

Fishery.]—Long exclusive enjoyment of a right to a several fishery in a public navigable river is sufficient primâ facie evidence upon which to presume that the Crown had granted a separate right before Magna Charta, yet the omission of any reference to such right, or any reasonable ground for considering that the user had not been exclusive, may be sufficient to negative such a presumption. *Edgar* v. *English Fisheries Commissioners*, 23 L. T. 732.

A prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corporation and its lessees, without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter eve in each year, and of

catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it:—Held (Lord Blackburn dissenting), that the claim of the inhabitants was not to a profit à prendre in alieno solo; that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage. *Goodman* v. *Saltash Corporation*, 52 L. J., Q. B. 193; 7 App. Cas. 633; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276—H. L. (E.)

Access of Air to Chimney of Dwelling-house.]—The access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Will. 4, c. 71). *Webb* v. *Bird* (infra) followed. *Bryant* v. *Lefever*, 48 L. J., C. P. 380; 4 C. P. D. 172; 40 L. T. 579; 27 W. R. 592—C. A.

An enjoyment of an unobstructed current of air to a windmill for thirty years raises no presumption of an implied grant by the adjoining owners of a right to it. *Webb* v. *Bird*, 13 C. B. (N.S.) 841; 31 L. J., C. P. 335; 8 Jur. (N.S.) 621—Ex. Ch.

Sign-board of Public-house.]—The plaintiffs, the owners of a public-house, claimed the right to affix a sign-board to the wall of the defendant's house. The sign-board had been so affixed for upwards of forty years. The two houses had formerly belonged to the same owner, the defendant's house having been granted away by such owner before the plaintiffs' house. When he first became owner of the two houses the plaintiffs' house was not occupied as a public-house. It did not, however, appear whether the sign-board was first affixed to the defendant's house during the common ownership:—Held, that it could not be assumed that it was first affixed during the common ownership. *Moody* v. *Steggles*, 48 L. J., Ch. 639; 12 Ch. D. 261; 41 L. T. 25.

Held, also, that the easement claimed was a legal one, and that a grant of it by the defendant's predecessors in title to the plaintiffs' predecessors in title must be presumed. And an injunction was granted to restrain the defendants from removing the sign-board. *Ib.*

And see EASEMENT.

2. As to Identity.

Names.]—It is not necessary to prove strictly the identity of the defendant with the person of the same name, concerning whom a witness gives evidence. The similarity of the names is sufficient to put the defendant to the proof that he is not the person spoken of. *Hamber* v. *Roberts*, 7 C. B. 861; 18 L. J., C. P. 250.

It is primâ facie proof of identity, if a name is written up in an auction room, and the auctioneer is addressed by the bystanders by that name. *Collier* v. *Nokes*, 2 Car. & K. 1012.

The plaintiff was appointed engineer to a railway company at a meeting of the provisional committee. The defendant had previously agreed to join the committee, and had forwarded applications for shares, but whether before or after the meeting was uncertain. An individual answering to the defendant's name was present at the meeting, and visited the office of the company:—Held, that there was no evidence of the defendant's identity with that individual. *Giles* v. *Cornfoot*, 2 Car. & K. 653.

In an action for medicines and attendances by an apothecary, he put in evidence a licence from the Apothecaries' Company to practise as such, granted to a person bearing the same christian and surname:—Held, that this was sufficient primâ facie evidence to shew his identity with the person named in the licence. *Simpson* v. *Dismore*, 9 M. & W. 47; 1 D. (N.S.) 357; 11 L. J., Ex. 137; 5 Jur. 1012. S. P., *Russell* v. *Smyth*, 1 D. (N.S.) 929; 9 M. & W. 810; 11 L. J., Ex. 308.

Declaration as to.]—If a carman takes goods to the house of L., not knowing him, and asks for Mr. L. of a person whom he finds in the house, and that person says, "I am Mr. L.," this is primâ facie evidence that he was L. *Wilton* v. *Edwards*, 6 Car. & P. 677.

In an action against S., it was proved that a witness went to a tavern and asked a waiter if S. was there, and on a person coming out to the witness, the latter asked him who he was, and he said his name was S. The witness had not known the defendant before, and had never seen him since:—Held, that this was some proof that this person was S., and that the conversation between the witness and this person was receivable. *Reynolds* v. *Staines*, 2 Car. & K. 745.

An action having been brought against William Henderson, for negligently navigating a vessel, and the circumstances under which the collision took place having been proved, it was objected that no evidence had been given that the defendant was the pilot in charge of the vessel; whereupon the plaintiff's counsel called out, "Mr. Henderson," upon which a person in court answered, "Here," and said, "I am the pilot." It was proved by a person who had gone on board the vessel at the time of the accident, that he had seen that person then acting as pilot:—Held, that this was sufficient evidence of the identity of the defendant with the pilot. *Smith* v. *Henderson*, 9 M. & W. 798; 2 D. (N.S.) 245; 11 L. J., Ex. 315.

But where a person, on being sent by the defendant, an indorser of a bill of exchange, to the plaintiff, the indorsee, to inquire as to the solvency of B., a prior indorser, went to the plaintiff's residence, and, on the street door being opened, a person in a dressing-gown, whom he had never seen before or since, asked him what his business was:—Held, not sufficient evidence of identity to let in evidence of the conversation. *Corfield* v. *Parsons*, 1 C. & M. 730; 3 Tyr. 806; 2 L. J., Ex. 262.

Handwriting.]—In support of a plea of coverture, alleging the marriage of the defendant with one J. G., a copy of the marriage register was put in evidence, and a witness was called, who stated, that he was acquainted with one J. G., that he had inspected the original register, and that one of the signatures to it was in the handwriting of the J. G. whom he knew:—Held, that this was evidence of the identity of J. G.,

without the original register being produced. *Sayer* v. *Glossop*, 2 Ex. 409; 17 L. J., Ex. 300; 12 Jur. 465.

In an action against Henry Thomas Ryde, as acceptor of a bill of exchange, it appeared that a Henry Thomas Ryde had kept cash at the bank where the bill was made payable, and had drawn cheques which the cashier had paid. The cashier knew the party's handwriting by the cheques, and swore that the acceptance was in the same writing; but he had not paid any cheques for some time, did not know the party personally, and could not further identify him with the defendant:—Held, a sufficient primâ facie case. *Roden* v. *Ryde*, 4 Q. B. 626; 3 G. & D. 604; 12 L. J., Q. B. 276; 7 Jur. 213.

In an action on a bill of exchange, directed to Charles Banner Crawford, East India House, and accepted C. B. Crawford, a witness stated that the acceptance was in the handwriting of C. B. Crawford, and that he was formerly in the India House, but the witness could not tell whether that person was the defendant in the suit:—Held, that the evidence was sufficient without proof of identity. *Greenshields* v. *Crawford*, 9 M. & W. 314; 1 D. (N.S.) 439; 11 L. J., Ex. 372; 6 Jur. 303.

Belief.]—In order to prove the publication of a libellous pamphlet in an action, a witness said that she received from the defendant a copy of a pamphlet, of which she read some portions, and lent it to several persons in succession, who returned it to her, and although there was no mark by which she could identify it, she *believed* the copy produced to be the same, but could not swear that it was:—Held, that this was evidence of publication proper to be left to the jury. *Fryer* v. *Gathercole*, 4 Ex. 262; 18 L. J., Ex. 389; 13 Jur. 542.

Circumstantial Evidence.]—Identity may be proved by circumstantial evidence. *Rooker* v. *Rooker and Newton*, 3 Sw. & Tr. 526; 33 L. J., Mat. 42; 9 Jur. (N.S.) 1329; 12 W. R. 807.

Question for Jury.]—Identity of names in certificates of births, baptisms, marriages and burials, with the persons to whom they are alleged to refer, is for the jury. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 367; 14 W. R. 694.

3. Of Birth, Legitimacy, Sanity, and Life.

Birth.]—Where there was a claim to a share of a residuary personal estate, the title to which depended upon the question whether a child en ventre sa mère at the time of the death of its father was or was not born alive:—Held, that there was sufficient to prove the existence of life in the child after its separation from its mother, there being proof of the performance of one clear vital function—pulsation. *Brock* v. *Kellock*, 3 Giff. 58. Affirmed, 30 L. J., Ch. 498; 7 Jur. (N.S.) 789; 4 L. T. 572; 9 W. R. 939—L.JJ.

The opinions of eminent medical men, that, in the absence of clear evidence of respiration, clear evidence of pulsation and of animal motion must not be taken as a proof of the existence of animal life, not supported. *Ib.*

The proposition, that unless there is proof of the performance of all three functions essential to vitality, there is no proof that vitality was known to exist, not adopted. *Ib.*

The opinions of certain medical practitioners, that unless respiration, which is one of the vital functions, is proved to have taken place, there is no sufficient evidence that a child was born alive, not adopted generally by the medical profession. *Ib.*

And see Criminal Law.

Legitimacy of Children.]—The presumption in favour of the legitimacy of a child born in wedlock is not a presumptio juris et de jure, but may be rebutted by evidence, which must be clear and conclusive and not merely resting on a balance of probabilities. *Bosville* v. *Att.-Gen.*, 56 L. J., P. 97; 12 P. D. 177; 57 L. T. 88; 36 W. R. 79.

And see tit. Bastardy, Vol. II. col. 1430.

Sanity.]—The presumption that every man is sane until the contrary is proved, is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of law and fact. *Sutton* v. *Sadler*, 3 C. B. (N.S.) 87; 26 L. J., C. P. 284; 3 Jur. (N.S.) 1150; 5 W. R. 880.

See also Criminal Law.

Life.]—There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered. *Lapsley* v. *Grierson*, 1 H. L. Cas. 498.

There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards. *Phené's Trusts, In re*, 39 L. J., Ch. 316; L. R. 5 Ch. 139; 22 L. T. 111; 18 W. R. 303.

Where the issue is as to the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson* v. *Hodges*, 2 East, 312; 6 R. R. 427.

4. Of Death and Survivorship.

Death—Person not Heard of for Seven Years—Onus probandi.]—By deed, dated in 1866, trusts of personalty were declared, after the death of the settlor, in favour of a person by name. The named person had not been heard of since 1861. There was no evidence as to the date of his death, and on the death of the settlor her representatives claimed the money, contending that there was a resulting trust in her favour:—Held, that where a trust was declared by deed in favour of a named person, such person must, until the contrary was shewn, be taken to have been in existence at the date of the deed: that the onus of proving his death before that date lay on the representatives of the settlor, and as it had not been discharged by them, there was no resulting trust, and the money must be paid to the representatives of the named person. *Corbishley's Trusts, In re*, 49 L. J., Ch. 266; 14 Ch. D. 846; 28 W. R. 536.

If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what particular time within that period he died is not a matter of presumption, but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims

a right to the establishment of which that fact is essential. *Phené's Trusts, In re*, 39 L. J., Ch. 316; L. R. 5 Ch. 139; 22 L. T. 111; 18 W. R. 303.

There is no presumption of law in favour of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards. *Ib.*

A. died on the 5th of January, 1861, having bequeathed his residuary estate equally between his nephews and nieces. One of his nephews, N., was born in 1829, had gone to America in 1853, had frequently written home till August, 1858, when he wrote from on board an American ship of war, but from that time no letter had been received from him, and nothing was afterwards heard about him, except that he was entered in the books of the American navy as having deserted on the 16th of June, 1860, while on leave:—Held, that his personal representative had not established a title to any share of the estate, and that it must be divided among the nephews and nieces who were proved to have survived the testator. *Ib.*

The death of a legatee is presumed after he has not been heard of for seven years, and there is no presumption of law that he lived beyond the first day of the seven years; but the onus of proving that he survived a given day lies on those who claim under him. And the fact that the person who takes in case of a lapse, whether as next of kin or as residuary legatee, is the one to commence proceedings to obtain payment of the money to himself, does not shift the onus of proof. *Lewes' Trusts, In re*, 40 L. J., Ch. 602; L. R. 6 Ch. 356; 24 L. T. 533; 19 W. R. 617.

A person emigrated to Australia under circumstances showing that he was likely to communicate constantly with his family in Ireland, and having so communicated with them for some time, then ceased to do so, and was not heard of for more than seven years. From his last letter it was probable that, had he lived, he would have continued to write home. Inquiries were made by his family concerning him, and advertisements published, but with no result:—Held, that there was sufficient primâ facie evidence to establish a title depending on his death without issue during the lifetime of a person who died after the expiration of the seven years, and to authorise the Landed Estates Court to proceed on a petition for sale of lands held under that title. *Webb's Trusts, In re*, Ir. R. 5 Eq. 235—C. A.

Where a party has not been heard of for seven years after going abroad he will, at the expiration of that time, be presumed to be dead, but there is no presumption raised by the law as to the time when the death actually took place; this is a matter concerning which the jury must form their opinion upon the particular facts of the case. *Doe* d. *Knight* v. *Nepean*, 2 N. & M. 219; 5 B. & Ad. 86; 2 L. J., K. B. 150. *S. C., Nepean* v. *Doe* d. *Knight*, 2 M. & W. 894; 7 L. J., Ex. 335—Ex. Ch.

Where a person has not been heard of for seven years, there is no presumption of law that he died at any particular period during that time; and it is for the party alleging that he was not alive four years after he was last heard of to prove that fact. *Lambe* v. *Orton*, 29 L. J., Ch. 286; 6 Jur. (N.S.) 61; 1 L. T. 290; 8 W. R. 111.

A person ought not to be presumed to be dead, from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive. *Watson* v. *England*, 14 Sim. 28; 8 Jur. 1062.

The presumption of death after seven years' absence does not arise where the probability of intelligence is rebutted by circumstances. *Bowden* v. *Henderson*, 2 Sm. & G. 360.

When a person has not been heard of for seven years the presumption of law is that he is dead, but there is no presumption when he died; and he must be taken to have lived to the end of the seven years. *Dunn* v. *Snowden*, 2 Drew. & Sm. 201; 32 L. J., Ch. 104; 7 L. T. 558; 11 W. R. 160.

Although the law presumes a person who has not been heard of for seven years to be dead, yet, in the absence of special circumstances, it draws no presumption from that fact as to the particular period when he died; and the onus of proving death at any particular period of time within the seven years lies with the party alleging death at such particular time. *Thomas* v. *Thomas*, 2 Drew. & Sm. 298; 11 L. T. 47; 13 W. R. 225.

Where a tenant for life has not been seen or heard of for fourteen years, by a person resident near the estate on which he resided, although not a member of his family, it is primâ facie evidence of the death of such tenant. *Doe* d. *Lloyd* v. *Deakin*, 4 B. & Ald. 433; 23 R. R. 335.

If a person has not been heard of for seven years, there is a presumption of law that he is dead; but there is no presumption as to when, during the seven years he died. The person upon whom it rests to prove, either that he was alive or dead at a particular time, must do so by distinct evidence. *Rhodes, In re, Rhodes* v. *Rhodes*, 56 L. J., Ch. 825; 36 Ch. D. 586; 57 L. T. 652.

A. R. was last heard of in 1873; but there was no evidence as to when he died. He died entitled to a sum of money, which had recently been paid to his administrator:—Held, that (in the absence of any evidence as to when he died) neither his next of kin in 1873, nor his next of kin in 1880, were entitled to have the money paid to them. *Ib.*

Although there is no legal presumption as to the actual time of death, there is a presumption at law, when a party has been absent and not heard of for seven years, that he is dead. The plaintiffs having insured the life interest of one H. with the defendant insurance company for the better security of certain advances to H., and H. not having been seen or heard of for a period of over seven years:—Held, that H. must be taken to be dead, and that the plaintiffs were entitled to the amount of the life policy and bonuses. *Willyams* v. *Scottish Widows Fund*, 52 J. P. 471.

In the absence of special circumstances, until a person has been unaccounted for for seven years, there is no presumption of law that he is alive or dead. After the expiration of that period there is a presumption of law that he is dead; and the onus of proving either before or after the lapse of such period that a person was alive or dead within that period is upon the person alleging the fact. There is no presumption of law in favour of continuance of life, but there is a disputable presumption of fact in favour of continuance of life, for any reasonable time after a person has been last heard of. *Connor, In*

goods of, 29 L. R., Ir. 261. See also *Spenceley, In goods of*, post, WILL.

The Court of Chancery, following the analogy of 7 Will. 3, c. 8, s. 1, acts upon the general rule, that a man's death is to be presumed after an interval of seven years since he was last heard of; but the rule admits of exceptions, and the court is bound to consider the circumstances of the particular case, in order to see whether the presumption is rebutted, or, rather, whether it fairly arises. *M'Mahon* v. *M'Elroy*, Ir. R. 5 Eq. 1.

In 1859 a suit for administration was instituted by the tenant for life. The mortgagee obtained, under an order made in 1860, liberty to enter, and did enter, into possession of the rents for the purpose of keeping down the interest on her mortgage, and paying the balance to the tenant for life. On a petition presented by the same parties for an account of arrears of rent received by the mortgagee:—Held, that the petitioners had been guilty of no laches in not filing their petition till the expiration of seven years after the disappearance of the tenant for life, and that they were, therefore, entitled to an account of rents; but that there was no fiduciary relation between the mortgagee and the petitioners, and therefore, they were only entitled to arrears for six years before the filing of the petition. *Hickman* v. *Upsall*, 46 L. J., Ch. 245; 4 Ch. D. 144; 35 L. T. 919; 25 W. R. 175.

When a man has not been heard of for seven years, there can be no presumption of his death until the expiration of that period; those who allege the death within that period are bound to prove the fact. Consequently, where a legacy was left to a man who was last heard of in 1854, by a testator who died in 1860:—Held, not to have lapsed, but to be payable to his personal representatives. *Benham, In re*, 36 L. J., Ch. 502; L. R. 4 Eq. 416; 16 L. T. 349; 15 W. R. 741.

But on appeal the court required evidence as to the time of death, and could not come to a decision on the point upon mere presumption; and inquiries were directed accordingly. *S. C.*, 37 L. J., Ch. 265; 17 L. T. 180; 16 W. R. 180.

D., in 1814, sailed from Liverpool for Rio de Janeiro, and had never since been heard of. The plaintiff, as next of kin, claimed a fund to which D. had become entitled; but the defendant, into whose possession as trustee the fund came in 1844, retained it in his own hands, and refused to pay it over to the plaintiff, without receiving direct and positive proof of the death of D.:—Held, that the trustee must pay over the whole fund, together with interest at 5*l.* per cent. from the time when he ought to have invested it, and also the costs of the suit. *Dobson* v. *Pattinson*, 3 Jur. (N.S.) 1202; 5 W. R. 771.

Payment of money out of court ordered to an administratix of a person presumed to be dead, not having been heard of for more than seven years; the court being satisfied with such evidence of death as was thought sufficient by the Ecclesiastical Court in granting administration. *Dunsmure* v. *Boulderson*, 5 Jur. 958.

A person who, if living, would have been entitled to a share of residue, as one of the next of kin, but who left England seventeen years ago, and had never since returned or been heard of, was presumed to be dead. *Buckman* v. *Ives*, 6 L. J., Ch. 197; 1 Jur. 234.

Testator by his will, dated in 1828, bequeathed a fifth of his residue to W. R., E. R., and J. R., and all other the children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take such portion of the fifth as their parents would have taken if living. The testator died in 1829. J. R. the elder had two children besides those named in the will. One of them, N. R., went abroad in 1809, and had not been heard of since 1815. Both before and after the testator's death, endeavours were made, by inquiries and advertisements, to ascertain whether N. R. were living or dead, but without success:—Held, that he must be presumed to have died before the date of the will, but nevertheless that his children were entitled to the share which he would have taken if he had survived the testator. *Rust* v. *Baker*, 8 Sim. 443.

A reference was made to the Master, to inquire whether A. B. was living or dead. He reported certain facts and findings on stated evidence, showing that, after diligent inquiry, nothing had been heard of A. B. for more than seven years; and he found that he was not able to state to the court whether A. B. was living or dead. On petition to confirm the report, the court read and considered the evidence, and came to a conclusion presuming the death. *Grissall* v. *Stelfox*, 9 Jur. 890. And see *Wilcock* v. *Purchase*, *Id.* 891, n.

There is no absolute presumption of law as to the continuance of life, nor any absolute presumption against a party doing an act because the doing of it would make him guilty of an offence against the law. In every instance the circumstances of the case must be considered. *Rex* v. *Twyning* (2 B. & Ald. 386; 20 R. R. 480) explained. *Lapsley* v. *Grierson*, 1 H. L. Cas. 498.

Where a man entitled to a legacy has not been heard of for fifteen years, and was supposed to have gone to Australia, where he had been inquired (but not advertised) for without success, the court refused to transfer the principal to parties claiming to be his legal personal representatives, but directed an inquiry. *Allin, In re*, 17 L. T. 60; 15 W. R. 1164.

Evidence of absence, and not being heard of for thirty years, sufficient to intend death of mortgagee, on bill by mortgagor to redeem. *Masten* v. *Cookson*, 2 Eq. Abr. 414.

Presumption of death of legatee, after twenty-seven years, without any intelligence about him; but when the court makes a reference to the Master in any such instance, it expects the Master to draw a conclusion, and not to rest content with a bare statement of facts. *Dixon* v. *Dixon*, 3 Bro. C. C. 510.

Payment ordered where one party entitled had not been heard of for twenty years, upon recognizance to refund. *Bailey* v. *Hammond*, 7 Ves. 590.

The presumption of death from length of time has relation to the commencement of that period. *Webster* v. *Birchmore*, 13 Ves. 362.

A tenant for life of a fund in court was transported in 1838, and had not since been heard of. Upon an application made in 1852, by the remaindermen, for payment, the court would only direct payment of the dividends to them, and required an undertaking to replace the amount out of the capital, if the tenant for life should be still alive. *Mileham's Trust, In re*, 15 Beav. 507.

Presumption of the death of a person not heard

of for many years. *Lyford's Settlement, In re*, 17 Jur. 570.

A husband and wife in America, by a deed of separation, agreed to live apart, and that the wife should be at liberty to carry on business, &c., and to retain for her own use all her present and future property, in any way acquired. Subsequently a legacy, having accrued in right of the wife, was carried to the account of the husband and wife. Nothing having been heard of the husband for fourteen years, on a petition presented by the wife, asking the transfer to her of the stock, the court directed the stock to be sold, and the proceeds paid to her on her sole receipt. *Whitworth* v. *Dilworth*, 2 Sm. & G. 35; 18 Jur. 445.

Where, on a motion to take the bill off the file, on the ground that the plaintiff was not alive in 1839, when the suit was instituted, the affidavit in support thereof stated that the plaintiff went to America in 1824, and had not since been heard of by the defendant. No direct evidence was produced by the other side that the plaintiff was living, nor the date of any letter from him since 1827:—Held, that the circumstances afforded sufficient ground of suspicion to direct a reference to the Master as to that fact. *Howe* v. *Maclean*, 9 L. J., Ex. Eq. 1.

A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837, the Master having certified, upon presumption, that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the Master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment to the same party of the accumulations since that time. And in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund in case the annuitant or her personal representative should ever establish a claim. *Cuthbert* v. *Purrier*, 2 Ph. 199; 6 Jur. 447.

—— **Less than Seven Years—Special Circumstances.**]—A person who was entitled to the dividends on stock payable in April and October, applied for his dividends in April, 1860, and was last seen in August in the same year, when he was in a very bad state of health. He never applied for his half-yearly dividends in the ensuing October. It appeared that he was of very dissolute habits, and chiefly depended on the dividends for his maintenance. The question being whether he died before November, 1860:—Held, that not having applied for the dividends due to him in October, 1860, and having regard to the state of his health when last seen, the presumption must be that he died before November, 1860. *Beasney's Trusts, In re*, 38 L. J., Ch. 159; L. R. 7 Eq. 498; 19 L. T. 630.

A tenant for life entitled beneficially under a will assigned her interests to secure the repayment of certain advances, and the premiums on policies on her life. At the end of March, 1866, a small sum of money, usually paid quarterly, was paid to her. Shortly afterwards she went on a pedestrian tour, and had never been heard of since. The small sum which became payable at the end of June was never applied for:—Held, that the presumption was that she was dead; that on the evidence she could not be presumed to have died before June, 1866; but that she must be taken to have died soon after June, 1866. *Hickman* v. *Upsall*, L. R. 20 Eq. 136; 23 W. R. 776.

A sailor left his ship at the end of 1849 or very early in 1850, and had not since been heard of:—Held, that if he was shown to have intended to desert, it could not be presumed that he was dead in May, 1850; but that if he intended to return to his ship, then the court would assume that he had met with an accident, by which he perished a very short time after leaving the vessel, and before May, 1850. *Lakin* v. *Lakin*, 34 Beav. 443.

Where parties sailed from an island in the West Indies before the hurricane months, and were never again heard of, it was presumed after the seven years from their being last seen had elapsed, that they died before the expiration of the period commonly known by the name of the hurricane months, that is, the period between the 1st of August and the 10th of January, and therefore before the 24th of January. *Sillick* v. *Booth*, 1 Y. & Coll. C. C. 117; 11 L. J., Ch. 41.

An issue to try the question was, under the circumstances, refused by the court. *Ib.*

In July, 1852, H. quitted England for America, and wrote home announcing his safe arrival at New York. There was evidence that he was in declining health when he quitted England, and that, from his character, education and previous life, he would, if living, have communicated with his friends in England. Advertisements requesting information concerning him had been inserted in the American newspapers, but he was never heard of again. The father of H. died in September, 1853, intestate. One of the next of kin of the father, supposing the son to have predeceased him, filed a bill for the administration of the father's estate:—Held, that there was primâ facie evidence of the death of H. in his father's lifetime to entitle him to have the personal estate secured in court. *Danby* v. *Danby*, 5 Jur. (N.S.) 54.

—— **Non-production of Cestui que Vie.**]—The devisee of land in case of the death of another without having issue is a person who has a claim in expectancy to an estate after the death of a person, within the meaning of 6 Anne, c. 18, s. 1. A close of land was devised to T. in fee, but in case she should die without leaving lawful issue, to others. T. married and left her husband, having had no issue. He died in May, 1888. Orders were made in June and August, 1888, respectively that A. who had bought the interest of T., should produce her first at W. church door, secondly, in court; she not having been produced, and A. not having proved that she was alive:—The court ordered that she should be taken to be dead. *Pople, In re, Baker, Ex parte*, 58 L. J., Ch. 372; 40 Ch. D. 589; 60 L. T. 668; 37 W. R. 554.

—— **Contradictory Evidence.**]—Upon a bill of discovery in aid of a defence at law, and an injunction to restrain the proceedings at law, the court will not dissolve the injunction before the coming in of the defendant's answer, upon presumptive evidence of his death, if that evidence, though strong, be qualified by circumstances tending to a contrary conclusion. *Janson* v. *Solarte*, 2 Y. & Coll. 127; 6 L. J., Ex. Eq. 75.

—— **Insufficient Evidence.**]—A. left this country on the 9th of November, 1829. On the 16th of June, 1831, his brother-in-law received a letter from America on behalf of A., describing him as having changed his name to B. Three months after this A.'s wife sent a letter to him, addressed to him as B., by the hand of a friend, who could not find him. He was not heard of any more, and it did not appear that any other inquiries were made by his family:—Held, that on this state of facts, there was not sufficient information to ground presumption of death, still less of the particular period of death. *Creed, In re*, 1 Drew. 235.

—— **Time of Death—Question for Jury.**]—Where a vessel is proved to have sailed, and has not been heard of for two or three years, it is to be presumed that she is lost; but at what time an individual, who sailed on board of such vessel, perished, is to be collected by the jury from the particular circumstances of the case. *Watson* v. *King*, 1 Stark. 121. *And see cases* supra.

—— **Grant of Administration.**]—*See* post, WILL.

Proof of Death—Entry in Register.]—The proper way to prove the death of a person is by a certified copy of the entry in the register of deaths, but such evidence ought in general to be supported by an affidavit as to the fact of the burial. *Riseley* v. *Shepherd*, 21 W. R. 782.

—— **And Production of Will.**]—To prove that W. F. of L. was dead, his will, dated in 1817, from the Prerogative Court, was produced, and also an examined copy of the register of burials of L., of 1817, containing an entry of the burial of a W. F. of L. And it was stated by a niece of W. F. that he was dead, and that she had received a legacy of 100*l.* under his will, but was not at the place when he died:—Held, to be sufficient evidence of the death of W. F. *Doe* d. *Hall* v. *Penfold*, 8 Car. & P. 536.

—— **Person Dying Abroad.**]—Where a party dies abroad, and his will is proved, and the estate administered to there, and the property brought to this country, although there is no certificate of burial, the court will consider that sufficient evidence of death, and will direct payment to the executor. *Jerrad* v. *Spicer*, 11 W. R. 634.

—— **Death at Sea.**]—A sum of stock standing in court to the account of A. B. ordered to be transferred to C. D., the father and administrator of A. B., on evidence of letters from abroad to C. D., from the owner of the vessel, and his clerk, on board of which A. B. died, and of a foreign newspaper, announcing A. B.'s death on board the same vessel, and also on evidence of receipt and identity of a box containing a flute and mathematical instruments from abroad, which had been given to A. B. on his quitting this country, none of the crew of the vessel on board of which A. B. was stated to have died being in this country. *Stickney* v. *Knight*, 13 L. J., Ch. 101.

—— **Lunatic.**]—The court will never act on the allegation of the decease of a lunatic without proof of that fact by affidavit. *Fermor, Ex parte*, 1 W. R. 43.

—— **Necessity for.**]—Where a party dies since order for distributing the fund, the court will not vary the order without proof of death. *Bell* v. *Bell*, 2 W. R. 135.

—— **Discretion of Bank of England.**]—Evidence which the Court of Chancery may, in uncontested cases, consider sufficient to prove a death, is not necessarily binding and conclusive upon, or to be accepted as satisfactory by, the Bank of England. The bank has a discretion to exercise for its own protection and the benefit of the public; and the court will not compel it, when exercising that discretion bonâ fide, to depart from its own settled practice. *Prosser* v. *Bank of England*, 41 L. J., Ch. 327; L. R. 13 Eq. 611; 26 L. T. 60; 20 W. R. 362.

—— **Recital in Private Act.**]—Recital of the death of a prior tenant for life in a private act of parliament is, upon an application by a subsequent tenant for life for payment of the income, insufficient evidence of the death. *Cowell* v. *Chambers*, 21 Beav. 619.

—— **Proof of Existence and Death—Search.**]—Ejectment in 1849 by a reversioner for premises demised in 1801 for three lives and twenty-one years. Two of the cestuis que vie had died before 1828. No witness was called who had ever known the third; and except the mention of him in the lease (which described him as aged ten years), there was no proof that he had ever existed. No evidence of search for him was given:—Held, that to raise the presumption of his death there should have been evidence that he had not been heard of by those persons who would naturally have heard of him had he been alive, or that search had been ineffectually made to find such a person; and that the mere fact that no witness called had heard of him was not sufficient. *Doe* d. *France* v. *Andrews*, 15 Q. B. 756.

Direction to Jury—Action on Policy of Insurance.]—A policy on the life of Nutt was granted in 1863. An action was brought upon it in 1874, and the question was whether Nutt was then alive or dead. He had been absent from his former home for more than seven years, having left it in 1867. His sister and brother-in-law, who lived where he had formerly lived, gave evidence as to his absence, and said they had not heard of him for more than seven years. On cross-examination, they said that a niece of his had said that when she was in Melbourne, in December, 1872, or January, 1873, she saw a man whom she believed to be her uncle Nutt, but he was lost in the passing crowd before she was able to get to speak to him. No effort appeared to have been made to find him at Melbourne, and the other relatives believed the niece to have been mistaken. The jury expressed a similar opinion. The judge directed the jury that they "could not say that the man had not been heard of during the last seven years when one of his relatives declared that she had seen him alive and well within the last three years; and still less could they say that he had never been heard of, when all the members of the family stated that they had heard what she had stated," and "that the ground for the presumption of death from a man having been absent for seven years was entirely removed by the direct evidence that every relative had heard that he was alive." And

lastly, the judge said to the jury: "Under these circumstances, unless you are prepared to find that he was dead in April, 1875, and find it upon evidence which tends to prove exactly the contrary, and in the absence of that evidence upon which alone the presumption should be raised of his death, your verdict ought to be for the defendant." The Court of Appeal considered this to be a misdirection, and ordered a venire de novo. On appeal, the lords were equally divided, and so the decision of the Appeal Court stood affirmed. *Prudential Assurance Co.* v. *Edmonds*, 2 App. Cas. 487.

—— **Bigamy.**]—In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive:—Held, that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. *Reg.* v. *Willshire*, 50 L. J., M. C. 57; 6 Q. B. D. 366; 44 L. T. 222; 29 W. R. 473; 14 Cox, C. C. 541; 45 J. P. 375.

And see CRIMINAL LAW.

In other Cases between Husband and Wife.]—*See* HUSBAND AND WIFE.

Of Death without Issue.]—After the lapse of a period of more than 100 years, in the absence of evidence to the contrary, the death of a party without issue may be presumed. *Doe* d. *Oldham* v. *Wolley*, 8 B. & C. 22; 2 M. & Ry. 195; 3 Car. & P. 402; 6 L. J. (O.S.) K. B. 286.

In pedigree cases, persons presumed to be dead are presumed to have died unmarried and without issue. *Ib.*

The pedigree of a claimant as a descendant from the seventh son of the first peer, who was so created by letters patent to hold to him and the heirs male of his body, stated that that peer left seven sons; that the issue of the first and second were extinct, and that the four next died without issue, there being no contemporaneous account of them, nor other evidence, except reputation in the family, which agreed with the pedigree:—Held, that it might be presumed they died without issue, more especially as, during a long contest for the dignity, no descendant from them claimed it. *Roscommon's (Earl) Case*, 6 Cl. & F. 97.

A woman emigrated, along with her husband and seven children, to America, in 1847, where she died in 1866, and not any of the children had been heard of for ten years preceding the trial:—Held, that it could not be presumed that all the seven children had died without issue. *Mullaly* v. *Walsh*, Ir. R. 6 C. L. 314.

In making a title by pedigree, evidence that a man has not been heard of for many years is sufficient evidence primâ facie to prove him dead without issue. *Rowe* v. *Hasland*, 1 W. Bl. 404.

Proof by one of a family that many years before a younger brother of the person last seised had gone abroad, and that the belief of the family was that he had died there, and that the witness had never heard in the family of his having been married, is primâ facie evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment. *Doe* d. *Banning* v. *Griffin*, 15 East, 293; 13 R. R. 474.

In pedigree cases, an old will, by which the testator purports to leave all his property to collateral relations or friends, is regarded as very strong evidence of his having died without children. *Hungate* v. *Gascoyne*, 2 Ph. 25; 15 L. J., Ch. 382; 10 Jur. 625.

Survivorship.]—A young sailor was last seen in the summer of 1840 going to Portsmouth to embark. His grandmother died in March, 1841. It was presumed that he was the survivor. *Tindall, In re*, 30 Beav. 151.

A son, first tenant in tail in remainder, left this country on the 11th of April, 1858, and was never heard of afterwards; his father, tenant for life, died on the 8th of May, 1858:—Held, in 1872, that it should be presumed that the son survived the father. *Pennefather* v. *Pennefather*, Ir. R. 6 Eq. 171.

A sailor, who left England in May, 1845, on the Arctic expedition with Sir John Franklin, and who had not been heard of since June, 1845, was presumed in 1856, under particular circumstances, to have survived another person who died in 1850. *Ommaney* v. *Stilwell*, 23 Beav. 328; 2 Jur. (N.S.) 1058.

A. went abroad in September, 1830; his father died in September, 1833; about twenty months previous to that time A. was heard of for the last time. The court ordered a share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it in case A. should be living, or should have died after his father. *Dowley* v. *Winfield*, 14 Sim. 277; 8 Jur. 972.

—— **Insufficient Proof of.**]—A testator gave a legacy to be equally divided, within twelve months, between the children of P. who should be living at his, the testator's death, such sum to be raised out of the property thereinafter given to his executrix for life. He then gave to his executrix real and personal estate for her life, and after her death to the children of P. living at his, the testator's, death. At the testator's death in January, 1847, there were four children of P. living, but another, J. T. P., had not been heard of since February, 1845, and nothing ever was heard of him afterwards. The executrix paid to the four children, who were known to be living, four fifth shares of the legacy, but did not raise the remaining fifth. In 1851 she became lunatic, and in 1852 the funds, to the income of which she was entitled for life, were transferred to the credit of the lunacy to the account of the lunatic and the children of P., and the income was ordered to be applied for her benefit. In 1871 the four surviving children of P. and the administrator of J. T. P. petitioned that the remaining fifth share of the legacy, with interest, might be paid to the four children, or, if not, then to the administrator of J. T. P.:—Held, that there being no proof that J. T. P. survived the testator, the share must be paid to the four children who were known to have survived him; that the manner in which the

court had dealt with the fund took the case out of the statute as to the principal, but that only six years' arrears of interest should be given. *Walker, In re*, 41 L. J., Ch. 219; L. R. 7 Ch. 120; 25 L. T. 775; 20 W. R. 171.

A testator gave his residuary estate in trust for such of his seven nephews and nieces as should be living at his death, with a substitutionary gift to the issue of any nephew or niece who should predecease him leaving issue. The testator died in October, 1858. One of his nephews had gone abroad in 1848, being then unmarried and in delicate health. He occasionally wrote to his family, but his last letter was dated July, 1852, and since its receipt nothing had been heard of him. The court dealt with the residuary estate on the footing that the nephew in question had predeceased the testator and left no issue. *Hanby, In re*, 25 W. R. 427.

When the evidence that a legatee did not survive the testator is not conclusive, and it appears that better evidence might possibly be obtained, the court will not draw an inference that the legatee is dead, but direct the amount of the legacy to be carried to a separate account. *Rhodes, In re, Fraser* v. *Renton*, 28 L. T. 392.

—— **Commorientes.**]—There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one and the same cause. *Wing* v. *Angrave*, 8 H. L. Cas. 183; 30 L. J., Ch. 65. *S. C.* sub nom. *Underwood* v. *Wing*, 4 De G. M. & G. 633; 3 Eq. R. 794; 24 L. J., Ch. 293; 1 Jur. (N.S.) 159; 2 W. R. 641.

Nor is there any presumption of law that all died at the same time. *Ib.*

The question is one of fact depending wholly on evidence, and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. The onus probandi is on the person asserting the affirmative. *Ib.*

Where, therefore, a husband, wife and two children were swept off the deck of a vessel by one wave, and there was no distinct evidence that any one was seen later than another, although evidence was given that the husband was a strong man and a good swimmer, and the wife was a weak and delicate woman, and could not swim at all, the court would not assume that one survived the other. *Ib.*

A. made a will by which, under a power of appointment reserved to her in her father's will, she bequeathed her property to her husband; "and in case my husband shall die in my lifetime," to W. The husband made a will in the same terms. The husband and wife were by the same wave swept off the deck of a vessel in a storm at sea, and were drowned. No evidence was given to prove that one survived the other:—Held, that W. could not claim under either will, and that the property went over to those who by the father's will were to take in default of appointment by the daughter. *Ib.*

The union of the two titles of W. did not affect the case, for he could not succeed in one because he did not succeed under the other, but was bound to establish his claim clearly under one or the other. *Ib.*

A husband and wife, having made mutual wills, each appointing the other sole executor and universal legatee, subsequently went to sea in the same ship, which never arrived at its destination, and was presumed to have been lost, with all hands:—Held, that there was no presumption of law as to which of the two, the husband or the wife, died first. *Alston, In goods of*, 61 L. J., P. 92; [1892] P. 142; 66 L. T. 591.

By an ante-nuptial marriage settlement, consols belonging to the husband were settled after the respective deaths of the husband and wife, and failure of children (which happened), in trust for the survivor of the husband and wife, absolutely; and certain Portuguese bonds belonging to the wife were settled upon trust for the husband during the joint lives of himself and his wife, and in case he survived her in trust for such persons as she should by will appoint, and in default of appointment for her next of kin, excluding the husband, but, in case she survived him, in trust for her absolutely. The husband by his will gave all his property to his wife absolutely; and the wife by her will gave all her property to her husband for life, with remainder to her sisters absolutely. The husband and wife having perished together at sea:—Held, that the consols belonged to the legal personal representatives of the husband, and the bonds to the legal personal representatives of the wife. *Wollaston* v. *Berkeley*, 45 L. J., Ch. D. 772; 2 Ch. D. 213; 34 L. T. 171; 24 W. R. 360.

A testator and two of the legatees in his will perished in a ship which was supposed to have foundered. There being no evidence of survivorship:—Held, that the bequest failed. *Barnett* v. *Tugwell*, 31 Beav. 232.

A testator left legacies to three persons, and if any of them died their share was to go to the others. One of the legatees and the testator died at the same instant:—Held, that "death" must, according to the ordinary rule, mean death in the testator's lifetime, and that the legacy of the legatee so dying became part of the residue. *Elliott* v. *Smith, Elliott, In re*, 52 L. J., Ch. 222; 22 Ch. D. 236; 48 L. T. 27; 31 W. R. 336.

Where two parties perish by the same event, as in a shipwreck, and nothing more is known as to which died first, the presumption of priority of death will be raised from the comparative age, health and strength of the parties. *Sillick* v. *Booth*, 1 Y. & Coll. C. C. 121; 11 L. J., Ch. 123; 6 Jur. 142.

When, on a claim by a class of next of kin, it is doubtful whether a deceased nearer of kin survived the intestate, the onus rests on the representatives of such nearer of kin to show that he survived the intestate. *Greene, In re*, 35 L. J., Ch. 252; L. R. 1 Eq. 288; 12 Jur. (N.S.) 70; 13 L. T. 541; 14 W. R. 192.

Two persons (a mother and daughter) died under circumstances which rendered it doubtful which of the two was the survivor. The mother was entitled absolutely to a fund which was claimed by those who were her next of kin, exclusively of the daughter:—Held, that the onus probandi lay on those asserting a nearer kinship; and that, in the absence of evidence that the daughter survived, the claimants were entitled. *Ib.*

5. As to Documents.

a. Stamp.

Deed duly Stamped.]—Although upon the presumption omnia rite esse acta, if secondary evidence is tendered to prove the contents of an instrument which is either lost, or retained by

the opposite party after notice to produce it, the court will presume that the original was duly stamped unless some evidence to the contrary is given; yet where there is evidence that an instrument, unstamped at its execution, continued for a considerable time after its execution unstamped, the onus is shifted, and unless evidence is produced to lead to the belief that it was stamped at some time subsequently the conclusion is that it remained unstamped. *Marine Investment Co.* v. *Haviside*, 42 L. J., Ch. 173; L. R. 5 H. L. 624.

If a man withholds an agreement under which he is chargeable, it is presumed to have been properly stamped. *Crisp* v. *Anderson*, 1 Stark. 35; 18 R. R. 744. And see *Closmadeuc* v. *Carrell*, 18 C. B. 36; 25 L. J., C. P. 216; 2 Jur. (N.S.) 474; 4 W. R. 547. *See further*, post, IV., 6, *e*, ADMISSIBILITY OF UNSTAMPED DOCUMENTS (PROOF OF STAMP).

b. Execution.

Deed.]—A deed acknowledged by married women was signed by the parties and witnessed; but no seal or representation of a seal appeared at all on the deed:—Held, that the attestation clause, in which it was stated that the deed had been signed, sealed and delivered in the presence of the witnesses, was primâ facie evidence of due execution. *Sandilands, In re*, L. R. 6 C. P. 411, *S. C.*, nom. *Mayer, In re*, 40 L. J., C. P. 201; 24 L. T. 273; 19 W. R. 641. And see *Hall* v. *Bainbridge*, 12 Q. B. 699.

Proof of handwriting of parties to a deed is a sufficient proof of execution under the C. L. P. Act, 1854, s. 26. *Mair's Estate, In re*, 42 L. J., Ch. 882; 28 L. T. 760; 21 W. R. 749.

If the handwriting to a deed be proved the jury may presume the sealing and delivery. *Grellier* v. *Neale*, Peake, 146; 3 R. R. 669. See also *Smith, In re, Oswell* v. *Shepherd*, 67 L. T. 64.

—— **More than Thirty Years old—Proper Custody.**]—*See* post, col. 709.

Will.]—In a suit concerning the validity of a will, the surrounding circumstances and the appearance of the document were in favour of its having been duly attested. The adverse evidence, viz., that of the two witnesses, who denied having attested in the presence of the testator, appeared to be of a doubtful character. The court acted on the presumption omnia ritè esse acta, and pronounced for the will. *Bailey* v. *Frowan*, 19 W. R. 511.

—— **Attestation.**]—A holograph will, signed at foot by the testator, and containing an attestation clause, appeared attested by two marksmen. Their names, as subscribed to the will, the attestation clause, and the words "mark—his," which appeared written above and below crosses opposite each of their names, were in the handwriting of the testator. At the date of the instrument, two persons of the names so subscribed as those of the attesting witnesses were in his employment; they were both illiterate, and both predeceased him. The document was found shortly after the testator's death in his house, preserved amongst others of his papers. It purported to give all his property to his widow. He stated to her the night before his death that he left her all he had—that everything was hers. It did not appear that any fourth person was present at the execution of the will, and no direct evidence of its due execution was given:—Held that there were reasonable grounds for presuming that the will had been duly executed and attested pursuant to the provisions of the Wills Act, and sufficient to enable the court to pronounce in favour of its validity. *Clarke* v. *Clarke*, 5 L. R., Ir. 47—C. A.

Doctrine of presumption as to the attestation of wills in presence of the testator. *Winchilsea* v. *Wauchope*, 5 L. J., Ch. 167. *And see* WILL.

c. Date.

On Face.]—The date which appears on the face of a document is primâ facie its true date. *Malpas* v. *Clements*, 19 L. J., Q. B. 435. S. P., *Potez* v. *Gossop*, 2 Ex. 191. *Anderson* v. *Weston*, 6 Bing. (N.C.) 296; 9 L. J., C. P. 194.

But quære, whether the date a letter bears is primâ facie its true date. *Butler* v. *Mountgarrett* (*Viscount*), 7 H. L. Cas. 633.

A receipt and also a delivery order, given by the plaintiff to a witness a month after the sale, but dated on the day of the sale, and not otherwise shown to be in existence before the sale, are admissible as affording some evidence of the sale having taken place on the day of the date of the documents. *Morgan* v. *Whitmore*, 6 Ex. 716; 20 L. J., Ex. 289.

There is a presumption that a cheque is drawn on the day of its date. *Laws* v. *Rand*, 3 C. B. (N.S.) 442; 27 L. J., C. P. 76.

Post Mark.]—*See* post, col. 677.

Posting Letters.]—Proof of the posting of several letters at several dates is not conclusive of any of them having been received at the address to which they were directed. *Reidpath's Case*, 40 L. J., Ch. 39; L. R. 11 Eq. 86; 23 L. T. 834; 19 W. R. 219.

The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—Held, that the defendant was a shareholder. *British and American Telegraph Co.* v. *Colson* (L. R. 6 Ex. 108), overruled. *Household Fire Insurance Co.* v. *Grant*, 48 L. J., Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858—C. A.

A contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent. *Imperial Land Company of Marseilles, In re, Harris's Case*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

And see CONTRACT, ante, vol. IV., cols. 11, 12.

d. Erasures, Alterations and Interlineations.

Time of.]—The entry of a resolution in the minute-book of a corporation, accepting a proposal for a lease of part of the corporate property, being partially erased, is, in the absence of evidence to the contrary, to be presumed to have been made before the book was signed by the chairman of the meeting at which the resolution was passed. *Stevens' Hospital* v. *Dyas*, 15 Ir. C. L. R. 405.

In Affidavit.]—A bankrupt was indicted for not surrendering. On the trial the proceedings in bankruptcy were put in, and it appeared that there were erasures and interlineations in the affidavit verifying the petition for adjudication:—Held, that the presumption of law was, that the affidavit was in the same state as when it was sworn; as to alter it after it was sworn would be an act of fraud and misconduct which would not be presumed. *Reg.* v. *Gordon*, Dears. C. C. 586; 25 L. J., M. C. 19; 2 Jur. (N.S.) 67; 4 W. R. 46; 7 Cox, C. C. 19.

Deed.]—As a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is that it was made before execution. *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745.

Will.]—A testator, by his will, dated in 1834, devised and bequeathed real and personal estate upon trusts. Certain of the words in the declaration of trusts were interlineated. Probate was granted of the will by the consistory court of C. A question being raised whether, with regard to the real estate, the interlineation was made before or after the execution of the will:—Held, that, having regard to the granting of the probate by the consistory court, it must be presumed to have been made before the execution. *Cruttenden, In re*, 45 L. T. 465; 30 W. R. 57.

The presumption that a document was executed as it appears does not apply to the case of a will, which may be altered by a testator without fraud or wrong. *Doe* d. *Tatum* v. *Catomore*, 16 Q. B. 745.

—— **Alterations—Attestation of.**]—The clause appointing executors was written partly on the second and partly on the third side of a will. Subsequently the testator altered the clause, but his signature and those of the attesting witnesses appeared opposite only to the alterations, which were made on the second side. The court granted probate of all the alterations. *Wilkinson, In goods of*, 6 P. D. 100; 29 W. R. 896; 45 J. P. 716.

—— **Interlineation after Execution.**]—Testatrix duly executed her will in the presence of two witnesses, who subscribed and attested it. Immediately after its execution an omission was discovered in the will, and this omission was supplied by an interlineation. Testatrix approved of the will as altered, acknowledging it as her "last will and testament," and the witnesses then, in her presence, placed their initials in the margin opposite the interlineation:—Held, that there had been no re-execution of the will, and that consequently the interlineation should be omitted from the probate. *Shearn, In goods of*, 50 L. J., P. 15; 43 L. T. 736; 29 W. R. 445; 45 J. P. 308.

A will contained alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to:—Held, there being an absence of all direct evidence as to the alterations and erasures, that the presumption of law was that such alterations and erasures were made after the execution of the will. *Cooper* v. *Bockett*, 4 Moore, P. C. 419; 10 Jur. 931.

—— **Presumption of Mutilation.**]—The will of a testatrix was found upon her death with the signature and attestation clause cut off and folded inside the will. There was no other evidence of intention:—Held, that this was a sufficient evidence of an animus revocandi. *Magnesi* or *Maynes* v. *Hazleton*, 44 L. T. 586; 45 J. P. 816.

Effect.]—Where any document has been or appears to have been altered in a material part, the person producing it cannot claim to enforce any right under it unless the alteration was made before execution or other completion of the instrument and with due consent, and this whether the alteration was made by the person producing or a stranger. *Pigot's Case*, 11 Rep. 47. And see *Aldous* v. *Cornwell*, L. R. 3 Q. B. 573; *Suffell* v. *Bank of England*, 9 Q. B. D. 555; *and cases under* BILLS OF EXCHANGE.

6. ACTING IN OFFICES.

Public Offices.]—Evidence of acting in a public office is evidence to go to the jury of a title to that office as against a wrongdoer, though the title is put in issue by the pleadings and the appointment is required to be under seal. *Dexter* v. *Hayes*, 11 Ir. C. L. R. 106.

Such evidence of acting raises a presumption that all the formalities necessary to be completed to authorise such acting have been complied with. *Ib.*

Trustees were created by an act for the purpose of building a bridge, and it was enacted that no person should be capable of acting as a trustee until he should have taken and subscribed the oath therein set forth, which oath so taken and subscribed by each trustee should be entered in the book of proceedings of the trustees. The book contained a blank form of oath, under which the names of the trustees were written by themselves, without any date; but there were entries from time to time in the proceedings, to the effect that they were appointed trustees, having qualified by taking and subscribing the oath prescribed:—Held, that it sufficiently appeared that the trustees were properly sworn, although there was no regular jurat or entry of the oath having been administered by the trustees. *Miles* v. *Bough*, 3 Railw. Cas. 668; 3 G. & D. 119; 3 Q. B. 845; 12 L. J., Q. B. 74.

Held, also, that in order to prove orders and directions of the trustees, it was necessary to give evidence of their having subscribed the oath. *Ib.*

In an action for money received by five churchwardens against one, who, wrongfully claiming to be churchwarden of a township, had therein collected money due under a church-rate, it appeared that one of the churchwardens had not made any declaration under 5 & 6 Will. 4, c. 62, s. 8, but his predecessor, who had made a declaration for the previous year, was willing to be substituted:—Held, that on such substitution being made, it was no valid objection that such predecessor had made no fresh declaration, inasmuch as he remained in office under his declaration, till he had a properly-constituted successor. *Bremner* v. *Hall*, 1 H. & R. 800; 35 L. J., C. P. 332; L. R. 1 C. P. 748; 12 Jur. (N.S.) 648; 15 L. T. 352; 14 W. R. 964.

In replevin, the defendants averred for a distress for poor-rates:—Held, that one of the defendants having acted as overseer of the poor, was primâ facie evidence that he was so. *Bristol Governor* v. *Wait*, 6 Car. & P. 511. S. P., *M'Gahey*

v. *Alston*, 2 M. & W. 206; 2 Gale, 238; 6 L. J., Ex. 29.

In ejectment by churchwardens and overseers, proof that they have acted in that capacity is sufficient, without proof of their appointment. *Doe* d. *Bowley* v. *Barnes*, 8 Q. B. 1030; 15 L. J., Q. B. 293; 10 Jur. 520.

Proof that a party holds the office of churchwarden is primâ facie evidence of his having been lawfully appointed, even where the question turns on his title to the possession of land in his capacity of such churchwarden. *Garvill* v. *Utting*, 9 Jur. 1081.

The fact that a party did a particular act, as signing a land-tax assessment, in an official capacity, may be proved, not only by showing that he exercised the office before or at the period in question, but also by evidence, limited to a reasonable time, of his having exercised it afterwards. *Doe* d. *Hopley* v. *Young*, 8 Q. B. 63; 15 L. J., Q. B. 9; 9 Jur. 941.

An averment in an information for a libel, that Lord St. Vincent was, at the time when such libel was published, first lord of the Admiralty, is supported by producing the patent of appointment, dated prior to the publication. *Rex* v. *Budd*, 5 Esp. 230.

Other Capacities.]—The plaintiff, part-owner of a ship, and who acted as ship's husband, being authorised by the other part-owners (of whom the defendant was one), to repair and lengthen the ship, gave verbal orders for the repairs, and entered into a written contract with a shipbuilder for lengthening the ship. Afterwards the plaintiff received a notice from the defendant that he would not be answerable for any alterations in the ship. The work was completed and the plaintiff paid for it, and on telling the defendant the amount, he said that "the ship had better have been sold." The plaintiff having sued the defendant for his proportion of the money paid:—Held, first, that the fact of the plaintiff having acted as ship's husband was sufficient evidence of his appointment, without any formal proof. *Chapell* v. *Bray*, 6 H. & N. 145; 30 L. J., Ex. 24; 3 L. T. 278; 9 W. R. 17.

Held, secondly, that the authority to make the alterations could not be revoked after it was acted on, and that it was for the defendant to prove that his notice was given before the work was commenced. *Ib.*

Held, thirdly, that the plaintiff need not produce the written contract, since the work was done, the money paid under it, and the defendant, on being told the amount, did not deny his liability. *Ib.*

7. As to Other Matters.

Rebutting.] — All presumptions may be rebutted by facts, or by contrary and stronger presumptions. *Jayne* v. *Price*, 5 Taunt. 326; 1 Marsh. 68; 15 R. R. 518.

Foreign Judgment.]—The presumption, when a foreign court has purported to act properly and within its jurisdiction, is omnia rite esse acta. *Taylor* v. *Ford*, 29 L. T. 392; 22 W. R. 47.

Conformity to Act of Parliament.]—An award by a commissioner acting under a local inclosure act, incorporating 41 Geo. 3, c. 109, and thereby empowered to stop up old roads over wastes, subject to the concurrence and order of two justices, directed such a road (being a carriageway) to be stopped up, and ever since the road had been stopped by a locked gate, and never used by any one with carriages or carts. There was evidence, however, of user by foot passengers:—Held, that although the award did not show that the concurrence and order of two justices had been obtained, and although there was no proof that it had, yet, after twenty-eight years, it might well be presumed that such order and concurrence had been, in fact, duly obtained. *Williams* v. *Eyton*, 4 H. & N. 357; 28 L. J., Ex. 146; 5 Jur. (N.S.) 770; 7 W. R. 291—Ex. Ch.

In support of a plea of coverture, the defendant stated that she was married at a Roman Catholic chapel by a priest, and according to Roman Catholic rites; that she had since lived with her husband; that he was then in Australia, but that she had heard from him within a few months. No evidence was given of the chapel being registered, or that the registrar was present, as required by 6 & 7 Will. 4, c. 85:—Held, that the evidence was sufficient, as the law would presume that the provisions of the act had been complied with. *Sichel* v. *Lambert*, 15 C. B. (N.S.) 781; 33 L. J., C. P. 137; 10 Jur. (N.S.) 617; 9 L. T. 687; 12 W. R. 312.

Attesting Recruit.] — A recruit received enlisting-money, knowing it to be such, from a soldier who was employed by a non-commissioned officer in the recruiting service, and who had belonged to a regiment for a longer period than that within which he ought to have been attested according to the Mutiny Act:—Held, that such soldier must be presumed to have been regularly attested. *Wolton* v. *Gavin*, 16 Q. B. 48; 20 L. J., Q. B. 73; 15 Jur. 329.

The fact that the soldier intended to have taken the recruit to be attested before a justice who had no authority to attest, affords no counter-presumption that the recruiting soldier had been himself improperly attested. *Ib.*

Production of Documents.]—There is a presumption against persons who keep back a document, and against them the evidence is to be taken most strongly. *Att.-Gen.* v. *Windsor* (*Dean*), 24 Beav. 679; 27 L. J., Ch. 320; 4 Jur. 518; 6 W. R. 220.

But there is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired. *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589; 33 L. J., Ch. 688; 10 Jur. (N.S.) 961; 10 L. T. 767.

In an action by an indorsee against the drawer of a bill of exchange, the only evidence of notice of dishonour was this statement of the defendant: "I have several good defences to the action; in the first place the letter was not sent to me in time." The letter was not produced:—Held, by Denman, C.J., that as the defendant withheld the letter, the jury were justified in assuming that, if produced, it would have appeared to have been in time. By Patteson, Coleridge, and Littledale, JJ., that though the date might have been correct, there was a possibility that the letter might have been sent otherwise than through the post, and that there was no reason why the defendant should have produced primâ facie evidence against himself. *Braithwaite* v. *Coleman*, 1 Harrison, 223.

But where a letter was proved to have been posted on the day of the dishonour, and the

defendant defended on the ground of want of due presentment, but not that of want of notice, and did not produce the letter, the jury were held to be warranted in inferring that the letter contained due notice of dishonour. *Curlewis* v. *Corfield*, 1 Q. B. 814; 1 G. & D. 480. And see *Mason* v. *Morley*, 34 L. J., Ch. 422; 12 L. T. 414; 13 W. R. 669.

The plaintiff, in a suit in equity, relied on the defendants' knowledge of a fact said to be communicated to them in a letter of which no copy was kept, but the receipt of which the defendants admitted. The defendants denied that it contained the statement alleged, but did not produce the letter, or satisfactorily account for its non-production:—Held, under these circumstances, that the plaintiff's representation must be taken to be true. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871.

The suppression of some of a series of documents relating to the title, which are admitted to be in the possession of a party, is evidence that the documents withheld afford inferences unfavourable to the title of the party. *James* v. *Biou*, 2 Sim. & S. 600.

—— **Loss.**]—Where a loss of evidence has been occasioned without the default of the defendant, any presumption arising from the absence of such evidence is in his favour. Extent of the doctrine in *Kennedy* v. *Green* (3 Myl. & K. 699). *Atterbury* v. *Wallis*, 2 Jur. (N.S.) 343. *S. C.* on appeal, 4 W. R. 734.

—— **Destruction.**]—In some circumstances the voluntary destruction of books of account may be treated lightly; but where the transactions to which they related are recent, where the accounts have not been finally adjusted, or the balance ascertained or paid, and still more where the act of destruction is committed by a person who has filed a bill to have the accounts taken, some very cogent reason must be given to satisfy the court that the destruction was proper or justifiable, and it will presume against the destroyer everything most unfavourable to him which is consistent with the facts admitted or proved. An understanding (so-called) not amounting to an agreement is merely nothing. *Gray* v. *Haig*, 20 Beav. 219.

Name on Note.]—In an action on a note made by the defendant payable to J. H., and indorsed by him to the plaintiff, it appeared that there were two persons of the same name, father and son, and there was no evidence to show to which of them the note had been given, but it appeared that the indorsement was in the handwriting of the son:—Held, that although, primâ facie, the presumption would be that J. H., the father, was meant, that presumption was rebutted by the son's indorsement. *Stebbing* v. *Spicer*, 8 C. B. 827.

Legality and Honesty of Transactions.]—It is a presumption of law that a transaction was done legally and honestly, and this presumption acquires weight by lapse of time—per Bowen, L.J. *Postlethwaite, In re, Postlethwaite* v. *Rickman*, 60 L. T. 514; 37 W. R. 200; 53 J. P. 357.

Legal Origin of Right.]—A right should be presumed to have had a legal origin if such a legal origin was possible, and the court will presume that those acts were done and those circumstances existed that were necessary to the creation of a valid title—per Herschell (Lord). *Philipps* v. *Halliday*, 61 L. J., Q. B. 210; [1891] A. C. 228; 64 L. T. 745; 55 J. P. 741.

Legal Origin for existing state of things.]—In the absence of evidence as to the origin of an existing state of things, an illegal origin is not to be presumed, if it might naturally have had a legal origin. *Croft* v. *Rickmansworth Highway Board*, 57 L. J., Ch. 589.

Amount Lent—Unknown Note.]—In an action for money lent, the only evidence was, that the defendant having asked the plaintiff for some money, the latter handed him a note which was believed to be a banknote, but the amount of which did not appear:—Held, that the jury was rightly directed to presume it to have been a note for 5*l.*, as being the smallest note in circulation in this country. *Lawton* v. *Sweeney*, 8 Jur. 964.

Letters.]—Proof of the posting of letters, is not conclusive of their arrival. *Reidpath's Case*, 40 L. J., Ch. 39; L. R. 11 Eq. 86; 23 L. T. 834; 19 W. R. 219.

But posting of a letter accepting a contract held sufficient proof of completion of the contract. *Household Fire Insurance Co.* v. *Grant*, 48 L. J., Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858—C. A. S. P., *Imperial Land Company of Marseilles, In re*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

Proof that the plaintiff wrote a letter to the defendant, purporting to contain a bill of exchange, with directions how the proceeds should be applied, and that the defendant soon afterwards had a bill in his possession, which answered the description contained in the letter, affords presumption that both the letter and the bill found their way to him. *Kieran* v. *Johnson*, 1 Stark. 109.

Possession of.]—The fact of a letter having been sent to a woman some years before her death, is not sufficient to raise a presumption that such letter is in the custody of her executrix three or four years after, as the testatrix might have destroyed it in her lifetime. *Drew* v. *Durnborough*, 2 Car. & P. 198.

Receipt of Special Message.]—On the trial of an action of trover for a bill of exchange, it was proved that the defendants, who were bankers, had discounted the bill for a customer for whom they were in the habit of discounting bills, and that the bill had been brought to them by the customer's clerk, who was directed to inquire whether they would discount it, and to state to the defendants the particulars of an arrangement between the holder of the bill and the customer. Neither party called the clerk as a witness:—Held, that the jury ought not to have been directed to presume that the clerk delivered the message, but that, in the absence of evidence to the contrary, the presumption was that the bankers had bonâ fide discounted the bill, without notice of the circumstances which the clerk had been directed to tell them. *Middleton* v. *Barned*, 4 Ex. 241; 18 L. J., Ex. 433.

Ownership of Money.]—Where money is found concealed in a house which had formerly

belonged to and been inhabited by W., who has been dead for twenty-nine years, and it is shown that since the time of his death the house has been inhabited by poor people of improvident habits, this is evidence from which a jury may infer that the money was placed where it was found by W., and so is the property of his representative. *Clegg* v. *Haslam*, 16 L. T. 152.

Ship—Place of Building.]—The court cannot intend, without express allegation, that a ship is British built; where the bill only stated that it was built by B. & Co. of Newcastle, and not at Newcastle, a demurrer founded on the registry acts not supported. *Smith* v. *Small*, 14 Sim. 119.

—— **Existence of.**]—A ship never heard of, after having sailed, is presumed to have foundered at sea. *Green* v. *Brown*, 2 Str. 1200.

Value of Goods.]—When a person has wrongfully converted property it will be assumed as against him, if he will not produce it, to have been of the best description. *Armory* v. *Delamirie*, 1 Strange, 504.

If goods are sold without any express stipulation as to price, in an action by the vendor, if no express evidence of their value be forthcoming on the part of the plaintiff, the presumption is that they are of the lowest value at which such goods sell, unless the vendee has prevented the truth being arrived at, when a contrary presumption arises. *Clunnes* v. *Pezzy*, 1 Camp. 8.

Woman past Childbearing.]—The court will presume a woman to be past childbearing when she is in her fifty-fourth year. *Widdow's Trusts, In re*, 40 L. J., Ch. 380; L. R. 11 Eq. 408; 24 L. T. 87; 19 W. R. 468.

The presumption that a woman aged fifty-one years and eleven months, who had been married fifteen years and had never had any children, would not have any children, acted upon. *Allason's Trusts, In re*, 36 L. T. 653.

A fund in court was settled upon a married woman absolutely in default of issue. The woman gave birth to a stillborn child on the 1st June, 1871, and her husband died on the 12th of the same month. There was no other issue. On an application by the woman on the 9th December following, that the fund be paid to her:—Held, that the application was premature. *Att.-Gen.* v. *Clements*, 25 L. T. 739.

A wife, aged forty-seven, had had six children by her husband, but had not been since pregnant for seventeen years. Medical evidence was adduced to show that she had fourteen years ago suffered from a disease which, in the opinion of the medical men, rendered it improbable, if not absolutely impossible, that she should have further issue:—Held, that there was sufficient presumption against any future issue for the court to act upon. *Summers' Trusts, In re*, 30 L. T. 377; 22 W. R. 639.

A woman, aged fifty-two, who had been a widow for twenty-four years, was absolutely entitled in default of children to a fund in the hands of trustees:—Held, on petition for advice, that the trustees were justified in paying it over to her. *Taylor's Settlement Trusts, In re*, 43 L. T. 795; 29 W. R. 350.

In the administration of an estate, the court refused to act on the presumption that a married lady of fifty-two was beyond the age of bearing issue. *Conduit* v. *Soane*, 24 L. T. 656; 19 W. R. 817.

The court refused to treat a woman as past childbearing whose age was fifty-four and six months, and had never had any children, but had only been married three years. *Croxton* v. *May*, 9 Ch. D. 388; 39 L. T. 461; 27 W. R. 327—C. A. And see also *Millner's Estate, In re*, 42 L. J., Ch. 44; L. R. 14 Eq. 245; 26 L. T. 825; 20 W. R. 823: and *Davidson* v. *Kimpton*, 18 Ch. D. 213; 45 L. T. 131; 29 W. R. 912.

After Verdict.]—Nothing is to be presumed after verdict but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. *Spiers* v. *Parker*, 1 Term Rep. 141; 1 R. R. 165.

Of Non-delivery of Goods.]—Whether proof prout de jure can be allowed of delivery of goods, where, subsequent to the alleged delivery, written statements of account containing partial settlements have been delivered containing no notice of the disputed articles, quære. *Dunbar* v. *Harvie*, 2 Bligh, 351.

Semble, that in such a case, where the dealing was between a publican and a distiller, who kept the accounts, it requires strong evidence of delivery of the goods to rebut the presumption arising from the accounts delivered. *Ib.*

Whether the account-books of the distiller in such a case afford a semiplena probatio, and lay a ground for the oath in supplement, quære. *Ib.*

Of Payment.]—Twenty years affords a presumption of payment on a judgment. *Curties* v. *Fitzpatrick*, Peake, Ad. C. 92.

To a bond of over twenty years standing, was pleaded payment and a release. To rebut the presumption of payment, an affidavit made by defendant, before a Master in chancery, was produced, in which he (being the son-in-law of the obligee) swore, that having applied to the obligee further to assist him, the latter refused, saying that he had already had his share of the estate; that he might do what he pleased with what he had, as he never should call on him for it. Although the presumption of payment was thereby rebutted, it was nevertheless evidence also of the bond having been cancelled or otherwise legally discharged. *Washington* v. *Brymer*, Peake, Ad. C. 200.

The mere fact of the delivery of an account, without evidence of contemporaneous or subsequent conduct, does not afford presumption of settlement. *Irvine* v. *Young*, 1 Sim. & S. 333.

—— **By Surety.**]—In an action by the surety on a sheriff's bond against his principal, for the recovery of money forfeited under the bond, and alleged to have been paid to the sheriff, the evidence of payment was, that an action having been brought upon the bond against both, they had defended the action by one attorney; that a compromise had been effected under the immediate authority of the surety; that the surety had sent a cheque for the agreed sum to the sheriff by post, and that he had subsequently verbally stated to the principal that he had paid the debt and costs in the action, to which the latter made no reply; and that eight or nine years had elapsed since the compromise:—Held, that there was evidence that the debt had been satisfied by the surety. *Price* v. *Burca*, 6 W. R. 40.

Arising from Assertion of Professional Privilege.]—There is no presumption of fact to be made against a party who enforces this rule against the disclosure by his solicitor of knowledge professionally acquired. *Wentworth* v. *Lloyd*, 10 H. L. Cas. 589; 33 L. J., Ch. 688; 10 Jur. (N.S.) 961; 10 L. T. 767.

Existence of Agreement.]—A court cannot, without proof, presume an agreement, on the ground that, if there was no agreement, there was fraud. *Siree* v. *Kirwan*, 9 Cl. & F. 716.

As to Duplicate Deed.]—Where a defendant seeks to obtain an annuity deed, bond and warrant of attorney, securing payment of the annuity, he must show that only one copy or part of these instruments was made at the time of their execution, the presumption being that there were duplicates. *Griffin* v. *Smythe*, 8 D. P. C. 490.

Of Conjugal Intercourse.]—Doctrine of law as to presumption of sexual intercourse between a husband and wife, living apart under a deed of separation but occasionally meeting; and as to the evidence by which that presumption may be rebutted. *Morris* v. *Davies*, 5 L. J. (O.S.) Ch. 177.

Where Positive Evidence available.] — A party cannot rely on presumption to cast an obligation on another, if, from the nature of the case he must of necessity be able to show the obligation by positive evidence. *Boyle* v. *Tamlyn*, 6 B. & C. 329; 5 L. J. (O.S.) K. B. 134; 30 R. R. 343.

On Belief.]—Presumption is not always on a belief that the thing has actually taken place. *Hillary* v. *Waller*, 12 Ves. 252.

Knowledge of Law.]—A witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed on the maxim ignorantia juris non excusat. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., M. C. 114; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553.

Knowledge of Rights.]—Primâ facie and presumptively, a person under no disability who has a full knowledge of facts from which rights of property arise or accrue to that person, ought to be deemed to be aware of those rights, semble. *Horne* v. *Barton*, 8 De G. M. & G. 587; 26 L. J., Ch. 225; 2 Jur. (N.S.) 1032; 4 W. R. 821.

Inference from Answer of Witness.]—Witness swearing he never heard of an agreement at or before a certain time, is a negative pregnant that he heard of it after. *Walker* v. *Walker*, 2 Atk. 100.

Report.]—It is not the course to take the report to be right, unless it can be shown to be wrong. The court requires the party in whose favour it is to show how it is supported. *Kilbee* v. *Sneyd*, 2 Moll. 195.

See further, BURDEN OF PROOF, post, cols. 809 et seq.

8. MATTERS JUDICIALLY NOTICED.

Course of Nature.] — The courts will take judicial notice of the existence of facts which must have happened according to the constant and invariable course of nature. *Rex* v. *Luffe*, 8 East, 202; 9 R. R. 406.

Time.]—The court will take judicial notice of the day of the week on which a certain day of the month was. *Hanson* v. *Shackleton*, 4 D. P. C. 48; 1 H. & W. 542.

And on what day the king dies. *Henry* v. *Cole*, 2 Ld. Raym. 811; 7 Mod. 103.

The court will not take judicial notice of the hours of the day in the calendar. *Collier* v. *Nokes*, 5 Ex. 275; 2 Car. & K. 1012.

But will take judicial cognizance that a place lies east or west of Greenwich, and consequently has a time different from that of Greenwich. *Curtis* v. *March*, 3 H. & N. 866; 28 L. J., Ex. 36; 4 Jur. (N.S.) 1112.

—— **Almanack.**]—The almanack is part of the law of England. *Tutton* v. *Darke*, 5 H. & N. 647; 29 L. J., Ex. 271; 6 Jur. (N.S.) 983; 2 L. T. 361.

But an almanack is not evidence of the time of sunrise on a particular day. *Ib.*

Topography.]—The court will not take judicial notice that a particular street is not in a certain county, although it may be generally known to be situate in another. *Humphreys* v. *Budd*, 9 D. P. C. 1000; 5 Jur. 630. See *Reg.* v. *Holborn Union*, 6 El. & Bl. 715; 25 L. J., M. C. 110; 2 Jur. (N.S.) 571; 4 W. R. 606.

The courts do not take judicial notice that particular places are or are not within particular counties. *Brune* v. *Thompson*, 2 Q. B. 789; 2 G. & D. 110; Car. & M. 34.

The court will take judicial notice that a city is a county of a city. *Reg.* v. *St. Maurice*, 16 Q. B. 908; 20 L. J., M. C. 221; 15 Jur. 559.

The quarter sessions ought to take judicial notice of the petty sessional divisions in their county. *Reg.* v. *Whittles*, 13 Q. B. 248; 18 L. J., M. C. 96; 13 Jur. 403.

By the repealed statute 11 Geo. 4 & 1 Will. 4, c. 66, it was made an offence to utter any writing as and for a copy of an entry in any register of marriage made or kept by the vicar of any parish in England:—Held, that the judge would take judicial notice that the parish of Seighford, in the county of Stafford, is a parish in England, and that the indictment need not aver that fact. *Reg.* v. *Sharpe*, 8 Car. & P. 436.

—— **Places on Admiralty Chart.**]—A court should take judicial notice of the geographical positions of, and general names applied to, a district as shown on the Admiralty chart. *Birrell* v. *Dryer*, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 267—H. L. (Sc.)

Extent of Jurisdiction.]—The court will also take judicial notice that the common law of England extends to Ireland. *Nesbitt, In re*, 2 D. & L. 529; 14 L. J., M. C. 30.

The court will take judicial notice that the colony of Victoria is beyond seas. *Cooke* v. *Wilson*, 1 C. B. (N.S.) 153; 26 L. J., C. P. 15; 2 Jur. (N.S.) 1094; 5 W. R. 24.

So, of the maritime laws of nations. *Chandler* v. *Grieves*, 3 H. Bl. 606, n.; 3 R. R. 525.

Foreign Law.]—The courts in this country do not take notice of the revenue laws of another country, unless where the contract itself is made void by them. *Bristowe* v. *Secqueville*, 5 Ex. 275; 19 L. J., Ex. 289; 14 Jur. 674.

It is a rule of English law, that no knowledge of foreign law is to be imputed to an English judge sitting in a court of mere English jurisdic-

tion. *Nelson (Earl)* v. *Bridport (Lord)*, 8 Beav. 527 ; 10 Jur. 871.

Laws of France or Holland must be proved, else the court cannot take notice of them. *Freemoult* v. *Dedire*, 1 P. W. 431. *And see* cases, post, cols. 610, 611, 612.

Irish Law.]—The appellant, a domiciled Irishwoman being an infant without legal guardian, married in Ireland, before the passing of the Infants Settlement Act (18 & 19 Vict. c. 43), a domiciled Scotchman. An ante-nuptial settlement was executed. After the death of her husband she commenced the present action in the Scotch courts to set aside the settlement. No evidence was given as to the capacity of an infant to execute a binding contract by the law of Ireland : —Held, that, the point being raised in the pleadings, the house must take judicial notice that by the law of Ireland the settlement was not binding on the appellant, without regard to whether any, or what, evidence of the law of Ireland, as a matter of fact, had been given in the court below ; and, further, that the validity of the settlement was not affected by the fact that at the time of its execution both parties contemplated a Scottish domicil during their married life. *Cooper* v. *Cooper*, 13 App. Cas. 88 ; 59 L. T. 1—H. L. (Sc.)

Power of Irish Judge to administer Oath.]—The courts take judicial notice that the chief justice of a superior court in Ireland, is competent to administer an oath, and therefore will be satisfied with a mere verification of his handwriting. *French* v. *Bellew*, 1 M. & S. 302.

English Law and Practice.]—The courts take notice of their own course and practice of proceedings. *Pugh* v. *Robinson*, 1 Term Rep. 118.

The court would not take judicial notice of the general rules and orders made by the commissioners of bankruptcy for the regulation of the practice of their courts under 5 & 6 Vict. c. 122, s. 70. *Ramsden, In re*, 1 B. C. Rep. 133 ; 15 L. J., Q. B. 234 ; 10 Jur. 879.

Nor of the rules and practice adopted by, and in force in, the court of review when that court existed. *Van Sandau* v. *Turner*, 6 Q. B. 773 ; 14 L. J., Q. B. 154 ; 9 Jur. 296.

The courts of common law will take judicial notice of the jurisdiction of the Court of Admiralty, though not of its practice. *Place* v. *Potts*, 8 Ex. 705 ; 22 L. J., Ex. 269 ; 17 Jur. 1168.

But they will not take notice of any informality in the plaint in a county court, that being matter of practice to be dealt with by the judge at the hearing. *Sargent* v. *Wedlake*, 11 C. B. 732.

The general lien of bankers is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange. *Brandao* v. *Barnett*, 12 Cl. & F. 787 ; 3 C. B. 519.

The court takes judicial notice of the law of England as administered in equity. *Sims* v. *Marryatt*, 17 Q. B. 281.

The courts of common law take judicial notice that a bill filed in chancery by a creditor of a deceased testator for the administration of the estate under the direction of the court, does not of itself control or suspend the right of the executors to dispose of the property, and make a good title thereto. *Neeves* v. *Burrage*, 14 Q. B. 504 ; 19 L. J., Q. B. 68.

Record—Nature of Action.]—Where, after the execution of a writ of inquiry, the plaintiff obtained a rule calling on the defendant to show cause why the plaintiff should not have his costs, but the rule was not expressed to be drawn up upon reading the record, nor was the nature of the action stated upon the affidavit :—Held, that the records of the court were always actually or constructively before the court, and that the court would therefore take cognizance of the nature of the action as appearing upon the record. *Craven* v. *Smith*, 38 L. J., Ex. 90 ; L. R. 4 Ex. 146 ; 20 L. T. 400 ; 17 W. R. 710.

Notary's Seal.]—The execution of a release was attested by a notary in a colony :—Held, that the court would take judicial notice of the notary's seal and signature. *Brooke* v. *Brooke*, 50 L. J., Ch. 528 ; 17 Ch. D. 833 ; 44 L. T. 512 ; 30 W. R. 45.

The court will judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad. *Cole* v. *Sherard*, 11 Ex. 482.

Stamp on Order.]—The court will not judicially notice the stamp upon a copy of an order, it not being the seal of the court, but the mark of the judge's clerk. *Barrett Navigation Co.* v. *Shower*, 8 D. P. C. 173.

Solicitor on Roll.]—In an application to tax an attorney's bill, the court will take judicial notice of his being on the roll. *King, Ex parte*, 3 D. P. C. 41.

On an application against an attorney for an attachment for his contempt of a judge's order made a rule of court, the court will take judicial notice of his being on the roll. *Hore, Ex parte*, 1 C. & M. 211 ; 3 D. P. C. 600.

Commissioners.] — The court will not take judicial notice of who are its commissioners for oaths or inspect the list to see if A. B. is one. *Frost* v. *Hayward*, 10 M. & W. 673 ; 2 D. (N.S.) 566 ; 12 L. J., Ex. 84 ; 6 Jur. 1045.

The court takes judicial notice of the signature of a commissioner lawfully authorised to administer oaths in a colony. *Anon.*, 1 W. R. 187.

Nature of Company.]—The court will not take notice that none but freemen of the city of London are admissible into the livery of a company, unless it has been certified to the court by the recorder of London. *Piper* v. *Chappel*, 14 M. & W. 624 ; 9 Jur. 601.

Nor that, where a company is stated in a pleading to be constituted according to a certain principle known as a société anonyme, the shares in such company are transferable. *Gerhard* v. *Bates*, 2 El. & Bl. 476 ; 1 C. L. R. 868 ; 22 L. J., Q. B. 364 ; 17 Jur. 1097 ; 1 W. R. 383.

—— **Cost-book Principle.**] — What the cost-book principle is cannot be judicially taken notice of by the court. What that principle is must be proved in the cause, as any other custom. *Pennant and Craigwen Consolidated Lead Mining Co., In re, Fenn's Case*, 2 Eq. Rep. 944 ; 4 De G. M. & G. 285 ; 22 L. J., Ch. 692 ; 2 W. R. 282.

The court is not bound to take judicial notice of the meaning of the term "cost-book principle." *Great Cambrian Mining and Quarrying Co., In re, Hawkins' Case*, 2 Kay & J. 253 ; 25 L. J., Ch. 221 ; 2 Jur. (N.S.) 85 ; 4 W. R. 224.

The court will not take notice of the meaning of the term "cost-book principle." *Bodmin United Mines, In re*, 23 Beav. 370.

State of War.]—The courts will take judicial notice that a war exists between this country and a foreign state, which war is recognised in different acts of parliament. *Rex* v. *De Berenger*, 3 M. & S. 67; 15 R. R. 415. S. P., *Alcenius* v. *Nygren*, 4 El. & Bl. 217; 24 L. J., Q. B. 19; 1 Jur. (N.S.) 16; 3 W. R. 25.

Recognition of State.]—To prevent a demurrer to bill, it was falsely alleged in it that a revolted colony of Spain had been recognised by Great Britain as an independent state: the court is bound to know judicially that the allegation is false, and not to give it the intended effect. *Taylor* v. *Barclay*, 2 Sim. 213; 7 L. J. (O.S.) Ch. 65; 29 R. R. 82.

Oxford.]—And that the University of Oxford is a national institution, the purposes of which are the advancement of religion and learning. *Oxford Rate, In re*, 8 El. & Bl. 184.

Officers of State.]—The court may take judicial notice of the persons who filled the great offices of state so long ago as 1803. *Whaley* v. *Carlisle*, 17 Ir. C. L. R. 792.

The court will take judicial notice of the signature of a person certified under the hand of the secretary of state for India to be a person lawfully authorised to administer oaths there. *Ferguson* v. *Benyon*, 16 W. R. 71.

Value of Money.]—The court will take judicial notice of the difference in the value of money in the reign of Richard I. and the present day. *Bryant* v. *Foot*, 9 B. & S. 444; 37 L. J., Q. B. 217; L. R. 3 Q. B. 497; 18 L. T. 587; 16 W. R. 808—Ex. Ch.

Age.]—A person attains his twenty-fifth year when he becomes twenty-four. *Grant* v. *Grant*, 4 Y. & C. 256.

Illegality.]—Where in an action it appears that an indictable conspiracy has been committed, the court will take judicial notice of the fact, though it is not pleaded. *Scott* v. *Brown*, 61 L. J., Q. B. 738; [1892] 2 Q. B. 724; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213—C. A.

"Pulse," What is.]—The judges will take notice that "beans" are "pulse." *Rex* v. *Woodward*, 1 M. C. C. 323.

Custom of London.]—The courts will not take judicial notice of the custom in London to cart whores: it must be proved. *Stainton* v. *Jones*, 2 Selw. N. P. 1225.

III. DOCUMENTARY EVIDENCE.

A. *PUBLIC AND OFFICIAL DOCUMENTS.*

1. JOURNALS AND ACTS OF PARLIAMENT.

Journals.]—Copies of the journals of parliament are evidence. *Rex* v. *Gordon (Lord George)*, 2 Dougl. 590. See *Mortimer* v. *M'Callan*, 6 M. & W. 67.

The journals of the House of Lords are evidence to prove, not only an address to the king, but the king's answer to the house. *Rex* v. *Franklin*, 5 Term Rep. 445, n.

An entry in a printed copy of the journals of the House of Commons is not receivable unless it has been compared with some original at the house, but an examined copy of an entry in the minute-book kept by the clerk at the table of the house is receivable. *Chubb* v. *Salomons*, 3 Car. & K. 75.

Where a patent of peerage cannot be found, entries on the journals of the House of Lords, showing the limitations of the patent, may be referred to for that purpose; or an examined copy of the record of the patent will be received. *Saye & Sele (Barony)*, 1 H. L. Cas. 507.

Acts of Parliament.]—A local act, containing the usual clause that it shall be deemed and taken to be a public act, &c., may be read in evidence without any proof of its having been printed by the king's printer, or compared with the original on the rolls of parliament. *Woodward* v. *Cotton*, 6 Car. & P. 494.

If the counsel for a party rely on an act of parliament and cite it as an act to be judicially noticed, the opposite party has no right to insist that the counsel citing it should produce a copy of it printed by the Queen's printer. *Faman* v. *Dawes*, Car. & M. 127.

—— **Explained by Usage of House.**]—Evidence of the usages and practice of the House is admissible to explain the meaning of the Parliamentary Oaths Act, 1866, and the standing orders of the house with regard to making and subscribing the oath. *Att.-Gen.* v. *Bradlaugh*, 54 L. J., Q. B. 205; 14 Q. B. D. 667; 52 L. T. 589; 33 W. R. 673; 49 J. P. 500—C. A.

And see 8 & 9 Vict. c. 113, s. 3.

Lost Act of Parliament.]—*See* e. SECONDARY EVIDENCE, and *Doe* d. *Bacon* v. *Brydges*, 6 Man. & G. 282; 7 Scott (N.R.) 333; 13 L. J., C. P. 200.

—— **Presumption as to.**] — See *Chilton* v. *London Corporation*, 47 L. J., Ch. 433; 7 Ch. D. 735; 38 L. T. 498.

2. GAZETTES.

Gazettes.]—The Gazette, purporting to be printed by the king's printer, is good evidence of all acts of state therein contained. *Rex* v. *Holt*, 2 Leach, C. C. 598; 5 Term Rep. 436.

The Gazette is sufficient evidence of a proclamation issued under an order in council, because such proclamation is a public act regarding the crown and government, and must pass the great seal before it can be admitted into the Gazette. *Att.-Gen.* v. *Theakstone*, 8 Price, 89; 22 R. R. 716.

The Gazette alone is not evidence of the appointment of an officer to a commission in the army; but if the commission is not produced after notice, it may be admitted. *Kirwan* v. *Cockburn*, 5 Esp. 233; 8 R. R. 849. S. P., *Rex* v. *Gardner*, 2 Camp. 513; 11 R. R. 784.

A declaration alleged the division of a parish into several district parishes, by order of the king in council (under 58 Geo. 3, c. 45):—Held, that the allegation could not be proved by production of the Gazette containing a copy of such order. *Greenwood* v. *Woodham*, 2 M. & Rob. 363.

Where an act of parliament makes a gazette evidence, if it purports to be printed by the Queen's printers, or by the Queen's authority, a gazette purporting to be printed by A., without

giving his style as Queen's printer, and purporting to be printed by authority, is not receivable. *Reg.* v. *Wallace*, 17 Ir. C. L. R. 206; 14 W. R. 462.

By 17 & 18 Vict. c. 104, s. 295, it was provided that the admiralty might make certain regulations, such regulations to be published in the London Gazette, and production of the Gazette to be sufficient evidence of the due making and purport thereof; and by s. 2, the admiralty was defined to mean the lord high admiral, or the commissioners for executing his office:—Held, that a notice published in the Gazette, purporting to be given by the lords commissioners of the admiralty, but signed only "by command of their lordships, W. G. Romaine," was by production of the Gazette proved to be duly made by the admiralty. *The Olivia*, 1 Lush. 497.

If a person adjudicated a bankrupt takes no steps within the prescribed period to annul the adjudication, the London Gazette containing the advertisement of his bankruptcy is conclusive evidence of the bankruptcy in criminal as well as in civil proceedings taken against him. *Reg.* v. *Levi*, L. & C. 597; 34 L. J., M. C. 174; 11 Jur. (N.S.) 450; 12 L. T. 502; 13 W. R. 724; 10 Cox, C. C. 110. S. P., *Reg.* v. *Harris*, 4 Cox, C. C. 140; *Reg.* v. *Robinson*, 36 L. J., M. C. 78; L. R. 2 C. C. 80; 16 L. T. 605; 15 W. R. 966; 10 Cox, C. C. 467. *Reg.* v. *Randnitz*, 21 L. T. 621; 11 Cox, C. C. 360. *Revell* v. *Blake*, 41 L. J., C. P. 129; L. R. 7 C. P. 300; 26 L. T. 578; 20 W. R. 756.

Cuttings from, Insufficient.]—A petition in bankruptcy having been presented against the prisoner in the D. county court, the court made an order that the publication of a notice of the petition in the London Gazette should be deemed service of the petition on the prisoner. The prisoner did not appear according to this notice, and there was no evidence that it had come to his knowledge. The prisoner was adjudicated bankrupt in his absence, and divers proceedings in the bankruptcy took place. Subsequently thereto the prisoner was arrested, and afterwards examined in court touching his affairs by the trustee in the bankruptcy, and the result was that he was indicted and convicted for various offences under the Bankruptcy Act. On the trial, in proof of the publication of the order of the county court in the Gazette, the file of the proceedings in the bankruptcy court was produced, containing a cutting from the Gazette of the advertisement of the order of the county court and notice to appear:—Held, that this cutting from the Gazette was improperly received as evidence of the publication of the notice in the London Gazette, and that the conviction could not be sustained. *Reg.* v. *Lowe*, 52 L. J., M. C. 122; 48 L. T. 768; 15 Cox, C. C. 286; 47 J. P. 535.

3. Acts of State.

Declaration of War.]—To ascertain the date of a declaration of war, the declaration from the ambassador of the court abroad, transmitted by him to the secretary of state's office, is evidence. *Thelluson* v. *Cosling*, 4 Esp. 266.

Articles of War.]—A copy of the articles of war, printed by the king's printer, is good evidence. *Rex* v. *Withers*, 5 Term Rep. 442; 1 East, P. C. 360.

Proclamations.]—A judge at nisi prius will not take judicial notice of the king's proclamations. *Van Omeron* v. *Dowick*, 2 Camp. 44; 11 R. R. 656.

The king's proclamation, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, is admissible to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those parts. *Rex* v. *Sutton*, 4 M. & S. 532.

Certificate of Secretary of State—Conclusive as to Status of Foreign Sovereign.]—A letter from a secretary of state (in this case the secretary of state for the colonies) in his official capacity, in answer to an inquiry by the court as to the status of the alleged sovereign, is conclusive on the question of sovereignty and independence. *Mighell* v. *Johore (Sultan)*, 63 L. J., Q. B. 593; [1894] 1 Q. B. 149; 9 R. 447; 70 L. T. 64; 58 J. P. 244—C. A.

Letter of Instruction from Lords of the Treasury.]—A letter of instruction from the lords of the treasury, signed by three lords of the treasury, is admissible upon proof of the handwriting of the three whose names are subscribed to it, without producing the commission. *Rex* v. *Jones*, 2 Camp. 131.

State Papers, Production of—Public Policy.]—If the production of a state paper would be injurious to the public service, the public interest must be considered paramount to the individual interest of a suitor in a court of justice. *Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J., Ex. 430; 6 Jur. (N.S.) 780; 2 L. T. 378; 8 W. R. 544.

The question, whether the production of a document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper. *Ib.*

Commissions.]—A return to a royal commission, not signed or sealed by the commissioners, is not admissible to prove any matter therein stated. *Slane Peerage*, 5 Cl. & F. 23.

A document from the office of the duchy of Cornwall, purporting to be a caption of seisin to the use of the duke, by persons assigned by his letters patent to receive seisin, is receivable as a public instrument. *Rowe* v. *Brenton*, 3 M. & Ry. 156; 8 B. & C. 765.

A visitation was produced from the proper office; the commission under which it was taken could not be found. The visitation purported to have been taken by deputation from Clarenceux king-of-arms. The deputation was produced. It recited the commission, and the power therein contained for Clarenceux to appoint his deputies:—Held, that the visitation was admissible. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

Warrant of Precedence.]—A record of a royal warrant of precedence was produced from the Heralds' office; the original had been sought for at the Home office and the State Paper office, but in vain. It was a part of the duty of the heralds to record such warrants. The record was received. *Ib.*

4. Foreign, Colonial, and Indian Documents and Laws.

Report to Foreign Government.]—The report of a committee appointed by a public department

in a foreign state, though addressed to that department and acted on by the government, is not necessarily admissible in the courts here as evidence of all the facts stated therein. M., the consul in London for the then Genoese government, applied in 1789 to his government to receive the rank and employment of diplomatic agent here. The executive government (collegii) referred the application to a committee called the Giunta della Marina to inquire into the propriety of the proposed change of appointment, and into M.'s fitness for the post of diplomatic agent. The Giunta reported favourably on both points. In the course of the report the Giunta described him as "a native of Quarto, of about forty-five years of age." He was appointed in 1790, and died in England in 1803. His only child, a daughter, died here in 1871 without any known relations. Her property was taken possession of by the crown, but, on a process instituted here, a decree was made directing payment of the fund to certain persons of the Freccia family, who claimed to be next of kin, and whose claim was founded on an allegation that M. had been born at St. Ilario, near Genoa, in 1735. Other persons then claimed to be next of kin, asserting that M. had been born at Quarto in 1744. In a suit between these two sets of claimants, the report of the Giunta was tendered in evidence as fixing the real place and time of M.'s birth :—Held, that it was not admissible for that purpose. *Sturla* v. *Freccia*, 5 App. Cas. 623 ; 43 L. T. 209 ; 29 W. R. 217 ; 44 J. P. 812. Affirming 49 L. J., Ch. 41—C. A.

Per Lord Blackburn : "A public document" means a document that is made for the purpose of the public making use of it, especially where there is a judicial or quasi-judicial duty to inquire. Its very object must be that the public, and all persons concerned in it, may have access to it. *Ib.*

Judicial Proceedings.]—An order of a foreign court made ex parte on a shareholder of an insolvent company to contribute to the assets, is an order or other judicial proceeding within 14 & 15 Vict. c. 99, ss. 7, 11, and may be proved by a certified copy. *Leishman* v. *Cochrane*, 1 Moore, P. C. (N.S.) 315 ; 9 L. T. 104 ; 12 W. R. 181.

An insurance company was formed in Calcutta, and registered in the Supreme Court, pursuant to the act of the Indian legislature. L., resident in the Mauritius, was a shareholder in this company, which was limited for five years. That time being about to expire, a new company was formed to take the business of the old company, in which L.'s name was entered by F., the company's secretary at Calcutta, whom he verbally authorised to execute the new co-partnership deed. The company having become insolvent, was wound up by the Supreme Court at Calcutta. L.'s name being on the list of shareholders, certain orders were made by the Supreme Court, calling upon him to pay a contribution to the assets of the company. L. refused and repudiated his liability, on the ground that he was not a shareholder, never having given authority to F. to execute the deed of partnership. Upon an action in the Supreme Court in the Mauritius, by the official assignee of the insolvent company, against L. to recover the amount of contribution ordered by the Supreme Court at Calcutta :—Held, first, that the certified copies of the orders of the Supreme Court at Calcutta in the matter were properly admitted in evidence, under 14 & 15 Vict. c. 99, without proof of the official seals or signatures of that court. *Ib.*

Held, secondly, that being satisfied upon the evidence that L.'s name had been put on the list of shareholders with his consent, so as to entitle him to a share in the profits, the judicial committee was of opinion that L. was liable to pay the contributions claimed, and that it was unnecessary to inquire whether parol authority would warrant the execution of the deed by F. *Ib.*

Where the proceedings in an Austrian court were tendered, and it was proved that the court out of which the proceedings issued used a seal, and the documents tendered had the seal impressed upon them for the double purpose of cancelling the stamps affixed to the documents and for authentication :—Held, that this was sufficient to make them admissible in evidence here. *Loibel* v. *Strampfer*, 16 L. T. 720.

Proceedings in a sheriff's court in Scotland held admissible as to matters of pedigree, on the same principle on which answers and decrees in chancery have been admitted in peerage cases, the facts of the pedigree not being in dispute but only incidentally stated in the proceedings. *Lyell* v. *Kennedy*, 59 L. J., Q. B. 268 ; 14 App. Cas. 437 ; 62 L. T. 77 ; 38 W. R. 353—H. L. (E.)

Will.]—The copy of a foreign will contained in the ancillary probate granted in this country to the foreign executors, is the only admissible evidence of the will. *Enohin* v. *Wylie*, 10 H. L. Cas. 1 ; 31 L. J., Ch. 402 ; 6 L. T. 603 ; 10 W. R. 467.

Probate.]—A Scotch probate is not recognised by the Court of Chancery in England. *M'Donald* v. *Bryce*, 22 L. J., Ch. 779 ; 17 Jur. 335 ; 1 W. R. 261.

Copy of Patent.]—Where a document purported to be an official copy of a Belgian patent sealed with the Belgian seal, it was admitted without proof of its being an examined copy or proof of the seal, inasmuch as it came within the words "or other acts of state," in 14 & 15 Vict. c. 99, s. 7. *Betts, Ex parte*, 9 Jur. (N.S.) 137 ; 7 L. T. 577 ; 11 W. R. 221—P. C.

Colony—Release attested by Notary.]—The execution of a release was attested by a notary in a colony. There was no evidence that the attestation was for the purpose of using the deed in court :—Held, nevertheless, that it was a document to be used in court within 15 & 16 Vict. c. 86, s. 22, and that the court would take judicial notice of the notary's seal and signature. *Brooke* v. *Brooke*, 50 L. J., Ch. 528 ; 17 Ch. D. 833 ; 44 L. T. 512 ; 30 W. R. 45.

—— **Registrar's Certificates.**]—The certificate, by the registrar in the island of St. Vincent's, of the registration of a deed :—Held, not to be admissible, under the 15 & 16 Vict. c. 86, s. 22, without proof of the signature, on the ground that the registrar was not a person authorised to administer oaths. *Baillie* v. *Jackson*, 3 De G. M. & G. 38 ; 10 Hare (App.), xlvi. ; 22 L. J., Ch. 753 ; 17 Jur. 170 ; 1 W. R. 196.

—— **Notarial Certificate.**]—In an action in Lower Canada, the plaintiff produced a deed of

sale executed before a notary public in Upper Canada, and a certificate by such notary of the due execution of the deed. No further evidence of execution was produced:—Held, that the certificate of a notary public of the due execution of a deed in a colony regulated by English law does not dispense with the proper evidence of execution, though the certificate is put in evidence in a colony regulated by French law, where such certificate is sufficient evidence. *Nye* v. *Macdonald*, 39 L. J., P. C. 34; L. R. 3 P. C. 331; 23 L. T. 220; 18 W. R. 1075.

—— **Probate of Will.**]—A petitioner asked for payment out of court of money to which he was entitled under an appointment by will:—Held, that probate of the will in the supreme court of New Zealand was not sufficient for this court to act upon, but the will must be proved in England. *Limehouse Board of Works, Ex parte, Vallance, In re*, 52 L. J., Ch. 791; 24 Ch. D. 177; 48 L. T. 941.

Letters testimonial sealed by the supreme court of the colony of Victoria, setting forth verbatim a will of real estate made in that colony, and stating that it had been duly proved, were accepted as sufficient proof of the will for the purposes of the usual preliminary decree in a partition action. *Waite* v. *Bingley*, 51 L. J., Ch. 651; 21 Ch. D. 675; 30 W. R. 698.

India—Acts of Council.]—A book containing the acts of the legislative council of India, produced by a clerk from the India office, is sufficient evidence of the acts therein contained. *Gardner* v. *Wright*, 15 L. T. 325.

—— **Registers of Baptisms.**]—In an action to determine the right to letters of administration, the issue being as to the legitimacy of certain persons, copies of registers of baptisms in India were admitted in evidence. *Queen's Proctor* v. *Fry*, 48 L. J., P. 68; 4 P. D. 230; 41 L. T. 530. See also *Evans* v. *Ball*, 38 L. T. 141.

Before 14 & 15 Vict. c. 99, s. 7—Foreign Documents.]—To prove the seal of a foreign cour de commerce a witness should be called who has known the seal used on other occasions, and a witness who has never known it used, but who speaks to its being the seal of that court from an inscription around it so stating, is not sufficient. *Bristow* v. *De Secqueville*, 3 Car. & K. 64.

A document under the seal of the court of the Holy Office or Inquisition of Rome, but apparently drawn up by a notary whose name is attached to it, from a record in that court, but which was not set forth in the document, is not evidence to prove the grounds of a judgment pronounced by that court, the ratio decidendi not being stated, although it is admissible in support of an allegation in a plea of justification of a libel, that such a judgment has been pronounced. *Reg.* v. *Newman*, Dears. C. C. 85; 3 Car. & K. 252; 1 El. & Bl. 268; 22 L. J., Q. B. 156.

A charterparty was entered into at Java. By the law of Holland, which is the law in force there, the parties upon entering into such a contract, go before a notary public: he makes an entry in his books, which the parties sign, and he makes out copies from time to time, when requested, which he delivers to the parties. These copies are received in evidence in the courts of Holland, but at Java, the notary's book itself must be produced. These copies cannot be received in the courts in England (no proof being given when they were made), either on the ground of the notary being a public officer, whose duty it was to make copies, or of his being the agent of the parties by whose acts they had agreed to be bound. *Brown* v. *Thornton*, 1 N. & P. 339; W. W. & D. 11; 6 A. & E. 185; 6 L. J., K. B. 82.

The sentence of a foreign court of admiralty cannot be received in evidence, without proof of the ship having been captured. *Marshall* v. *Parker*, 2 Camp. 69; 11 R. R. 665.

The English courts cannot take notice of any judicial act done in a foreign country, without evidence of the laws of such country. *Ganer* v. *Lanesborough (Lady)*, Peake, 25; 3 R. R. 647.

In an action on a foreign judgment, it is not sufficient to prove the judge's handwriting subscribed to it, without proving that the seal affixed thereto is the seal of the court. *Henry* v. *Ady*, 3 East, 221; 4 Esp. 228.

In an action on a foreign judgment, the judgment produced at the trial must be authenticated by the seal of the foreign court, or evidence must be given that the court has no seal; and then the judgment may be established by proving the signature of the judge. *Alves* v. *Bunbury*, 4 Camp. 28.

An exemplification of a sentence in Holland, under the common seal of the States, may be read in evidence in a suit in chancery. *Anon.*, 9 Mod. 66.

Decree at Leghorn allowed to be read as evidence. *Burrows* v. *Jamereau*, Dick. 48.

—— **Colonial Documents.**]—If a colonial court possesses a seal, it must be used for the purpose of authenticating a judgment of the court, although it is so much worn as no longer to make any impression. *Curan* v. *Stewart*, 1 Stark. 525.

In an action on two judgments recovered in the supreme court of Jamaica, copies of the judgments purporting to be signed by the clerk of the court, and certified by him to be true copies, accompanied by a certificate of a notary public of his being clerk of the court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, were held to be admissible to prove the judgments. *Appleton* v. *Braybrook (Lord)*, 6 M. & S. 34; 2 Stark. 6; 18 R. R. 294.

A judgment in the court of common pleas in the island of Tobago was proved by a witness swearing to the handwriting of the chief justice of the court, and saying that he would have acted upon the seal appended to it as the seal of the island. *Buchanan* v. *Rucker*, 1 Camp. 63; 9 East, 192; 9 R. R. 531.

Semble, an examined copy of a letter of attorney, enrolled in the office of record, in Jamaica, is not admissible (without more); although an examined copy of a deed so enrolled is, by force of acts of the local legislature, admissible. *Faulkener* v. *Daniel*, 3 Hare, 221.

Foreign Laws.]—The law of France as to marriage may be proved by the production of a printed book, purporting to contain the code of France, and proved by parol testimony to contain

the law of that country; and a book purporting to have been published at the royal printing-office, at Paris, which (according to the statement of the witness) was authorised to print the laws of France by the government of that country, was received as evidence of such law, and on which the courts in this country would act. *Lacon* v. *Higgins*, 3 Stark. 178; D. & R. N. P. C. 38; 25 R. R. 779.

A printed copy of the Cinq Codes of France, produced by the French vice-consul resident at London, who purchased it at a bookseller's shop in Paris, was received as evidence of the law of France, upon which the court would act. *Ib.*

In support of a plea of discharge by a Jamaica court of insolvency, a printed copy of a colonial act, from the colonial office, was received with evidence that there was an insolvent debtor's court in that island. *Clarke* v. *Emery*, 1 F. & F. 446.

An English barrister practising in Canadian appeals before the privy council is not competent to give evidence as an expert as to the validity, according to the law of Canada, of a marriage solemnised in that country. *Cartwright* v. *Cartwright*, 26 W. R. 684.

An opinion of a Scotch advocate was in evidence. The judge considering that there was implied therein an opinion on a question of Scotch law raised in the suit, decided the question on that evidence. *Macdonald* v. *Macdonald*, 41 L. J., Ch. 566; L. R. 14 Eq. 60; 26 L. T. 685; 20 W. R. 739.

A witness whose knowledge of the law of a foreign country is derived solely from having studied it, is incompetent to prove the operation or effect of such law. *Bonelli, In goods of*, 45 L. J., P. 42; 1 P. D. 69; 34 L. T. 32; 24 W. R. 255.

On a question of foreign law, a joint written opinion given by two jurists was exhibited to them on their examination, which they verified as being according to the law of the foreign country:—Held, that this evidence was receivable. *Nelson* (*Earl*) v. *Bridport* (*Lord*), 8 Beav. 527; 10 Jur. 871.

The affidavit of a person describing himself as a "solicitor practising in the supreme courts of Scotland" was not received in evidence on a question of Scotch law. *Todd, In re*, 19 Beav. 582.

—— **Proved as Facts.**]—Foreign laws must be proved as facts, if a question arises on their existence. *Mostyn* v. *Fabrigas*, Cowp. 174.

A commission granted to examine at Paris as to the extent of jurisdiction of a particular court erected there, but not as to the original constitution of it. *Gage* v. *Stafford* (*Lady*), 2 Ves. 556.

Laws and customs of France or Holland must be proved, else the court cannot take notice of them. *Freemoult* v. *Dedire*, 1 P. W. 431.

Foreign law must be proved as a fact. *Cridland, Ex parte*, 3 Ves. & B. 99. S. P., *Nelson* (*Earl*) v. *Bridport* (*Lord*), 8 Beav. 527; 10 Jur. 871.

A question of foreign law, being one of fact, must be decided in each cause on evidence adduced in it, and not by a decision or on evidence adduced in another case, although similarly circumstanced. *M'Cormick* v. *Garnett*, 5 De G. M. & G. 278; 23 L. J., Ch. 777; 18 Jur. 412; 2 Eq. R. 536; 2 W. R. 403.

Where reliance is placed upon a difference between the law of England and the law of a foreign state, the party is bound by witnesses or books of authority, to shew that there is such a difference. *Smith* v. *Gould*, 4 Moore, P. C. 21; 6 Jur. 543.

A question whether an interest in a heritable bond charged upon lands in Scotland will pass by will, referred to the master to report the law of Scotland. *Glover* v. *Strathoff*, 2 Bro. C. C. 32.

A question arose as to the right of the parties under a Scotch settlement. The court referred to the master to inquire as to its construction according to the law of Scotland. The master made his report founded on the opinion of Scotch advocates, and the cause coming on the court acted thereon, and ordered accordingly. *Williams* v. *Williams*, 3 Beav. 547.

Where a question arises in consequence of estates in Scotland being devised to a certain person, the court will not adjudicate upon that question until it has been ascertained, by a reference to one of the masters, whether the estates did pass by the Scotch law or not. *M'Call* v. *M'Call*, 2 Con. & L. 184.

And see post, cols. 915, 916.

—— **Construction of.**]—Foreign law and the construction of a foreign contract, just as much as the construction of an English contract, are matters for the decision of the judge, after having the foreign law, or the language of the foreign contract, interpreted and explained to him by the evidence of foreign experts, and are not in any case questions for a jury. *Copin* v. *Adamson*, 43 L. J., Ex. 161; L. R. 9 Ex. 345; 31 L. T. 242; 22 W. R. 658.

In the construction of a foreign document in the English courts, the judge or court must obtain, first, a translation of the document; secondly, an explanation of any terms of art used in it; thirdly, information on any special law; and fourthly, on any peculiar rule of construction of the foreign state affecting it; and it is the duty of the English court with such light to construe the document. *Di Sora* v. *Phillips*, 10 H. L. Cas. 624; 2 N. R. 553; 33 L. J., Ch. 129—H. L. (E.)

When the question at issue in an English court is what is the foreign law on the subject, and an expert refers in his evidence to sections of the foreign code as supporting the propositions for which he vouches, the English court may refer to and construe those sections. *Concha* v. *Murietta*, 40 Ch. D. 543; 60 L. T. 798—C. A.

There may be cases in which a judge may take upon himself to construe the words of a foreign law, and determine their application to the case in question, especially if there should be a variance or want of clearness in the testimony. Semble. *Nelson* (*Earl*) v. *Bridport* (*Lord*), 8 Beav. 527; 10 Jur. 871.

Under 22 & 23 Vict. c. 63—Proof of Scots Law.]—In a suit instituted in this country, where a question of Scotch law arises, the court has power under the 22 & 23 Vict. c. 63, to order a case to be settled for the opinion of the Scotch court, and, on a return of the judgment of such court, to apply the facts to such decision, and make an order accordingly. *Wilson* v. *Moore*, 12 W. R. 1137.

Where a settlement creating a power of appointment is in the Scotch form, the court will not decide the question of the validity of

the appointment without ascertaining the law of Scotland on the subject, and for this purpose will direct a case to be stated for the opinion of the court of session under 22 & 23 Vict. c. 63. *Topham* v. *Portland* (*Duke*), 1 De G. J. & Sm. 578; 32 L. J., Ch. 257; 11 W. R. 507.

In a case of conflict of opinions on a question of pure and difficult Scotch law, the court will not decide on the usual evidence, the opinions of advocates, but will send a case to the Scotch court under the 22 and 23 Vict. c. 63, but it is matter of discretion in the court. *Lord* v. *Colvin*, 1 Dr. & Sm. 24; 29 L. J., Ch. 297; 6 Jur. (N.S.) 189; 8 W. R. 254.

Where the court of chancery, for the purpose of disposing of a case depending before it, thinks it expedient to send a case to any other court in the queen's dominions where a different law is administered, it can, in its discretion, do so. Such case must state shortly, but sufficiently, all the facts, and the foreign court would, primâ facie, act in the same manner with respect to it, as courts of common law in this country would do upon a case sent under the old practice. *S. C.*, 8 W. R. 201.

By 18 & 19 Vict. c. 63, disputes are to be referred to the county courts, which are to make such orders as the court of chancery may make, but in Scotch friendly societies the jurisdiction is given to the sheriff. Some members of a Scotch society having sought relief before the sheriff, the defendants pleaded to the jurisdiction, whereupon the sheriff directed a case to the court of chancery, under 22 & 23 Vict. c. 63, to ascertain whether that court had jurisdiction in such a case in England:—Held, that the case did not come within the statute, and the court declined to express its opinion. *Brodie* v. *Johnson*, 30 Beav. 129.

Where previously to the marriage of a domiciled Englishman to a domiciled Scotchwoman in Scotland a settlement was executed in Scotch form, the court declined to decide questions arising out of the terms of the settlement and affecting the husband's property in England, without being informed as to the construction which would be put upon the instrument by a Scotch court; and it therefore directed a case to be sent to the court of session, under 22 & 23 Vict. c. 63, to ascertain the law of Scotland applicable to the settlement. *Eglinton* (*Earl*) v. *Lamb*, 15 L. T. 657.

—— **Hindoo Law.**]—Form of reference to the supreme court at Calcutta of questions of Hindoo law under 22 & 23 Vict. c. 63. *Login* v. *Coorg*, 30 Beav. 632.

5. Certificates.

College.]—The certificate of the veterinary college, that the plaintiff had attended lectures there, is not admissible in evidence, as not coming from a body known to the law. *Sewell* v. *Corp*, 1 Car. & P. 392.

Enrolment.]—On a proviso in a duchy lease, that it shall be enrolled with the auditor, the certificate of the auditor on the margin is sufficient evidence of the enrolment. *Kinnersley* v. *Orpe*, 1 Dougl. 56.

Burthen of Ship.]—A master of a foreign vessel arriving in the port of London, delivered to the custom-house officers a report of the burthen of his ship, and the number of his crew, and it was filed at the custom-house:—Held, that 8 & 9 Vict. c. 86, ss. 2, 7, 18, did not give this the character of a public document, so as to make it evidence of the burthen of the ship. *Huntley* v. *Donovan*, 15 Q. B. 96.

A certificate was produced from the custom-house, where it had been filed, signed by a party who certified that he had measured the vessel and stated the amount of the tonnage:—Held (it not being shewn that this was an act prescribed by statute), that the certificate could not be received as a public document to prove the burthen of the ship. *Ib.*

Masters' Certificates.]—The plaintiffs were the owners of a cargo, shipped on board the defendant's ship, and they alleged that the master of the ship so negligently navigated her, that by reason of his negligence the ship went aground and the cargo was lost. The conduct of the master had, before the trial, been the subject of a Board of Trade inquiry, and his certificate had been suspended upon the ground that he had been guilty of negligence on the occasion. This appeared by an entry in the record of certificates kept in pursuance of the Merchant Shipping Act, 1854, s. 138:—Held, that a certified copy of the entry in the record of certificates was not admissible. *M'Allum* v. *Reid*, L. R. 3 Adm. 57, n.

Baptismal.]—A baptismal certificate, when adduced at nisi prius, is evidence only of the fact of baptism, and not of any independent fact which is therein stated. It would be misdirection if the judge who had admitted such a certificate, failed to tell the jury that they were not to treat it as evidence of such independent fact. But the court will not, on that ground alone, grant a new trial, if it appears that there was other and abundant evidence on which the jury might have found their verdict, if the certificate objected to had been altogether excluded. *Thrussell* v. *Barker*, 17 L. T. 665.

A certificate of baptism from a Roman Catholic chapel, signed by the priest, is not good evidence. *D'Aglie* v. *Fryer*, 13 L. J., Ch. 398.

Death.]—The certificate of the district registrar is sufficient evidence of a person's death. *Traill* v. *Kibblewhite*, 10 Jur. 107.

Funeral.]—A funeral certificate from a manuscript book, entitled "Funeral Certificates of the Nobility," produced from the Heralds' College, is admissible evidence of the state of the deceased's family, and of the other statements contained in it. *Vaux Peerage Case*, 5 Cl. & F. 542.

Highway.]—A certificate by justices of the peace that a highway (indicted) is in repair, is a legal instrument, recognised by the courts of law, and admissible after conviction, when the court is about to impose a fine. *Rex* v. *Mawbey*, 6 Term Rep. 619; 3 R. R. 282.

Ordination.]—A certificate of the ordination of a clergyman in Ireland, signed by the Archbishop of Tuam, found amongst the papers of the clergyman after his death, is properly received in evidence, having come from the proper custody, and being more than thirty years old, and not being the act of any court; and not

having any relation to the corporate character of the archbishop, the seal was to be considered the seal of the natural person, and not of the corporation. *Rex* v. *Bathwick*, 2 B. & Ad. 639.

Under 9 & 10 Vict. c. 20, s. 5.]—Signature of chairman of committees of house of lords to a certificate under 9 & 10 Vict. c. 20, s. 5, must be proved. *Anon.*, 2 W. R. 614.

Redemption of Land Tax.] — The proper evidence to shew that the land tax has been redeemed, is the certificate of the commissioners or a copy of the register. *Buchanan* v. *Poppleton*, 4 C. B. (N.S.) 20 ; 27 L. J., C. P. 210 ; 4 Jur. (N.S.) 414.

Excise Accounts.]—The certificate of the secretary of the Board of Excise, as to the accuracy and effect of accounts in the books of excise, ought not to be received in evidence. *Dunbar* v. *Harvey*, 2 Bligh, 351.

Registration of Company.]—The certificate of the registration of a company under the hand of the assistant registrar, is admissible, without any allegation in the certificate, or proof, aliunde, of the absence of the registrar ; although by 7 & 8 Vict. c. 110, s. 19, the assistant registrar was only empowered to act in the absence of his principal. *Baker* v. *Cane*, 1 H. & N. 674 ; 26 L. J., Ex. 190 ; 5 W. R. 345.

Of Stock Broker.]—The unsupported declaration of the party interested, viz. of the mortgagee alone, is not sufficient evidence of the nonpayment of mortgage money upon which the power of sale arose, and the certificate of a stockbroker of a corresponding fund in the bank-books is not evidence of the identity of stock as between vendor and purchaser. *Hobson* v. *Bell*, 2 Beav. 17 ; 8 L. J. Ch. 241 ; 3 Jur. 196.

As to Custom of London.]—If the lord mayor and aldermen have once certified to the custom of London, the certificate is conclusive, and the court never refers the same question a second time. *Bruin* v. *Knot*, 12 Sim. 453 ; 9 Jur. 979.

Foreign.]—A copy of an entry made from a certificate of baptism by a chaplain of a British minister at a foreign court, is not sufficient evidence of birth and parentage. *Dufferin and Clandeboye's Peerage*, 2 H. L. Cas. 47.

In an action to determine the right to letters of administration, the issue being as to the legitimacy of certain persons, copies of registers of baptisms in India were admitted in evidence. *Queen's Proctor* v. *Fry*, 48 L. J., P. 68 ; 4 P. D. 230.

The certificate of the Hanoverian ambassador, under the seal of the legation, is admissible evidence of the law of Hanover as to the validity of a testamentary paper. *Klingemann, In goods of*, 3 Sw. & Tr. 18 ; 32 L. J., P. 16 ; 8 L. T. 172 ; 11 W. R. 218.

In proof of a marriage in Chili, a document was tendered purporting to be an extract from a register of marriages, and signed by the curate-rector of the church where it was solemnised. His signature was verified by a public notary, whose signature was verified by other notaries, and their signatures were verified by the foreign minister of the Chilian Republic, and a certificate under the hand and seal of the British consul at Chili was added. On the evidence of a witness that a register was kept by the curate-rector of every church in Chili of marriages solemnised in it, and that certificates of marriage such as that tendered were in the Chilian courts received in evidence, that he knew the name of the curate-rector, and was also well acquainted with several of the persons whose signatures were appended to the certificate as witnesses, the document was admitted as evidence of the marriage. *Abbot* v. *Abbot*, 29 L. J., Mat. 57.

—— **Damaged Goods.**]—The certificate of a British vice-consul at the Brazils, of the amount of the proceeds of damaged goods, which by the law of that country are compelled to be sold under his inspection, is not evidence. *Waldron* v. *Coombe*, 3 Taunt. 162 ; 12 R. R. 629.

The certificate of an agent for Lloyd's at a foreign port, ascertaining an average loss upon a cargo damaged by sea-water, is not of itself admissible to shew the amount of the loss, in an action brought by the assured against the underwriters in this country. *Drake* v. *Marryat*, 2 D. & R. 696 ; 1 B. & C. 473 ; 25 R. R. 464 ; 1 L. J. (O.S.) K. B. 161.

Colonial.]—The certificate of a deed, as registered in a registry office in one of the colonies by the registrar, who was not "a person lawfully authorised to administer oaths," is not, per se, evidence of the fact of such registration under the 22nd section of the act 15 & 16 Vict. c. 86, but the signature of the registrar requires verification. *Baillie* v. *Jackson*, 3 De G. M. & G. 38 ; 10 Hare (App.), xlvi. ; 22 L. J., Ch. 753 ; 17 Jur. 170 ; 1 W. R. 196.

Notarial.]—A notarial protest under seal is no evidence that a foreign bill of exchange has been presented for payment in England. *Chesmer* v. *Noyes*, 4 Camp. 122.

The protest of a captain is of itself evidence only to contradict the captain's evidence, and not to shew a variance between it and the condemnation. *Christian* v. *Coombe*, 2 Esp. 490.

The court will judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad. *Cole* v. *Sherard*, 11 Ex. 482.

A notarial copy of the condemnation of a ship, as not being worth repairing, is only evidence of the fact of her having been condemned, and not of the particular defects on which the condemnation was grounded. *Wright* v. *Barnard*, 2 Esp. 699 ; 5 R. R. 767. And see *Nye* v. *Macdonald*, 39 L. J., P. C. 34 ; L. R. 3 P. C. 331 ; 23 L. T. 220 ; 18 W. R. 1075 ; and *Brooke* v. *Brooke*, 50 L. J., Ch. 528 ; 17 Ch. D. 833 ; 44 L. T. 512 ; 30 W. R. 45 ; ante, col. 608, and *Fox* v. *Bearblock*, 50 L. J., Ch. 489 ; 17 Ch. D. 429 ; post, col. 644.

Appointing Creditors' Assignee.]—Assignees were chosen before action, but the certificate of their appointment was not signed until after action :—Held, that as the certificate was good on the face of it, it could not be impeached, and was conclusive evidence of their due appointment to the office of assignee. *Kelly* v. *Morray*, 1 H. & R. 684 ; 35 L. J., C. P. 287 ; L. R. 1 C. P. 667 ; 12 Jur. (N.S.) 769 ; 14 L. T. 624 ; 14 W. R. 939.

6. Ancient Surveys and Terriers.

When Admissible.]—A document purporting to be a survey of a manor made while it was part

of the possessions of the Duchy of Cornwall, and coming out of the proper custody, is admissible as evidence of the boundaries and customs of the manor. *Smith* v. *Brownlow* (*Earl*), L. R. 9 Eq. 241 ; 21 L. T. 739 ; 18 W. R. 271.

Plaintiff tendered a document in evidence, dated 26th August, 26 Eliz., which, after reciting a commission under the great seal of England, directed to certain persons therein named, granting them power by all modes to survey what honours, manors, lands, &c. in Ireland, had or ought to have come to the hands of the crown by reason of the treason of the Earl of Desmond, and others named, and to survey all the ancient possessions and revenues of the crown in Ireland, stated that the commissioners had seen and examined the honours, &c., which had come to the crown by reason of the aforesaid treason, it was proved that the original of the commission was not forthcoming. Held :—That the survey having been prepared by public officers in reference to a matter affecting the interests of the public was admissible in evidence, though it had not been taken by a jury. *Devonshire* (*Duke*) v. *Neill*, 2 L. R. Ir. 132.

The Down survey, though it is conclusive only as to the boundaries of the new and old interests, defined by the statute of Car. 2, is, as a public document, admissible evidence on questions between any persons of matters stated in it. *Dublin* (*Archbishop*) v. *Trimleston* (*Lord*), 12 Ir. Eq. R. 251.

The books of distributions being only abstracts of the survey, are not admissible as evidence of matters stated in them. *Ib.*

The poor-law valuation is evidence as a public document, of the value of land comprised in it. *Swift* v. *M'Tiernan*, 11 Ir. Eq. R. 602. S. P., *Welland* v. *Middleton* (*Lord*), 11 Ir. Eq. R. 603.

Tithe Map.]—A sealed copy of a tithe commutation map is not receivable on a question of ownership of land. *Wilberforce* v. *Hearfield*, 46 L. J., Ch. 584 ; 5 Ch. D. 709 ; 25 W. R. 861.

The proceedings (properly authenticated) of the commissioners acting under the Tithe Commutation Acts, are public evidence of the matters therein stated, and to be received as such. *Giffard* v. *Williams*, 38 L. J., Ch. 597.

Crown Surveys and Valuations.]—A valuation made for the crown, tempore Edward VI., is not evidence to establish a manorial custom. *Phillips* v. *Hudson*, 36 L. J., Ch. 301 ; L. R. 2 Ch. 243 ; 16 L. T. 221 ; 15 W. R. 370.

Where a manor formerly belonged to the crown, a grant and survey recorded in the augmentation office are not evidence for the tenants against the lord. *Ib.*

A survey taken by commissioners from the crown, when seised of a manor, is admissible to shew what were the demesne lands of the manor at that time. *Dimes* v. *Arden*, 6 N. & M. 494 ; 5 L. J., K. B. 158.

To prove the extent and rights of a manor, which had formerly been parcel of the duchy of Lancaster, a document produced from the duchy-office was tendered, purporting to be a survey of the manor made in 33 Eliz., while the manor belonged to the duchy, by the deputy-surveyor of the duchy, founded on the presentment of the tenants of the manor, at a court of survey ; and it appeared that Queen Elizabeth had paid the expenses of the survey :—Held, to be inadmissible, either as a document made under public authority, or as evidence of reputation. *Evans* v. *Taylor*, 3 N. & P. 174 ; 7 A. & E. 617 ; 7 L. J., Q. B. 73.

Queen Elizabeth granted the lordship of Denbigh in fee to the Earl of Leicester, who mortgaged it to the corporation of London, and died in the 30th Eliz. In the 33rd Eliz. the corporation conveyed the lands to the crown, and covenanted to deliver up all muniments of title, surveys, &c., and the property has ever since remained in the possession of the Crown. In the reign of Charles I. the Crown granted in fee farm "a messuage and escheat lands and tenements, containing by estimation 112 acres of arable lands, situate in the vill of Kernynyved, now or late in the tenure or occupation of David ap John ap David." In replevin for a distress for this rent, made in a close of a farm called Plas Bach, the defendant for the purpose of proving that Plas Bach was parcel of the 112 acres of escheat lands out of which the rent issued, tendered in evidence the following survey, from the office of the Land Revenue Records : "Lordship of Denbigh. Survey taken in the reign of Queen Elizabeth, 11th. The Comot of Kynmerch. The presentment of the jury of survey for town lands within the Comot of Kynmerch." Various townships were then mentioned, and Kernynyved, as to which it was stated that David ap John ap David occupied certain parcels of land, amongst them one messuage called "Y Place Baghe," and in the margin were the words, "Acres, 112 ; *li.* 3*s.* 4*d.*" :—Held, that the survey was not admissible. *Daniel* v. *Wilkin*, 7 Ex. 429 ; 21 L. J., Ex. 236.

An ancient extent of crown lands found in the office of inland revenue records, and purporting to have been made by the steward of the crown lands, is evidence of the title of the crown to lands therein stated to have been purchased by the crown of a subject. *Doe* d. *William the Fourth* v. *Roberts*, 13 M. & W. 520 ; 14 L. J., Ex. 274.

Evidence of a payment in lieu of tithes was given, extending as far back as the reign of Charles I. Still more ancient documents relating to the same parish, and among them the ecclesiastical survey of Henry VIII., made no mention of such payment :—Held, that in these circumstances, an allegation that such payment existed before the time of legal memory, was not supported. *Graves* v. *Fisher*, 3 Cl. & F. 1 ; 8 Bligh (N.S.) 937.

Under the Commonwealth.]—To support a claim for payment of 4*d.* a wey for all coals gotten within a manor and seigniory, and exported to sea, a book was produced from the custody of the plaintiff, purporting to be a survey taken in 1650, after the manor and seigniory had been granted to Oliver Cromwell, by the authority of parliament, and purporting to be taken by virtue of a commision to certain persons named in the survey given by Oliver Cromwell, lord general of the parliament forces. After specifying certain rents, it stated "that the jury present &c. 4*d.* due unto the lord for every wey of coals that is transported out of the lordship." No commission was proved, nor was it signed by the jury :—Held, that this survey was inadmissible either as a public document or as evidence of reputation. *Beaufort* (*Duke*) v. *Smith*, 4 Ex. 456 ; 19 L. J., Ex. 97.

A parliamentary survey made during the Commonwealth is evidence of reputation, whether

made under competent authority or not. *Freeman* v. *Read*, 4 B. & S. 174; 32 L. J., M. C. 226; 10 Jur. (N.S.) 149.

Commission of Lord.]—An ancient survey of a manor made before commissioners appointed by the lord of the manor and a jury of the tenants of the manor, is admissible as evidence to shew the boundaries of the manor; but is not admissible as evidence of the lord's title to wreck. *Talbot* v. *Lewis*, 6 Car. & P. 603.

Terriers.]—A terrier or a map of the parish, not signed by any of the parishioners or parish officers, is not admissible evidence of the boundary of the parish. *Earl* v. *Lewis*, 4 Esp. 3.

In order to render a terrier or other ancient document admissible, it is not necessary that it is produced from the most proper place of custody; it is sufficient that it comes from a place where it might reasonably be expected to be found; and, therefore, where a terrier was produced by the son of an attorney who was a registrar of a diocese, and who stated that he brought the document from his father's office:—Held, that it was receivable, although it appeared there was a general registry-room belonging to the cathedral. *Croughton* v. *Blake*, 12 M. & W. 205; 13 L. J., Ex. 78; 8 Jur. 275.

A copy from the parish registry, if the original cannot be found, is evidence. The proper repositories of terriers and vicars' books to make them evidence, are the church chest, the registry of the bishop, and the registry of the archdeacon. *Armstrong* v. *Hewett*, 4 Price, 216; 18 R. R. 707.

A return made by the incumbents of a parish church, and another clergyman, in answer to queries sent to them by the bishop of the diocese, for the information of the governors of Queen Anne's Bounty, when an augmentation took place, is admissible, as being in the nature of an inquisition in a public matter. *Carr* v. *Mostyn*, 5 Ex. 69; 19 L. J., Ex. 249.

Terriers of the glebe lands and other rights belonging to a parish church, dating from 1727 to 1825, containing the following clause: "Easter Offerings. Every communicant, 2*d.*; every cow, 2*d.*; every plough, 2*d.*; every foal, 1*s.*; every hive of bees, 1*d.*; every house, 3½*d.*"—are evidence of such a custom as excludes the common-law right (if such exists) to a payment of 2*d.* for every member of a family of the age of sixteen as an Easter offering, because it includes items to which the common-law right does not extend. *Reg.* v. *Hall*, 7 B. & S. 642; 35 L. J., M. C. 251; L. R. 1 Q. B. 632; 12 Jur. (N.S.) 892.

A terrier without date and bearing the signatures of various persons, having no addition or designation affixed to their names, is admissible in evidence on behalf of the vicar, if produced in circumstances shewing it to be a genuine document. *Hall* v. *Farmer*, 2 Y. & C. 145.

County History.]—The manors of R. and of S., the parishes of C. and of Y., and the counties of B. and of G., were conterminous:—Held, in an action for disturbance of common, in which the boundaries of the two manors came in question, a county history of the county of B. which stated the boundaries of the counties at this spot was not receivable. *Evans* v. *Getting*, 6 Car. & P. 586.

Grants.]—Ancient grants are not to be received in evidence, unless they can be accounted for, as coming from the hands of some one connected with the estate to which they relate. *Swinnerton* v. *Stafford* (*Marquis*), 3 Taunt. 91.

7. Parish Registers.

Baptism.]—An entry in the register of the christening of a child, as to the time of its birth, is not of itself sufficient evidence of the age. *Wilson* v. *Law*, 3 Stark. 63; 23 R. R. 757.

If a parish register of baptisms states that the person baptised was born on a particular day, that is not evidence of the date of its birth. *Rex* v. *Clapham*, 4 Car. & P. 29. S. P., *Burghart* v. *Angerstein*, 6 Car. & P. 690.

A baptismal register, in which the party is described as the illegitimate son of his mother, is admissible on the trial of an issue as to the legitimacy of such party. *Cope* v. *Cope*, 1 M. & Rob. 269; 5 Car. & P. 604. S. P., *Morris* v. *Davies*, id. 271, n. (*b*); 3 Car. & P. 215.

A register of baptism is not per se evidence of the place of birth of the party baptised. *Rex* v. *North Petherton*, 5 B. & C. 508; 8 D. & R. 325; 4 L. J. (O.S.) K. B. 213; 29 R. R. 305.

A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register, made at a subsequent period by a succeeding incumbent, founded upon such minute. *Doe* d. *Warren* v. *Bray*, 3 M. & R. 428; 8 B. & C. 813; 7 L. J. (O.S.) K. B. 161.

It requires very strong evidence to satisfy the court that a parish register is not to be trusted in so material a matter as a christian name of a child whose baptism is recorded. *Webb* v. *Haycock*, 19 Beav. 342.

Marriage.]—The registry of a marriage is evidence between strangers of the time of the marriage. *Doe* d. *Woolaston* v. *Barnes*, 1 M. & Rob. 386.

An examined copy of an entry in a parish register of marriages is receivable to prove a marriage, although the entry in the register purports to be attested by one witness only, the words, "in the presence of" in the entry being followed by one name only. *Doe* d. *Blayney* v. *Savage*, 1 Car. & K. 487.

—— **Licence.**]—To prove a marriage by special licence in a private house, the affidavit made for the purpose of obtaining it, and the fiat by the archbishop from the proper office, and also a copy of the register of the parish which stated the marriage to have been by special licence at a private house, were produced:—Held, sufficient, without producing or accounting for the licence. *Doe* d. *Egremont* (*Earl*) v. *Grazebrook*, 3 G. & D. 334; 4 Q. B. 406; 12 L. J., Q. B. 221; 7 Jur. 530.

Burial.]—The 52 Geo. 3, c. 146, s. 5, requires parish registers to be kept at the parson's house or in the church; the custody of such registers by the parish clerk at his house is not, unless accounted for, such reasonably proper custody as to render receivable in evidence an extract made by a witness from a book produced to him as the parish register by the clerk at the clerk's house. *Doe* d. *Arundel* (*Lord*) v. *Fowler*, 14 Q. B. 700; 19 L. J., Q. B. 151; 14 Jur. 179.

A witness sent to verify a copy of a register of burial, went to a house which he was told by a

person whom he met in the street was the house of the parish clerk, and compared it with the entry in a book which was produced as the parish register by a person who said he was the parish clerk:—Held, that the copy was inadmissible, the custody of the book not being that prescribed for the parish register by s. 5, and being unaccounted for. *Ib.*

In an action for use and occupation by the reversioner, against a person who had been tenant for years, determinable on three lives, a register of burials at a Wesleyan chapel is not admissible to prove the death of one of the cestuis que vie; nor is the evidence of a witness, who heard in the family that another of the cestuis que vie was dead. *Whittuck* v. *Waters*, 4 Car. & P. 375.

Lost or Damaged.]—Parish registers are admissible in evidence, notwithstanding the loss of a leaf, not destroying the series of entries. *Walker* v. *Wingfield*, 18 Ves. 443; 11 R. R. 232.

If a vicar of a parish is applied to for an extract of a parish register of a particular date, and he states that there is no register book of that year, this is not sufficient proof of loss of the book to let in secondary evidence of the contents of the register without calling the vicar. *Walker* v. *Beauchamp*, 6 Car. & P. 552.

If an original parish register is produced on a trial, that certain entries in it should be read, the jury may look at the book to see whether the entries which have been read are in their proper places or not, but for no other purpose. *Ib.*

Handwriting and Signature.] — A copy of a register of marriage, signed with the name of a person who had been curate of the parish eighty years before the trial, and who signed as curate, produced by a witness who had been seven years parish clerk, and who said that the same signature in the same handwriting appeared in several places of the original register, is admissible, though no proof was given of the curate's death, and no further proof of his handwriting. *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314; 16 L. J., Q. B. 218.

In support of a plea of coverture, an examined copy of a register of marriage between defendant and J. G. was given in evidence. A witness deposed that he knew J. G. and his handwriting, and that the handwriting of the J. G. in the register was that of the person whom he knew:—Held, that the evidence was admissible without the production of the original register. *Sayer* v. *Glossop*, 2 Ex. 409; 17 L. J., Ex. 300.

An extract from a parish register, signed by the curate of the parish, is admissible, without proof of the signature of the curate. *Porter's Trusts, In re*, 25 L. J., Ch. 688; 2 Jur. (N.S.) 349; 4 W. R. 443.

Extracts from parish registers signed by persons describing themselves in such signatures as rectors or vicars, are sufficient, within 14 & 15 Vict. c. 99, s. 14, but not where the description was incumbent or curate without further evidence. *Hall, In re*, 2 De G. M. & G. 748; 9 Hare (App.), xvi.; 22 L. J., Ch. 177; 17 Jur. 29; 1 W. R. 2.

Charges.]—A person who applied under 6 & 7 Will. 4, c. 86, to search a parish register for burials and baptisms, was told by the parish clerk in whose custody it was, that if any extracts from the register were made by the applicant, he must pay a fee to the incumbent as for certified copies. Several extracts having been made after this intimation, and paid for:—Held, first, that the charge was an extortionate one, unwarranted by the statute. *Steele* v. *Williams*, 8 Ex. 625; 22 L. J., Ex. 225; 17 Jur. 464.

Held, secondly, that the money thus wrongly paid could be recovered from the parish clerk. *Ib.*

Appointment of Registrar.]—In every case of vacancy of the office of superintendent registrar of births, marriages and deaths in any union, the power of filling up the vacancy is by 6 & 7 Will. 4, c. 86, given to the guardians; and the clerk to the guardians has no right to claim the appointment except in the case of the first appointment after the act first came into operation. *Reg.* v. *Acason*, 2 B. & S. 795; 31 L. J., Q. B. 227; 8 Jur. (N.S.) 841; 6 L. T. 535; 10 W. R. 691.

Scotch Parish Registers.]—Scotch parish registers or certified extracts from them receivable in Scotch courts as kept under the sanction of public authority, are receivable in English courts as to matters properly and regularly recorded in them. *Lyell* v. *Kennedy*, 59 L. J., Q. B. 268; 14 App. Cas. 437; 62 L. T. 77; 38 W. R. 353—H. L. (E.)

—— **Proof of Writing—Duty.**]—Entries in Scotch parish registers of births, deaths and marriages are only admissible in evidence if it is proved either that they are in the handwriting of a deceased person whose duty it was to make the entries, or that a public duty to keep the registers was imposed upon the person making the entries. *Lyell* v. *Kennedy*, 56 L. T. 647; 35 W. R. 725—C. A.

Colonial.] — Extracts from colonial parish registers of the entries of marriages, baptisms and burials are not receivable as evidence in support of a pedigree, unless it is proved that such registers are required to be kept by the law of the colony, and such extracts are proved to be correct copies of the register, and are signed by the registrar, whose signature must also be verified. *Evans* v. *Ball*, 38 L. T. 141.

8. Non-Parochial Registers.

Under 3 & 4 Vict. c. 92.]—See a note in 9 Car. & P. 793, for a list of registers made admissible under this statute.

Fleet.]—The Fleet registers of marriages are not receivable in evidence for any purpose whatsoever. *Doe* d. *Davies* v. *Gatacre*, 8 Car. & P. 578.

The Fleet register, evidence not as a register, but a declaration upon the fact. *Lloyd* v. *Passingham*, 16 Ves. 59.

Church Register—Memorandum.]—A memorandum in a register of a church by its deceased rector made 110 years ago, though not a contemporaneous entry made in the regular course of the register, is admissible as evidence, and goes to prove that the rector did the things stated in the memorandum. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.) See also *Bidder* v. *Bridges*, 54 L. T. 529; 34 W. R. 514.

—— **Entry of Date of Birth.**]—Although an entry in a baptismal register by the officiating clergyman of the day when the baptised child

was born furnishes no proof per se that the child was born on the day stated, the entry will not be rejected altogether as an item of evidence upon an inquiry as to the legitimacy, from its birth before or after the marriage of its reputed parents, of the child in question. *Turner, In re, Glenister* v. *Harding*, 29 Ch. D. 985 ; 53 L. T. 528.

—— **Proof of Identity.**]—The entry of names and titles of persons in a church book, either for marriages or births, cannot be positive evidence of the marriage or birth of any person, unless the identity of person named in such entries is fully proved, and strengthened also with circumstances of cohabitation, and the allowance of parties. *Draycott* v. *Talbot*, 3 Bro. P. C. 564.

Bishop's Register.]—A bishop's register is evidence of the facts stated in it. *Arnold* v. *Bath and Wells (Bishop)*, 5 Bing. 316 ; 2 M. & P. 559 ; 7 L. J. (O.S.) C. P. 120.

In ejectment, it being proved by the rector of a parish that no parish registers existed there of earlier date than 1733, the transcripts of the registers of that parish for 1705 and 1706, returned under the 70th canon of 1603, were produced by the registrar of the diocese from the bishop's registry, and received as evidence of a marriage in 1705, and a baptism in 1706, of persons through whom the plaintiff traced his title. *Doe* d. *Wood* v. *Wilkins*, 2 Car. & K. 328.

Extracts from the register of the bishop of the diocese are admissible to prove the appointment to a parish office. *Hartley* v. *Cook*, 5 Car. & P. 441 ; 9 Bing. 728 ; 3 M. & Scott, 230 ; 2 L. J., C. P. 141.

Scotch Chapel.]—Books kept by the sessions clerk of a Scotch chapel, containing minutes of the kirk sessions, and other proceedings of the congregation, were admissible in evidence in a suit between members of the congregation. *Milligan* v. *Mitchell*, 3 Myl. & C. 72 ; 7 L. J., Ch. 37.

Episcopal Chapel.]—In the absence of proof that the registers of episcopal chapels at Edinburgh are by the law of Scotland documents of an authentic and public nature, copies thereof rejected as inadmissible by the law of England. *Conway* v. *Bearley*, 3 Hag. Ecc. 651.

Irish.]—The rule as to proof of marriages, births, &c., by the registers in the absence of living witnesses :—Held, not to apply to Ireland, where such have not been duly kept ; and copies therefore of instruments, and evidence of reputation, received after proof of no registers found, after proper search. *Roscommon Peerage*, 6 Cl. & F. 97.

At Library.]—Entry of birth of a dissenter's child in a register kept for the purpose at a public library, not evidence. *Taylor, Ex parte*, 1 Jac. & Walk. 483.

Roman Catholic.]—Upon the question of the legitimacy of one E. H. an entry, dated in 1804, in the Roman Catholic registry of marriages and baptisms of a parish, was offered in evidence of the baptism of the said E. H., in which she was described as the child of I. H. and H. his wife, signed by a clergyman who was proved to be deceased, and to have been the Roman Catholic curate of the parish. Evidence was also given that it was the duty of the clergyman, when baptising, to make an entry of the baptism, and to add a statement shewing whether or not the child was born in lawful wedlock :—Held, that the entry was inadmissible—1, because it was not contemporaneous ; 2, because there was no evidence to shew that the curate officiated at, or had personal knowledge of, the marriage. *Ryan* v. *Ring*, 25 L. R., Ir. 184.

Entries made in the chapel books by Roman Catholic clergymen, whose death and handwriting have been proved, are evidence of a marriage or baptism recorded thereby. *Malone* v. *L'Estrange*, 2 Ir. Eq. R. 16. See *Malone* v. *O'Connor*, Macl. & R. 469 ; 6 Cl. & F. 572.

Semble, that entries of births and marriages made by the curate of a Roman Catholic chapel in the discharge of his duty are not admissible as evidence. Sed quære *Malone* v. *L'Estrange*, 2 Ir. Eq. 16. *Ennis* v. *Carroll*, 17 W. R. 344. (Ir.)

9. Registrar-General's Certificates of Births, Deaths and Marriages.

Register of Births.]—A copy of an entry in the register book of births in a registrar's district, within a superintendent registrar's larger district, certified to be a true copy under the hand of the deputy superintendent registrar, who also certified under his hand that the register book was in his lawful custody :—Held, admissible evidence of the entry in the register book upon the mere production of such copy. *Reg.* v. *Weaver*, 43 L. J., M. C. 13 ; L. R. 2 C. C. 85 ; 29 L. T. 544 ; 22 W. R. 190 ; 12 Cox, C. C. 527.

Upon an indictment for carnally knowing a girl, being above the age of ten years and under the age of twelve years, such a certified copy of an entry shewing that the child was of the age of eleven years and eight months was held sufficient proof of the age, there being independent evidence of the identity of the child with the name of the child entered into the book. *Ib.*

The entry in a register of births under 6 & 7 Will. 4, c. 86, is evidence of the birth having taken place before the date of registration, but not of the exact date of birth. *Wintle, In re*, L. R. 9 Eq. 373 ; 21 L. T. 781 ; 18 W. R. 394.

—— **Of Deaths.**]—A certified copy of the register of deaths, under the seal of the general registry office, accompanied by an affidavit of identity, is sufficient evidence of the death. *Parkinson* v. *Francis*, 15 Sim. 160.

Identity.]—The identity of the persons named in certificates of marriage, baptism and burial with persons of the same names appearing in a pedigree produced and relied on by a plaintiff to establish his claim in ejectment, is a question entirely for the jury, and the court will not grant a rule to enter a nonsuit on the ground of want of evidence of such identity. *Hubbard* v. *Lees*, 4 H. & C. 418 ; 35 L. J., Ex. 169 ; L. R. 1 Ex. 255 ; 12 Jur. (N.S.) 435 ; 14 L. T. 367 ; 14 W. R. 694.

10. Foreign Registers of Births, Deaths and Marriages.

Indian—Baptisms.]—In an action to determine the right to letters of administration, the issue being as to the legitimacy of certain persons, copies of registers of baptisms in India were admitted in evidence. *Queen's Proctor* v. *Fry*, 48 L. J., P. 68 ; 4 P. D. 230. See also *Evans* v. *Ball*, supra.

—— **Marriage—Register kept in Custody of Secretary of State.**]—The court allowed a marriage in India to be proved by the production from the India Office of a register kept in the custody of the secretary of state, and by a copy of the entry certified and signed by the under secretary of state, and sealed with the seal of the secretary of state, the parties themselves also swearing to the marriage. *Regan* v. *Regan*, 1 R. 493; 67 L. T. 720.

French.]—Attested copies of French registers of marriages, births, and deaths are admissible upon the testimony of a French advocate, that such registers were kept according to French law, and would be received in evidence in the French courts. *Perth Earldom*, 2 H. L. Cas. 865.

—— **Births.**]—It being proved that the register of births kept at the mairie at Hyères could not be removed:—Held, that the contents of the entry could be proved by a copy the accuracy of which was proved by a witness who had himself compared it with the original. *Burnaby* v. *Baillie*, 42 Ch. D. 282; 38 W. R. 125.

At Embassy.]—A copy of an entry, made from a certificate of baptism by a chaplain of a British minister at a foreign court, is not sufficient evidence of birth and parentage. *Dufferin and Clandeboye's (Lord) Peerage*, 2 H. L. Cas. 47.

A book kept at the British ambassador's hotel in Paris, in which the ambassador's chaplain makes and subscribes entries of all marriages of British subjects celebrated by him, has not the authenticity of an English parish register. An attested copy of an entry in it is not admissible to prove a marriage. *Athlone Peerage*, 8 Cl. & F. 262.

Consular Seal and Signature—Deaths.]—Consular signature attached to a copy of a document under the 15 & 16 Vict. c. 86, s. 22, does not make the document itself receivable evidence. *Forbes, In re*, 9 Hare (App.) xx. n.; 1 W. R. 32.

The 22nd section of the 15 & 16 Vict. c. 86, making consulate seals receivable, is not retrospective. *Brooks* v. *Lery*, 1 W. R. 120.

11. Other Registers.

a. Trade-Marks.

Books of Registrar of Trade-Marks.]—The books of the registrar of trade-marks, which shew marks the registration of which has been refused, are not evidence that these marks are publici juris. *Orr-Ewing* v. *Johnston*, 13 Ch. D. 434, 442.

Whether Conclusive.]—P. registered "braided fixed stars" as a trade-mark for matches. After the expiration of five years another manufacturer applied to cancel the registration, on the ground that the words could not be registered as a trade-made, for that "fixed stars" was a name well known in the trade for a particular description of matches before P. used the alleged trade-mark, and that the words "braided fixed stars" were only a proper description of a kind of matches made by P. under a patent which had recently expired, and which matches were at the time of the registration well known in the trade by that name, and differed from the "fixed stars" formerly known by having a braided stem, which was the subject of the patent:—Held, by Chitty, J., that even if s. 3 of the Trade Marks Registration Act, 1875, did not make the lapse of five years conclusive evidence that the alleged trade-mark was a proper trade-mark, which, semble, it did, it at all events excluded evidence to shew that words which primâ facie appeared to be fancy words and proper to constitute a trade-mark were not capable of constituting one. His lordship therefore declined to hear evidence on the subject, and refused the application. But held, on appeal, that a mark which is not authorised to be registered as a trade-mark does not acquire the character of a trade-mark by being on the register for five years, and may be removed from the register though that period has elapsed, and that evidence ought therefore to have been admitted which went to shew that at the time of the registration the words "braided fixed stars" were merely descriptive of a kind of matches well known in the trade. *Palmer's Application, In re*, 51 L. J., Ch. 673; 21 Ch. D. 47; 46 L. T. 787; 46 J. P. 772—C. A.

Whether a person sued for using a name which has been five years on the register as a trade-mark can defend himself on the ground that it is not a trade-mark, quære. *Ib.*

And see Trade.

b. Patents.

See Patent.

c. Ships.

See Shipping.

d. Land.

See Deed and Bond.

12. Parish Books.

Custody.]—On the trial of an indictment for the non-repair of highways, entries in a parish book, produced by the churchwardens from the parish chest, to shew who were the surveyors of the highways, are receivable. *Reg.* v. *Pembridge*, Car. & M. 157.

A written resolution of a vestry meeting purporting to allow Mr. D. 50*l.* is not admissible to prove what was said by the persons who were at the meeting, with a view of shewing for what the 50*l.* was allowed. *Ib.*

The workhouse of a union is not an improper repository for documents of a parish within the union, so as to make them inadmissible when produced thence. *Slater* v. *Hodgson*, 2 New Sess. Cas. 488; 9 Q. B. 727.

Boundaries.]—On an issue raised upon an alleged immemorial custom for the parishioners of a parish to go through a particular house upon their perambulations of the parish boundaries, entries in the parish books, recording the fact that the perambulations had taken a particular line, are not evidence on such an issue. *Taylor* v. *Devey*, 7 A. & E. 45; 7 L. J., M. C. 11.

Under an issue to try the boundaries of a parish, papers handed over to the present incumbent by the representative of his predecessor, as papers belonging to the parish found in the late incumbent's possession, are evidence. *Earl* v. *Lewis*, 4 Esp. 1.

On the question whether a place is parcel of a certain parish, old entries made by a churchwarden in a book, by which he does not charge himself, but in which he merely makes statements relative to repairs done to a chapel in the parish church, alleged to belong to the place in question, are not evidence. *Cooke* v. *Banks*, 2 Car. & P. 478; 31 R. R. 680.

Right to Pew.]—In an action for disturbing the plaintiff's enjoyment of a pew, claimed in right of a messuage, an old entry in the vestry book, signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is admissible to prove his right to the pew. *Price* v. *Littlewood*, 3 Camp. 288.

Right to Fishery—Rate-Books.]—In an action for trespass to a several fishery, entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the plaintiff's predecessors in title. *Smith* v. *Andrews*, [1891] 2 Ch. 678; 65 L. T. 175.

Burials.—An entry in an old account of burial fees received by the sexton of a large parish, by which he charged himself with the receipt of a sum of money for the burial of Joseph Lloyd, described as in Wells-street, admitted as evidence that a person of that name, who was proved by the parish register of burials to have been buried there on the day on which the entry bore date, resided in Wells-street. *Lloyd* v. *Wait*, 1 Ph. 61; 6 Jur. 456.

An entry in a parish book, kept at the parish church, of a burial in the workhouse cemetery within the parish, is evidence of the death of the person named, though it appears that the incumbent sanctioned the entries in the book on the faith of the statements made by others, and not from his personal knowledge of the burials. *Doe* d. *France* v. *Andrews*, 15 Q. B. 756.

Right of Election.]—Old entries in the vestry books of a parish are not evidence to shew the right of the election to a parish office to be in the parishioners and rector, as it did not appear whether the incumbent was present at the meeting they related to; but several entries of vestry meetings at which the rector was present were received. *Hartley* v. *Cook*, 5 Car. & P. 441; 9 Bing. 728; 3 M. & Scott, 230; 2 L. J., C. P. 141.

Vestry Minute-Book — Membership.] — The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the contract. Afterwards the defendant was elected a member of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant, and the minute-book of the vestry containing his name as a member in attendance, were put in as evidence at the trial:—Held, that there was evidence under s. 60 of the above act that the defendant had acted as member of the vestry. *Hunnings* v. *Williamson*, 52 L. J., Q. B. 416; 11 Q. B. D. 533; 46 L. T. 361; 32 W. R. 267.

Ownership of Land.] —An information on behalf of the poor of the parish of P. stated an agreement, dated in 1634, by the then Earl of Portland, which recited that there lay in his park at R. divers parcels of land, which contained about six and a half acres, and belonged to the poor of the parish of P., for which lands lying dispersed in his said grounds, being theretofore ordained for good and charitable uses, the earl was desirous to give a full yearly rent and satisfaction, and thereby promised and agreed to pay to the churchwardens and overseers of P. for the time being the yearly sum of 6*l.*; and the earl thereby further promised and agreed to make such further assurances thereof as by counsel should be advised, and to set out sufficient land of a better value for performance thereof, which he would either tie for the payment of the said yearly rent, or otherwise assure and convey to such person and persons and their heirs as by the vestry of the said parish should be nominated to be feoffees in trust for the same. No conveyance was shown to be made in pursuance of this agreement. It appeared from entries in the parish books that the earl and his successors, in the ownership of part of his land (which had since been divided), had paid every year 6*l.*, which was expressed in such entries to be rent of parish land; and that in 1849 a receipt was accepted by the then owner of part of the earl's land for 6*l.*, for "rent of parish land":—Held, that it could not be presumed in the face of this evidence that there had ever been any sale of the parish land to the earl in consideration of a rent-charge. *Att.-Gen.* v. *Stephens*, 1 Kay & J. 724; 3 Eq. Rep. 1072; 24 L. J., Ch. 694; 1 Jur. (N.S.) 1039; 3 W. R. 649. *And see* 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

In the agreement the amount of rent was written upon an erasure, and it was only signed by the Earl of Portland, but being produced out of the custody of the parish officers:—Held, that it was evidence for a jury, coupled with the entries in the parish books, to prove that the rent mentioned in those entries was the same as that stipulated to be paid in such agreement, and that therefore the agreement was to pay 6*l.* a year in respect of six and a half acres of land belonging to the parish. *Ib.*

The books in which the said entries were being the churchwardens' books, and appearing to have been audited, and being produced from the proper custody, although not signed by any one:—Held, that the entries were good evidence of the receipt by the parish of 6*l.* yearly for rent of parish land. *Ib.*

Evidence of Consent to Suit.]—Where churchwardens, by order of the parish, commence a suit, the consent of the parish shall bind it, and the vestry-book shall be allowed as evidence of the consent. *Radnor Parish, In re*, 4 Vin. Abr. 529, pl. 10.

Production at Hearing.]—Plaintiff had subpœnaed the defendants' agent, to produce, at the hearing, a parish book in his custody:—Held, that, as it was a public document, and in the possession of the defendants' agent, the defendants were entitled to have it produced, and read at the hearing, for their benefit. *Ward* v. *Pomfret*, 5 Sim. 475; 2 L. J., Ch. 22.

13. ORDERS OF POOR LAW COMMISSIONERS.

Entries.]—Entries made by a medical officer in a book, which he is directed to keep by a rule

under the hand and seal of the poor law commissioners, of his visits to sick paupers, are not admissible for him as a public writing to prove that he paid such visits. *Merrick* v. *Wakley*, 3 N. & P. 284 ; 8 A. & E. 170 ; 1 W. W. & H. 268 ; 8 Car. & P. 283 ; 7 L. J., Q. B. 190 ; 2 Jur. 838.

14. Books of Quarter Sessions.

In what Court.]—An original sessions book being a paper book, containing the orders and other proceedings of the court, made up and recorded after each sessions by the clerk of the peace, from minutes taken by him in court, headed at each sessions with the usual caption of the justices at sessions, and signed at the termination of the proceedings of the sessions, "By the court, (*J. C.*) clerk of the peace," and being the only record kept of the proceedings of the sessions, and always received in the court for the purpose of proving them, is admissible in the same court of quarter sessions, though sitting under a different commission, to prove an order of the court. *Reg.* v. *Yeareley*, 1 P. & D. 60 ; 8 A. & E. 806 ; 8 L. J., M. C. 9.

Contents of—How Proved.]—The minute-book of a court of quarter sessions is not evidence of its proceedings. The record should be made upon parchment, and an examined copy produced by a witness who examined it. *Rex* v. *Thring*, 5 Car. & P. 507.

Semble, that a minute-book in which an entry of the proceedings at sessions is made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence as a proof of the fact there stated. *Rex* v. *Bellamy*, 1 R. & M. 171.

15. Bankers' Books.

Inspection under Bankers' Books Evidence Act, 1879.]—The effect of s. 3, of the Bankers' Books Evidence Act, 1879, is to make copies of entries in the books of a banker admissible evidence against any one. Therefore, copies of entries in the books of the bankers of a defendant are evidence against the plaintiff. *Harding* v. *Williams*, 49 L. J., Ch. 661 ; 14 Ch. D. 197 ; 42 L. T. 507 ; 28 W. R. 615.

—— **When Ordered.**]—In an action for goods sold and delivered, to which payment and a counterclaim were pleaded, the plaintiff, after issue joined, applied ex parte to a judge at chambers, and obtained leave, under s. 7 of the Bankers' Books Evidence Act, 1879, to inspect the defendant's banking account. The order was served on the defendant's bankers, and they, on receipt of it, informed the defendant, who thus heard of the order which had been made. The defendant took out a summons before the same judge to set aside the order, and obtained a variation of it by which the inspection was limited to the period within which the goods were alleged to have been sold and delivered :—Held, that under the circumstances, the plaintiff was not entitled to the order for inspection. *Davies* v. *White*, 53 L. J., Q. B. 275 ; 50 L. T. 327 ; 32 W. R. 520.

The plaintiff in an administration action was a residuary legatee of M., a solicitor, the testator in the action, and in the course of the cross-examination on the accounts, before the chief clerk, of the defendant H., who was the testator's son-in-law and executor, and was carrying on business as a solicitor under the firm of "M. & H.," applied to the court under s. 7 of the Bankers' Books Evidence Act, 1879, that she, or her solicitor, who had been appointed receiver in the action, might be at liberty to inspect at the bankers of the testator and the defendant the books of the bank for four years containing the entries of the accounts of the testator and also of M. & H., and to take copies of such entries. The plaintiff's solicitor deposed that the inspection was necessary for the purposes of the action :—Held, that the plaintiff was entitled to the order asked for. *Marshfield, In re, Marshfield* v. *Hutchings*, 55 L. J., Ch. 522 ; 32 Ch. D. 499 ; 54 L. T. 564 ; 34 W. R. 511.

An order under s. 7 of the Bankers' Books Evidence Act, 1879, giving liberty to inspect and take copies from bankers' books should not be made unless special grounds for the application are shown to exist ; but upon such grounds the order will be made before trial. *Perry* v. *Phosphor Bronze Co.*, 14 R. 351 ; 71 L. T. 854—C. A.

—— **Bank no Party to Action.**]—Sect. 7 of the Bankers' Books Evidence Act, 1879 (enabling the court to give liberty to a party to a legal proceeding to inspect and take copies of any entries in bankers' books) should be read in conjunction with the preceding sections. The power given to the court by that section is purely discretionary, and should not be exercised where a defendant seeks to prove justification of a libel imputing pecuniary embarrassment. *Emmott* v. *Star Newspaper Co.*, 62 L. J., Q. B. 77 ; 5 R. 137 ; 67 L. T. 829 ; 57 J. P. 201.

—— **Accounts of Persons not Parties.**]—The Bankers' Books Evidence Act, 1879, gives power to order inspection of entries in bankers' books relating to banking accounts kept in the names of other persons besides the parties to the action. *Howard* v. *Beall*, 58 L. J., Q. B. 384 ; 23 Q. B. D. 1 ; 60 L. T. 637 ; 37 W. R. 555.

The court has jurisdiction under s. 7 of the Bankers' Books Evidence Act, 1879, to order inspection before trial of entries in bankers' books relating to accounts kept in the name of the third person, if the court is satisfied that such third person is identified with a party to the action, and that such entries are material and would be admissible in evidence against a party to the action upon the trial. *Howard* v. *Beall* (58 L. J., Q. B. 384) considered. *South Staffordshire Tramways Co.* v. *Ebbsmith*, 65 L. J., Q. B. 96 ; [1895] 2 Q. B. 669 ; 73 L. T. 454 ; 44 W. R. 97—C. A.

The court will not, as a general rule, make an order under s. 7 of the Bankers' Books Evidence Act, 1879, for the inspection before the trial by one of the parties to an action of the banking account of third persons not parties to or concerned in the litigation. *Pollock* v. *Garle*, 66 L. J., Ch. 788 ; [1898] 1 Ch. 1 ; 77 L. T. 415 ; 46 W. R. 66—C. A.

—— **Application Ex parte.**]—In civil proceedings an order for inspection of the banking account of a party under s. 7 of the Bankers' Books Evidence Act, 1879, may properly be made upon an ex parte application, although as a general rule it would be advisable to serve the party before making the order, and the

application need not in every case be supported by evidence. The inspection granted ought, however, to be limited to the period covered by the matters in dispute in the proceedings. *Arnott* v. *Hayes*, 56 L. J., Ch. 844; 36 Ch. D. 731; 57 L. T. 299; 36 W. R. 246—C. A.

In civil proceedings an application for such an order for inspection ought not to be made ex parte; and semble, that the power to grant the order ex parte is limited to criminal proceedings. *Davies* v. *White*, supra, col. 629.

In an action where one of the issues was, whether the plaintiff, who had an account in a bank, had paid to the bank a sum of money due to the same bank by another party, who had also an account therein, the court, on the ex parte application of the defendant, made an order under s. 7 of the Bankers' Books Evidence Act, 1879, giving him liberty to inspect and take copies of any entries in the accounts of the plaintiff and the party indebted to the bank, with reference to any sum or sums paid by the plaintiff for the indebtedness of the other party. *Fitzpatrick* v. *McDonald*, 30 L. R., Ir. 249.

—— **Irrelevant Entries.**]—Where in an action an application is made before trial for inspection of the account in his bankers' books of a party to the action, the court, in exercising its jurisdiction for that purpose under s. 7 of the Bankers' Books Evidence Act, 1879, will follow the ordinary rule as to discovery before trial, and will refuse inspection of entries as to which the party whose account is sought to be inspected deposes that they are irrelevant. *South Staffordshire Tramways Co.* v. *Ebbsmith*, supra.

By the Bankers' Books Evidence Act (42 & 43 Vict. c. 11), s. 3, subject to the provisions of this act, a copy of any entry in a banker's book shall be received as primâ facie evidence of such entry. By s. 7, on the application of any party to a legal proceeding a court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. The plaintiff in an action for probate having been ordered to produce for inspection documents in her possession relating to the matters in question in the action, produced the pass-books of her banking account, sealing up parts of them which were, as she deposed, irrelevant to the matters in issue. Application was thereupon made by the opposite parties for an order authorising them to inspect the books, or in the alternative for leave to issue a subpœna duces tecum to the officers of the bank for their production:—Held, that the application could not be granted, for there was nothing in the act to deprive a party to a legal proceeding of his right to refuse discovery of entries in his banker's books on the ground that they were irrelevant, and that whether the subpœna duces tecum should be granted was a matter which ought to be left for the determination of the judge at the trial. *Parnell* v. *Wood*, [1892] P. 137; 66 L. T. 670; 40 W. R. 564—C. A.

—— **Scotch Bank—Jurisdiction of Judge of High Court in England to Make Order.**]—A judge of the High Court of Justice in England has jurisdiction under s. 7 of the Bankers' Books Evidence Act, 1879, to make an order that a party to a legal proceeding in England may be at liberty to inspect and take copies of entries in the books of a bank in Scotland for the purposes of such proceeding. *Kissam* v. *Link*, 65 L. J., Q. B. 433; [1896] 1 Q. B. 574; 74 L. T. 368; 44 W. R. 452—C. A.

Before the Act.]—A banker's ledger is admissible to show that a customer had no funds in his hands on a particular day, although entries were made therein by several of the clerks of the house. *Furness* v. *Cope*, 2 M. & P. 197; 5 Bing. 114; 6 L. J. (O.S.) C. P. 242.

A banker's pass book delivered to his customer, in which there are entries on one side only, is not evidence of a settled account between the parties, although the customer keeps the book, without making any objection to the entries contained in it. *Randleson, Ex parte*, 2 Deac. & C. 534.

—— **Proof of.**] — Entries in the books of bankers, merchants, &c., can only be proved by the clerk by whom the entries have been made. *Cooper* v. *Marsden*, 1 Esp. 1.

Bank of England.]—Copies of the books of the Bank of England are evidence, but, upon a question whether the signature to a transfer is in a genuine handwriting, the book must be produced. *Auriol* v. *Smith*, 18 Ves. 198. See *Mortimer* v. *M'Callan*, 6 M. & W. 58; 9 L. J. Ex. 73; 4 Jur. 172.

Copies from the transfer book of stock are good evidence. *Marsh* v. *Collnett*, 2 Esp. 665; 5 R. R. 763.

To prove a transfer of stock, a copy from the bank books must be produced, parol evidence not being admissible. *Breton* v. *Cope*, Peake, 43.

16. Books of other Companies and Corporations.

India House Returns.]—A book kept at the India House, from returns given on oath, pursuant to 53 Geo. 3, c. 155, containing the lists or number of passengers going on board an East India ship, was evidence to shew the value of the voyage, on the ground that it is a public book, kept by the authority of an act of parliament. *Richardson* v. *Mellish*, 2 Bing. 229; 9 Moore, 435; 1 Car. & P. 241; R. & M. 66; 3 L. J. (O.S.) C. P. 265; 27 R. R. 603.

Companies.] — In a case of pedigree, an entry in the books of the Merchant Taylors' Company, that C. was admitted a freeman of that company by the description of T. C., of S. street, son of J. C., deceased, is receivable, not only to prove the fact that he was admitted a freeman, but that the company received him by that description, and entries of admission to the freedom of the city of London are also evidence in like manner. *Collins* v. *Maule*, 8 Car. & P. 502.

The books of an insurance company, in which they charge themselves with the receipt of a certain sum of money as a premium to insure a particular house in the occupation of S. from fire, are evidence of his occupation; and such entries are evidence, because the party making them charges himself with the receipt of money. *Doe* d. *Smith* v. *Cartwright*, 1 Car. & P. 218; R. & M. 62; 28 R. R. 774.

Land was taken upon lease, and an association formed for the purpose of erecting and carrying on waterworks. Some years afterwards the fee

simple in the lands was conveyed to the then shareholders, the conveyance being of undivided pieces of land without reference to any company. The lands were subsequently let, and the rent received by a treasurer on behalf of a committee of shareholders. Minute books were kept by a secretary in the same way as previously to the conveyance, though it appeared that the shareholders no longer considered themselves as a company:—Held, that although the form of the conveyance in fee raised the presumption that the company had been dissolved, the evidence afforded by the subsequent minute books was sufficient to show that the company was still in existence and within the provisions of the Winding-up Acts. *Sheerness Well and Waterworks Co., In re*, 6 W. R. 118.

—— **Register of Shareholders.**]—The register of shareholders of a company within 8 & 9 Vict. c. 16, s. 9, authenticated by its seal, is admissible in evidence without any proof that such seal was affixed at an ordinary meeting of the company pursuant to the act, s. 9. *L. & N.-W. Ry.* v. *M'Michael*, 20 L. J., Ex. 6.

A. was indicted for forging, and uttering a transfer of shares in a railway company:—Held, that the register of shareholders kept under 8 & 9 Vict. c. 16, s. 9, was evidence to prove that an individual is a shareholder, without any authentication of the seal; and that, in order to sustain the indictment, it was unnecessary to give further proof that such individual was a shareholder of the company. *Reg.* v. *Nash*, 2 Den. C. C. 493; 21 L. J., M. C. 147; 16 Jur. 553.

The Companies Clauses Consolidation Act, 1845, enacts that the company shall keep a book, to be called "The Register of Shareholders," which is to contain the names, &c., of the shareholders, and to be authenticated by the common seal of the company, which book was to be primâ facie evidence of a party being a shareholder. In the present case the register book consisted of several large volumes, the last of which only, containing a recapitulation of the previous volumes, was authenticated by the seal of the company:—Held, that this was sufficient, and that it was properly received in evidence. *Inglis* v. *G. N. Ry.*, 16 Jur. 895.

The Companies Clauses Consolidation Act directs that all minutes of proceedings of directors shall be entered in a book; "and every such entry shall be signed by the chairman of such meeting, and such entry, so signed, shall be received in evidence," &c.:—Held, following *Miles* v. *Bough* (3 Q. B. 845), that where a meeting for a particular purpose was adjourned to a subsequent day, and the minutes of the adjourned meeting alone were signed by the chairman, the minute was properly admissible in evidence. *Ib.*

The Companies Clauses Consolidation Act for Scotland (8 & 9 Vict. c. 17, s. 9) requires, in the same terms as the English statute of that name, a book to be kept, containing in alphabetical order "the names of the shareholders," with the number of the shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares. The 29th section of the statute makes such book primâ facie evidence of a person being a shareholder, and of the number and amount of his shares:—Held, first, that as this was an exceptional privilege in favour of the company, the provisions of the statute with respect to the mode of keeping the book must be strictly complied with; and secondly, that an entry in the book, describing A. as possessed of a certain number of shares numbered from one given number to another given number, and stating a gross amount as paid upon these shares, was a sufficient compliance with those provisions, so as to render the book admissible in evidence. *Bain* v. *Whitehaven and Furness Junction Ry.*, 3 H. L. Cas. 1.

The statute requires that a book, to be called "the Register of Shareholders," shall be kept. The book actually kept was marked "Register of Proprietors":—Held, that this variation in the title did not prevent it from being given in evidence. *Ib.*

—— **Against Member.**]—Entries in the books of an incorporated company are not evidence against a member of the company, in respect of a contract entered into by him with the company, although the act by which the company is incorporated authorises each member to inspect and take copies of the books or any part of them. *Hill* v. *Manchester Waterworks Co.*, 2 N. & M. 573; 2 B. & Ad. 545; 3 L. J., K. B. 19.

Corporations.]—An entry in the public books of a corporation is not evidence for them, unless such entry is of a public nature. *Marriage* v. *Lawrence*, 3 B. & Ald. 142; 22 R. R. 326.

An entry in the books of a corporation held not evidence for them upon a question as to their right to toll; the entry not being one to which the public had a right of access. *Brett* v. *Beales*, 10 B. & C. 508; 8 L. J. (o.s.) K. B. 141.

The books of a corporation are not evidence to prove a usage, by entries of acts of submission by particular persons, to the exercise of rights insisted on, without proof, aliunde, of the situation of those persons, and their relative position with reference to the corporation. *Davies* v. *Morgan*, 1 C. & J. 587; 1 Tyr. 457; 9 L. J. (o.s.) Ex. 153.

Lapse of time dispenses with proof of the handwriting of the individual making entries in corporation books, where the document is admissible in se. *Ib.*

The entry in the books of a corporation, of an application to purchase lands, of the price of or charge for such lands, and of the receipt of a sum of money from the applicant:—Held, not evidence of a contract binding on the corporation. *Livesey* v. *Livesey*, 9 L. J., Ch. 73.

A book showing how the court of the lord mayor and aldermen have managed the estates of orphans, kept in the muniment room of the corporation, under the proper custody:—Held, to be receivable as evidence of the custom. *Bruin* v. *Knott*, 12 Sim. 436; 6 Jur. 885.

—— **What Documents.**]—In an action for tolls claimed by a corporation, an ancient schedule, produced from among their muniments, copies of which were delivered by their officer to the lessee of the tolls, and by the lessee to the collector, by which they have actually collected, is admissible for the corporation. *Brett* v. *Beales*, M. & M. 419.

Contra, when the copies in the hands of the lessee are not shewn to have been delivered to him from the corporation, although they correspond accurately with the old schedule. *Ib.*

A tenant of a corporation brought an action against O. for entering his several fishery in a public navigable river. At the trial, in order to

prove the ancient possession of the fishery, the plaintiff gave in evidence an assembly book of the corporation, containing entries shewing that the fishery was let for certain rents to a tenant. On exception to this evidence:—Held, that such book was admissible, for the rule is, that ancient documents, coming out of the proper custody, and purporting, upon the face of them, to exercise ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proof of possession. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593; 9 Jur. (N.S.) 1135; 9 L. T. 93; 12 W. R. 178.

—— **Unsigned Minute.**]—A minute, of date 1749, from an original unsigned minute-book, produced from the proper custody and kept in accordance with a charter of a society, is admissible evidence. *Lauderdale Peerage, The*, 10 App. Cas. 692—H. L. (Sc.)

Custody.]—The chest of an incorporated company, kept by their clerk for the time being, is the proper custody for old documents relative to the admission of freemen, and other acts of the company. *Shrewsbury (Warden)* v. *Hart*, 1 Car. & P. 114.

Such documents if kept in the clerk's house are inadmissible. *Ib.*

17. Probate and Letters of Administration.

Probate applies only to Personalty.]—By the law of England, the probate (and not the will) is the only admissible evidence in an action regarding the testator's personal estate. *Yates* v. *Thompson*, 3 Cl. & F. 569.

The probate of a will is not a sufficient authentication of it so far as it relates to copyholds. *Archer* v. *Slater*, 11 Sim. 507.

The court will not establish a will of copyhold; where a surrender is made to the use of a will, and an instrument is admitted to probate by the ecclesiastical court, the probate copy is sufficient to guide the uses of the surrender. *S. C.* 10 Sim. 624.

Probate of a will not evidence that copyholds pass by it. *Jervoise* v. *Northumberland (Duke)*, 1 Jac. & Walk. 570; 21 R. R. 229.

Probate is not evidence of will of real estate. *Gibson* v. *Whitehead*, 4 Madd. 244.

The probate of a will cannot be read in case of a real estate, if the defendant admits merely that he believes there is such a will; secus, if the admission is full. *Mullins* v. *Pratt*, Bunb. 6.

Conclusiveness.]—A will is made in French, and the probate in English, and varies from the original; probate being in a different language is not conclusive. *L'Fit* v. *L'Batt*, 1 P. W. 526.

The court will look only to the probate copy of a will, though strong grounds for suspecting that another copy tendered in evidence is the correct one. *Bernal* v. *Bernal*, 3 Myl. & Cr. 559, n.

Probate of will in the ecclesiastical court sufficient as far as it goes; farther proof if necessary may be proceeded on in this court. *Colman* v. *Sarrel*, 1 Ves. J. 54; 1 R. R. 83.

A codicil, expressed to be in event of testator's death before he joins his wife, was executed after their separation in the West Indies upon an intended voyage to England. The voyage being prevented by accident, he joined her, and they lived together there and in England, to which country they returned together; and though testator, having afterwards gone to Corsica and thence to Lisbon, died there, the codicil was held to be contingent, and not to take effect under the circumstances. Probate is not conclusive, not being refused except in a plain case. *Sinclair* v. *Hone*, 6 Ves. 607.

The court, not being satisfied that the probate sufficiently set out the testator's will, required the production of the original will, and did not confine its attention to the probate. *Manning* v. *Purcell*, 24 L. J., Ch. 522.

A paper proved as a will, reciting the marriage articles of the testator's daughter with A., confirming those articles, and directing that all the testator's property and effects shall be vested in A., preferable to any executor or administrator upon and after the testator's decease for all and every the purposes of his said agreement expressed or intended. The probate obtained by A. as executor held conclusive, and he was held not a trustee for the next of kin upon parol evidence of declarations, subsequent to the will. *Walton* v. *Walton*, 14 Ves. 318.

In a suit instituted in this court for the distribution of the assets of an intestate, the grant of letters of administration is conclusive evidence upon the question who is the intestate's sole next of kin. *Barrs* v. *Jackson*, 1 Ph. 382; 14 L. J., Ch. 433; 9 Jur. 609. Reversing 1 Y. & Coll. C. C. 585.

Evidence as to Executors and Administrators.]—An allegation that A., B., & C. were named executors, and that A. and B. proved the will, and are the personal representatives of the testator, may be proved by the production of the probate: and in the absence of any denial of that fact by the answers, or any averment that C. also proved, C. is not a necessary party to the suit. *Dyson* v. *Morris*, 1 Hare, 413; 11 L. J., Ch. 241; 6 Jur. 297.

The Probate-Act-Book of the prerogative court containing an entry of a will being proved, and of probate being granted to the executors therein named, admitted as evidence of those persons being the executors, without accounting for the non-production of the probate. *Cox* v. *Allingham*, Jac. 514.

An averment in the bill that a defendant had obtained a grant of letters of administration of the estate, and was the legal personal representative of the author of the trust, is sufficiently proved by the production of such letters of administration, notwithstanding they appear to have been granted on a date subsequent to the institution of the suit. *Bateman* v. *Margerison*, 6 Hare, 496.

Case in which a party in a cause, heard upon bill and answer without replication, producing letters of administration to a deceased person, the court may admit them, to ascertain the representative character of such party, and may act upon the evidence which they furnish of that character. *Wilkinson* v. *Fowkes*, 9 Hare, 592.

Evidence of Death.]—Probate of testator's will evidence of his death. *French* v. *French*, Dick. 268. *But see* 10 Ves. 289.

The production by a plaintiff suing as administrator to A., of the letters of administration, is

not primâ facie evidence of A.'s death. *Moons* v. *De Bernales*, 1 Russ. 301.

At the hearing liberty given to a plaintiff suing as administrator, to exhibit interrogatories to prove the death of the person whose administrator he claimed to be, and the cause permitted to stand over for that purpose. *Ib.*

The grant of letters of administration and the copy of an entry in the registry of the death of an individual are not sufficient evidence of that fact, but an affidavit of his death must be produced. *Leach* v. *Leach*, 13 L. J., Ch. 128; 8 Jur. 211.

Of Sanity.]—Probate of a will is conclusive evidence of the sanity of the testator to dispose of his personal estate, but it is by no means conclusive evidence of his capacity to dispose of his real estate. *Hume* v. *Burton*, 1 Ridgw. P. C. 277.

Recital of.]—Recital of letters of administration in letters of administration de bonis non: —Held, sufficient evidence of the original letters. *Burty* v. *Price*, 1 Jur. 101.

Notice of Intention to Produce Probate.]—When, in a bill to set aside the grant of an annuity made by A. to B., and charged upon A.'s land, with also a personal covenant for payment, the plaintiff is himself the devisee as well as residuary legatee under A.'s will, he ought, under 20 & 21 Vict. c. 79, s. 68 (Ir.), to give notice to the other party that he intends to give in evidence as proof of the devise or testamentary disposition, the probate of the will. But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the court might properly, and would, adjourn the hearing to give an opportunity to remove that technical difficulty. *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39.

Foreign Probate.]—*See* ante, cols. 608, 609.

18. Log Books.

Entries by Deceased Seamen.]—Entries in a log-book by a deceased seaman in the course of his duty, but not contemporaneous with the facts entered, and not against his interest, are not admissible in evidence. *The Henry Coxon*, 47 L. J., P. 83; 3 P. D. 156; 38 L. T. 819; 27 W. R. 263.

To Prove what.]—The log and muster-books of a ship, returned every quarter to the admiralty, mentioned the name of an officer as with the ship at a certain place for a given period of time:—Held, that this was not sufficient evidence of his having actually been there for the time specified. *Heathcote's Divorce Bill*, 1 Macq. H. L. 277.

To prove the time of the sailing of a ship under convoy, the log-book of the man-of-war which convoyed the fleet is evidence. *D'Israeli* v. *Jowett*, 1 Esp, 427. And see *Rundle* v. *Beaumont*, 4 Bing. 537; 1 M. & P. 396; 6 L. J. (O.S.) C. P. 91.

A ship's log-book, written by the mate who is abroad, may be used to refresh the memory of the captain, who read it about a week after it was written. *Anderson* v. *Whalley*, 3 Car. & K. 54.

Engineer's.]—The engineer's log-book kept on board a steamer is admissible as evidence against the shipowner. *The Earl of Dumfries*, 54 L. J., P. 7; 10 P. D. 31; 51 L. T. 906; 33 W. R. 568; 5 Asp. M. C. 342.

Erasure.]—The log-book of one of the ships produced contained an erasure as to the wind at the time of the collision, but the alteration was rather adverse to the ship:—Held, that the erasure was immaterial. *The Constitution*, 10 Jur. (N.S.) 831; 10 L. T. 894.

19. Lighthouse Journals.

The court of admiralty, regarding lighthouse journals as official books, kept under competent authority, will admit their contents in evidence upon their mere production. *The Maria Das Dorias*, Br. & Lush. 27; 32 L. J., Adm. 163; 7 L. T. 838; 11 W. R. 500.

20. Court-Rolls.

Against Tenants.]—The court-rolls of a manor taken by themselves are evidence only against the tenants of the manor, and the lord of the manor. *Att.-Gen.* v. *Hotham* (*Lord*), Turn. & R. 217; 24 R. R. 21.

Right to Foreshore.]—Dispute between a lord of a manor and a corporation as to the ownership of a piece of foreshore. The court-rolls contained entries—(1) Of fines paid to the lord for salvage' for moorage, and for trespasses, in taking wreck and the like, and of sums paid to the lord by the bailiff for wreck sold by him. (2) Presentments as to wreck, porpoises, &c., coming on the soil with no express mention of receipt of money except (in some cases) by the bailiff. (3) Presentments of wreck, the payments in respect of which were partly made to the salvors and partly to the lord. (4) Presentments directing the bailiff to levy certain fines, &c. (5) Similar presentments with no express direction to the bailiff to levy. (6) Presentments of wreck with no particular entries as to value or entered as matter for future inquiry:—Held, that all the entries except the last could be safely admitted as evidence of the lord's title. *Walton-cum-Trinley Manor, In re, Tomline, Ex parte*, 28 L. T. 12; 21 W. R. 475.

As to Descent.]—An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent, though no instances of any persons having been taken according to it are proved. *Roe* d. *Beebee* v. *Parker*, 5 Term Rep. 26.

Entries on the rolls of a manor court, of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held during her chaste viduity, are evidence of a custom for the widow, to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence, although there were no instances in fact stated on the rolls or known, of such a forfeiture having been enforced. *Doe* d. *Askew* v. *Askew*, 10 East, 520; 10 R. R. 366. And see *Doe* d. *Brown* v. *Brown*, 11 East, 441.

Proclamation.]—The entry in the court-rolls is sufficient to prove proclamation. *Doe* d. *Tarrant* v. *Hellier*, 3 Term Rep. 164; 1 R. R. 680.

Admission.]—In ejectment, by the devisees of copyhold premises, to prove their admission, it is not only necessary to prove by the court-rolls that persons of their names have been admitted, but evidence must be given of their identity. *Doe* d. *Hanson* v. *Smith*, 1 Camp. 196.

As to Tenure.]—In administering the real estate of the heir of an intestate it was discovered that a farm, part of a manor, and supposed to be freehold, had been leased in 1598 to the predecessors in title of the intestate, for a term of 1,000 years, subject to a rent and heriots. The lease contained a covenant by the lord "at all times hereafter and from time to time during the space of five years next ensuing," at the request of the lessee, to convey to him the fee. There was no direct evidence of any such conveyance. The entries in the court rolls of the manor recorded the payment of rent and heriots down to the present time, and also uniformly mentioned the farm as freehold. In 1777 the remainder of the term was assigned (for the fifth time since the lease) to L., who, two years afterwards, devised the farm as freehold, and it subsequently passed as freehold under several devises, until it reached the intestate in the cause:—Held, that the continuance of the rent and heriots rendered the entries in the court rolls more at variance with the theory of the farm being freehold than with that of its being leasehold; that L. having acknowledged the existence of the term two years before he devised the farm as freehold, the court could not presume that the tenure had been in the interim converted to freehold; and that the farm must pass to the intestate's personal representatives as leasehold. *Pickett* v. *Peckham*, 16 W. R. 1177.

Examined Copies.]—An examined copy of an ancient court-roll is admissible without the production of the original. *Rowe* v. *Brenton*, 3 M. & Ry. 297; 8 B. & C. 765.

Entries in court-rolls of amerciaments imposed are not evidence without proof of payment. *Ib.*

An examined copy from the books of the manor, that certain pits have been demised, is evidence, without production of the books themselves, to shew that they are demisable by custom. *Doe* d. *Croydon* v. *Cook*, 5 Esp. 221.

Copies of court-roll authenticated by the steward of a manor are admissible, though they are not the copies delivered to the tenant of the estate. *Breeze* v. *Hawker*, 14 Sim. 350.

A copy of court-roll duly stamped purported to be signed by V., who was proved to be the steward of the manor. The plaintiff's attorney, who produced it, did not know the handwriting of V.; but he stated that he had shewn this copy of court-roll to V., who stated that it had been delivered out by him, as steward of the manor, to the plaintiff:—Held, that this acknowledgment of it by V. was equivalent to the witness having received it from V., as steward of the manor. *Doe* d. *Burrows* v. *Freeman*, 1 Car. & K. 386.

An examined copy of a court-roll of a manor, made for the purpose of being given in evidence on a trial, does not require a stamp. *Doe* d. *Burrows* v. *Freeman*, 1 Car. & K. 386; 12 M. & W. 844; 14 L. J., Ex. 142.

Copy Thirty Years Old.]—Copy of admittance may be read, though not signed, where it is of thirty years' standing. *Ely* (*Dean*) v. *Stewart*, 2 Atk. 44; Barnard 170.

Manor Books.]—Where an ancient manor book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in court by the counsel or the steward of the lord of the manor; nor as it seems, by the lord of the manor in person. *Evans* v. *Rees*, 10 A. & E. 151; 2 P. & D. 626; 9 L. J., M. C. 83.

To prove a prescriptive right of fishery, as appurtenant to a manor, old licences on the court-rolls, granted by the lords of the manor, in consideration of certain rents, to fish in the locus in quo, are evidence, without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery. *Rogers* v. *Allen*, 1 Camp. 309; 10 R. R. 689.

Parchment writings preserved among the muniments of a manor, dated 1698 and 1717, purporting to be signed by many persons, copyholders of the manor, stating an unlimited right of common in the commoners, but that this having been found inconvenient, they had agreed to stock the common in a certain restricted manner, is evidence of reputation as to the general right, sufficient to destroy the restricted right set up by the plaintiff. *Chapman* v. *Cowlan*, 13 East, 10; 12 R. R. 294.

Customaries.]—A customary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from steward to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. *Denn* d. *Goodwin* v. *Spray*, 1 Term Rep. 466; 1 R. R. 250.

In lands held by copy of court-roll, not at the will of the lord, but according to the custom of the manor, the freehold is in the lord; and in the absence of custom (the onus of establishing which lies upon the tenant), the tenant has no right to work the minerals. *Portland* (*Duke*) v. *Hill*, 35 L. J., Ch. 439; L. R. 2 Eq. 765; 12 Jur. (N.S.) 286; 15 W. R. 38.

The existence of a customary, compiled within the period of legal memory, is conclusive evidence against the existence of a custom not mentioned therein. *Ib.*

The customary of a manor, compiled within the period of legal memory, recognised a right in the tenants to dig coal propriis usis. It appeared, from subsequent documents, that the privilege of digging coal for their own consumption had been enjoyed by the tenants under the waste, but there was no evidence of a similar restricted enjoyment by the tenants under their customary inclosures. There was evidence of tenants having during a long period dug coal in their customary inclosures for sale:—Held, that the custom was restricted to digging in the waste for coal for the tenants' own consumption, and that the tenants had no right of digging coals under their customary inclosures. *Ib.*

Book of Steward.]—A book was kept by the steward of a manor, in which were entered the assessments of all fines, as well those which were paid as those which were unpaid; but the steward made out a second book at the end of each year, in which he entered the fines which he had received:—Held, that the first book was

not admissible for the lord of the manor, to shew what fines had been paid. *Ely (Dean)* v. *Caldecott*, 5 M. & P. 272; 7 Bing. 433; 9 L. J. (O.S.) C. P. 171.

An entry in the book of the steward of a manor, and a parol proof by the foreman of the jury, allowed as good evidence against an entry on the roll, and an admission thereon. *Hill* v. *Wiggett*, 2 Vern. 547.

Presentments and Answers.]—In an action by the lord of a manor for wreck, a document, dated in 1639, was offered in evidence, purporting to be the answer of the tenants of the manor, to a commission issued by the lord of the manor, for surveying the same, in which document it was stated that the lord was entitled to wreck:—Held, that this evidence was inadmissible, the title of the lord not being a matter of public concern, and the jurors having no peculiar means of knowledge. *Talbot* v. *Lewis*, 1 C., M. & R. 495; 5 Tyr. 1; 4 L. J., Ex. 9. See *Briscoe* v. *Lomax*, 3 N. & P. 308; 8 A. & E. 198; 7 L. J., Q. B. 148.

A plaintiff was the occupier of a farm called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question in the cause being whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to shew that the plaintiff had not the right of soil, produced, from the rolls of the manor, an instrument purporting to be a presentment in 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as was within the lordship, and was claimed by A. to belong to his tenement, called Tyr Adam, upon their oaths said, that they had considered the claim and the evidence, and presented that all the land within the boundaries was part and parcel of the common called K., and that neither A., nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or further or any greater right than such as the other freehold tenants of the lordship had for their common cattle:—Held, that this instrument was not admissible, either as a presentment, because the homage had no right to decide the claim made by an individual to the freehold, they being interested,—nor as an award, because there was no mutual submission,—nor as evidence of reputation, because it was the declaration of the homage post litem motam. *Richards* v. *Bassett*, 10 B. & C. 657; 8 L. J. (O.S.) K. B. 289.

Entries of presentments in the books of a manor are not evidence of acts of ownership. *Irwin* v. *Simpson*, 7 Bro. P. C. 317.

21. Revenue Books.

Stamp Office.]—Under 36 Geo. 3, c. 52, s. 27, a copy of an entry in the stamp-office books, of payment of the duty on a legacy, is evidence of payment of the legacy, but the copy must be proved in the usual way. *Harrison* v. *Berwell*, 10 Sim. 380; 9 L. J., Ch. 72; 4 Jur. 245.

A copy signed by the comptroller of stamp duties is not sufficient. *Ib.*

Excise Office.]—An entry by A. in the excise office, in the names of A., B. and C., of premises for the keeping of beer for sale, is conclusive, where the crown is concerned, against A., as to his partnership with B. and C.; but in respect of private persons, it is merely primâ facie evidence. *Ellis* v. *Watson*, 2 Stark. 453; 20 R. R. 725.

Excise books transcribed from the maltster's specimen paper are admissible against him, without calling the officers to substantiate them. *Rex* v. *Grimwood*, 1 Price, 369.

Whether accounts of stock kept in the excise books are evidence between third parties as to the delivery of goods, quære. Copies of such accounts may be given in evidence, semble, on the ground that the originals are public books; but in such case the copies produced must be proved by a witness who had examined them with the originals, and can swear to their accuracy. *Dunbar* v. *Harvie*, 2 Bligh, 351.

Land Tax.]—Entries in the books of a collector of land-tax stating S. to have been rated for a particular house, and the payment of the sum so rated, are admissible to shew that S. was in the occupation of the premises at the time of the rates being made. *Doe* d. *Smith* v. *Cartwright*, R. & M. 62; 1 Car. & P. 218; 28 R. R. 774.

Land-tax assessments are not evidence of seisin, where it is shewn to be usual to retain the name of deceased proprietors on the books until the estate is sold to a different family. *Doe* d. *Stansbury* v. *Arkwright*, 1 N. & M. 731; 2 A. & E. 182; 2 L. J., K. B. 102.

Assessments of commissioners of the land-tax, by which it appears that at a certain time property was assessed in the name of S. (the family surname only), are evidence to shew, in connection with other facts, that at such time the property was occupied by a particular individual. *Doe* d. *Strode* v. *Seaton*, 2 A. & E. 171; 4 N. & M. 81.

Stage-Coach Licence.]—The entry in the office in Somerset House for licensing stage-coaches, is no evidence to prove that the persons named in the licence are owners of the coach. *Strother* v. *Willan*, 4 Camp. 24.

Cart Duty.]—An entry in the books of the receiver of the duties on carts, is not evidence of property, without shewing by whom the entry was made. *Weever* v. *Prentice*, 1 Esp. 369.

22. Other Public Books.

Government Offices.]—A book containing the acts of the legislative council of India, produced by a clerk from the India office, is sufficient evidence of the acts therein contained. *Gardner* v. *Wright*, 15 L. T. 325.

Roll of Attorneys.]—The book from the master's office, wherein are entered the names of the attorneys of the court, is good evidence to prove a party an attorney, without production of the roll. *Rex* v. *Crossley*, 2 Esp. 526.

Church Trustees.]—If, by a private act of parliament, church trustees are to enter their proceedings in a book, which is made evidence, and by the same act persons aggrieved by the rates are to appeal to the trustees; appeals not being required by the act to be in writing; parol evidence may be given that parties did in fact appeal, but not of what the trustees did on those appeals, as that should be proved by the book. *Reg.* v. *Murphy*, 8 Car. & P. 297.

Paving Commissioners.]—A local paving act authorised commissioners, at a meeting to be

called for that purpose, to order footpaths to be raised, and directed that the entries in the commissioners' books might be read in evidence. An entry in the books, stating that such an order was made at a meeting held by public notice, does not prove that the meeting was duly holden, so as to legalise the order. It should appear by the entry, or be shewn aliunde, that notice was given of the purpose for which the meeting was called. *Heysham* v. *Forster*, 5 M. & Ry. 277.

Heralds' College.]—The book called "Arms and Descents of the Nobility, E. 16," though produced from the Heralds' College, is not admissible; not being kept under authority of any official order, or in discharge of any official duty. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

Rentals of Deanery.] — Upon a question whether certain ancient books, from 1585 to 1693, preserved in the archives of the dean and chapter of Exeter, entitled "Rentals," and containing columns of the names of their estates with the rents reserved on each, and "solvit" written in different handwritings against such rents, were entries made by the receivers of the dean and chapter, charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receivers' books, by shewing that the receivers of the dean and chapter for the last sixty years had kept their books of accounts in the same form. *Doe* d. *Webber* v. *Thynne* (*Lord*), 10 East, 206; 10 R. R. 280.

A book in which leases were inrolled, and which was kept in the office of the auditor of the bishop of Durham (such officer holding a patent office in the county palatine), is admissible in evidence to sustain the claims of a lessee of the bishop of Durham, the original and counterpart of the lease being lost. *Humble* v. *Hunt*, Holt, N. P. 601.

A book in the chapter-house of the dean and chapter of Sarum, purporting to contain copies of leases granted by the dean and chapter, is as a public book evidence of those leases for the purpose of reputation, without proof of possession under the leases. *Combs* v. *Coether*, M. & M. 398.

"Assembly Book" of Corporation.]—A plaintiff in an action claiming under a grant from the crown of a several fishery, tendered in evidence an "Assembly Book," belonging to the corporation, dated in 1676, and containing entries of the rents due to the corporation from its various tenants, among which were entries of rents paid in respect of the fishery:—Held, that the book was admissible as an ancient document shewing the exercise of acts of ownership. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593; 9 Jur. 1135; 9 L. T. 93; 12 W. R. 178.

Letter of Licence from Crown.]—The plaintiff also tendered in evidence, for the purpose of shewing the meaning of a particular phrase in the grant, a letter of licence from the crown, in 1676, to one of its grantees, to alien the subject-matter of the grant:—Held, that the licence was admissible for that purpose. *Ib.*

Coroner's Book.]—In an action to try whether the Queen, in right of the Duchy of Lancaster, has the right to appoint coroners for the duchy, the plaintiff insisting, that in former times an officer of the duchy, called the feodary, discharged the duties of coroner: a manuscript book, written by a feodary in the reign of Queen Elizabeth, and purporting to contain an account of the duties of his office, and precedents relating thereto, is not receivable for the plaintiff, who claimed to be duchy-coroner, although such book has been kept in the duchy office, and referred to there as a book of authority. *Jewison* v. *Dyson*, 3 M. & Rob. 377.

Magistrates' Minute Book.]—A minute book kept by the magistrates' clerk, to shew who had been appointed by the magistrates to be surveyors of the highways for 1812, is not receivable without proof of a search for the original appointment under the hands and seals of the magistrates. *Reg.* v. *Pembridge*, Car. & M. 157.

Consistorial Court Minute Book.]—To prove a decree for alimony, the minute book of the Consistorial Court is good evidence. *Houliston* v. *Smyth*, 2 Car. & P. 25; 28 R. R. 609.

College Books.]—Where it was the usual practice for entries in the books of a certain college at Cambridge to be authenticated by the signature of the college registrar, who was a notary public, in his character as such:—Held, that an unauthenticated entry in such book was not admissible in evidence. *Fox* v. *Bearblock*, 50 L. J., Ch. 489; 17 Ch. D. 429; 44 L. T. 508; 29 W. R. 661.

23. Other Public Documents.

Copy or Original.]—If a copy of any document, which itself is not evidence at common law, is made evidence by act of parliament, a copy must be produced, and the original is not made admissible by implication. *Burdon* v. *Rickets*, 2 Camp. 121, n.

When an ancient document, purporting to be an exemplification, is produced from the proper place of deposit, but has not, at the time of its production, the Great Seal affixed, it is still to be presumed that it is an exemplification, and may be read in evidence as such. *Beverley Corporation* v. *Craven*, 2 M. & Rob. 140.

Exemplification of part of a patent not suffered to be read in evidence, notwithstanding the statutes of 3 & 4 Edw. 6, and 13 Eliz., where the other side have notice to consult the patent roll, and so may be surprised by an imperfect exemplification. *Att.-Gen.* v. *Taylor*, Pre. Ch. 59.

Letters Patent.]—Letters patent under the Great Seal are records and valid before inrolment. *Devonshire* (*Duke*) v. *Neill*, 2 L. R., Ir. 132.

Letters patent are admissible in evidence without proof of the king's letter directing the grant. *Ib.*

A commission, referred to in a patent confirming the title of a subject to lands in Ireland, is admissible to shew the authority and explain the position of the commissioners, by whose advice the patent was granted, and it is no objection that the commission was constituted by letters patent passed under the Great Seal of England. *Ib.*

Close Rolls—Order directing Inquiries—Mere Claim.]—Two entries were offered in evidence from the Close Rolls of 2 & 8 Hen. 3; both were commands of the king to the then Justiciary of Ireland, by which, after reciting that certain persons alleged they were wrongfully disseised of certain lands, he directed him to

make inquiries, and, if the claim was right, to cause these persons to have full seisin thereof:—Held, not admissible, being mere claims to the possession of lands, and not followed by judgments. *Ib.*

Court Seals.]—The common seal of the city of London proves itself. *Doe* d. *Woodmass* v. *Mason*, 1 Esp. 53; 5 R. R. 718.

Where a court is constituted by act of parliament, and possesses a seal, such seal proves itself. *Doe* d. *Duncan* v. *Edwards*, 1 P. & D. 408; 9 A. & E. 554; 2 W. W. & H. 12; 8 L. J., Q. B. 98; 3 Jur. 41.

Voting Papers.]—The voting papers given in at the election of councillors, under 5 & 6 Will. 4, c. 76, which, by s. 35, the mayor is to cause to be kept in the town clerk's office for six months after the election, are not such public documents as to prove themselves on production from the proper custody. *Reg.* v. *Ledgard*, 3 N. & P. 513; 1 W. W. & H. 487; 8 A. & E. 535; 7 L. J., Q. B. 237.

Inquisitions.]—An inquisition by the Duke of Lancaster in the year 1360 was held to be a public document, as the Duke of Lancaster had sovereign rights at that time in the duchy, and as it was directed to three of the justices of the duke, and was said to be sent "into our chancery." *Manchester Corporation* v. *Lyons*, 22 Ch. D. 299—C. A.

Leases.]—The inrolment of a lease granted by the Duke of Cornwall is evidence, in the same manner as if it had been granted by the crown, when there is no Duke of Cornwall. *Rowe* v. *Brenton*, 8 B. & C. 755; 3 M. & Ry. 164.

Diplomas.]—The mere production in court of a diploma of a doctor of physic, under the seal of one of the universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree. *Moises* v. *Thornton*, 1 Term Rep. 303; 3 Esp. 4.

Return of Corn Sales.]—Returns of sales of corn made under 1 & 2 Geo. 4, c. 87, were not conclusive evidence to shew the parties to whom the corn was delivered. *Woodley* v. *Brown*, 2 Bing. 527; 10 Moore, 281; 1 Car. & P. 503.

Entries as to Livings.]—Entries in the books kept at the First Fruits' office are admissible to shew the fact of a collation to a living made by the bishop at a particular time. *Irish Society* v. *Derry* (*Bishop*), 12 Cl. & F. 641.

Returns made by the bishop in obedience to writs from the exchequer, requiring him to state the vacancies of, and presentations and collations to, the livings in his diocese, are admissible as statements made by a public officer in the discharge of a public duty. *Ib.*

Though such returns may contain statements of a kind unusual in such documents, which statements were in favour of the right of the bishop who made them, they are, nevertheless, admissible, provided that the statements are within the scope of the inquiry to the writ. *Ib.*

An original collation from the registry of the bishopric, and appearing on the face of it to be pleno jure, is admissible to shew that the right claimed has, in fact, been exercised. *Ib.*

A return made by the incumbents of an ancient chapelry, and other clergymen, in answer to questions sent by the diocesan, for the information of the governors of Queen Anne's Bounty, at the time an augmentation was made, is admissible, as being in the nature of an inquisition in a public matter. *Carr* v. *Mostyn*, 5 Ex. 69; 19 L. J., Ex. 249.

A return made by the registrar of a diocese in answer to the inquiry of a clergyman whose benefice was under sequestration, enumerating the writs lodged with him, with the dates of the delivery and the sums due, though not proved to be made in virtue of his office, is evidence against the bishop; and so also are letters of the registrar of a similar character. *Hogg* v. *Garrett*, 12 Ir. Eq. R. 559.

Report—Surveyor of Public Body.]—A public body, acting under the powers of the Lands Clauses Act, had entered into negotiations with the plaintiff for the purchase of his land. They passed a resolution directing their solicitor to write a letter to the plaintiff, the resolution being based upon the report of their own surveyor. The plaintiff wished to put the report in evidence to shew the grounds for passing the resolution, and to explain the latter:—Held, that the report was not admissible as evidence. *Cooper* v. *Metropolitan Board of Works*, 25 Ch. D. 472; 50 L. T. 602—C. A.

Consent to Suit.]—The consent of the creditors of a bankrupt to the institution of a suit by his assignees, though filed amongst the proceedings in the bankruptcy, must be proved. *Smith* v. *Briggs*, 5 Sim. 391. But see *Evans*, *Ex parte*, 3 Deac. & C. 470; *Jones* v. *Yates*, 3 Y. & J. 373; *Piercy* v. *Roberts*, 1 Myl. & K. 4; 2 L. J., Ch. 17.

Poundage.] — Semble, that the receipt of poundage is evidence of a conversion by the sheriff. *Garland* v. *Carlisle*, 4 Cl. & F. 693; 11 Bli. (N.S.) 421.

24. Examined and Certified Extracts and Copies.

Register—Of Voters.]—The register of voters at a parliamentary election is a document of such a public nature as to be admissible in evidence, upon its mere production by the returning officer, and therefore an examined or a certified copy of it is also admissible. *Reed* v. *Lamb*, 6 H. & N. 75; 29 L. J., Ex. 452; 6 Jur. (N.S.) 828.

If a document offered in evidence under 14 & 15 Vict. c. 99, s. 14, as a certified copy, is rejected as such for not containing the requisites of one, it may be received in evidence as an examined copy, if proved to have been duly examined. *Ib.*

Whenever a book is of such a public nature as to be admissible on its mere production from the proper custody, its contents may be proved by an examined copy. *Ib.*

—— **Of Marriages.**]—An authenticated copy of the register of marriages kept in India, made and transmitted to the East India Company in London under the authority of the company, is a duplicate original, and as such is admissible evidence to prove a marriage celebrated in India. *Rateliff* v. *Rateliff*, 29 L. J., Mat. 171; 5 Jur. (N.S.) 714; 7 W. R. 726.

On an indictment for bigamy, it was alleged that the first marriage took place in a dissenting chapel, duly licensed for marriages. A witness produced a certificate, under the hand of the

superintendent registrar, of the fact that the chapel had been duly registered. It did not purport to be a copy of an extract, but the witness proved that he had examined it with the register book at the office of the superintendent registrar, and that it was correct:—Held, that the document was admissible as an examined copy or extract from the superintendent registrar's book, under 14 & 15 Vict. c. 99, s. 14, and was therefore good evidence of the due registration of the chapel. *Reg.* v. *Mainwaring*, Dears. & B. 132; 26 L. J., M. C. 10; 2 Jur. (N.S.) 1236; 5 W. R. 119; 7 Cox, C. C. 192.

Crown Leases.]—Documents deposited in the office of her Majesty's Land Revenue, Records, and Inrolments, pursuant to 2 Will. 4, c. 1, may be proved by examined copies in a suit brought to establish the title of the crown or its lessee to lands to which such documents relate. *Doe* d. *William the Fourth* v. *Roberts*, 13 M. & W. 520; 14 L. J., Ex. 274.

Expired leases by the crown of lands or mines, tendered in evidence as acts of ownership, by the crown, are so provable by examined copies, although the originals may not have been inrolled within six months after their execution, pursuant to 10 Geo. 4, c. 50, s. 63. *Ib.*

Memorial of Assignment of Judgment.]—Under 9 Geo. 2, c. 5, amended by 25 Geo. 2, c. 14, and made perpetual by 12 Geo. 3, c. 19, s. 3, an examined copy of the inrolment of the memorial of an assignment of a judgment recovered in Ireland, is good evidence of that assignment. *Fitzgerald* v. *Fitzgerald*, 8 C. B. 592; 19 L. J., C. P. 126; 14 Jur. 485.

An attested copy of the memorial of the assignment of a judgment is evidence of the fact of the assignment: so, the attested copy of the memorial of the registry of a deed is evidence of the fact of the registry; but if the memorial be used as evidence of the contents of the deed, the original must be produced. *Hobhouse* v. *Hamilton*, 1 Sch. & Lef. 207.

Affidavits.]—An examined copy of an affidavit for an injunction is not admissible without proof of identity, or that it has been used. *Rees* v. *Bowen*, 1 M'Clel. & Y. 383.

Semble, the office copy of an affidavit lodged in the registry is a document of a "public nature" within the meaning of 14 & 15 Vict. c. 99, s. 14. *Moriarty* v. *Moriarty*, 18 W. R. 145.

Other Documents.]—By-laws duly made by a railway company pursuant to the Railway Clauses Act, 8 & 9 Vict. c. 20, ss. 108–111, and confirmed and allowed as by law required, are public documents, a certified copy of which is admissible under 14 & 15 Vict. c. 99, s. 14. *Motteram* v. *Eastern Counties Ry.*, 7 C. B. (N.S.) 58; 29 L. J., M. C. 57; 6 Jur. (N.S.) 759; 1 L. T. 101; 8 W. R. 77.

By 17 & 18 Vict. c. 36, s. 3, the officer of the Queen's Bench is required to keep a book containing a list of every bill of sale filed in the office, and the dates of the execution and filing of the same:—Held, that this book was of such a public nature that a certified copy was admissible under 14 & 15 Vict. c. 99, s. 14, and that such certified copy proved the time at which the affidavit was filed, as well as the time at which the bill was filed. *Grindell* v. *Brendon*, 6 C. B. (N.S.) 698; 28 L. J., C. P. 333; 5 Jur. (N.S.) 1420; 7 W. R. 579. S. P., *Bath* v. *Sutton*, 27 L. J., Ex. 388.

A copy (unstamped) of the act book of the Ecclesiastical Court is admissible under 14 & 15 Vict. c. 99, s. 14, with accounts for non-production of probate. *Dorrett* v. *Meux*, 15 C. B. 142; 2 C. L. R. 807; 23 L. J., C. P. 221; 2 W. R. 480.

Copies of the tithe certificate and applotment, compared and attested by the registrar of the diocese, are evidence of the contents of the original document. *Hawkins* v. *Carry*, 2 Jones, 431; *Crowley* v. *Flood*, *Ib.*, 555.

Certified copies of the schedule, &c., may be given in evidence, under the Insolvent Act, by parties other than the insolvent or his creditors. *Price* v. *Assheton*, 1 Y. & Coll. 441.

An inspeximus of a grant contained in the inrolment of a subsequent grant of confirmation of the preceding grant, produced from the records of the Rolls Office:—Held, to be good evidence of the former grant. *Att.-Gen.* v. *Cashel Corporation*, 2 Con. & L. 9; 3 Dr. & War. 299.

Mode of Examining.]—To prove a copy of a record it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record; it is not necessary for the persons examining to exchange papers, and read them alternately. *Rolf* v. *Dart*, 2 Taunt. 52. S. P., *M'Neil* v. *London* (*Sheriffs*), 1 Esp. 263; *Reid* v. *Margison*, 1 Camp. 468; *Giles* v. *Hill*, 41 Camp. 471, n.

To make a copy of a record admissible, it is not enough that it was held by witness while another read the original to him. There must be a change of hands, or the witness must himself read the copy with the original. *Slane Peerage*, 5 Cl. & F. 23.

To give evidence of the transcript of the rules of a benefit society inrolled at the office of the clerk of the peace, by proof of an examined copy of it, the witness who examined the copy with the transcript must prove that he examined the copy of all the rules with the transcript. *Reg.* v. *Boynes*, 1 Car. & K. 65.

B. *JUDICIAL DOCUMENTS.*

1. Proceedings at Law.

a. Judgments.

Proof of.]—The judgment book is not evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment is no party to the action. *Ayrey* v. *Davenport*, 2 Bos. & P. (N.R.) 474.

The day-book kept at the judgment office is not evidence to prove even the time of signing a judgment. *Lee* v. *Meecock*, 5 Esp. 177.

A judgment cannot be proved by a judgment paper from the office of the master, but only by an examined or an office copy of the record. *Jeffs* v. *Day*, 12 L. T. 852.

An unsealed issue roll is not a record of the court; and, therefore, the entry of a nolle prosequi thereon against one of two defendants is not the proper evidence of such nolle prosequi, to shew that, as against such defendant, the action is at an end. *Fagan* v. *Dawson*, 4 Man. & G. 711.

A judgment may be proved by the production of a duly certified copy of an entry in the entry-book of judgments of the court in which the judgment was recovered. *Anderson*, *Ex parte*, *Tollemache*, *In re*, 54 L. J., Q. B. 383; 14 Q. B. D. 606; 52 L. T. 786—C. A.

An allegation in an indictment for perjury that judgment was "entered up" in an action, is proved by the production of the book from the judgment office in which the incipitur is entered. *Reg.* v. *Gordon*, Car. & M. 410.

Where the examined copy of a judgment was proved by a witness to have been examined at the house of a person having the custody of the records of the court, the witness knowing that the person had the custody :—Held, sufficient. *Bannister* v. *Lambert*, 1 L. J., K. B. 179.

A mother and son were in possession of a house, for which a declaration in ejectment was served on the son, who let judgment go by default, and also on the mother, who defended :—Held, that on the trial of the ejectment against the mother, an examined copy of the judgment recovered against the son by the lessor of the plaintiff for use and occupation of the house was not receivable in evidence. *Doe* d. *Morse* v. *Williams*, Car. & M. 615.

The judgment of a manor court is sufficiently proved by production of a minute in the court books containing entries of the pleadings, but setting forth as to the judgment only a form of caption, names of parties and suitors of the court, and a memorandum that a venire facias was executed, verdict found for plaintiff, and final judgment entered for debt and costs, specifying the amounts, the deputy steward of the court stating that he was present at the trial, and that it was not usual to draw up a more formal judgment, and it appearing that a levari facias had issued reciting a judgment in terms corresponding with the entry. *Dawson* v. *Gregory*, 7 Q. B. 756 ; 14 L. J., Q. B. 286 ; 9 Jur. 688.

—— **Report of Judge—Irish Action.**]—A report made by an Irish judge to a divisional court in Ireland to be used on an application to set aside a verdict, is evidence in an English action between the same parties of what took place at the trial and what the judge decided. *Houstoun* v. *Sligo* (*Marquis*), 29 Ch, D. 448—C. A.

—— **Shorthand Note.**]—An affidavit verifying the shorthand note of the judgment in the action pleaded as res judicata was also admitted. *Ib.*

—— **Shorthand Writer Dead.**]—It was proposed to read a shorthand note of proceedings in a prior probate suit, but the shorthand writer was dead. On an affidavit being produced by a person who had acted as proctor in that suit certifying to the correctness of the note, the court permitted it to be read. *De Mora* v. *Concha*, 29 Ch. D. 281—C. A.

In what Cases Evidence.]—In a dispute between a lord of a manor and a corporation as to the ownership of a piece of foreshore, an action of trespass by a former lord of the manor against the same corporation, and decided in his favour in 1738 and acquiesced in ever since, was considered the strongest possible evidence in his favour. *Walton-cum-Trimley Manor, In re, Tomline, Ex parte*, 28 L. T. 12 ; 21 W. R. 475.

A claim by an individual to a several fishery in non-tidal waters is not a question of public interest on which a judgment which does not work an estoppel is admissible against strangers. *De Burgho's Estate, In re*, [1896] 1 Ir. R. 274.

In an action by third persons for selling goods under a fieri facias, a copy of the judgment must be given in evidence for the defendants. *Martin* v. *Podger*, 2 W. Bl. 701 ; 5 Burr. 2631.

In an action by a plaintiff claiming under an elegit for use and occupation, an examined copy of the judgment-roll containing the award of the elegit and return of the inquisition, is evidence of the plaintiff's title, without proving a copy of the elegit and of the inquisition. *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565 ; 15 R. R. 352.

On a trial at Nisi Prius, evidence that the cause was originally commenced in the Palace Court, and that defendant let judgment go by default in that court and afterwards removed the cause by habeas corpus is admissible. *Tedmas* v. *Lees*, 5 Car. & P. 233.

Bill by a party, from whom a promissory note had been obtained for a gambling debt, to restrain an indorsee of the note with notice of the consideration from proceeding in an action commenced by him against the plaintiff in equity upon the note, and in which action the defendant in equity had declared. Before an injunction had been applied for the action was tried, and a verdict found for the defendant at law :—Held, on the hearing of the cause, that the judgment was admissible in evidence, and conclusive in equity, as to those facts as to which it was conclusive at law ; but that, as it was obtained after the defendant had answered and no supplemental bill had been filed, he was entitled to an inquiry whether it had been fairly obtained. *Pearce* v. *Gray*, 2 Y. & Coll. C. C. 322.

A judgment recovered against executors is not evidence against devisees. *Marten* v. *Whichelo*, Cr. & Ph. 257 ; 10 L. J., Ch. 384.

Of Courts of Concurrent or Exclusive Jurisdiction.]—The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties. *Mackintosh* v. *Smith*, 4 Macq. H. L. 913.

The judgments of courts of exclusive jurisdiction are evidence, whether the matter arises incidentally, or is the matter directly in issue. *Ib.*

Judge's Charge and Notes.]—An unauthenticated MS. report of a trial about 140 years ago of an action of trespass, and of the charge of the chief baron, is a document which ought not to be admitted in evidence. *Bridges* v. *Highton*, 11 L. T. 653.

At the hearing of an appeal a party is entitled to read a shorthand writer's notes of the evidence taken in the court below as his impression of what passed ; and the judge's notes will be taken by the Court of Appeal to represent rightly the whole effect. *Gee, In re, Laming* v. *Gee*, 41 L. T. 744 ; 28 W. R. 217—C. A.

Judge's notes are not evidence in equity. *Learmouth, Ex parte*, 6 Madd. 113. S. P., *East India Co.* v. *Bazett*, 1 L. J. (o.s.) Ch. 93.

Effect of.]—If a judgment of outlawry stand in the way of a claim to a barony in abeyance, although it is clearly erroneous, the Committee of Privileges cannot overlook it or reverse it ; but the claimant must apply to the proper tribunal for its reversal, and produce the judgment of reversal to the committee. *Wharton Peerage*, 12 Cl. & F. 295.

b. Verdicts.

Where a verdict is found subject to a special case, and a new trial directed, the special case as signed by counsel on each side, is evidence or

the facts therein stated. *Van Wort* v. *Wolley*, R. & M. 4.

In the 13 Car. 1, a commission issued out of the Duchy Court of Lancaster to inquire into certain boundaries. The return stated that the commissioners had inquired into the matter, having been attended by the parties, and that a jury had been sworn to inquire and give a true verdict concerning the boundary, and that thereupon the commissioners set out the boundary:—Held, that this was a proceeding in the nature of a verdict before a court of competent jurisdiction and therefore admissible. *Briscoe* v. *Lomax*, 3 N. & P. 308; 8 A. & E. 198; 7 L. J., Q. B. 148; 2 Jur. 682.

A verdict on an issue is not admissible evidence on a second trial of the same issue. *O'Connor* v. *Malone*, Macl. & R. 468; 6 Cl. & F. 572.

On a plea of usury to an action on a bond, a verdict of acquittal for the usury penalties on the same bond, between the same parties is admissible for the plaintiff. *Cleve* v. *Powell*, 1 M. & Rob. 228.

A verdict will not be set aside on the ground of the admission of illegal evidence, where, independent of such evidence, there is evidence amply sufficient to sustain the verdict. *Essex (Earl)* v. *Hodgson*, 15 W. R. 960.

Postea.]—The postea is evidence of a verdict for the sums indorsed, and is good evidence of a set-off to the extent of it. *Garland* v. *Scoones*, 2 Esp. 648.

In an action on an indemnity bond, the postea was held sufficient evidence in proof of an allegation in a replication, that the plaintiff was obliged to and did pay a sum of money, as and for the damages and costs recovered by the person against whose claims the obligor had become bound to protect the plaintiff; where, in consequence of an arrangement between the parties, no judgment was ever entered up. *Harrop* v. *Bradshaw*, 9 Price, 359.

A general verdict was returned for the defendant. It was entered by order of the judge by mistake for the plaintiff. After the jury had been discharged they were recalled, the judge recollected what their verdict was, and from their statement found that a mistake had been made. The judge directed the postea to be amended:—Held, that he had power to order the amendment. *Baker* v. *Lawrence*, 22 L. T. 813; 18 W. R. 835.

c. Records.

Proof of.]—An action in a superior court is a "proceeding" in which a certified copy of a record is admissible as evidence of the record under 14 & 15 Vict. c. 99, s. 13. *Richardson* v. *Willis*, 42 L. J., Ex. 15; L. R. 8 Ex. 69; 27 L. T. 828; 12 Cox, C. C. 298.

A document becomes a record of the court by being delivered to the proper officer of the court, and received and filed by him as such, although it is not numbered or docketed. *Parsons* v. *Willoughby de Broke (Lord)*, 13 W. R. 315.

Parol evidence is inadmissible to shew the day on which a trial takes place; the record must be produced. *Thomas* v. *London (Sheriffs)*, 6 Esp. 80.

To prove an allegation that a cause was carried down to trial, it is necessary to produce the nisi prius record, although it is not alleged that the cause was in fact tried. *Parry* v. *Collis*, Peake's Add. Cas. 47.

The nisi prius record of a cause with the minute of the verdict indorsed by the officer of the court on the jury panel, is good evidence that the cause came on for trial, though no regular postea is indorsed. *Rex* v. *Browne*, M. & M. 315.

A record, found in the proper office, must be intended to have been always in the state in which it was found, and parol evidence will not be admitted to prove it wrong. *Dickson* v. *Fisher*, 1 W. Bl. 664; 4 Burr. 2267.

A nisi prius record having been put in evidence, and there appearing to be two counts or distinct causes of action, and the verdict entered generally for the plaintiff, with 65*l.* damages, parol evidence is admissible to shew that substantial damages were recovered on one count only. *Preston* v. *Peeke*, El. Bl. & El. 336; 27 L. J., Q. B. 424; 4 Jur. (N.S.) 613; 6 W. R. 591.

Printed copies of records rejected, the originals being accessible. *Crawford and Lindsay Peerages*, 2 H. L. Cas. 547.

In a former action between the same parties in which the plaintiff sued in person, certain statements were made in the defendant's plea which were not denied by the replication; there had been a trial, but no judgment:—Held, that neither the issue delivered by the plaintiff himself, nor the nisi prius record in the former action, was admissible in evidence as proof of an admission of the facts stated in the plea in the former action and not denied in the replication. *Holt* v. *Miers*, 9 Car. & P. 191.

When Lost.]—The plaintiffs in an action to establish commonable rights over a piece of land in a certain parish, founded their claim upon an action of novel disseisin brought in 23 Hen. 3, the records in which were missing. It was submitted that the proceedings could be proved by (1) a note-book in the British Museum containing a note of the case, which was submitted as being a copy of the record; (2) a document forming part of the Cottonian MSS. in the British Museum, purporting to be a register of a priory interested in the action, containing an account of the action; and (3) a note of the action in an entry in the church-book of a parish, the parson of which was a defendant to the action, made 438 years after the date of the action:—Held, that (1) and (2) were not admissible, but that (3) was receivable in evidence quantum valeat, as an entry of an historical fact in which the parish was interested, it being probably taken from the record which might then have been in existence. *Bidder* v. *Bridges*, 54 L. T. 529; 34 W. R. 514.

d. Rules and Orders of Court.

Arbitration.]—A submission to arbitration by agreement written and attested is not sufficiently proved by evidence of a rule making such agreement a rule of court, under 9 & 10 Will. 3, c. 15, s. 1. *Berney* or *Bernie* v. *Reed*, 7 Q. B. 79; 14 L. J., Q. B. 247.

But a judge's order for referring a cause may be proved by such rule of court. *Ib.*

The allegations in a rule of court do not prove the facts alleged. *Woodroffe* v. *Williams*, 6 Taunt. 19; 1 Marsh. 419.

In an action on an award made under a judge's order, to prove the order it is not enough to put in an office copy of the rule making it a rule of court. *Still* v. *Halford*, 4 Camp. 17.

A rule of the Court of Queen's Bench, made in an action pending in that court, cannot be read on a petition of bankruptcy, without being verified by affidavit, and notice ought to be given to the other party of the intention to read it on the hearing. *Chambers, Ex parte*, 1 Deac. 197.

Reference at Trial to Official Referee.]—At the trial of an administration action, certain inquiries were by consent ordered to be made before an official referee, and further consideration was adjourned. When the action came on for further consideration, the plaintiff applied to have the referee's report varied, though he had given no notice to the defendant of the application:—Held, that the application must be heard; but that, if the defendant desired, the further consideration must be adjourned for him to have time to meet the application:—Held, also, that no evidence of what took place before the referee need be produced. *Brook, In re, Sykes* v. *Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

Practice.]—Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of those printed copies is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shewn to have been examined with the original. *Daniel* v. *Robson*, M. & M. 294.

Upon an indictment for perjury, a witness was called to prove the practice of the Insolvent Debtors Court, which the prosecutor alleged made an affidavit necessary, and upon which perjury had been assigned. The witness produced a printed paper, which purported to be a copy of the rules of the Insolvent Debtors Court, from which he stated what was the practice. He had no knowledge of the practice independently of the paper:—Held, that such evidence could not be received as proof of the practice. *Rex* v. *Koops*, 1 N. & P. 828; 6 A. & E. 198; W. W. & D. 148; 6 L. J., K. B. 114.

The practice of the Ecclesiastical Court is a matter of fact to be proved by evidence, and left to the jury. *Beaurain* v. *Scott*, 3 Camp. 388; 14 R. R. 759.

e. Writs, Warrants and Returns.

Time from which Writ takes effect.] — It appeared from the statement of claim that the writ of summons in the action issued on the 2nd of July, and that on the same day, but before the issuing of the writ, the cause of action arose. The statement of claim was demurred to, on the ground that the issuing of the writ of summons being a judicial act, must be considered as having taken place at the earliest moment of the day, and therefore before the cause of action accrued:—Held, that the writ of summons being an act of the party and not a judicial act, the court could for this purpose take cognizance of the fact that the writ did not issue till later in the day than the cause of action accrued, and that the statement of claim was therefore good. *Clarke* v. *Bradlaugh*, 50 L. J., Q. B. 678; 7 Q. B. D. 151; 44 L. T. 779; 29 W. R. 882. Affirmed, 51 L. J., Q. B. 1; 8 Q. B. D. 63; 30 W. R. 53—C. A.

Semble, even in the case of judicial acts, the court will, if necessary, in order to ascertain which has priority, inquire as to parts or fractions of a day. *Ib.*

Error in Date of "Teste."]—The plaintiffs, in an action for goods supplied, issued a specially-indorsed writ against the defendant. The goods were supplied during and after the month of July, 1882. The copy of the writ served on the defendant was accurate in all respects except that in the "teste," the year was thus given, "one thousand eight hundred and eighty," instead of "eighty-two." In default of appearance the plaintiffs signed final judgment under Ord. XV. r. 1. The defendant afterwards applied to set the judgment aside on the ground that the "teste" of a writ was a material part of it, and any error in it would be fatal to its validity; and that the affidavit of service by the solicitor's clerk who served it was false. The registrar and the judge at chambers before whom the application was made both refused to set the judgment aside. The defendant appealed:—Held, that the affidavit of service by the clerk was not a false one, and that the mistake in the "teste" of the writ was a mere imperfection, and not a fatal error prejudicing the defendant, who therefore was not entitled to have the judgment against him set aside. *Wesson* v. *Stalker*, 47 L. T. 444.

The record is conclusive evidence of the time of the issuing of the writ; but, if a wrong date has been inserted, the trial may be set aside, and the record altered. *Whipple* v. *Manley*, 2 Gale, 56; 5 D. P. C. 100; 1 M. & W. 432; 1 Tyr. & G. 672; 5 L. J., Ex. 191.

The date of the commencement of the action being stated in the writ of trial requires no proof. *Robinson* v. *Rowland*, 1 W. W. & H. 74; 2 Jur. 136.

Order.]—The marshal's return is not proof of the order in which writs, by virtue of which a party is in custody, were executed. *Wright* v. *Stanford*, 1 D. (N.S.) 272; 6 Jur. 130.

Sheriff's Returns.]—In an action against a sheriff for a false return to a fi. fa., office copies of the writ and return, which are not proved to have been examined copies, are not receivable, even where the original cause was in the same court as the action against the sheriff. *Pitcher* v. *King*, 1 Car. & K. 655.

An examined copy of a writ returned and filed, and of the indorsement thereon, on which writ is indorsed, apparently by the sheriff's authority, the name of the bailiff employed to make the levy, is not evidence to prove who was the bailiff so employed by the sheriff, evidence not being added that the indorsement of the bailiff's name on the writ itself was made by the sheriff's authority. *Hill* v. *Middlesex (Sheriff)*, 7 Taunt. 8; Holt, 217. S. P., contra, *Blatch* v. *Archer*, Cowp. 66.

But, in an action against the sheriff, to recover penalties for the extortion of his officer, in taking a larger fee than was allowed on the discharge of a person out of custody on giving bail:—Held, that the indorsement of the name of the officer on the writ was sufficient to connect him with the sheriff, without shewing that such indorsement was made with his authority. *Bowden* v. *Waithman*, 5 Moore, 183.

So, in an action against the sheriff for not arresting a defendant, proof of the indorsement of the officer's name on the writ by a clerk in the under-sheriff's office, is sufficient to connect such officer with the sheriff, and to shew that the indorsement was made with his authority, without calling the officer himself, or producing the warrant under which he acted. *Francis* v. *Neave*, 6 Moore, 120; 3 Br. & B. 126.

The sheriff's return to a fi. fa., that he has levied the money. is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it, in an action for money had and received. *Cator* v. *Stokes*, 1 M. & S. 599.

In an action against a sheriff's officer for an illegal arrest, it is evidence against him, that the warrant was directed to him. *Slack* v. *London (Sheriffs)*, 1 Esp. 42.

In an action of trespass against the sheriff, it is sufficient evidence to shew a bill of sale executed by him of the property in question, which recites the writ and taking, and the sale of the property by him under it. *Woodward* v. *Larking*, 3 Esp. 286.

The return purporting to be made by a lord of a manor to the sheriff's mandate to levy under a fi. fa. is primâ facie evidence that the person whose return it purports to be is the lord of the manor. *Tyler* v. *Leeds (Duke)*, 2 Stark. 218.

Evidence that the person who actually made the return has acted as bailiff to the lord of the manor for sixteen years, and during that time has made returns for the lord of the manor, is sufficient to charge the lord of the manor with the acts of the bailiff. *Ib.*

In an action against a judgment creditor for maliciously suing out an alias fi. fa. after a sufficient execution levied upon the plaintiff's goods under the first fi. fa.:—Held, that the sheriff's return indorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case), wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, was primâ facie evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Gyfford* v. *Woodgate*, 11 East, 297; 2 Camp. 117.

Precept to Returning Officer at Election.]—In an action for bribery at a borough election, an examined copy of the precept to the returning officer, taken from the original at the Crown office, is sufficient evidence of the precept. *Webb* v. *Smith*, 4 Bing. (N.C.) 373; 6 Scott, 147; 1 Arn. 145; 9 L. J., C. P. 191.

Sequestration.]—Plaintiff producing a copy of sequestration only, on motion to take bill pro confesso, court refused it; but sequestration not being under seal or executed, was held no objection. *Anon.*, 10 Mod. 431.

2. Proceedings in Chancery.

a. Decrees and Orders.

Effect of.]—Orders of the Court of Chancery will be inadmissible in evidence as not amounting to any final decree, or containing any adjudication of the court upon the right of the parties, but merely directing the continuance of a certain state of things pendente lite. *Pim* v. *Curell*, 6 M. & W. 234.

A final decree upon a sum ascertained is equal to a judgment; but a mere decree for an account of the plaintiff's demands, and of the personal estate come to the hands of the defendant, with a mere direction for a payment out of the result of that account, does not prevent the executor praying a judgment. *Perry* v. *Phelips*, 10 Ves. 34; 7 R. R. 331.

In an action upon a wager, whether a decree of the Court of Chancery would be reversed on an appeal to the House of Lords, proof of the decree and reversal is sufficient, without shewing the previous proceedings below; a copy of the judgment of reversal is admissible. *Jones* v. *Randall*, Cowp. 17; Lofft, 383, 428.

Semble, that a decree in equity is admissible in evidence, without reciting the previous proceedings therein, or proving them, where the object of its production is to prove the existence of the decree, and not any facts previously in issue in the suit. *Blower* v. *Hollis*, 3 Tyr. 356; 1 C. & M. 393; 2 L. J., Ex. 176.

An order for an attachment for not paying the costs of a suit in equity is in itself primâ facie evidence that a suit had been pending. *Ib.*

An order made in one suit giving liberty to prove in another suit for an amount to be certified by the chief clerk, and a certificate made in pursuance of such order, are not alone sufficient to establish the debt in the other suit. *Micklethwait* v. *Winstanley*, 5 N. R. 204.

Decree in a former cause between the same parties read as evidence, though not conclusive; so also of depositions in a cause which had settled the rights of all as under a decree for performance of trusts. *Askew* v. *Poulterers' Co.* 2 Ves. 89.

Pleadings and depositions and a decree in a former suit (the same will being in issue) are admissible, as shewing the acts and knowledge of the parties who had the same interests under the will as the plaintiff. *Lorton (Viscount)* v. *Kingston (Earl)*, 5 Cl. & F. 269.

Acts of the court, as a decree or order in another cause between the same parties, may be read without an order. *Brooks* v. *Taylor*, Mos. 188.

Decree of Court of Chancery determining matter of right, is good evidence of that right, as to all persons claiming under party against whom decree was made, though at the distance of a hundred years afterwards. *Borough* v. *Whichcote*, 3 Bro. P. C. 595. See also *Benson* v. *Olive*, 1 Barnard. K. B. 348.

A decree between co-defendants, grounded on pleadings and proof, between plaintiff and defendant, is regular. *Chamley* v. *Dunsany (Lord)*, 2 Sch. & Lef. 718.

Identity—Pedigree.]—A decretal order in chancery, reciting the substance of the bill and answer, is admissible, on proof of pedigree, to establish the identity of parties to the suit. *Wharton Peerage*, 12 Cl. & F. 295.

But an answer alone, though sworn but not filed, is not admissible. *Ib.*

Nature of Rights.]—On the trial of a writ of right, a decree of chancery between the father of the tenant and certain other persons in no way connected with the defendant, brought to establish the will under which the tenant's title arose, and by which decree the court directed, that the estates were to be considered as belonging to the tenant's father, the devisee, and that he should be let into possession, and have all the title-deeds delivered to him, is properly admitted for the purpose of explaining the character in which the devisee took possession of the estate. *Davies* v. *Lowndes*, 7 Scott (N.R.) 141; 6 Man. & G. 47.

On an issue as to the existence of an immemorial right of the deputy day-meters of the city of London to the exclusive right, by themselves and their servants, of measuring, shovelling,

unloading, and delivering all oysters brought in any vessel for sale to the port of London, and to receive a reasonable compensation for so doing:—Held, that a decree of a court of equity, in a cause between third parties, touching the same right, whereby an issue was directed to try whether certain sums were a reasonable recompense, was admissible. *Laybourn* v. *Crisp*, 4 M. & W. 320; 8 Car. & P. 397; 1 H. & H. 326; 8 L. J., Ex. 118.

Decree professing to establish customs of tithing, and modes of payment, some of which are obviously not legal moduses, founded on agreements not ratified by ordinary and patron, and not on bonâ fide adverse suit, to establish moduses, and pronounced in cause to which the ordinary and patron were not parties, is not conclusive on church or court. *Jenkinson* v. *Royston*, 5 Price, 496.

On a trial, touching the right to lands, decrees in chancery touching the rights of other parties concerning the same lands, were held admissible in evidence to shew the character in which the possessor enjoyed the lands. *Davies* v. *Lowndes*, 4 L. J., C. P. 214; 1 Bing. (N.C.) 606; 2 Sc. 90.

Judgment in Possessory Suit.]—In an action for trespass to a several fishery in a navigable tidal river in Ireland the defendants justified on the ground that the public had the right of fishing. The plaintiff's paper title (if the possession and enjoyment were consistent with it) afforded irresistible ground for a presumption that the fishery was put in defence before Magna Charta. As evidence of possession and user the plaintiff tendered (inter alia) the proceedings and decree in 1687 in a "possessory" suit brought in the Court of Chancery in Ireland by C. (the plaintiff's predecessor in title) against strangers to the present action; by which decree an injunction was awarded to quiet C. and his under-tenants in such possession of their fishing as they had at the time of exhibiting the bill and three years before, to continue until evicted by due course of law, both parties being at liberty to take proceedings at law against each other for ascertaining their titles:—Held, that as the decree was a solemn and final adjudication, not collusive, and as it could not have been made except upon proof of unbroken user and enjoyment for at least three years before the bill, inconsistent with any actual exercise at that time of a public right of fishing, the proceedings and decree were admissible; and that the effect of this evidence (not being met by any counter-evidence applicable to the same period) was extremely strong to establish possession and enjoyment of the fishery in the latter part of the seventeenth century, consistent with the paper title and exclusive of the public. *Pim* v. *Curell* (6 M. & W. 234) discussed. *Neill* v. *Devonshire* (*Duke*), 8 App. Cas. 135; 31 W. R. 622—H. L. (Ir.)

Held, also, that a judgment obtained by the plaintiff in 1826 in an action against a stranger for trespass by fishing in the locus in quo, in which action the defendant appeared but allowed judgment to go by default of pleading, was evidence in the present action of possession in 1826. *Ib.*

Admissibility of Copy, where Original Lost.]—To support the proof of a custom for the lord of a manor to take only one heriot from a tenant, whatever the number of his holdings might be, a paper, purporting to be a copy of an old decree of the Court of Chancery, in a suit between a copyholder and the lord, produced by a witness, who succeeded his brother as lord of the manor, and who stated that he had found it amongst his brother's papers, is admissible, as against a subsequent lord, evidence having been given of an ineffectual search for the original. *Price* v. *Woodhouse*, 3 Ex. 616; 18 L. J., Ex. 271.

Original Order.]—The document delivered out by the registrar of the Court of Chancery, as the order of the court, is the original order; and to make it evidence, it is not necessary that it should be compared with any book of the orders of the court. *Ludlow Corporation* v. *Charlton*, 9 Car. & P. 242.

Office Copy.]—An office copy of an order is for all practical purposes the same as the original order. *Davenport* v. *Townsend*, 15 L. T. 528; 15 W. R. 378.

Bill of Discovery.]—A. brought an action against a sheriff for a false return of nulla bona to a fi. fa. against the goods of B. B. filed a bill of discovery against A., on which there had been a decree or an order that A. should bring into the Court of Chancery all letters written by B. or any other person to him respecting the original debt. A., under this decree or order, brought in various letters:—Held, that none of them could be read in evidence on the part of the defendant in the present action, without first putting in the bill and answer. *Hewitt* v. *Pigott*, 5 Car. & P. 75.

Effect in Irish Suit.]—A mortgagee of part of estate in Ireland files his bill of foreclosure in Court of Chancery, in England, and obtains the usual decree; a mortgagee of other part of same estate files his bill of foreclosure in Court of Chancery in Ireland, and on hearing of cause, desired that decree of English Court of Chancery might be read to intent that decree of Irish Court of Chancery might be made agreeable thereto; but refused, because present plaintiff, though defendant in former cause, was not brought to a hearing on that cause, and consequently was no party to that decree. *Everard* v. *Ashton*, 3 Bro. P. C. 561.

In Rolls Court.]—An order by the Lord Chancellor, on the death of a lunatic tenant for life, of a fund in court, discharging her committee to whom the dividends had been ordered to be paid, is no evidence in the Rolls Court of such death. *Berry* v. *Usher*, 4 Jur. 5.

b. Bills and Answers.

Bill—Privity.]—A bill in chancery is not evidence against the party in whose name it is filed, unless his privity to it is shewn. *Boileau* v. *Rutlin*, 2 Ex. 665; 12 Jur. 899.

Where that privity is established the bill is admissible to prove the fact that such a suit was instituted, and what the subject of it was; but it is not evidence by way of admission against the party by whom it was filed of the truth of the facts alleged or stated in it. *Ib.*

Proceedings after answer of a bill in chancery tend to diminish the presumption that it might have been filed by a stranger, and may be sufficient to establish the privity of the party in whose name it was filed. *Ib.*

A bill in chancery is no evidence of the facts contained therein, not even of those on which

the prayer of relief is founded. *Doe* d. *Bowerman* v. *Sybourn*, 7 Term Rep. 2 ; 2 Esp. 499 ; 4 R. R. 363.

Except that a bill in chancery by an ancestor is evidence to prove a family pedigree stated therein. *Taylor* v. *Cole*, 7 Term Rep. 3, n ; 1 R. R. 706. See also *Malcolmson* v. *O'Dea*, infra.

The court never reads a bill as evidence of plaintiff's knowledge of a fact. Lord Chancellor, holding that plaintiff had determined his option by the case made by his bill, refused to allow paragraphs of it to be entered on the registrar's notes of proofs on hearing, to shew that plaintiff contemplated an aspect of the facts circumscribing his own rights as growing out of the alternative he had elected. *Kilbee* v. *Sneyd*, 2 Moll. 207.

Bill in chancery may be read as evidence in court of equity, though it cannot be read at law. *Ives* v. *Medcalfe*, 1 Atk. 63.

—— **In Other Suits.**]—Bill in another cause allowed to be read at hearing, as corroborating circumstances to prove stale demand. *Handeside* v. *Brown*, Dick. 236.

A bill in chancery filed by tenant for life, though no decree was pronounced in the cause, may be read in evidence in a suit against remainderman, partly relating to the same lands, but only as evidence of such a bill having been filed. *Nangle* v. *Smith*, 1 Ir. Eq. R. 119.

Where a bill has been amended, the amended bill is the only one upon record : the original bill, therefore, cannot be read as evidence to prove what a plaintiff considered his right to be at the time of filing it. *Hales* v. *Pomfret*, Dan. 141.

—— **Effect of Reading.**] — Where plaintiff reads bill in another cause against the same defendant as evidence, the defendant may also read his answer to it. *Dolphin* v. *Dolphin*, 2 Moll. 540.

Answer—In what Action.] — The answer in chancery of one who had been a partner in a firm, but who had retired from the firm, and ceased to have any interest in it before the commencement of that suit, is not admissible against the continuing partners of the firm, although it relates to transactions which occurred with the firm at the time when the retired partner was a member of it. *Parker* v. *Morrell*, 2 Car. & K. 599.

Declarations made by a party in possession of an estate, in his answer to a bill in chancery, are admissible against him, and persons deriving from him ; but declarations by him of what he heard another person state, not adding that he believed the statement, are not admissible to cut down or defeat his estate. *Roe* d. *Trimlestown* (*Lord*) v. *Kemmis*, 9 Cl. & F. 780.

In 1810 the plaintiff became assignee of an unexpired term granted to W. In 1809 W. had entered into an agreement to grant a lease to M., who was let into possession under the agreement, and through whom the defendant claimed. In 1835 the plaintiff filed a bill in chancery against M. to enforce the agreement ; and in 1839 M. put in his answer, in which he acknowledged the title of the plaintiff. In ejectment against the defendant : — Held, that the answer was an acknowledgment of title given to the plaintiff within 3 & 4 Will. 4, c. 27, s. 14. *Goode* v. *Job*, 1 El. & El. 6 ; 28 L. J., Q. B. 1 ; 5 Jur. (N.S.) 145.

An answer in chancery by a mortgagor to a bill of foreclosure filed by the mortgagee is not admissible in evidence, the mortgagor having conveyed his interest in the estate to another twenty years before the answer was filed, and the person to whom the estate was conveyed being no party to the mortgage or to the proceedings in equity. *Gully* v. *Exeter* (*Bishop*), 2 M. & P. 266 ; 5 Bing. 171.

There was a dispute as to the limits of a several fishery. In an action against alleged trespassers the lessee of the corporation tendered in evidence a bill and an answer in chancery in a suit instituted a great many years before by another grantee of the crown against the corporation, and in which the limits of the alleged fishery were described :—Held, that as part of the history of the fishery and of the claims made to it, the bill and answer were admissible. *Malcolmson* v. *O'Dea*, 10 H. L. Cas. 593 ; 9 Jur. (N.S.) 1135 ; 9 L. T. 93 ; 12 W. R. 178.

In an action on a bond, a defendant pleaded that he was induced to execute it by the fraud, covin, and misrepresentation of A. and B., the plaintiffs, and D. in collusion with them. The money for which the bond was given was part of the property included in the marriage settlement of H., the defendant's brother, which was advanced to H. by the plaintiffs, the trustees. For the defendant, it was proposed to put in the answer of A. in chancery, to shew that D. had committed a breach of trust with respect to some other of the trust money :—Held, that the answer could not be given in evidence for this purpose. *Courtenay* (*Lord*) v. *Phillimore*, 2 Car. & K. 1018.

In ejectment by an executor, it is sufficient primâ facie evidence that the testator had a chattel interest in the premises, to put in the defendant's answer to a bill in equity, stating that "he believed the testator was possessed of the leasehold premises in the bill mentioned." *Doe* d. *Digby* v. *Steel*, 3 Camp. 115 ; 13 R. R. 768.

A., B. and C. were committees of a lunatic. To a bill filed against the lunatic and themselves as committees, they put in an answer stating certain facts. That cause went to issue, and witnesses were examined. The lunatic died. A., and the wives of B. and C., who were relatives, obtained letters of administration to her estate, as her next of kin. The plaintiff in the original suit then filed a bill of revivor against A., the two wives and their husbands, merely praying for a revival of the suit. The ordinary order was made. The defendants to the bill of revivor put in an answer, in which they craved to have the full benefit of the answer to the original bill. There was no replication to this answer. The original answer contained statements which, at the hearing, were admitted to be read against the defendants :—Held, that, under the circumstances of this case, these statements were properly admitted in evidence. *Stanton* v. *Percival*, 5 H. L. Cas. 257 ; 24 L. J., Ch. 369 ; 3 W. R. 391.

Quære, by the Lord Chancellor, whether, as a general rule, the answer of a committee of a lunatic is admissible in a suit against the lunatic's personal representative to bind the lunatic's estate. *Ib.*

A plaintiff in one suit put in his answer to the original bill in another suit respecting the same matter. The bill in the second suit was then amended, and the plaintiff died before putting in his answer to the amended bill. Replication was filed in the second suit, and the first suit was brought on by way of motion for decree. An order

was obtained to use the evidence in the second suit on the hearing of the first:—Held, that the plaintiff's answer to the original bill was not admissible as evidence. *Moore* v. *Harper*, 14 L. T. 14; 14 W. R. 306.

A defendant having, on cross-examination as a witness in another cause, given evidence affecting the statements contained in her answer, plaintiff applied, after the cause was in the paper, and seven months after notice of motion for decree, for leave to read at the hearing the defendant's evidence in the other cause. Plaintiff having been guilty of no laches, leave was given. *Watson* v. *Cleaver*, 1 Jur. (N.S.) 270; 3 W. R. 265.

Effect of.]—An admission in answer to a bill filed by other creditors against the defendant may be read as evidence against him. *Grant* v. *Jackson*, Peake, 204.

An admission in an answer of one defendant of a certain fact, is not evidence of that fact against another defendant upon motion for decree, though notice to read the answer has been given. Where, however, a defendant objected to such evidence, the court allowed the case to stand over with leave for the plaintiff to file affidavits, deposing to the fact in question. *Saltmarsh* v. *Hardy*, 42 L. J., Ch. 422.

The futility of a defence resting on an unproved inconsistent prior conveyance, evidenced by admissions in an answer to another suit, observed on. *Scott* v. *Scott*, 11 Ir. Eq. R. 487.

Expenditure on the estate claimed with plaintiff's knowledge, but chiefly in his minority:—Held, no defence. *Ib.*

If a defendant in his answer states portions of pleadings at law, but for greater certainty refers to a copy thereof, when produced the plaintiff may, on a motion for an injunction, read the whole of such pleadings from a copy verified by affidavit. *Rawson* v. *Samuel*, 4 Myl. & C. 330.

A bill was filed in chancery by A. as next friend to B. The defendant put in an answer which was not signed, but there was indorsed a consent by A. that this answer should be received without oath. The bill and answer were produced from the proper office:—Held, admissible. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

The answer of W. and H. to a bill in equity, filed by a third person, stating that W. has conveyed a reversion to H., is evidence against H. that he has done so, and if the answer refers to a deed, that makes no difference, and notice to produce the deed is not necessary. *Ashmore* v. *Hardy*, 7 Car. & P. 501.

Where matters are stated by the answer which are not put in evidence, it is in the discretion of the court to direct inquiries as to those matters before the master. A settled account suggested by the answer, but not proved, is usually the subject of inquiry. *Counop* v. *Hayward*, 1 Y. & C. 633.

If a defendant gives in evidence an answer in chancery of the plaintiff, it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay. *Roe* d. *Pellatt* v. *Ferrars*, 2 Bos. & P. 542.

If an answer in chancery is produced in evidence, the party against whom it is produced is entitled to have the whole bill in chancery read, as part of his adversary's case. *Pennell* v. *Meyer*, 8 Car. & P. 470; 2 M. & Rob. 98.

As to all equity proceedings, it is a general ule, that, in order to give any interlocutory matter in evidence, a foundation must be laid by proving all its former stages. *Roch* v. *Rix*, Gilb. Evid. 56. As the bill to make way for the answer, the bill and answer, or the defendant's contempt for the depositions, &c., *Piercy* v. ——, T. Jones, 164; Gilb. Evid. 65; otherwise the whole bearing of the evidence would not appear, neither would the court see that the proceeding was regular; in which case the answer and depositions would have only the effect of a mere voluntary affidavit, and which, if made by a stranger, could not be received in evidence, as the party would be deprived of his cross-examination, and if made by the party himself then as before mentioned. *Anon.*, Sty. 446.

When the answer of a party in another cause is resorted to as evidence the whole of it is admissible both at law and in equity. *Boardman* v. *Jackson*, 2 Ball & B. 386.

Although in general, pleadings in one suit cannot be used in another, as evidence of the truth of the allegations contained in them, yet, where a pleading is signed by the party, it will be regarded in the light of an admission, and, as such, will be evidence against him, not only with reference to a different subject-matter, but in a suit maintained against a different opponent. *Marianski* v. *Cairns*, 1 Macq. H. L. 212.

Putting in.]—The defendant in the action filed a bill against plaintiff in the action, who put in an answer which being excepted to, and the exceptions allowed, he filed an amended bill to the answer, to which exceptions were also allowed. Five other amended bills in succession were also filed in consequence of the exceptions taken to the answers being in like manner allowed. The answer to the last amended bill was not excepted to:—Held, that defendant having given in evidence the first five amended bills and answers, was not bound to put in evidence the last answer also. *Edwards* v. *Glengall* (*Earl*), 9 L. J., Ex. 65. (*See* L. J. Digest, Vol. IV., p. 233.)

Examined Copies.]—On a trial at law, an examined copy of the plaintiff's answer to a bill in equity may be read in evidence against him without producing the original. *Hodgkinson* v. *Willis*, 3 Camp. 401.

But some evidence of the identity of the parties must be given. *Ib.*

Upon a plea of plene administravit a plaintiff, in order to shew assets, gave in evidence a copy of a bill and answer, purporting to be an answer by a person of the same name, and sustaining the same character as the defendant:—Held, that the copy was admissible, and that on the face of it there was presumptive evidence of identity, the defendant not having shewn any circumstances to rebut the presumption. *Hennell* v. *Lyon*, 1 B. & Ald. 182; 18 R. R. 456.

In ejectment, examined office copies of a bill in chancery, filed by the defendant for an injunction, and of an affidavit purporting to have been made in the equity suit by a person of the same name and description, in support of the motion for the injunction, which alleged title to the premises in one of the lessors of the plaintiffs, were produced to prove that title:—Held, that the copy of the affidavit was not admissible without proof of identity, or that it had been used. *Rees* d. *Howell* v. *Bowen*, M'Clel. & Y. 383. And see *Highfield* v. *Peake*, M. & M. 109; 31 R. R. 722.

On the trial of a civil cause, an examined copy of an answer in chancery is admissible to contradict a witness who swore in opposition to what

was stated in the answer to which he was a party. *Ewer* v. *Ambrose*, 6 D. & R. 127; 4 B. & C. 25; 3 L. J. (o.s.) K. B. 128; 28 R. R. 198.

An examined copy of an answer in chancery by a person not party to the action, is admissible without producing the original or proving the party's handwriting. *Tooth* v. *Bagwell*, 2 Car. & P. 271.

Office Copy.]—Office copy of an answer in chancery offered in evidence. It appeared from the examination of the witness, who had compared the office copy with the original, that the original contained words at length, such as "complainant," "orator," &c., which in the office copy were written "complt.," "oror.," &c.:—Held, no objection. *Anderdon* v. *Foley* (*Lord*), 2 L. J., K. B. 214.

Office copy of bill cannot be read as evidence, if original is not on file, though officer of court is ready to prove that the original cannot be found amongst the records. *Irwin* v. *Simpson*, 7 Bro. P. C. 317.

The defendant refusing to produce the office copy of the bill, the draft could not be read, but a specific performance was decreed upon inspection of the record. *Huddleston* v. *Briscoe*, 11 Ves. 583.

The fact that the plaintiff had filed a bill in this court, being relied on by the defendant as having worked a forfeiture of his interest:—Held, that the mere production of the office copy was not sufficient evidence, there being no proof of identity; and, secondly, that the defendant was not entitled to an inquiry on the point. *Williams* v. *Knipe*, 5 Beav. 273.

Copies of bills, answers, and depositions in this court, ordered to be certified by the clerk of records and writs, under the statute 14 & 15 Vict. c. 99, s. 14. *Reeve* v. *Hodson*, 10 Hare (App.) xix; 22 L. J., Ch. 696; 12 Jur. 844; 1 W. R. 244.

Demurrer to Bill.]—A demurrer or a plea to a bill in equity, does not so admit the facts charged as to be evidence against the defendant of those facts in a future action between the same parties. *Tomkins* v. *Ashby*, M. & M. 32.

Record.]—Before ordering the production of original records, the court requires it to be shewn that the office copies will not be sufficient. *Anon.*, 13 Beav. 420.

To warrant an application to produce, on the trial of a civil action, a record of the court, the court may require sufficient ground to be laid, particularly as the office copy might be evidence. *Stratford* v. *Greene*, 1 Ball & B. 296.

—— **Proper Custody.**]—An order having been improperly obtained in this court for the production of the records of the proceedings in a suit in the Court of Great Sessions, Wales, they were forwarded by the registrar of that court, through his agent in London, to the clerk in court of the plaintiff, the proper officer:—Held, till such order was rescinded, that they were to be deemed to be in the proper custody. *Greenfell* v. *Girdlestone*, 7 L. J., Ex. Eq. 42; 2 Y. & C. 662.

c. Depositions.

Admissibility under Ord. XXXVII. r. 3.]—In order to make the evidence taken in one action available in another under the provisions of Ord. XXXVII. r. 3, the actions must be between the same parties or their privies or the persons they represent, and the issue must be exactly the same. Ord. XXXVII. r. 3, merely does away with the necessity for an order, but does not affect the ordinary rules of evidence. *Printing Telegraph and Construction Co. of the Agence Havas* v. *Drucker*, 64 L. J., Q. B. 58; [1894] 2 Q. B. 801; 9 R. 677; 71 L. T. 172; 42 W. R. 674—C. A.

In whose Presence.]—The deposition of a witness, taken in a judicial proceeding in the presence of the party there charged, is not admissible in another proceeding against that party, on the ground that he was present and had the opportunity of cross-examining. *Melen* v. *Andrews*, M. & M. 336; 31 R. R. 736.

Taken de bene esse.]—In a suit instituted in 1815 for a declaration of title to mines and minerals, witnesses were examined by commission de bene esse in that year. Nothing had been done in that suit since 1818. In modern suits for, in effect, the same purpose, the evidence had been closed, and the suits were ready to be set down for hearing. On motion in all the suits publication of the ancient evidence was allowed, and an order was made as in *Hamilton* (*Duke*) v. *Meynal*. *Moggridge* v. *Hall*, 13 Ch. D. 380; 28 W. R. 487. Affirmed, on appeal, 19 Ch. D. 224; 30 W. R. 557—C. A.

When a bill had been filed to administer the real and personal estate of an intestate, the object being to ascertain his co-heirs and next of kin, and after decree made, but before it was drawn up, a person claiming to be a co-heir and one of the next of kin, not a party to the first suit, had filed a bill against all the parties to the first suit, also praying administration, with the object of having the evidence of a witness taken de bene esse, and the witness had been examined and cross-examined—an application that the evidence taken de bene esse in the second suit might be read in the first suit was refused. *Hill* v. *Hibbit*, 38 L. J., Ch. 447; L. R. 7 Eq. 421.

Parties.]—In an issue from chancery between A. and B., depositions produced in chancery by B., in a suit of C. against B., are inadmissible. *Atkins* v. *Humphreys*, 1 M. & Rob. 523.

Where, on a bill brought by A. against B., C. and D., and others, the defendants had examined some witnesses, that B. being now plaintiff, may read those depositions against the plaintiff or any of the defendants in the first cause. *Barstow* v. *Palmes*, Pre. Ch. 233.

Depositions taken in a former cause cannot be read, in another cause, against one who does not claim under the party against whom those depositions were taken. But if a legatee brings a bill against the executor, and proves assets, another legatee, though no party, may have the benefit of those depositions. *Coke* v. *Fountain*, 1 Vern. 413.

If the cause is brought into a hearing, and stands over, with liberty to add a party, if he is a material defendant, and concerned in interest, the depositions taken before cannot be read against him. *Niblett* v. *Daniel*, Bunb. 310.

The creditors of L. obtained a decree for payment of their debts, and to set aside some conveyances gained by fraud, and S. and the legatees are made defendants. The legatees having brought their bill against S., the question

was, if the depositions in the former cause, touching the fraud, could not be read in this :—Held, the question being the same in both causes, and S.'s defence the same, the depositions ought to be read. *Nevil* v. *Johnson*, 2 Vern. 447.

A witness examined at a former trial of an issue betwixt the same parties, and who has been examined in the cause, in case he dies, not only his depositions may be read, but what he swore at the former trial may be given in evidence. *Coker* v. *Farewell*, 2 P. W. 563.

Depositions taken in a former cause, where neither plaintiff nor defendant were parties, cannot be read as evidence, but where either plaintiff or defendant was a party in the former cause, the depositions in that cause may be read against such of them as was a party. *Peterborough* v. *Germaine* (*Earl*), 3 Bro. P. C. 539.

Depositions of witnesses taken in former causes, relating to same matter for which new suit is instituted against another party, ought to be permitted to be read as evidence upon the hearing of such new cause, although the witnesses themselves are not proved to be dead. *London* (*City*) v. *Perkins*, 3 Bro. P. C. 602.

An order made to read the proceedings taken in one cause, in another, must be between the same parties. *Eade* v. *Lingood*, 1 Atk. 204.

The deposition of a witness examined on interrogatories, jointly interested with the defendant, may be read in evidence for defendant, the name of the deponent being indorsed on the record under 3 & 4 Will. 4, c. 42, s. 27. *Adams* v. *Garrard*, 2 M. & Rob. 400.

Depositions in a former cause in chancery admitted to be read upon motion, the same matter being then under examination as now, though neither the plaintiff nor any under whom he claimed was privy to the former suit. *Terwit* v. *Gresham*, 1 Ch. Ca. 73.

Where a bill was filed by a person claiming as tenant in common, founding his title on articles alleged to be lost, and evidence of the contents of the articles was given :—Held, that the depositions if read in that cause, the witnesses being dead, might be read in a suit instituted by another tenant in common, claiming in the same right against the same person in possession ; what was evidence against the occupying tenant in common in the first cause, may be used as evidence for the plaintiff in the second, although he claims, not as representative, but as having rights co-extensive in pari materiâ. *Byrne* v. *Frere*, 2 Moll. 20.

Although there are two suits in this court between parties having the same respective interests, and relating to the same matters, the depositions of such only of the witnesses in the prior suit as are dead will be allowed to be read in the subsequent suit. *Carrington* v. *Cornock*, 2 Sim. 567.

A party having been examined as a witness in a former cause :—Held, that his depositions were sufficiently put in issue to entitle them to be read by a general reference in the pleading to his deposition. *Houlditch* v. *Donegal* (*Marquis*), 1 Moll. 366.

After witnesses examined upon original bill, amended bill was filed against new parties, some infants, court will not allow evidence taken on original bill to be read against new defendants the infants. *Quantock* v. *Bullen*, 5 Madd. 81.

Case in which, after parties have gone into evidence in an original suit, evidence is material or admissible in a supplemental suit. *Wilkinson* v. *Fowkes*, 9 Hare, 592.

Evidence taken in an original suit may be read in a cross-suit under the common order, the court having judicial notice of both causes. *Gray* v. *Haig*, 21 L. J., Ch. 542.

Order of course granted to read in another suit evidence taken in winding-up suits. *Ernest* v. *Weiss*, 1 N. R. 6.

A., without authority, sold a trust estate to B. In a suit to recover the money from A., B., who was not a party, was examined as a witness. A suit was afterwards instituted against the representatives of B. to recover the estate itself, and an order of course was obtained in it to use the depositions in the former suit, saving just exceptions. It was discharged as irregular. *Hope* v. *Liddell*, 21 Beav. 180.

Depositions taken in a cause wherein tenant in tail, or the father, is only tenant for life, remainder to the son, cannot be read against the son. *Peterborough* v. *Norfolk*, Pre. Ch. 212.

Tenant for life, in possession of real estate, was also tenant for life of personal estate, under same will, and was heir-at-law of surviving trustee of real estate, but was not a trustee of the personal estate. Two suits were instituted against him, one by the tenant for life in remainder of the real estate, complaining of mismanagement of that estate, and praying consequential relief, and particularly the removal of the tenant for life in possession from being trustee ; the other suit was instituted by the first tenant in tail in remainder for the same objects as regarded the real estate, but praying also relief in respect of personal estate :—Held, that evidence taken in the former suit was not admissible in the latter, it not appearing that the witnesses were dead, or incapable of being examined. The court declined, except on consent, to make one decree in both the above suits. *Blagrave* v. *Blagrave*, 1 De G. & Sm. 252 ; 16 L. J., Ch. 346 ; 11 Jur. 744.

A., B. and C. were partners. C. became lunatic, but A. and B. carried on the business in partnership : and then A. died. In a suit to take the accounts of the firm of A. and B., it was held, that affidavits made by A., in a suit between him and the committee of C., in which he alluded to an understanding between himself and B., which in some instances had been acted upon, that the advances made to the customers of A. and B., should be repaid before any portion of the moneys paid by those customers should be applied in payment of the debts of the prior firm of A., B. and C., were not sufficient proof of such an agreement in a contest between B. and the executors of A. *Toulmin* v. *Copland*, 3 Y. & Coll. 625.

Although, generally, the best evidence for a litigant is his adversary's testimony in his favour, yet this rule must be qualified, where the evidence was given in a suit in which the controversy was not between the same parties, nor put upon the same footing, or where the adversary had an interest in giving the testimony in question. *Ib.*

In replevin in which the question was, whether the locus in quo, a tract of mountain land, was the property of B., as lord of the manor, or formed part of the estate of M., the plaintiff tendered the depositions of two witnesses taken in a chancery suit, previously to the 1st November, 1852, instituted by E. against M., the object of which was to set aside the purchase of the

estate, on the ground that M. had acted as his (E.'s) solicitor, and had given inadequate value. In that suit M. sought to shew, by his answer, that the acreage and value of the estate were but small, and used as part of his evidence the depositions of two former tenants of the estate in corroboration. These depositions contained statements respecting the extent of the estate, and tended to prove that the locus in quo could have formed no portion thereof. The plaintiff claimed under B., and the defendant on the record was tenant to M., who was the real defendant in the action :—Held, that the depositions were admissible as primary evidence of the same facts against M. in a subsequent action by a stranger to the suit of E. against M. *Richards* v. *Morgan*, 4 B. & S. 641 ; 33 L. J., Q. B. 114 ; 10 Jur. (N.S.) 559 ; 9 L. T. 662 ; 12 W. R. 162.

Evidence with respect to a transaction between A. and B., taken on behalf of B. in a suit between B. and C. for the purpose of asserting against C. a right to property which B. claimed by virtue of that transaction, cannot be used by D. in a suit to which B., C. and D. are parties, and in which D. sets up both against B. and C. an equitable interest in the property, contemporaneous with and growing out of the title alleged to have been acquired by B. A. made a voluntary statement of lands in favour of C., and afterwards, under an alleged contract for sale, conveyed them to B., who was represented on the face of the conveyance to be a purchaser for value. B. then filed a bill against C., to have the voluntary settlement set aside, and his own title on the lands established, and in that suit examined a witness to prove the bona fides of the sale. D. subsequently filed a bill against B. and C., alleging that the sale was valid, but that the price was in part paid out of the moneys which belonged to D., and claiming a lien to that extent upon the lands purchased. Finally C. filed a bill against B. and D. to set aside the sale in toto, on the ground of its being fraudulent and collusive, and to establish the voluntary settlement :—Held, that in the last-mentioned suit, upon an issue directed between D. and C., to try whether the purchase-money was bonâ fide paid, it was not competent to D. to use the depositions taken in the suit between B. and C. *Humphreys* v. *Pensam*, 1 Myl. & C. 581.

In a tithe suit by a vicar, for small tithes, depositions of deceased witnesses in an old suit, by the rector, for the great tithes of the parish, were received as evidence. *Ward* v. *Pomfret*, 5 Sim. 475 ; 2 L. J., Ch. 22.

Answer purporting to be the answer of a minor by his mother and guardian, may be read against the mother in another cause where she is defendant in her own capacity. *Beasley* v. *Magrath*, 2 Sch. & Lef. 34.

When Action Dismissed.]—Depositions taken on a bill of revivor, afterwards dismissed upon the ground that the party had no title to revive, cannot be read ; otherwise, if the bill had been dismissed for want of equity merely. *Backhouse* v. *Middleton*, 1 Ch. Ca. 173 ; 3 Ch. Rep. 39 ; 2 Freem. 132.

If plaintiff's bill be dismissed for irregularity, as where a devisee revives the suit for his devisor, and several depositions are taken, and then the cause on hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot revive, then the depositions cannot be read in any other cause, for there was no cause regularly before the court. *S. C.*, 1 Ch. Ca. 173.

But if a cause was once regularly before the court, though the bill be dismissed by reason that the remedy was at law, then the depositions will be evidence. *Smith* v. *Veale*, 1 Ld. Raym. 735.

For what Purpose.]—An examined office copy of a deposition in chancery is admissible for the purpose of contradicting the testimony of the same person in a court of law. *Highfield* v. *Peake*, M. & M. 109 ; 31 R. R. 722.

Where depositions in a suit in equity are given in evidence at law, and the bill and answer are also put in to shew that the depositions are admissible, the opposite counsel has no right to refer to the bill and answer in his address to the jury. *Chappell* v. *Purday*, 14 M. & W. 303 ; 14 L. J., Ex. 258.

Depositions of a witness made in another cause, or another court, may be read for the purpose of confronting his evidence, and without any order of the court. *Anon.*, Mos. 118.

Depositions in former cause between different parties, cannot be used as to credit of witness. *Mackworth* v. *Penrose*, Dick. 50.

Semble, on bill for relief, the evidence taken may be read as evidence of reputation against persons not parties to suit ; but secus, on bill to perpetuate only. *Biddiford* v. *Partridge*, 3 Anstr. 646.

On petition to expunge debt of C., examination of witness on former occasion as to a debt sought to be proved by A., cannot be read. *Coles, Ex parte*, 3 Madd. 315 ; Buck, 242.

Pleadings and depositions and a decree in a former suit (the same will being in issue) are admissible, as shewing the acts and knowledge of the parties who had the same interests under the will as the plaintiff. *Lorton* (*Viscount*) v. *Kingston* (*Earl*), 5 Cl. & F. 269.

Examination in chancery may be used before the delegates. *Gargrave* v. ——, 2 Ch. Ca. 250.

Declarations as to Pedigree.]—Upon the trial of an ejectment respecting Blackacre, between A. and B., in which it was necessary for A. to prove that he was the legitimate son of S. ; A., after proving by other evidence that S. was his reputed father, offered to give in evidence a deposition made by S. in a cause in chancery, instituted by A. against C., in order to perpetuate testimony to the alleged fact disputed by C., that he was the legitimate son of S., in which character he claimed an estate in remainder in Whiteacre, which was also claimed in remainder by C. B., the defendant in the ejectment, did not claim Blackacre under either A. or C., the plaintiff and defendant in the chancery suit :—Held, by the judges, that according to law the deposition of S. could not be received upon the trial of such ejectment against B. as evidence of declarations of S., the alleged father, in a matter of pedigree. *Berkeley's Case*, 4 Camp. 401 ; 14 R. R. 782.

Commission.]—Depositions taken under an old commission may be admitted without producing the commission, as it may be presumed to be lost ; aliter, where under a recent one. *Bayley* v. *Wylie*, 6 Esp. 87.

The bill and answer need not be produced. *Ib.*

Nature of Interrogatories.]—In an action, the issue at the trial being in which of the

two counties the locus in quo was situated, an exemplification of the depositions taken in an ancient suit to perpetuate testimony, to which the plaintiff and defendant were privies, is admissible evidence at the trial, though it appeared that the interrogatories upon which the depositions were framed were leading interrogatories, such as would not have been allowed to be put at the trial. *Williams* v. *Williams*, 4 M. & S. 497.

Parol Evidence of.]—A witness examined on the trial of an issue out of chancery, died; a new trial was granted, and on the new trial parol evidence was allowed to be given of what this witness had deposed on the former trial, notwithstanding there was the usual order for reading the depositions in equity of such witnesses as had died since the first trial. *Tod* v. *Winchilsea* (*Earl*), 3 Car. & P. 387.

Producing Office Copies.]—On a reference to the master under a decree, all the evidence referred to in the decree is before the master. Therefore, a party who objects to the draft of the master's report, on the ground that it is not warranted by the evidence, is not bound to produce office copies of the depositions; but he ought previously to notify to the master what parts of the evidence he intends to rely upon. *Wilson* v. *Wilson*, 15 Sim. 487; 11 Jur. 340.

3. Proceedings in County Courts.

Witness as to.]—The modern county courts are courts of record without records, and the mode of proving what occurred on a trial in one of those courts is, to call a person who was present who can speak as to the particular matter of fact. *Harmer* v. *Bean*, 3 Car. & K. 307.

Clerk's Books.]—But the clerk's book, or a certified copy of entries from such book, is the best and therefore the only evidence of proceedings in a county court. *Reg.* v. *Rowland*, 1 F. & F. 72.

A minute of the proceedings of a county court, made by the clerk, pursuant to the County Courts Acts, is conclusive evidence of them, even though the judge gives evidence to the contrary. *Dews* v. *Ryley*, 2 L. M. & P. 544; 11 C. B. 434; 20 L. J., C. P. 264; 15 Jur. 1159.

Recital on Writ.]—Goods having been seized under an execution upon a judgment in a county court against R., the plaintiff, who claimed the goods under an assignment which was void against creditors, brought an action against the bailiffs of the county court for such seizure, and, to prove the trespass, put in evidence the writ of execution, with the levy indorsed thereon. The writ recited the judgment recovered in the county court:—Held, that this was not sufficient evidence of the judgment to justify the bailiffs. *White* v. *Morris*, 11 C. B. 1015; 21 L. J., C. P. 185; 16 Jur. 500.

Effect of Judgment.]—*See* County Court.

4. Proceedings before Magistrates.

a. Orders.

Recitals in.]—Upon the trial of an indictment for disobeying an order of justices, the recital upon the face of the order of the facts giving the magistrates jurisdiction is not evidence of the existence of such facts. *Rex* v. *Gilkes*, 2 M. & Ry. 454; 8 B. & C. 439; 6 L. J. (o.s.) M. C. 118.

Under 5 & 6 Will. 4, c. 50, s. 73, an order of a justice, reciting that the plaintiff's timber was laid on the highway, and directing its removal, is conclusive to shew that the locus in quo was a highway; so that the plaintiff, in an action of trespass against the justice who made the order, cannot dispute his jurisdiction on the ground that the locus in quo was not a highway. *Mould* v. *Williams*, D. & M. 631; 5 Q. B. 469.

As to Highway.]—An order of justices made under 34 Geo. 3, c. 64, in the form given in the appendix, dividing a highway lying in two parishes, by a transverse line, into two parts, and directing that they should be repaired by the two parishes respectively, is conclusive evidence, on an indictment for the non-repair of one of the parts, that it is in the parish ordered to repair it. *Reg.* v. *Hickling*, 7 Q. B. 880; 14 L. J., M. C. 177; 9 Jur. 1075.

Affiliation.]—An order of affiliation is admissible to contradict a witness who denies having been present at the making of such order. *Watson* v. *Little*, 5 H. & N. 472; 29 L. J., Ex. 267; 8 W. R. 420.

b. Commitments and Convictions.

Conclusive.]—A conviction by a justice having competent jurisdiction, unappealed against and unreversed, cannot be controverted in evidence. *Fawcett* v. *Foulis*, 7 B. & C. 394; 1 M. & Ry. 102; 6 L. J. (o.s.) M. C. 44.

So, in an action against two justices, for seizing and detaining a decked and registered vessel on the river Thames, having gunpowder on board, under 2 Geo. 3, c. 28:—Held, that the owner could not give evidence to shew that she was not a boat within the meaning of that statute. *Brittain* v. *Kinnaird*, 4 Moore, 50; 1 Br. & B. 432; Gow, 164; 21 R. R. 680.

Action for disturbing a watercourse, which of right, ought to flow into the plaintiff's close to irrigate it. Plea, a denial of the right. On the trial it appeared that the watercourse was not ancient, but that the water had flowed in its present course for more than twenty years past the plaintiff's close. There was evidence that during that period the plaintiff and those under whom he claimed had been constantly in the habit of drawing off the water to irrigate his close, and that the owners of the watercourse resisted it. On one occasion when plaintiff's servant drew off the water he was summoned before a justice for so doing; the plaintiff's son, by his direction, attended and defended the servant, and paid a fine of one shilling. The conviction was under a local act, from which there was an appeal. The plaintiff did not appeal. The conviction was tendered and rejected:—Held, improperly rejected, as the conviction unappealed against was evidence of an acknowledgment by the plaintiff that the usage to draw off the water for irrigation was not as of right. *Eaton* v. *Swansea Waterworks Co.*, 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 675.

In what Actions.]—If A. is convicted before a justice, on the evidence of B., although B.'s name does not appear on the conviction, he cannot avail himself of it in any civil proceeding between him and A. *Smith* v. *Rummens*, 1 Camp. 9.

So, if B. and C. are convicted of a conspiracy on the prosecution of A., the conviction is not admissible evidence in an action afterwards brought against them by A. for the same conspiracy. *Hathaway* v. *Barrow*, 1 Camp. 151. And see *Burdon* v. *Browning*, 1 Taunt. 520.

The conviction of a person before a justice of the peace for obstructing officers, in which the evidence given is set out, cannot be given in evidence to contradict what is sworn by a witness at the trial as to what he swore before the justices. *Rex* v. *Howe*, 6 Esp. 124; 1 Camp. 461.

A conviction by justices in rem is evidence as between strangers, though founded upon the evidence of one of the parties who uses it. *Davies* v. *Nest*, 6 Car. & P. 167.

In an action against a defendant for giving the plaintiff into custody on a charge of stealing oysters from an oyster-bed:—Held, that the defendant could not, for the purpose of proving bona fides on his part, give evidence of a prior conviction of a third party for stealing oysters from the same bed, such conviction not having come to the knowledge of the defendant at the time of his giving the plaintiff into custody. *Thomas* v. *Russell*, 9 Ex. 764; 2 C. L. R. 542; 23 L. J., Ex 233; 2 W. R. 418.

When a plaintiff had been convicted under the Highway Act, 5 & 6 Will. 4, c. 50, s. 69, of erecting a building so as to encroach on a highway, and which building the defendant, as surveyor of the highway, had pulled down:—Held, that the conviction of the plaintiff under that section justified the defendant, and was conclusive as to the building being an encroachment. *Keane* v. *Reynolds*, 2 El. & Bl. 748; 2 C. L. R. 245; 18 Jur. 242.

Effect of Recitals in.]—Where, in a conviction, the summons is recited, such recital of it is evidence of the summons; but in an action against the convicting magistrate for false imprisonment, the plaintiff is entitled to give evidence to shew that there was no summons, and, if he succeeds in doing so, the conviction is bad. *Mason* v. *Barker*, 1 Car. & K. 200.

An examined copy of the magistrate's conviction, reciting an information, is sufficient proof of the information. *Scarth* v. *Gardener*, 5 Car. & P. 38.

Before Police Magistrate.] — A conviction before a police magistrate can only be proved by the production of the record of the conviction, or an examined copy of it. *Hartley* v. *Hindmarsh*, 1 H. & R. 607; 35 L. J., M. C. 255; L. R. 1 C. P. 553; 12 Jur. (N.S.) 502; 14 L. T. 795; 14 W. R. 862.

Copy.]—The 5 Geo. 4, c. 83, s. 17, requires convictions before justices under the act to be filed in the court of quarter sessions, and makes a copy of such conviction, signed by the clerk of the peace, evidence of the same. At a petty sessions it was attempted to prove a previous conviction of an offence under 5 Geo. 4, c. 83, by the oath of the police and the production of the minute-book of the clerk of the court, containing an entry of such conviction:—Held, that such evidence was insufficient. *Giles* v. *Siney*, 13 W. R. 92; 11 L. T. 310.

Warrant.]—A warrant of commitment is not evidence of the facts which are therein recited. *Stevens* v. *Clark*, 2 M. & Rob. 435; Car. & M. 509.

c. Depositions.

On another Charge.]—In order to prove malice or motive against an accused, the deposition of the deceased against him, taken before the magistrates on another charge, and for which he was afterwards convicted, was tendered in evidence, and it was admitted. *Reg.* v. *Buckley*, 13 Cox, C. C. 293.

Signing by Magistrates.]—It is not necessary that each deposition should be signed by the justice taking it; and therefore where a number of depositions taken at the same hearing on several sheets of paper were fastened together and signed by the justice taking them once only at the end of all the depositions in the form given in schedule M. to the 11 & 12 Vict. c. 42, one of these depositions will be admissible after the death of the witness making it, although no part of it is on the sheet signed by the justice. *Reg.* v. *Parker*, 39 L. J., M. C. 60; L. R. 1 C. C. 225; 21 L. T. 724; 18 W. R. 353. S. P., *Reg.* v. *Carrol*, 11 Cox. C. C. 322.

Where, on a preliminary hearing of a case, the magistrate's clerk had taken down what a witness said, but neither witness nor magistrate signed it:—Held, that what the witness said might be proved by any one who heard him, without producing the clerk's note. *Jeans* v. *Wheedon*, 2 M. & Rob. 486.

In Writing.]—The court will not in the absence of positive evidence presume that examinations before justices are not taken down in writing, so as to let in parol evidence. *Parsons* v. *Brown*, 3 Car. & K. 295.

It is to be presumed, that what is stated on oath before a magistrate is taken down in writing; and, therefore, parol evidence of such a statement is not receivable, unless it is first shewn that it was not so taken down. *Phillips* v. *Wimburn*, 4 Car. & P. 273.

The rule, that a written deposition, taken before a magistrate, under 7 Geo. 4, c. 64, s. 3, is the best evidence of the statement of the witness, is not confined to the proceeding in which the deposition is taken, but extends to all proceedings, civil as well as criminal, in which it is sought to adduce the statement of the witness in evidence. *Leach* v. *Simpson*, 5 M. & W. 309; 7 D. P. C. 13; 3 Jur. 654.

Evidence is admissible to add to the examination of a party before a magistrate, though taken in writing. *Venafra* v. *Johnson*, 1 M. & Rob. 316.

Party Alive.]—Where a plaintiff claimed to hold land under A., and on a previous charge of malicious trespass on the land before the petty sessions, had called A. as a witness, who however disproved the tenure:—Held, that the deposition of A. was admissible in evidence against the plaintiff, although A. was alive. *Cole* v. *Hadley*, 3 P. & D. 458; 11 A. & E. 807; 4 Jur. 483.

Whether Party Present.]—In an action by B. against A. for false imprisonment, A. pleaded a justification that B. had been guilty of embezzlement. A. and his witnesses having made the charge before a magistrate, depositions were taken in the hearing of B., and he made a statement in answer:—Held, that these depositions and B.'s statement in answer were receivable for A., as being matters stated in the hearing of B., to which he made an answer, but the depositions

were no proof of any fact therein stated. *Jones* v. *Morrell*, 1 Car. & K. 266.

Party Bedridden.]—Where a prosecutrix in a case of felony is bedridden, and there is no probability that she will ever be able to leave her house, the judge will admit her deposition before the magistrate as if she were dead. *Rex* v. *Hogg*, 6 Car. & P. 176.

See further, CRIMINAL LAW.

d. Statements of Parties.

In an action of assault, what was said by the magistrate to the plaintiff at a previous investigation of the circumstances before him, cannot be received as evidence on the part of the defendant at the trial, unless it drew any observations in reply from the plaintiff. *Child* v. *Grace*, 2 Car. & P. 193. See *Edden* v. *Thorniloe*, 6 Jur., N. P. C. 265.

5. PROCEEDINGS IN OTHER COURTS.

Decisions.]—On plea, sentence in Ecclesiastical Court, ex directo, in a matter properly cognizable there, is conclusive evidence where the same matter comes in question collaterally in a court of law or equity. *Meadows* v. *Kingston* (*Duchess*), Ambl. 756.

Sentence of Ecclesiastical Court held admissible, but not conclusive evidence on non-reconciliation between husband and wife. *Bateman* v. *Ross* (*Countess*), 1 Dow. 235.

Sentence in Ecclesiastical Court for fornication, &c., in a criminal way, not evidence against the issue; otherwise, if on the point of the marriage, and no collusion. *Brownsword* v. *Edwards*, 2 Ves. 245.

Infant defendants are not precluded as to question of bankruptcy by production of commission, &c., though no notice of intention to dispute has been given. *Bell* v. *Tinney*, 4 Madd. 372.

A. married B. by licence in 1798, during the time that the 26 Geo. 2, c. 33, was in force. In 1802 B. commenced a suit in the Ecclesiastical Court against A. of nullity of marriage, on the ground that she was a minor at the time of the marriage, and that her father's consent had not been given. It was proved in the suit that A. was a minor, and that her father was absent at the time of the marriage. A sentence of nullity was pronounced in June, 1802. In May, 1802, C., the only child of the alleged marriage, was born. Upon an inquiry who was the heir at law of A., C. claimed to be sole heiress, and objected to the reception, as evidence, of the sentence of the Ecclesiastical Court, on the ground that it had been fraudulently and collusively obtained. In support of this case, C. produced a bond, given by A. in 1801, for securing an annuity to B. for her life for her separate use, in which it was declared that it should remain good, notwithstanding a sentence of nullity of marriage, and produced a witness to prove conversations between A. and B. previously to the suit, in which they agreed that A. should give B. an annuity, and that legal proceedings to annul the marriage should be taken:—Held, that the sentence was not fraudulently or collusively obtained, and was admissible in evidence. *Harrison* v. *Southampton Corporation*, 22 L. J., Ch. 372.

A decree of the court of claims under stat. 11 & 12 Will. 3, s. 2, c. 2 (Eng.), adjudicating upon lands vested in an innocent person as charged with a rent, is not admissible in evidence, not being a matter within their jurisdiction; and although the possession of the lands and rent has ever since gone in accordance with the decree, it does not render it admissible, at least, without proving that it was known to the parties against whom it is produced, or those through whom they claim. *Dublin* (*Archbishop*) v. *Trimleston* (*Lord*), 12 Ir. Ch. R. 251.

Pleadings.]—Personal answer of defendant to libel in Ecclesiastical Court, preserved among the records of the register, is admissible evidence in suit for tithes in exchequer, by party claiming under same title as person whose answer it was. *Taylor* v. *Cook*, 8 Price, 664.

A man's answer in the Spiritual Court may be read against him in this court. *Mildmay* v. *Mildmay*, 1 Vern. 53.

Evidence—Court of Exchequer.]—Evidence taken in the Court of Exchequer may be used between the same parties litigant in chancery. *Magrath* v. *Veitch*, 1 Hog. 127.

Court will not, on motion, order depositions in tithe cause in exchequer, to be read in a tithe cause in this court, against other occupiers of land in the same parish, though objects of both suits and the interest of parties were the same. *Goodenough* v. *Alway*, 2 Sim. & S. 481.

Office copies of depositions by living persons in a tithe suit in the exchequer, may be read in a similar suit of this court, against another defendant, who makes the same defence, on production of office copies of the bill and answer in the former suit, without any order of this court for that purpose. *Williams* v. *Broadhead*, 1 Sim. 151; 5 L. J. (O.S.) Ch. 112.

—— **Court of Admiralty.**]—Examination in the Admiralty Court used in the Court of Chancery. *Watkins* v. *Fursland*, Tothill, 192.

—— **Bankruptcy.**]—The notes of the evidence of a bankrupt taken at his public examination are not evidence against him in an action to which he is a party in a representative capacity. *New's Trustee* v. *Hunting*, 66 L. J., Q. B. 554; [1897] 2 Q. B. 19; 76 L. T. 742; 45 W. R. 577—C. A.

The proceedings under a commission of bankruptcy, superseded, ordered to be produced at the hearing of a cause, in the Court of Chancery in Ireland, with a view to evidence, from the bankrupt's examination, but not of course *Bernal*, *Ex parte*, 11 Ves. 557.

Plaintiff had been examined in a bankruptcy, and defendant in his answer referred to the examination, as inconsistent with the bill of the plaintiff, who gave evidence in the suit, but was not cross-examined. Statement in bankruptcy which was neither an admission nor a confession, admitted as evidence at the hearing. *Davis* v. *Robinson*, 6 W. R. 673.

The examination of the assignee before the commissioner as to the sale of the property, was permitted to be read as evidence of the assignee's misconduct, although petition did not pray a resale. *Turrill*, *Ex parte*, 3 Deac. & C. 346.

An order of course may be made, under Consolidated Order XIX. r. 4, to read, at the hearing of a cause, proceedings in bankruptcy, including depositions. *Lake* v. *Peisley*, L. R. 1 Eq. 173; 11 Jur. (N.S.) 1012.

—— **Court of Council of York.**]—Depositions taken in Court of Council of York not allowable in chancery. *Rex* v. *Arundel* (*Countess*), Hob. 112. See also *Fielders* v. *Winchester* (*Bishop*), 1 Barnard, K. B. 323.

Depositions taken without bill or answer, not allowable in chancery. *Ib.*

—— **Star Chamber.**]—Allegations and admissions made in the course of arbitrary proceedings in the Star Chamber, and treaty for a compromise against its decree, as well as before the House of Commons, in an attempt to be relieved from the judgment of that court, were not to influence the court of equity. *Skinners' Co.* v. *Irish Society*, 7 Beav. 593. And see *S. C.*, 1 Myl. & C. 162. Affirmed, 12 Cl. & F. 425; 9 Jur. 1043.

—— **Chancery of Lancaster.**]—An order of course, to read, in a suit, evidence taken in a suit between the same parties in the Chancery Court of Lancaster, discharged as irregular. *Stephenson* v. *Biney*, L. R. 2 Eq. 303; 12 Jur. (N.S.) 428; 14 L. T. 432; 14 W. R. 788.

The right course in such a case is to prove that the issue is the same by production of the bill and answer, and the depositions can then be read without an order. *Ib.*

Evidence before Extinct Court.]—Where there had been a decree of one of the extinct courts, and depositions taken in the cause in which such decree was made, the court held that these depositions could not be used in evidence in a cause in this court (the court for matrimonial causes) except so far as they were embodied in the decree and therefore part of the proceedings of a court, and documents of a public nature of which this court would receive in evidence a certified copy. *Linzee* v. *Linzee*, 29 L. J., P. 128.

Order to Read.]—It is not necessary or proper to obtain an order of course to read in a cause depositions taken in another court, if they can be made evidence in the ordinary way. *Allen* v. *Bonnett*, L. R. 6 Eq. 522; 16 W. R. 1075.

6. Inquisitions.

Lunacy.]—Where, to an action against executors on the bond of their testator, they pleaded non est factum, and set up lunacy as a defence, an inquisition taken under a commission of lunacy against the testator after the execution of the bond, finding that he had been a lunatic from a day antecedent to that, without any lucid interval, is admissible. *Faulder* v. *Silk*, 3 Camp. 127; 13 R. R. 771.

An inquisition of lunacy is always admitted to be read, but is not conclusive evidence, for you may traverse it. *Sergeson* v. *Sealy*, 2 Atk. 412; 9 Mod. 370.

An inquisition of lunacy is not conclusive evidence of the precise date at which the lunacy commenced. *Bradbury, Ex parte, Walden, In re*, Mont. & C. 625; 4 Deac. 202; 9 L. J., Bk. 7; 3 Jur. 1108.

—— **Irish Inquisition.**]—Where an order in lunacy has been made in Ireland by the court having jurisdiction for that purpose, and a transcript of the record has, under the provisions of s. 52 of the Lunacy Regulation Act, 1853, been transmitted to this country, the English court must treat the order as a binding order, and has no jurisdiction to entertain an application either for the purpose of setting aside the proceedings in Ireland, or for a supersedeas. Any such application must be made to the court which originally made the order. *Talbot, In re*, 51 L. J., Ch. 360; 20 Ch. D. 269; 45 L. T. 730; 30 W. R. 386—C. A.

Whether Production of Commission necessary.]—An old inquisition post mortem, may be read in evidence, without producing the commission upon which it issued; but it is necessary to prove that such a commission did actually issue, but which may be done vivâ voce. *Anderton* v. *Magawley*, 3 Bro. P. C. 588.

Ownership.]—A document from the Court of Exchequer, purporting to be an extent of Crown lands, and pursuing the directions of the 4 Edw. I, stat. 1, may be given in evidence without producing the commission, or the authority under which it was taken. *Rowe* v. *Brenton*, 3 M. & Ry. 164; 8 B. & C. 747.

An inquisition made by a sheriff's jury to ascertain to whom the property of goods taken under a fi. fa. belongs, though found in favour of A., is not admissible in trover for the goods, brought by A. against the sheriff. *Latkow* v. *Eamer*, 2 H. Bl. 437.

In an action against a sheriff for a false return of nulla bona, an inquisition taken by him to ascertain the property of the goods taken under the fi. fa., finding them to be the property of a third person, not of the defendant in the execution, is not admissible for the sheriff. *Glossop* v. *Pole*, 3 M. & S. 175.

Damages.]—A horse having been killed by falling down an old shaft of a mine which had not been sufficiently covered over, the owner of the horse charged a person who was in the possession of a mine near to the spot with being also in possession of that shaft. The latter denied that the shaft was his, but said that if a miner's jury were called, and that they should say that the shaft was his, he would pay for the horse. A miner's jury was accordingly called, and they found in writing that the shaft was his:—Held, that this finding of the jury, coupled with his declaration, was admissible against him in an action to recover compensation for the loss of the horse. *Sybray* v. *White*, 1 M. & W. 435; 2 Gale, 68; 1 Tyr. & G. 746; 5 L. J., Ex. 173.

Liability to Repair.]—On an indictment for non-repair of Kelham Bridge, ratione tenuræ, the defendants tendered in evidence a record temp. 18 Edw. 3, setting out a presentment of the Bishop of Lincoln for not repairing the bridge; that the indictment was removed by certiorari, and at the trial the finding of the jury was, that the bishop was not liable to do the repairs, and that the jury was ignorant who was liable to do them; that the bridge had been constructed sixty years, and had been repaired from the alms of the men passing over it. It also appeared that a grant of pontage to the men of Kelham was also issued from the crown, upon the ground that it had been found by inquest that no one was liable to repair the bridge:—Held, that these documents were admissible. *Reg.* v. *Sutton*, 3 N. & P. 569; 8 A. & E. 516; 1 W. W. & H. 525; 7 L. J., Q. B. 205.

Tolls.]—In an action by the lessee of a corporation for toll traverse for a waggon, and a market toll for cattle, an information quo warranto by the attorney-general of Queen Elizabeth against the corporation, in respect of the customs they claimed and used, is not receivable, as it does not appear that it was prosecuted, such an information, like an indictment, not being evidence, unless there is the finding of a jury upon it. *Lancum* v. *Lovell*, 6 Car. & P. 437.

Where Evidence Lost.]—A report of the master finding a particular fact, will not be ordered to be read as evidence in another suit relating to the same matter, but between different parties, though the evidence, by which that fact was formerly proved, has been since lost. *Maule* v. *Mence*, 3 L. J. (O.S.) Ch. 42.

C. *OTHER DOCUMENTS.*

1. Letters.

a. Date.

Effect of.]—The date of a letter is evidence against the writer that it was written where dated. *Anon.*, 2 Chit. 194.

The date a letter bears is primâ facie its true date. *Potez* v. *Glossop*, 2 Ex. 191. S. P., *Malpas* v. *Clements*, 19 L. J., Q. B. 435.

Quære, whether the date a letter bears is primâ facie its true date. *Butler* v. *Mountgarrett* (*Viscount*), 7 H. L. Cas. 633.

A letter will be presumed to have been written on the day on which it bears date. *Goodtitle* d. *Baker* v. *Milburn*, 6 L. J., Ex. 209; 2 M. & W. 853.

Post-mark.]—The date in the post mark upon a letter is primâ facie evidence that such letter existed at the time of that date; but it is necessary to prove that the letter bears the genuine post-mark used by the particular post-office whose stamp it purports to bear at the time. *Fletcher* v. *Braddyl*, 3 Stark. 64; 23 R. R. 758.

The post-office mark is not conclusive of the time when a letter is posted. *Stocken* v. *Collin* or *Collins*, 7 M. & W. 515; 9 Car. & P. 653.

But if a letter containing a libel has the post-mark on it, this is primâ facie evidence of its having been published. *Shipley* v. *Todhunter*, 7 Car. & P. 580. S. P., *Warren* v. *Warren*, 1 C., M. & R. 150; 4 Tyr. 850.

Semble, if the post-mark of a letter is given in evidence, it ought to be proved, either by persons from the post-office, or by persons who are in the habit of receiving letters from the post-office. *Woodcock* v. *Houldsworth*, 16 M. & W. 124; 16 L. J., Ex. 49.

A date of a letter varying from the post-mark, it was objected that the post-mark could only be proved to be genuine by calling the person from the post-office who impressed the letter; on which the judge offered to stay the cause till the arrival of such clerk. But the jury found the post-mark genuine without his being called. The court refused to disturb the verdict. *Abbey* v. *Lill*, 5 Bing. 299; 2 M. & P. 534; 7 L. J. (O.S.) C. P. 96.

The post-office marks, in town or country, proved to be such, are evidence that the letters on which they are were in the office to which those marks belong, at the time those marks specify. *Rex* v. *Plumer*, R. & R. 264; 15 R. R. 741.

b. Posting and Delivering.

Posting—Effect on Contracts.]—Proof of the posting of several letters at successive dates is not conclusive of any of them having been received at the address at which they were directed. *Reidpath's Case, Constantinople and Alexandria Hotels Co., In re*, 40 L. J., Ch. 39; L. R. 11 Eq. 86; 23 L. T. 834; 19 W. R. 219.

A proposed contract is not binding on the proposer until its acceptance by the other party has been communicated to him, and posting a letter communicating the acceptance to him, is not sufficient to make it binding on him if he does not in fact receive the letter. *British and American Telegraph Co.* v. *Colson*, 40 L. J., Ex. 97; L. R. 6 Ex. 108; 23 L. T. 868. *But see following cases.*

The defendant applied for shares in the plaintiff company. The company allotted the shares to the defendant and duly addressed to him and posted a letter containing the notice of allotment, but the letter never was received by him:—Held, by Baggallay and Thesiger, L.JJ., Bramwell, L.J., dissenting, that the defendant was a shareholder. *British and American Telegraph Co.* v. *Colson* (supra), overruled. *Household Fire Insurance Co.* v. *Grant*, 48 L. J., Ex. 577; 4 Ex. D. 216; 41 L. T. 298; 27 W. R. 858—C. A.

A contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent. *Imperial Land Co. of Marseilles, In re, Harris's Case*, 41 L. J., Ch. 621; L. R. 7 Ch. 587; 26 L. T. 781; 20 W. R. 690.

A company being in course of formation, T., in March, 1866, sent a written application for shares, giving an imperfect address. Shares were allotted to him, and notice of the allotment posted on the 16th of March to the address given on his application. This should have reached him on the 17th, but owing to this address being imperfect, it did not reach him at all. Another letter was posted on the 20th, which reached him on the 21st. On the 20th he posted a letter to revoke his application for shares:—Held, that as the notice of the 16th would have reached him but for his giving a wrong address, its being posted must be taken as good notice to him, and that his revocation was too late. *Imperial Land Co. of Marseilles, In re, Townsend's Case*, 41 L. J., Ch. 198; L. R. 13 Eq. 148; 25 L. T. 692; 20 W. R. 164.

When a person has applied for shares, and they have been allotted to him, and notice of the allotment has been posted to and received by the allottee, the date at which the contract to take the shares is completed is the time of the posting the notice: and if the allottee sets up a revocation, he must prove that the letter of revocation was posted before the notice of allotment. *Ib.*

When an application for shares in a company has been sent by post, the contract to take shares is complete and binding from the moment that the letter announcing the allotment is put into the post, whether such letter subsequently reaches the allottee or not. *Imperial Land Co. of Marseilles, In re, Wall's Case*, 42 L. J., Ch. 372; L. R. 15 Eq. 18.

On the 28th June, 1873, M. H. by deed agreed to assign for value a policy, effected with the Reliance Assurance Society on his own life, to his father, who, on the same day, by a separate deed assigned it to D. by way of equitable mortgage to secure a present loan and future advances. The parties were all resident in Ireland, and a memorandum at foot of the policy which had been issued from the Dublin branch office, directed that notice of assignments should be given at the head office in London. Immediately upon the execution of the deeds of the 28th June, D. prepared a formal notice of the assignment to the father, in whose name and at whose request it was signed by him and addressed and posted in Dublin to B., the society's secretary at the London office. M. H., the son, was adjudicated a bankrupt in January, 1874, and died in the following August, when his assignees in bankruptcy gave notice to the London office, and claimed the proceeds of the policy as having been in his order or disposition at the time of his adjudication, B. deposing that D.'s notice had never reached the London office:—Held, per Ball, C., that the notice having been duly posted, must be presumed to have reached its destination; and, per Christian, L.J., that, irrespectively of the question whether the notice was actually received at the office, the mere posting of it was effectual to prevent the policy from being in the order or disposition of the bankrupt at the date of his bankruptcy by the consent and permission of the true owner within the meaning of the Irish Bankrupt and Insolvent Act, 1857 (20 & 21 Vict. c. 60), s. 313. *Hickey, In re*, 10 Ir. R. Eq. 117.

Withdrawal before Acceptance.]—An offer in writing for the sale of real estate, giving time for the acceptance of the offer, cannot be converted into a binding contract, if at any time before acceptance the person to whom the offer is made becomes aware of its withdrawal, although formal notice of such withdrawal may not be given to him. *Dickinson* v. *Dodds*, 45 L. J., Ch. 777; 2 Ch. D. 463; 34 L. T. 607; 24 W. R. 594—C. A.

The defendants offered goods to the plaintiffs by a letter posted on the 1st of October; the plaintiffs received the offer on the 11th, and accepted it by telegram on the same day, and by letter on the 15th. On the 8th of October the defendants posted to the plaintiffs a letter withdrawing the offer. This letter reached the plaintiffs on the 20th:—Held, by Lindley, J., that the withdrawal was inoperative, a complete contract binding both parties having been entered into on the 11th of October when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose was withdrawn. *Bryne* v. *Van Tienhoven*, 49 L. J., C. P. 316; 5 C. P. D. 344; 42 L. T. 371; 44 J. P. 667.

Revocation of Offer, when Effective.]—The defendant, being possessed of warrants for iron, wrote from London to the plaintiffs at Middlesborough, asking whether they could get him an offer for the warrants. Further correspondence ensued, and ultimately the defendant wrote to the plaintiffs fixing 40*s.* per ton, nett cash, as the lowest price at which he could sell, and stating that he would hold the offer open till the following Monday. The plaintiffs on the Monday morning at 9.42 telegraphed to the defendant: Please wire whether you would accept forty for delivery over two months, or if not, longest limit you could give." The defendant sent no answer to this telegram, and after its receipt on the same day he sold the warrants, and at 1.25 p.m. telegraphed to plaintiffs that he had done so. Before the arrival of his telegram to that effect, the plaintiffs having at 1 p.m. found a purchaser for the iron, sent a telegram at 1.34 p.m. to the defendant stating that they had secured his price. The defendant refused to deliver the iron, and thereupon the plaintiffs brought an action against him for non-delivery thereof. The jury found at the trial that the relation between the parties was that of buyer and seller, not of principal and agent. The state of the iron market was very unsettled at the time of the transaction, and it was impossible to foresee when the plaintiffs' telegram was sent at 9.42 a.m. how prices would range during the day:—Held, by Lush, J., that under the circumstances the plaintiffs' telegram at 9.42 ought not to be construed as a rejection of the defendant's offer, but merely as an inquiry whether he would modify the terms of it, and that, although the defendant was at liberty to revoke his offer before the close of the day on Monday, such revocation was not effectual until it reached the plaintiffs; consequently the defendant's offer was still open when the plaintiffs accepted it, and the action was, therefore, maintainable. *Cooke* v. *Oxley* (3 Term Rep. 653) discussed. *Stevenson* v. *McLean*, 49 L. J., Q. B. 701; 5 Q. B. D. 346; 42 L. T. 897; 28 W. R. 916.

A letter making an offer, adding, "send a reply by return of post," is conditional, and does not constitute a contract in the absence of a reply; and the subject of the letter having been sent to, but not actually received by, the defendant:—Held, no delivery to him. *Kirby* v. *Trotter*, 1 F. & F. 544.

If a person who receives a letter containing the terms of a proposed agreement writes an answer reciting those terms, and declaring his acceptance of them, he cannot, in any way, vary the effect of them without distinctly calling the attention of the party making the offer to the fact of his desire to do so. *English and Foreign Credit Co.* v. *Arduin*, 40 L. J., Ex. 108; L. R. 5 H. L. 64.

Reclaiming after Posting.]—A banker at Lyons posted a letter containing bills of exchange to D. in London, but before the departure of the mail he received a telegram from D., telling him to remit nothing. The banker accordingly sent to the post-office to reclaim his letter, which by the regulation of the French post-office he was entitled to do on complying with certain formalities. By mistake the formalities were not observed, and the letter was forwarded to its destination. In the meantime D. had filed a petition for liquidation:—Held, that the property in the bills did not pass to the trustee. *Cote, Ex parte, Deveze, In re*, 43 L. J., Bk. 19; L. R. 9 Ch. 27; 29 L. T. 598; 22 W. R. 39.

Posting within Jurisdiction.]—The defendant posted a letter at a post-office within the jurisdiction of the Lord Mayor's Court of London addressed to and received by the plaintiff outside the jurisdiction. This letter contained the following order: "Please send in at once (to office for us to pack) four hundredweight old brown Windsor soap." The plaintiff did not

reply accepting the offer, but sent the goods ordered to the defendant's office within the jurisdiction:—Held, that the contract was made within the jurisdiction, and that the posting of the order within the jurisdiction was the making of the offer within, and the delivery of the goods within, the acceptance of the offer within. *Taylor* v. *Jones*, 45 L. J., C. P. 110; 1 C. P. D. 87; 34 L. T. 131.

Proof of Posting.]—To prove the sending of a letter by the plaintiff to the defendant, a clerk of the plaintiff deposed that he made up the letters of which this was one, and placed them in a box in the room where he sat, and that the public postman invariably called every day and took the letters from that box:—Held, that such delivery to the postman was evidence for the jury that the letters had gone to the post-office. *Skilbeck* v. *Garbett*, 7 Q. B. 846; 14 L. J., Q. B. 338; 9 Jur. 939.

To prove the posting of letters, the party whose duty it was to post them should be called. *Ireland* v. *Stiff*, 1 F. & F. 240.

A letter allowed to be proved which had been given to a servant to be posted without any direct evidence that it had been posted or received, it being shewn that at the time at which, if posted, it would have arrived, a letter did reach the house to which it had been addressed. *Smith* v. *Osborn*, 1 F. & F. 267.

An agreement to employ the plaintiff in a particular capacity cannot be inferred from the direction upon a letter addressed by the defendant to the plaintiff in that character, the letter itself relating to the quantum of salary only. *Chiodi* v. *Waters*, 1 Stark. 335; 18 R. R. 777.

A witness produced a copy of a letter which he said was made by him, and he swore that he should in the ordinary course of business have posted the original:—Held, that this was evidence of posting, and that, the original not being produced, the copy was good secondary evidence. *Trotter* v. *Maclean*, 13 Ch. D. 574; 42 L. T. 118; 28 W. R. 244.

Neither proof of an entry made by a deceased person in the ordinary course of business in a postage-book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage. *Rowlands* v. *De Vecchi*, 1 Cab. & E. 10.

Presumption.]—Proof of the posting of a letter is not conclusive as to its arrival. *Reidpath's Case*, 40 L. J., Ch. 39; L. R. 11 Eq. 86; 23 L. T. 834; 19 W. R. 219. *But see cases* supra.

And see CONTRACT.

c. Contents.

Admissibility.]—An Irish railway company contracted with the plaintiff to carry certain pigs from a station in Ireland through to London, part of the journey being performed on the London and North-Western Railway. In an action against the Irish company for breach of contract in failing to carry the pigs to London within a reasonable time, a letter from I. T., an agent of the London and North-Western Railway Company, to the plaintiff, was admitted in evidence, subject to the defendants' objection, which stated: "Mr. S." [the defendants' traffic manager] "writes that the pigs arrived at Dublin on the 29th of October, but as the company" [the defendants] "only advised us about half-an-hour before they arrived, and having more on hand than could be shipped that day, they were not sent forward until the 30th of October":—Held, first, that the letter was properly received, although the written document to which it referred was not produced; secondly, that the letter was evidence of unreasonable delay in the carriage. *Ruddy* v. *Midland G. W. Ry.*, 8 L. R., Ir. 224.

When the object was to prove a claim of transaction terminating in fraud, on the part of the agent, a letter written by him containing a contract, which was a link in the chain, was held admissible evidence; so that the agent's vivâ voce testimony was dispensable. *Irving* v. *Motley*, 9 L. J. (O.S.) C. P. 161; 7 Bing. 543; 5 M. & P. 380.

Though a letter found upon a prisoner may be read, it is no evidence of the facts it states, they must be proved by other evidence. *Rex* v. *Plumer*, R. & R. 264; 15 R. R. 741.

Inclosure.]—A letter inclosing a note may be read in evidence as a declaration accompanying an act to shew for what purpose the note was sent. *Bruce* v. *Hurly*, 1 Stark. 23.

In an action for goods sold and delivered, the question turned upon whether a piece of cloth had been returned by the defendant to the plaintiff. The production of a note by the defendant, in which the plaintiff requested him to return the piece, is primâ facie evidence to shew that the piece has been returned. *Shepherd* v. *Currie*, 1 Stark. 454.

A post-office mark of double postage paid on letter, is not of itself evidence that the letter contained an inclosure. *Rex* v. *Plumer*, R. & R. 264; 15 R. R. 741.

Indorsement.]—In an action by the assignee of an insolvent, a letter written by the defendant was given in evidence; on the back of it something had been written by the insolvent:—Held, that the defendant's counsel was entitled to have that read. *Dagleish* v. *Dodd*, 5 Car. & P. 238.

Secondary Evidence.]—After notice to produce a letter written by the plaintiff to the defendant, parol evidence of its contents may be given by any one who recollects the contents, although it is in the plaintiff's power to produce the clerk who wrote the letter. *Liebman* v. *Pooley*, 1 Stark. 167; 18 R. R. 756.

But in such case the contents cannot be proved by the production of a copy of the original copy. *Ib.*

d. Putting in and Reading.

Purpose.]—A party has a right to call for and have read a letter making a demand on the other party, for the purpose of proving the demand, though the counsel for the other party offers to admit the demand. The statement of facts in such letter is not evidence of the facts, but only of their having been communicated to the other side. *Whithead* v. *Scott*, 1 M. & Rob. 2.

In what cases equity will allow letters to be read as evidence. *Montgomerie* v. *Att.-Gen.*, 9 Mod. 365.

Whether letters written by the defendant, against whom a bill was filed to set aside a deed for fraud, after the execution of the deed, could be received as evidence of a fraudulent intention in executing it. *Blenkinsopp* v. *Blenkinsopp*, 19 L. J., Ch. 425.

Letters addressed to a testator whose competency was the question in issue by persons well acquainted with him in his lifetime, and in which letters he was addressed as a sane and competent person, are not admissible in evidence, unless it can be proved that the testator himself dealt with the letters, or did some act in reference or relation to them. *Wright* v. *Tatham*, 2 Jur. 461.

What Part of Correspondence.]—It was proposed on the part of a plaintiff to give in evidence a letter written by the defendant's attorney, which purported to be an answer to a letter written to him by the plaintiff's attorneys:—Held, that, if the plaintiff's counsel put in this letter of the defendant's attorney, he should also call for and put in the letter to which it was an answer and not leave it to the defendant to put in the letter of the plaintiff's attorneys as his evidence. *Watson* v. *Moore*, 1 Car. & K. 626.

If a defendant gives in evidence a letter of the plaintiff, which purports to be an answer to a letter of the defendant, the defendant is not bound to give his own letter in evidence, even if the other side desires it; but the plaintiff's counsel may put in the defendant's letter as his evidence, or comment on its not being given in evidence. *De Medina* v. *Owen*, 3 Car. & K. 72.

Where the plaintiff puts in evidence letters of the defendant selected out of a correspondence, the defendant is not entitled to put in the intermediate letters, unless expressly referred to by those put in by the plaintiff. *Sturge* v. *Buchanan*, 2 M. & Rob. 90.

On cross-examination some letters written by a witness who was not a party in the cause, were put into her hand, and she was asked to explain the meaning of certain passages therein contained, and whether what she wrote in such passages was true:—Held, that the other party was entitled to have the whole of such letters read. *Smith* v. *Prickett*, 7 Jur. (N.S.) 610.

A defendant who puts in evidence a correspondence, consisting of several letters, between himself and the plaintiff has a right to give in evidence a letter written by him to the plaintiff, in reply to the plaintiff's last letter, which bore date on the day before the defendant's letter. *Roe* v. *Day*, 7 Car. & P. 705.

A defendant gave in evidence a letter of the plaintiff's, dated 17th January, purporting to be an answer to a letter to the plaintiff, written by W. Plaintiff's counsel proved W.'s handwriting to a letter addressed to plaintiff, and dated 16th February, but which had no post-mark, and wished to give this letter in evidence as being the letter to which that of the 17th was an answer:—Held, that the letter of the 16th was not receivable in evidence, unless it were shewn that it was the letter to which the plaintiff's letter was an answer, or at least that it was in existence before the date of plaintiff's letter. *M'Namara* v. *Gibbs*, Car. & M. 412.

Signed by Third Person.]—A letter written by a party, sought to charged is evidence, though it be signed by a third person. *Alexander* v. *Brown*, 1 Car. & P. 288.

When written without Prejudice.]—A letter from the plaintiff's solicitors to the defendant, which was followed in a day or two by another letter guarding against prejudice to the plaintiff's legal and other rights, was not allowed to be used by the defendant as evidence for any purpose of his defence. *Peacock* v. *Harper*, 26 W. R. 109.

The defendant being sued on a bill of exchange drawn and indorsed by him, wrote to the plaintiff's attorney in a letter headed "Without prejudice," as follows: "I never had any notice of dishonour of this bill, but if the debt will be accepted without costs, I do not want Mr. Holdsworth to be the loser of it, and I would give a cheque." Thereupon the plaintiff took out a rule to discontinue the action on payment of costs, which were afterwards taxed and paid by him. Before the costs were paid the plaintiff commenced another action on the bill against the defendant, and at the trial offered the letter as evidence of waiver of notice of dishonour, and it was admitted, and the jury found for the plaintiff:—Held, that the letter was a conditional offer to waive notice of dishonour, which became absolute when the plaintiff accepted the terms by discontinuing the first action and foregoing costs, and was therefore rightly admitted. *Holdsworth* v. *Dimsdale*, 24 L. T. 360; 19 W. R. 798.

A letter from a debtor which is stated to be "without prejudice," can never be relied upon to take the case out of the Statute of Limitations, for such a letter does not amount to a new contract, but is merely an offer which, if not simply accepted by the creditor, is intended to have no effect at all. *River Steamer Co., In re, Mitchell, Ex parte*, L. R. 6 Ch. 822; 25 L. T. 319; 19 W. R. 1130.

Where letters are written "without prejudice," with a view to a compromise, they cannot be given in evidence. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Where a letter is expressed to be written "without prejudice," although it cannot be used against the writer, there is nothing to prevent the writer himself using it. *Williams* v. *Thomas*, 2 Dr. & Sm. 29; 31 L. J., Ch. 674; 8 Jur. (N.S.) 250; 7 L. T. 184; 10 W. R. 417.

A letter written without prejudice that is sent by a debtor to his creditor stating that he is about to suspend payment of his debts is admissible upon the hearing of a bankruptcy petition to prove the commission of an act of bankruptcy. *Holt, Ex parte, Daintrey, In re*, 62 L. J., Q. B. 511; [1893] 2 Q. B. 116; 5 R. 414; 69 L. T. 257; 41 W. R. 590; 10 Morrell, 158.

The effect of letters and interviews "without prejudice" discussed. *Kurtz* v. *Spence*, 57 L. J., Ch. 238; 58 L. T. 438.

A judge is not entitled, without the consent of both parties, to look at letters written without prejudice for the purpose of seeing whether there is "good cause" for depriving a successful litigant of costs under Ord. LXV. r. 1. *Walker* v. *Wilsher*, 58 L. J., Q. B. 501; 23 Q. B. D. 335; 37 W. R. 723; 54 J. P. 213—C. A.

Letters written "without prejudice" cannot be used in evidence of admissions. The practice of attempting to do so disapproved of. *Jones* v. *Fowall*, 15 Beav. 388; 21 L. J., Ch. 725.

Observations as to the limited purpose for which such letters may be used. *Ib.*

A railway company having entered into possession of certain lands required for their works after notice by the landowner that they were not to enter until payment of the purchase-money, an injunction was granted against their retaining possession. They afterwards entered into a long correspondence "without prejudice." Ultimately

they paid the purchase and compensation-money into court, and then moved only to dissolve the injunction. The plaintiff wished, on that motion, that all proceedings might be stayed, and to go into the general question, but the defendants refused. Thereupon the plaintiff moved to that effect:—Held, on the hearing of this latter motion, that the defendants ought to pay all the costs of the suit, including the costs of this motion. *Woodard* v. *Eastern Counties Ry.*, 1 Jur. (N.S.) 899.

Effect of the words "without prejudice" on a correspondence for winding up a suit; and semble, that the letters may be read to assist the court in deciding on the question of costs. *Ib.*

Production refused of letters which passed between the respective solicitors, with a view to a compromise, upon an express stipulation that they should not, in any way, be referred to or used to the prejudice of the defendant, if an amicable arrangement was not come to. *Whiffen* v. *Hartwright*, 11 Beav. 111.

If, in a case of assault, plaintiff's attorney has written a letter to defendant asking an apology, plaintiff is only entitled to have so much of the letter read as simply asks the apology, and not any part of it in which plaintiff's attorney extols the respectability of his client, and if in the letter the writer states that he writes "without prejudice," no part of it can be given in evidence. *Healey* v. *Thatcher*, 8 Car. & P. 388.

—— **Effect on Subsequent Letters.**]—Where a letter is expressed to be written "without prejudice," the reply to it cannot be used in evidence, though not similarly guarded. *Paddock* v. *Forrester*, 3 Scott (N.R.) 734; 3 Man. & G. 903.

When a negotiation for a compromise is commenced by one letter "written without prejudice," the whole is protected. *Harris, Ex parte, Harris, In re*, 44 L. J., Bk. 33; 32 L. T. 417; 23 W. R. 531.

Private and Confidential.]—Where a party to an action sends letters marked "private and confidential" to the other party containing threats of committing a contempt of court, he cannot by so marking them impose on the other party, who had refused to hold any personal communication with him, any condition as to the way in which the letters might be used. *Kitcat* v. *Sharp*, 48 L. T. 64.

e. Copies and Drafts.

To Prove Sending.]—The fact of copies of letters being kept in a merchant's letter-book, is evidence against the party of the letters having been sent. *Sturge* v. *Buchanan*, 2 P. & D. 573; 10 A. & E. 598; 2 M. & Rob. 90; 8 L. J., Q. B. 272.

An entry of a letter in a merchant's letter-book produced by the clerk who copied it, who gave evidence that after copying letters it was the custom in the office to return them to the defendant to seal, and that either he or another clerk always carried the letters to the post-office, but neither of the clerks recollected the particular letter:—Held, that as the letters were, after being copied, returned to the defendant, the entry could not be read in proof of the letter being sent. *Toosey* v. *Williams*, M. & M. 129.

An entry of a deceased clerk of a merchant in the letter-book was received in evidence, on proof that it was made in the usual course of business in the merchant's counting-house. *Hagedorn* v. *Reid*, 3 Camp. 370; 1 M. & S. 567.

A press copy of a letter proved to have been posted with the right address, was admitted as primâ facie evidence that the letter containing a notice actually reached the party. *Futcher* v. *Hinder*, 1 F. & F. 357.

—— **Particular Date.**]—Where the defendants acknowledged they had received a letter of a particular date from the plaintiff, which upon notice they did not produce at the trial:—Held, that an entry by a deceased clerk of the plaintiff, in a letter-book, professing to be a copy of a letter of the same date from the plaintiff to the defendants, was admissible evidence of the contents of the letter, on proof that, according to the plaintiff's course of business, the letters which he wrote were copied by his clerk, and then sent off by the post, and that in other instances the copies so made by the clerk had been compared with the originals, and always found correct. *Pritt* v. *Fairclough*, 3 Camp. 305; 13 R. R. 811.

An entry in a diary kept by an agent is not admissible to prove a fact therein stated, unless it is shewn that it was the duty of the agent to make the whole entry. *Trotter* v. *Maclean*, 13 Ch. D. 574, 579; 42 L. T. 118; 28 W. R. 244.

When Admissible as Secondary Evidence.]—In an action to recover the balance on consignments of goods by the defendant to the plaintiffs to be sold in India, it appeared that the transaction took place vivâ voce between him and B., the managing clerk of the plaintiffs, who carried on business in London, Liverpool and Calcutta. B., who was since dead, managed their business at Liverpool. The contention of the defendant being that the transaction was a sale and not a consignment, the plaintiffs put in evidence a copy taken by machine of a letter which was lost, written in the course of business by B. to the plaintiffs, giving an account of the transaction, and inclosing invoices of the goods, and a draft of the defendant. And in order to prove the balance they put in an account current of the sales prepared from the account sale received from their correspondents in India which were lost:—Held, that if the letter was admissible this copy was good secondary evidence. *Smith* v. *Blakey*, 8 B. & S. 157; 36 L. J., Q. B. 156; L. R. 2 Q. B. 325; 15 W. R. 492.

On the trial of an action, a copy of a letter written by the plaintiff's agent, and referred to by the plaintiff in his answer to a bill in chancery, and the original of which letter, instead of being filed at the master's office, had, by consent of the parties, been deposited for inspection with the plaintiff's clerk in court in the chancery suit, is admissible on the part of the defendant at law, without reading the answer in chancery. *Long* v. *Champion*, 2 B. & Ad. 285.

A letter, setting forth the terms of a contract contained in another letter between the same parties, is evidence to go to the jury of the original contract. *Nelson* v. *Patrick*, 2 Car. & K. 641.

The giving in evidence by the one side, without objection raised by the other, a copy-letter from a letter-book, does not waive the right of the party so giving it from objecting to the other side putting in a letter between the same parties

from the same book. *Shedden* v. *Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. 217.

The duplicate of a writing, taken from the autograph at one impression by means of a copying-machine, cannot be read in evidence as an original. *Nodin* v. *Murray*, 3 Camp. 228; 13 R. R. 796.

A machine copy of a letter written by the plaintiff to a third party was allowed to be given in evidence as an admission on the part of the plaintiff, though not admissible as a letter. *Nathan* v. *Jacob*, 1 F. & F. 452.

A. was examined before commissioners of bankrupt and produced a machine copy of a letter he had sent to R. While A. was before the commissioners the solicitor to the assignees made a copy of such copy:—Held, that in an action by the assignees against A. the last made copy was not admissible against A. without reading his examination, although notice had been given to A. to produce the original copy. *Holland* v. *Reeves*, 7 Car. & P. 36.

And see post, col. 795.

Drafts.]—The agent of a plaintiff wrote a letter to a witness abroad, who had been examined under a commission. The agent before he wrote the letter shewed the draft of it to the plaintiff's attorney, who approved of it:—Held, that the draft of the letter was evidence for the defendant, as an act done without producing the letter; but that the answer written by the witness abroad, and sent to the plaintiff's agent, was not receivable. *Rawlins* v. *Desbrough*, 8 Car. & P. 321.

f. Construction.

For whom.]—At a trial at Nisi Prius, when the question turns solely on the construction of a single letter, without any other evidence to explain it, the construction and effect of the letter is a question of law to be determined by the court, and ought not in general to be left to the jury. *Morrell* v. *Frith*, 3 M. & W. 402; 1 H. & H. 100; 7 L. J., Ex. 172; 2 Jur. 619.

If, however, the evidence consists of several letters, or of a letter in connection with other evidence; or if the question turns on the meaning of a mercantile document, then the whole question ought to be left to the jury. *Ib.* But see *Begg* v. *Forbes*, 3 C. L. R. 336.

—— **Notice.**] — By agreement under seal between plaintiff and defendant's testator, the latter agreed to grant a lease for sixty years of certain tenements, then in plaintiff's possession, as tenant from year to year. After testator's death defendant repudiated the agreement as being a forgery and recovered judgment in ejectment in the county court. Plaintiff then gave the following notice:—"I hereby give you notice this day that I give up possession of all the land, according to the judge's order that I now hold of the late Mr. J. S. (Signed) G. S." Plaintiff having brought an action in the Court of Exchequer on the agreement, the judge considered it was for him to put a construction on this notice and told the jury that it amounted to an abandonment of all the plaintiff's claim under the agreement, and that if they found that the agreement had been signed by testator he was only entitled to nominal damages:—Held, this was a mis-direction; the meaning of the notice and the amount of damages ought to have been left to the jury. *Smith* v. *Symonds*, 1 L. T. 299.

g. Proof by Antiquity.

Custody and Age.]—The defendant produced letters thirty years old, purporting to be addressed to her mother, and proved that she was living with her mother at the time of her death when her papers and keys were given up to her:—Held, that the custody was proper. *Doe* d. *Thomas* v. *Beynon*, 4 P. & D. 193; 12 A. & E. 431; 9 L. J., Q. B. 359.

Letters more than thirty years old, produced from the proper custody, prove themselves. *Ib.*

It is not necessary that a signature of the writer of a letter above thirty years old should be proved. Where there is no existing direction to such a letter primâ facie, it must be presumed to have been written to the party among whose papers it is found. *Fenwick* v. *Reed*, 6 Madd. 7.

2. Brief and Case of Counsel.

Notes on.]—Notes of counsel on his brief at a trial at law, were admitted as evidence in a suit in equity. *Cattell* v. *Corrall*, 3 Y. & Coll. 413.

The court will act upon notes on counsel's briefs if they agree, although no entry or corresponding minute appears in the registrar's book. *Anderton* v. *Yates*, 15 Jur. 833.

Case.]—A case laid before counsel on behalf of the defendant, which has been produced for the inspection of the plaintiff under the usual order, may be read in support of the plaintiff's motion for a receiver. *George* v. *Evans*, 4 Y. & Coll. 211.

In quare impedit against the bishop of M. to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the bishopric, a case purporting to be the case stated for the opinion of counsel on the part of A., a former bishop of M., touching the right of presentation to that church, and found in the family mansion of A.'s descendants, was held admissible as against his successor in the same. *Meath* (*Bishop*) v. *Winchester* (*Marquis*), 4 Cl. & F. 445; 10 Bli. (N.S.) 330. Affirming 3 Bing. (N.C.) 183; 3 Scott, 561.

Opinion.] — Opinion of counsel read as evidence. *Brown* v. *Yerroway*, Dick. 353.

3. Cheques and Counterfoils.

Evidence of Payment.]—The steward of a manor appointed C. his deputy to admit a person to a copyhold of the manor which he had purchased; and C. also acted as his solicitor in the purchase. Ten days after admittance the purchaser gave C. a cheque for a sum made up of the lord's fine, the steward's fees, and C.'s professional charges, and this cheque was, at C.'s request, crossed with the name of C.'s bankers. On presentment the cheque was paid by the purchaser's bankers to C.'s bankers, but they retained the money to balance his overdrawn account. In an action by the lord against the purchaser for the fine:—Held, that there was evidence to support a plea of payment, and that payment by the crossed cheque was a mode of payment which discharged the purchaser as soon as the cheque was cashed. *Bridges* v. *Garrett*, 39 L. J., C. P. 251; L. R. 5 C. P. 451; 22 L. T. 448; 18 W. R. 815—Ex. Ch.

To prove payment of a debt by the defendant to the plaintiff, a banker's cheque drawn by the defendant on his bankers, and which appeared to have been received by the plaintiff, is evidence

to go to the jury of the payment. *Egg* v. *Barnett*, 3 Esp. 196. S. P., *Boswell* v. *Smith*, 6 Car. & P. 60.

Proof of the delivery and payment of a cheque to the plaintiff is not sufficient evidence of a debt, in order to support a set-off, unless it is shewn upon what consideration, and under what circumstances, the cheque was given. *Aubert* v. *Walsh*, 4 Taunt. 293; 12 R. R. 651.

The acceptance by a creditor of a cheque in his favour, drawn by his debtor, operates as payment unless dishonoured. *Pearce* v. *Davis*, 1 M. & Rob. 365.

The mere fact of a person's drawing such a cheque in favour of another is not evidence of a debt, but rather evidence of payment. *Ib.*

The mere circumstance of a cheque being made payable to a person, and his receipt of the money, is not evidence that the drawer gave it to him. *Lloyd* v. *Sandilands*, Gow, 13.

Amount.]—A., being indebted to B. in 125*l.* 7*s.* 9*d.* for goods sold and delivered, gave B. a cheque for 100*l.* payable on demand, which B. accepted in satisfaction:—Held, a good accord and satisfaction. *Cumber* v. *Wane* (Stra. 426) and *Sibree* v. *Tripp* (15 M. & W. 23) observed upon. *Goddard* v. *O'Brien*, 9 Q. B. D. 37; 46 L. T. 306; 30 W. R. 549.

Post-dated.]—Semble, that a post-dated cheque is receivable in evidence to prove its own invalidity. *Ede* v. *Knowles*, 2 Y. & Coll. C. C. 172.

When unstamped.]—*See* infra, IV. 6, cols. 835, et seq.

Counterfoils.]—A managing director of a company was indicted for misapplying to his own use an order for payment of 4,000*l.*, the property of the company. In the course of the trial evidence was given that he had promised to send a cheque for 4,000*l.* to A. on the 16th August. The cheque itself could not be found, but in the counterfoil book was one for 4,000*l.* in favour of A., following a counterfoil dated the 16th August:—Held, that this counterfoil was admissible against the prisoner. *Reg.* v. *Wilkinson*, 10 Cox, C. C. 537.

4. Receipts.

Evidence of Payment.]—Under the Railways Clauses Act, 1863, s. 12, where a railway forms a junction with another railway, the company with whose railway the junction is made is empowered to erect such signals and conveniences incident to the junction as may be necessary for the prevention of danger to or interference with the traffic at or near the junction; and the expenses of erecting and maintaining such signals and conveniences, are at the end of each half-year to be repaid by the company making the junction. To prove payment, the plaintiffs' secretary stated that he, on the 25th of February, sent to the persons who did the work a cheque for the amount of their bill, and got from them by return of post (on the 26th) a receipt, and the cashier of the latter stated that he received the cheque at 9 a.m. on the 26th as payment, and sent a receipt:—Held (Bovill, C.J., dissentiente), that the receipt was admissible, with the other facts, to prove payment on the morning of the 26th of February (the action having been brought on that day), without shewing that the cheque was honoured. *Carmarthen and Cardigan Ry.* v. *Manchester and Milford Ry.*, 42 L. J., C. P. 262; L. R. 8 C. P. 685.

A receipt is not conclusive evidence against the party who signs it. *Straton* v. *Rastall*, 2 Term Rep. 366. And see *Bauerman* v. *Radenius*, 7 Term Rep. 663; 2 Esp. 653.

A receipt in full is conclusive evidence, when given under a knowledge of all circumstances then depending between the parties. Aliter, when given without such knowledge. *Bristow* v. *Eastman*, 1 Esp. 173; Peake, 223; 5 R. R. 728.

The words "settled, Samuel Hughes," at the foot of a bill of parcels, import a receipt and an acquittance. *Rex* v. *Martin*, 7 Car. & P. 549; 2 M. C. C. 483.

A receipt is not an estoppel; it is only a primâ facie evidence that the money has been paid, and is open to explanation. *Skaife* v. *Jackson*, 5 D. & R. 290; 3 B. & C. 421.

The plaintiff, in order to protect his personal effects from his creditors, delivered the actual possession of them to the defendant; and in order that the latter might appear to be the real owner he made a priced invoice of the articles, and gave a receipt to the defendant for the amount as on a sale:—Held, that the plaintiff, as between himself and the defendant, was not estopped from shewing the real character of the transaction, so as to entitle him to recover back the goods from the defendant. *Bowes* v. *Foster*, 2 H. & N. 779; 27 L. J., Ex. 262; 4 Jur. (N.S.) 95; 6 W. R. 257.

A receipt in full allowed to be shewn to have been signed by mistake. *Cesarini* v. *Ronzani*, 1 F. & F. 339.

When a receipt has been given under seal it discharges at law all cause of action, and can only be set aside by the equitable jurisdiction of a court of law; but a mere receipt in writing has no such effect; it amounts simply to an acknowledgment of money paid; it cannot be pleaded in answer to an action, and it may be impeached or explained by parol evidence. *Lee* v. *Lancashire and Yorkshire Ry.*, L. R. 6 Ch. 527; 25 L. T. 77; 19 W. R. 729.

A right is not barred, by merely signing a receipt as a witness, upon payment by the executor to the adverse party, not amounting to a release or fraud. *Holmes* v. *Custance*, 12 Ves. 279.

A judge at Nisi Prius has no equitable jurisdiction, and can only look at the strict legal rights of the parties. Therefore, if in an action for goods sold, defendant proves a receipt in full, signed by the plaintiff, evidence cannot be admitted in answer that plaintiff had assigned all his effects for the benefit of his creditors; that the action was brought by his trustees in his name; that no money passed when the receipt was given; and that the plaintiff on the record and the defendant had colluded together to defeat the action; although upon an application to the court in banc, it might have interposed to prevent the defendant from availing himself of a receipt obtained under such circumstances. *Auler* v. *George*, 1 Camp. 392. But see *Bowes* v. *Foster*, supra.

—— **Of Rents.**]—Receipts for rents (produced from the proper custody, given by the tenant's father in his own name, after the date of a fine), are admissible to shew an exercise of ownership by him. *Davies* v. *Lowndes*, 5 Bing. (N.C.) 161; 7 Scott, 22; 8 L. J., C. P. 73.

T. occupied lands from 1790 to 1815, but had ceased to occupy them before the time of his

death. At T.'s death, among his papers were found a series of receipts for the rent of this land from 1790 to 1804, signed by M. P., sen., who died in 1806, and a similar series of receipts for rent from 1806 to 1815, signed by M. P., jun. (the daughter of M. P., sen.), who died in 1826:—Held, in ejectment for these lands, that these receipts were receivable as evidence of the seisin of M. P., sen., and M. P., jun. *Doe* d. *Blayney* v. *Savage*, 1 Car. & K. 487.

On a question relating to the rent paid for a particular property, a statement as to receipts from an agent, signed by a deceased principal, is, as being against interest, equally admissible in evidence with a statement by a deceased agent as to receipts from a tenant. But a rent-roll signed by a deceased solicitor who was paid to audit the accounts by testing the arithmetic, but not by examining with vouchers the truth as to alleged payments, is not admissible in evidence, either on the ground of a pecuniary interest or on the ground of the audit having been made in the ordinary course of business. *Vivian* v. *Moat*, 44 L. T. 210; 29 W. R. 504.

To shew a title in lessor, receipts for rent are per se insufficient, especially when he who signed them is living, and has not been examined. *Manning* v. *Lechmere*, 1 Atk. 453.

An information on behalf of the poor of the parish of P. stated an agreement, dated in 1634, by the then Earl of Portland, which recited that there lay in his park at R. divers parcels of land, which contained about six and a half acres, and belonged to the poor of the parish of P., for which lands lying dispersed in his said grounds, being theretofore ordained for good and charitable uses, the earl was desirous to give a full yearly rent and satisfaction, and thereby promised and agreed to pay to the churchwardens and overseers of P. for the time being the yearly sum of 6*l.*; and the earl thereby further promised and agreed to make such further assurances thereof as by counsel should be advised, and to set out sufficient land of a better value for performance thereof, which he would either tie for the payment of the said yearly rent, or otherwise assure and convey to such person and persons and their heirs as by the vestry of the said parish should be nominated to be feoffees in trust for the same. No conveyance was shewn to be made in pursuance of this agreement. It appeared from entries in the parish books that the earl and his successors, in the ownership of part of his land (which had since been divided), had paid every year 6*l.*, which was expressed in such entries to be rent of parish land; and that in 1849 a receipt was accepted by the then owner of part of the earl's land for 6*l.*, for "rent of parish land." A receipt, dated 1849, produced from the custody of the owner of part of the earl's estate, and expressed to be for 6*l.* for one year's rent of parish land:—Held, to be evidence against him that parish land was included in the estate in his possession, and that he was tenant of the parish in respect of such land; and held, that he was estopped by such receipt from disputing the title of the parish. *Att.-Gen.* v. *Stephens*, 1 Kay & J. 724; 3 Eq. Rep. 1072; 24 L. J., Ch. 694; 1 Jur. (N.S.) 1039. *And see* 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

A purchaser of land from an owner who had been paying his rent to the parish upon such receipts:—Held, to have notice that part of the land purchased belonged to the parish. *Ib.*

—— **Of Tithes.**]—Parson's receipts for tithes evidence for successor. *Glynn* v. *Bank of England*, 2 Ves. 38.

—— **Of Legacy.**]—A. agreed that a legacy given to his wife should be set off against a sum of the same amount, which he owed to the testator on his promissory note, and he and his wife signed a receipt for the legacy, but it did not appear that the executors had delivered up the note to him. A. afterwards died, leaving his wife surviving:—Held, that she was entitled to be paid the legacy, no release having been given for it by her husband. *Harrison* v. *Andrews*, 13 Sim. 595; 13 L. J., Ch. 243.

Rebutting Presumption.]—In an action by partners for a debt due to the firm, where the defendant gives in evidence a receipt by one partner in the names of all, evidence is admissible on behalf of the plaintiffs, to shew that the receipt was fraudulently given by the one partner. *Farrar* v. *Hutchinson*, 1 P. & D. 437; 9 A. & E. 641; 2 W. W. & H. 106; 8 L. J., Q. B. 107.

The usual acknowledgment in a deed of the receipt of a sum of money may be rebutted by evidence of some subsequent and distinct circumstance; as, for instance, if a cheque was given at the executing of the instrument, and it was dishonoured on presentment. *Deverell* v. *Whitmarsh*, 5 Jur. 963.

Where Fraud.]—Where a receipt in full has been obtained by fraud or misrepresentation, it will be considered as a nullity. *Benson* v. *Bennett*, 1 Camp, 394, n.

In an action for injuries arising from a railway accident, it was pleaded that the plaintiff had, upon payment of a certain sum, released the company from all further claim. He replied that such release had been obtained by fraudulent misrepresentation of facts, and of the legal effect of the deed of release:—Held, that the fraudulent misrepresentation alleged invalidated the deed. *Hirschfield* v. *L. B. & S. C. Ry.*, 46 L. J., Q. B. 94; 2 Q. B. D. 1; 35 L. T. 473.

A passenger who was injured by a railway accident sent in a claim for 691*l.* compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted 400*l.*, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that he had accepted 400*l.* in full satisfaction and discharge of the causes of action. The plaintiff then filed a bill to restrain them from relying on the plea, and from setting up the acceptance of the 400*l.* or the receipt, as a satisfaction or discharge of the damages, except to the extent of 400*l.* The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time:—Held, that, as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed. *Lee* v. *Lancashire and Yorkshire Ry.*, L. R. 6 Ch. 527; 25 L. T. 77; 19 W. R. 729.

The plaintiffs, through the introduction of R., entered into a contract with B. de M. for the

supply of goods. During the negotiations for a second contract, R. falsely represented that B. de M. would not complete it without the advance of an extra sum by the plaintiffs, on which R. was also to have a commission. The plaintiffs accordingly paid R. a sum of money in part discharge of what was due for such commission, and gave him a letter undertaking to pay the rest. They subsequently discovered the fraudulent representations, and on R. bringing an action on the letter of undertaking against the plaintiffs, they filed a bill to restrain the action and to make him deliver up the letter of undertaking:—Held, that the fraud could be pleaded in the action, and that a court of law was the proper tribunal, and that there was no equity to compel R. to give up the letter of undertaking. *Fennelly* v. *Ranscelot*, 19 W. R. 966.

To an action for compensation for injuries from a railway accident, the company pleaded a receipt in full; the plaintiff then filed a bill alleging the receipt to have been obtained by fraud, and praying that the company might be restrained from setting it up, but for no further relief:—Held, that although the plaintiff might have met the plea by an equitable replication, he was entitled to come to equity for the relief needed for the purposes of his action, and that he had rightly limited the prayer of his bill to such relief. *Stewart* v. *G. W. Ry.*, 2 De G. J. & S. 319; 11 Jur. (N.S.) 627; 13 L. T. 79; 13 W. R. 907.

In an action by partners for a debt due to the firm, where the defendant tenders a receipt by one partner in the name of all, evidence is admissible on behalf of the plaintiffs, to shew that the receipt was fraudulently given by the one partner. *Farrar* v. *Hutchinson*, 1 P. & D. 437; 9 A. & E. 641; 2 W. W. & H. 106; 8 L. J., Q. B. 107.

On Writ.]—A receipt given by the agent, indorsed on the back of a writ issued for the sum claimed, is admissible to prove payment of that sum, between the same parties without calling the agent. *Weary* v. *Alderson*, 2 M. & Rob. 127.

By Collector.]—In an action on a bond against a surety of a deceased collector of taxes, conditioned for the due performance of his duty as such, and for delivering to the obligee all books and accounts intrusted to his care; a collecting book received by him from his predecessor (for the faithful delivery of which to the obligee he became surety, and on the death of the principal it was accordingly delivered to such obligee), containing the names of the parishioners residing within the parish for which the collector was appointed, and the sums at which they were rated; and wherein the usual mark was made by him, opposite to some of such names, by which he indicated the receipt of the sums assessed on them:—and receipts signed by him for money paid to him in his official capacity were produced and received in evidence against the surety, on the execution of a writ of inquiry:—Held, on a motion whether such receipts ought to have been admitted, that the circumstances of the case did not warrant either an actual or implied authority by the surety to admit the receipts of the principal as evidence against him. *Goss* v. *Watlington*, 6 Moore, 355; 3 Br. & B. 132.

The receipt granted by the collector of quit-rent is evidence of the apportionment of rent. *Bowles* v. *Waller*, Hayes, 439.

Stamped as Agreement.]—A receipt for the deposit, duly stamped as an agreement, is sufficient to support a bill for specific performance of the contract. *Boun* v. *Stroud*, 21 L. T. 695.

When Unstamped.]—Where a receipt for money has been given on unstamped paper, it may be used by a witness who saw it given, to refresh his memory. *Rambert* v. *Cohen*, 4 Esp. 213; 6 R. R. 854.

In an action for a balance of account, the defendant tendered in evidence a piece of paper containing a debtor-and-creditor account, with the balance of 68*l.* 9*s.* 4*d.* struck in favour of the plaintiff. At the bottom of this account was an acknowledgment of the correctness of the account, and a receipt for the balance, signed by the plaintiff. This paper was not stamped; it was not tendered in evidence to prove the payment of the 68*l.* 9*s.* 4*d.*, that item being admitted by the plaintiff, but merely to prove that the plaintiff had acknowledged the correctness of the account:—Held, that this paper should be received in evidence; but it would have been otherwise had the payment of the sum mentioned in the receipt been a question in dispute. *Matheson* v. *Ross*, 2 H. L. Cas. 286; 13 Jur. 307.

Where the cases say that an unstamped receipt may be given in evidence to prove a collateral matter, they must be taken to mean a matter wholly unconnected with the fact of payment. *Ib.* See *Holmes* v. *Sizesmith*, 7 Ex. 802.

A document containing all the requisites to make it a valid contract, and purporting to be a receipt, though by reason of its being insufficiently stamped inadmissible as such, may be received as evidence of the contract. *Evans* v. *Prothero*, 1 De G. M. & G. 572; 21 L. J., Ch. 772—L. C. But see *S. C.*, 2 Mac. & G. 319; 20 L. J., Ch. 448; 15 Jur. 113—L. C., contra.

On Unstamped Deed.]—A receipt indorsed on the back of a stamped deed may be separately read in evidence, though it is a part of an indorsement requiring another stamp. *Odye* v. *Cookney*, 1 M. & Rob. 517.

Foreign.]—An unstamped receipt for 40*l.*, dated at Cologne, was held to be receivable in evidence here, and the fact that such a receipt would not be receivable in evidence at Cologne, until it had been stamped, on payment of a penalty, would make no difference as to its admissibility here, as our courts do not take notice of foreign revenue laws. *Bristow* v. *De Secqueville*, 3 Car. & K. 64; 5 Ex. 975.

Inferential Evidence of Contract.]—A master of a steam-tug, of which the defendant was owner, was employed by the plaintiff to tow his smack out of a harbour. In so doing, the smack was stranded through the negligence of the master. The plaintiff had, on previous occasions, hired the steam-tug, and on paying the charge had received a receipt, upon the back of which was printed a notice that the defendant would not be answerable for damage occasioned by any supposed negligence of his servants:—Held, that it was a question for the jury whether the contract was made on the terms printed on the back of the receipts. *Symonds* v. *Pain*, 6 H. & N. 709; 30 L. J., Ex. 256.

Entries of Receipts.]—*See cases* sub tit. ENTRIES, ante, cols. 549 et seq.

5. Advertisements.

Notice.]—An advertisement published in several daily newspapers is not evidence of notice to any individual who is not proved to have taken in, or to have been in the habit of reading, one of the newspapers in which it appeared. *Boydell* v. *Drummond*, 2 Camp. 157; 10 R. R. 450.

Evidence that an advertisement was inserted in a country newspaper, circulated at the residence of a party, is not admissible as proof of notice to the party of the facts contained in the advertisement, unless it is shewn that he took the newspaper in. *Norwich and Lowestoft Navigation* v. *Theobald*, M. & M. 153.

—— **Where Fraud.**]—A contract was made in June by the defendant's son; in January following it was discovered that, in making the contract, he had been acting for his father:—Held, that an advertisement published by the son in September, and tending to shew fraud in the transaction on the part of the defendant and his son, was admissible against the defendant. *Lucas* v. *Godwin*, 3 Bing. (N.C.) 737; 4 Scott, 502; 3 Hodges, 114; 6 L. J., C. P. 205.

The defendant, a money-lender, issued an advertisement headed "Money on easy terms," and containing a statement that money would be advanced on note of hand to, among others, farmers, on easy terms, and on reversions, &c., at 5 per cent. No other rate of interest was mentioned in the advertisement. The plaintiff, a farmer, having seen the advertisement, went to the defendant's office, and applied for a loan of 100*l.* He swore that the defendant's agent then told him he could have it at 5 per cent., and after negotiations agreed to take 4½ per cent., and that he executed a bill of sale, as he believed, to secure 100*l.* with interest at 4½ per cent. by weekly instalments. The bill of sale was in fact a security for the repayment of 150*l.* by weekly instalments of 2*l.* 10*s.*:—Held, in an action to set it aside, that where a man represents to the public by advertisement that he will lend money on easy terms, and afterwards lends it on very hard terms, the onus lies upon him to shew that he has removed from a borrower's mind the impression produced by such representation, and clearly explained to him the terms on which the loan had been made. On the evidence, the court believed the plaintiff's statement and set aside the bill of sale. *Moorhouse* v. *Woolfe*, 46 L. T. 374. And see *Redgrave* v. *Hurd*, 20 Ch. D. 1; 51 L. J., Ch. 113; 45 L. T. 485—C. A.

—— **Tender.**]—A circular sent out, as follows:—"We are instructed to offer to the wholesale trade for sale by tender the stock-in-trade of A., amounting as per stock-book to 2,503*l.* 13*s.* 1*d.*, and which will be sold at a discount in one lot: payment to be made in cash: the tender will be received and opened at our offices," does not amount to a contract or a promise to sell to the person who makes the highest tender. *Spencer* v. *Harding*, 39 L. J., C. P. 332; L. R. 5 C. P. 561; 23 L. T. 237; 19 W. R. 48.

—— **Auction.**]—An auctioneer advertised in newspapers that a sale by auction would take place on a particular day in a country town. He also circulated catalogues specifying the articles to be sold. A person attended the sale intending to buy certain articles specified in the catalogue, but on the day of sale they were withdrawn by the auctioneer:—Held, that there was no implied contract by him to indemnify the intended purchaser against the expense and inconvenience which he had incurred. *Harris* v. *Nickerson*, 42 L. J., Q. B. 171; L. R. 8 Q. B. 286; 28 L. T. 410; 21 W. R. 635.

See also Auction and Auctioneer.

6. Family Writings and Papers.

Family Bibles, &c.]—An entry in a father's family Bible, an inscription on a tombstone, or a pedigree hung up in the family mansion, are all good evidence. *Goodright* d. *Stevens* v. *Moss*, Cowp. 591.

But a Bible containing entries of births, deaths, and marriages, which were not shewn to have come to the knowledge of any deceased members of the family, is not admissible. *Splents* v. *Lefevre*, 11 L. T. 114—Ex. Ch.

The entry in a family Bible of the births of children, made by their mother shortly after such births, is good evidence, in the absence of other and better testimony, such children having been neither baptized nor registered. *Ashcroft* v. *Powell*, 9 L. T. 638; 12 W. R. 301—Ex. Ch.

Entries of pedigree in a family Bible or a Testament, which is produced from the proper custody, are admissible as evidence, without proof of handwriting or authorship. *Hubbard* v. *Lees*, 4 H. & C. 418; 35 L. J., Ex. 169; L. R. 1 Ex. 255; 12 Jur. (N.S.) 435; 14 L. T. 442; 14 W. R. 694.

Upon the trial of an ejectment respecting Little Acre, between N. and P., in which it was necessary for N. to prove that he was the legitimate son of T., T. being at that time dead: N., after proving by other evidence that T. was his reputed father, offered to give in evidence an entry in a Bible, in which T. had made such entry in his own handwriting, that N. was his eldest son, born in lawful wedlock, from J., the wife of T., on the first day of May, 1778, and signed by T. himself; and it was proved on the trial, that T. had declared "that he, T., had made such entry for the express purpose of establishing the legitimacy, and the time of the birth, of his eldest son N., in case the same should be called in question, in any case or in any cause whatsoever, by any person, after his death":—Held, that such entry in such Bible (or in any other book, or on any other piece of paper) could be received to prove that N. was the legitimate son of T., as evidence of the declaration of T., in matter of pedigree (but with strong circumstances of suspicion, on account of its particularity). *Berkeley's Case*, 4 Camp. 401; 14 R. R. 782.

In a claim of peerage, where the question was, whether the deceased peer, the father of the claimant, had been married or not, a prayer-book, found, after the death of the claimant's mother, among her papers, was received, and an entry made in her handwriting, declaring the fact of the marriage, read from it, not as conclusively proving that fact, but as a declaration of it made by one of the parties at the time. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

The plaintiffs, in order to prove that the person under whom they claimed was descended from H. J., produced an old religious book containing the following entry: "E. J., her book, 15th June, 1680, the gift of H. J., her father." It did not appear by whom the entry was made; but the book contained, in other parts of it, entries of the births of other members of the family, which were proved to be their father's handwriting;

and, moreover, the book had been preserved by the family :—Held, that the first-mentioned entry was admissible. *Wood* v. *Beauchamp*, 8 Sim. 26.

On a claim of peerage, entries in an old family prayer-book, according to the opinion of persons conversant with MSS. of different ages, written about the period of their dates :—Held, entitled to little weight, especially where the book was unsatisfactorily identified. *Tracy Peerage*, 10 Cl. & F. 154.

A Bible produced by a woman, aged 67, who said that it was given to her when seven years old by her father, who told her that it belonged to her grandfather, is evidence of itself to be left to the jury to say, whether an entry in it by which it appears that her grandfather was the son of a certain person, is true. *Doe* d. *Cracknel* v. *Head*, 1 L. J. (O.S.) K. B. 79.

Pedigrees.]—A pedigree, made by a person with a view to a suit respecting property, is not receivable in a claim of peerage by his son to prove his descent; nor a case, stated for the opinion of counsel, produced from the family papers of a distant relative of the claimant. *Slane Peerage Case*, 5 Cl. & F. 23.

Entries in a family missal are admitted as evidence of births, deaths, and marriages of members of the family, just like similar entries in a family Bible. *Ib.*

In 1671, the crown issued a commission to authorise the College of Heralds to receive and record the family pedigrees of all such benefactors as should be willing to contribute sums of money for the rebuilding of the Heralds' College, before then destroyed in the great fire of London. A pedigree so furnished to the college by a member of the family, and the signature to which was proved, was received in evidence, but only as a declaration of a member of the family. *Shrewsbury Peerage*, 7 H. L. Cas. 1. S. P., *Goodright* d. *Stevens* v. *Moss*, Cowp. 591.

A pedigree, "touching the name and families of Talbots," though proved to be in the handwriting of a former garter king of arms, not being shewn to be a book kept by him in discharging his duty in that office, is inadmissible. *Ib.*

A paper in the handwriting of B., found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents C. to have been a member, is admissible for the same purpose, though never made public in B.'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay. *Monkton* v. *Att.-Gen.*, 2 Russ. & Mylne, 147. *S. C.*, nom. *Robson* v. *Att.-Gen.*, 10 Cl. & F. 471.

A written pedigree, coming from the proper custody, relating to the descent of W. L., and signed by him, and purporting to bear date A.D. 1733, is admissible, as a recognition by W. L. of his family descent, though it bears a memorandum in these words, "Collected from parish registers, wills, monumental inscriptions, family records and histories," and although on the face of it it goes back to a fabulous period. *Davies* v. *Lowndes*, 7 Scott (N.R.) 141; 6 Man. & G. 471; 12 L. J., Ex. 506—Ex. Ch.

Held, also, that the document being more than thirty years old, must be taken to have been made at the period when dated; and that this period being ante litem motam, it must primâ facie be taken to have been made ante litem motam. *Ib.*

Old pedigrees, produced from the custody of a person whose ancestor was connected by marriage with the family described in the pedigree, are admissible as evidence to shew the state of that family. *Camoys Peerage*, 6 Cl. & F. 789.

Other Family Papers.]—Letters addressed to a lady, who had married into a particular family, produced from the custody of a member of that family, who likewise possessed many other family papers and deeds, and held by descent some of the property formerly belonging to the husband of the addressee of the letters, are admissible, to shew in what character she was addressed by members of her own family. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

A paper writing found among an ancestor's papers in the custody of a stranger in blood, and not signed by the ancestor nor by any of his family, is not admissible to shew the state of the family. *Vaux Peerage Case*, 5 Cl. & F. 539.

An inscription on an old portrait of one of that family, produced from proper custody, is admissible to shew the state of a family. *Camoys Peerage*, 6 Cl. & F. 789.

Form of.]—Family memorials to be admissible as evidence of pedigree must be spontaneous, and have originated before any question has been raised. Where, therefore, the document sought to be given in evidence was in the form of an affidavit, although not sworn, it was held to be ipso facto inadmissible. *Hill* v. *Hibbit*, 19 W. R. 250.

7. Mural and Monumental Inscriptions.

Monumental Inscriptions.]—The publicity of an inscription on a tombstone gives a sort of authenticity to it, and, if it remains uncontradicted for a great many years, it will, in the absence of evidence to the contrary, be taken to be true. But the rule as to the authority of inscriptions on tombstones cannot be put higher than that. *Haslam* v. *Cron*, 19 W. R. 968.

Circumstantial evidence is available only where the circumstances collected are consistent with one state of things and one only. *Ib.*

An inscription giving an account of the Moreton family on the wall of a chancel in a church called the Moreton chancel, in which some of the family (who had resided and had property in the parish) were buried, is good evidence of pedigree; and the inscription having been effaced, copies of it, one of which had been made in pencil, and was afterwards traced over with ink (but by whom it did not appear), were received as evidence of its contents. *Slaney* v. *Wade*, 7 Sim. 595; 1 Mylne & C. 338.

Tombstones.]—A claimant to a peerage, after his case was referred to the House of Lords, and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland, which, if proved, would sustain the claim. The tombstone could not be produced; several witnesses from the neighbourhood swore positively that they saw the tombstone and inscription about twenty years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them :—Held, that the evidence was not sufficient of the existence of the tombstone or of the inscription; and the neglect of the claimant to this material part of his case earlier induced a suspicion of fraud, which could not be removed without the production of the tombstone, or of other witnesses of greater credit

from the neighbourhood. *Tracy Peerage*, 10 Cl. & F. 154.

S. erected in a church a monument to the memory of S., whom he described in the inscription thereon to have been his (S.'s) father. The inscription had been put up after S. had been engaged in a controversy as to the relationship with C., but it did not directly relate to that controversy. It was admitted in evidence. *Shrewsbury Peerage*, 7 H. L. Cas. 1.

An old collection of monumental inscriptions in country churches is inadmissible to shew what had been the inscription on a partly-defaced tomb. *Ib.*

An inscription on a tombstone is inadmissible to prove the age of a person. *Colclough* v. *Smyth*, 15 Ir. Ch. Rep. 347; 10 L. T. 918. And see *Goodright* d. *Stevens* v. *Moss*, Cowp. 591, supra.

8. Ancient Leases, Agreements, and Title-Deeds.

Assignments.]—The defendant's testator was in possession of premises under the will of Papworth, who took by assignments from Thick:—Held, that a memorial of the assignment from Thick to Papworth, signed by the latter, was evidence against him, and those claiming under him. *Wollaston* v. *Hakewill*, 3 Scott (N.R.) 593; 3 Man. & G. 297.

A counterpart of a feoffment by a corporation to an individual of land in a town, produced from among the corporation muniments, was held inadmissible in an action by the lessee of the corporation for tolls; it appearing that no rent was received in respect of the property. *Lancum* v. *Lovell*, 6 Car. & P. 441.

Part of an old indenture relating to lands, appearing to have been severed with a sharp instrument, and formerly in the custody of the plaintiff's steward, until litigation commenced between them, and afterwards handed over to the succeeding steward, from whose custody it is produced at the trial, is admissible against the plaintiff in support of the case of the defendant, who derived title from the former steward. *Roe* d. *Trimlestown* (*Lord*) v. *Kemmis*, 9 Cl. & F. 774.

Leases.]—In ejectment to prove that the land was part of the estate of the plaintiff's ancestor, a counterpart of a lease purporting to demise that land was produced from the ancestor's muniment-room. It was dated in the ancestor's lifetime, and appeared to be executed by the person named as lessee, but by no one else. The lease itself was not produced, nor any excuse shewn for the non-production. No privity appeared between the lessee and the defendant in the ejectment:—Held, that the counterpart was admissible. *Doe* d. *Egremont* (*Earl*) v. *Pulman*, 3 Q. B. 622; 6 Jur. 1122.

Where an ancient lease (upon which a question arose as to the power to cut turf for sale) is lost, the recitals of the terms of the demise, in a renewal will be taken as evidence of the terms of the demise, even against an alleged user of the rights. *Chatterton* v. *White*, 1 Ir. Eq. R. 200.

If user be relied upon, it must be shewn to have been uninterrupted as against the landlord. *Ib.*

An article of agreement to demise lands executed upwards of thirty years, and produced out of the proper custody:—Held, to be admissible in evidence as an ancient instrument, by proving (not by the subscribing witnesses) the signatures of the parties, that it was in defendant's handwriting, and an indorsement, explaining why possession did not accompany it, its authenticity being thereby established. *Aylward* v. *Kearney*, 2 Ball & B. 463.

Title-Deeds.]—Although the title-deeds of a person seised of land are not in general admissible against third persons to prove the truth of the facts therein asserted, yet, where they are offered to shew, not that a certain sum was due and paid for a rent-charge, and not for rent of land in the occupation of those who made the payment, but to shew what the intention in making that payment probably was, and what they supposed their rights and liabilities to be, the deeds are clearly admissible. *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 111; 25 L. J., Ch. 888; 2 Jur. (N.S.) 51; 4 W. R. 191.

On a question whether N. was part of the parish of T., an ancient agreement was produced to shew that it was. The agreement was between the owner of N. and the rector and parishioners of T., and by it all the poor from N. who should be chargeable to T. should be maintained by N., and that N. should be free from poor-rate. This agreement was found in 1858 among the title-deeds of another large estate belonging to a different person in T.:—Held, that it was admissible in evidence as coming from proper custody. *Reg.* v. *Mytton*, 2 El. & El. 557; 29 L. J., M. C. 109; 6 Jur. (N.S.) 341; 2 L. T. 12; 8 W. R. 275.

An old grant from the crown, "of grain, hay, and herbage," not shewn to have been acted upon, and under which no enjoyment nor perception of the specific tithe claimed (agistment) was proved:—Held, not to be sufficient proof of the title, in persons claiming under grantee, to the tithe of agistment. *Scott* v. *Lawson*, 7 Price, 267.

Old rent rolls admitted as evidence to prove fee-farm rents, there having been an unity of possession for above three hundred years; and being so ancient, it could not be imagined they were fabricated to serve the present purpose. But an inquisition post mortem is not evidence, unless it is proved that a commission was ever issued to support it. *Newburgh* v. *Newburgh*, 3 Bro. P. C. 553.

The royal grants and the minister's accounts are, when they so state, usually considered as sufficient evidence that certain premises were parts of a dissolved monastery. *Lupton School* v. *Scarlett*, 2 Y. & J. 330.

In quare impedit.]—A deed relating to the same church, brought from the proper custody, is admissible in evidence in a quare impedit suit. *Meath* (*Bishop*) v. *Winchester* (*Marquis*), 4 Cl. & F. 445; 10 Bli. (N.S.) 330. Affirming 3 Bing. (N.C.) 183; 3 Scott, 561.

A plaintiff in quare impedit, after tracing his title through various steps, and averring the death of W., who had been shewn to be a joint tenant with plaintiff of a term of years in an advowson, alleged, "Whereupon and whereby the plaintiff became, and still is possessed of the said advowson, as of an advowson in gross for the remainder of the said term so theretofore granted." The defendant pleaded that he, as Bishop of M., was seised of the advowson in gross, in right of his see; without this, that the plaintiff was possessed of the advowson in manner and form as the plaintiff alleged:—Held, that a fine of the advowson in question, levied in 1 Jac. 2, by one whose estate the

plaintiff had, was not admissible in evidence under this or any similar issue. *Ib.*

Ancient Entries.]—Ancient entries made by the monks of an abbey, relating to an endowment by them of a vicarage (whether perfect or not), are good evidence (quantum valeant), of their subject matter; although such entries are mixed with extraneous memoranda, and the book is not confined or appropriated to subjects ejusdem generis; and, being admitted, they may be read throughout, for the purpose of proving anything which is material to the issue, provided it is relevant. *Bullen* v. *Michel*, 2 Price, 399; 16 R. R. 77.

A declaration of uses by the founder of a charity presumed from an entry in an ancient book purporting to be such declaration, but without a signature or date, the book being kept by the trustees for entering their proceedings, and containing an order by the trustees dated six years after creation of the trust that the declaration of the founder be there entered as a direction to the trustees. *Att.-Gen.* v. *Boultbee*, 2 Ves. J. 379.

Inspeximus—Evidence for Person not having Title.]—An abstract of what was termed an inspeximus of certain deeds and writings enrolled in the Chancery of Ireland (contained in a document 200 years old, which appeared to be in the nature of an abstract of title), reciting, amongst other things, two deeds of 15 Ed. 3 and 1 Rich. 2, and concluding by a statement that the Bishop and the Mayor and Corporation of Waterford had affixed their seals to the inspeximus for the better credit and testimony of the same, was produced from plaintiff's muniment room and tendered on his behalf as secondary evidence of the two deeds above mentioned:—Held, inadmissible because (a) the inspeximus related to lands to which plaintiff or his predecessors never had any title, and therefore was not produced from the proper custody; (b) no evidence was produced of the execution of the two deeds referred to. *Devonshire* (*Duke*) v. *Neill*, 2 L. R., Ir. 132.

Evidence of Title.]—Evidence of possession or of receipt of rents by persons claiming a title under a deed will render the deed admissible as evidence of the title, although such deed has been executed by a grantor not in such possession or receipt of rents. *Nash* v. *Ash*, 1 H. & C. 160; 32 L. J., Ex. 165; 8 Jur. (N.S.) 998.

Custody.]—*See* post, DEEDS, col. 710.

9. PLANS AND MAPS.

In an Accident Case.]—In an action for negligently driving, a plan, which is to be put into the hands of the witnesses, should merely shew the street, the pavement, the turnings, corners, &c., and not the supposed position of the carriages; but if it does so, the judge will not allow it to be used. *Beamon* v. *Ellis*, 4 Car. & P. 585.

In Ejectment.]—In ejectment, the only case in which a map of property is receivable is, where it is undisputed that, at the time the map was made, the property belonged to the person from whom both parties claim. *Doe* d. *Hughes* v. *Lakin*, 7 Car. & P. 481.

In what case an old map of an estate is good evidence to ascertain the quantities and boundaries of particular lands. *Wilkinson* v. *Allott*, 3 Bro. P. C. 684.

In Trespass—Ownership.]—In an action for breaking flood-gates, the defendant justified as lessee of a mill, which he held of a bishop. For the defendant, old leases of the mill, granted by the bishop, were produced from the bishop's registry, and read in evidence; and it was proposed, on the part of the defendant, to put in an old map of the place in question, also brought from the registry:—Held, that the map was not admissible. *Wakeman* v. *West*, 7 Car. & P. 479.

On the question whether certain land was part of the plaintiff's estate or waste of the manor, a perambulation of such manor by the lord, including the land in question, is evidence, as shewing an assertion of ownership by the lord, though it is not proved that any person on behalf of the plaintiff was present at the perambulation, or knew of it. *Woolway* v. *Rowe*, 1 A. & E. 114; 3 N. & M. 649.

In trespass quare clausum fregit, the defendant, in order to prove that there was a public highway across the locus in quo, put in evidence a copy of a map made by order of a former lord of the manor, of which the land in question formed part. The map had been used, for more than thirty years, by the deceased and present stewards of the manor, for the purpose of defining the copyholds. The map set out a road across the locus in quo, but did not describe it as a highway; and it was proved that other roads, similarly set out, were only occupation roads:—Held, that the map was not admissible as amounting to a declaration by a deceased person as to public right, inasmuch as, first, the map, if a declaration at all, was a declaration only as to the matter in respect of which it had been used, viz. the defining of the copyholds; and, secondly, the map itself did not describe the road as a highway. *Pipe* v. *Fulcher*, 1 El. & El. 111; 28 L. J., Q. B. 12; 5 Jur. (N.S.) 146; 7 W. R. 19.

A dwelling-house, with grounds and ornamental water, was demised, together with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessor, his heirs, or assigns. The lease referred to a plan on which the plantation was represented:—Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty, during the term, to destroy the plantation, and an injunction was granted to restrain him from so doing. *Nicholson* v. *Rose*, 4 De G. & J. 10.

—— **Mines.**]—In an action by a lessee of a mine to the north, against the lessee of a mine to the south, of a certain boundary, the lease was produced, and the parcel thereof described the boundary in question as a straight line from Vincent's house to a bound-stone; "which premises are particularly delineated by the map on the back of this sett." On this map the boundary line was drawn from the north-east corner of the house. Parol evidence, however, was admitted, which shewed that the site of Vincent's house was incorrectly laid down on the map; and the judge left the whole case to the jury:—Held, that parol evidence was properly admissible to shew whether the locus in quo was or was not included in the sett; and that the question parcel or no parcel was properly left to the jury. *Lyle* v. *Richards*, 35

L. J., Q. B. 214; L. R. 1 H. L. 222; 12 Jur. (N.S.) 947; 15 L. T. 1—H. L. (E.)

Held, also, that it was the duty of the judge to ask the jury whether they were satisfied that the existing Vincent's house was in fact the one intended to be described on the map, and if so, then to explain to them the true construction of the lease, and map as part thereof, and to direct them, as a matter of law, that the line must be drawn from the north-east corner of Vincent's house as it stood, notwithstanding its being incorrectly placed on the map. *Ib.*

An award under an act of parliament defined the southern boundaries of a level colliery thus: "commencing at the point where the level struck the coal, and extending in an eastward direction as deep as the level will drain." There was an old existing excavation (termed by miners a "level"), not horizontal, but running upward into the coal eastward from the point where it struck the coal bed. This excavation was described on the plan annexed to the award as the line of boundary:—Held, that this existing old level was the boundary meant by the award, and not an imaginary mathematical line drawn horizontally eastward from the point where the old excavation struck the coal. *Brain* v. *Harris*, 10 Ex. 908; 24 L. J., Ex. 177—Ex. Ch.

Position of House.]—In order to shew that a house was situate in the county of N., the plaintiff tendered in evidence a map printed on paper from an engraved copper-plate, having on the face of it these words, "A new map of the county of S., taken from the original map published by J. K. in 1736, who took an actual and accurate survey of the whole county, now republished with corrections and additions by J. and W. K., sons of the author, 1766, and engraved by J. R." The map was produced by a witness, who was a magistrate of the two counties N. and S., and had bought it twelve years before the trial, and during that time it had been in his possession and had not been altered:—Held, that the map was not admissible. *Hammond* v. *Bradstreet*, 10 Ex. 390; 2 C. L. R. 1195; 23 L. J., Ex. 332; 2 W. R. 625—Ex. Ch.

Highways.]—On the trial of an indictment for the non-repair of a highway, a map of the parish, produced from the parish chest, which map was made under an inclosure act (which was a private act, not printed), is not receivable to shew the boundaries of the parish, without proof of the inclosure act; but it being proved by the surveyor who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round and shewed them to him:—Held, that, on this proof, the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead at the time of the trial; but that it was not receivable without proof of his death. *Reg.* v. *Milton*, 1 Car. & K. 58.

A map attached to an old inclosure award shewing a highway existent at the date of the award is not admissible as evidence of reputation to prove the boundaries of the highway at that date against a person whose property adjoined the highway, but over which the inclosure commissioners have no jurisdiction. *Reg.* v. *Berger*, 63 L. J., Q. B. 529; [1894] 1 Q. B. 823; 10 R. 245; 70 L. T. 807; 42 W. R. 541; 17 Cox, C. C. 761; 58 J. P. 416.

A copper-plate map, taken by the direction of the overseers of a parish, on an issue whether a particular spot of ground is a highway or not, is not admissible. *Pollard* v. *Scott*, Peake, 19.

Metes and Bounds.]—A map, made under the authority of the king's commission in 1832, setting out the metes and bounds of the level of New Romney, authenticated by the presentment of a jury, who made it part of their return to an inquisition held under the same commission, and practically acquiesced in for nearly sixty years, is evidence of the local limits within which the commissioners of sewers of the level are entitled to exercise their jurisdiction of levying scots or rates. *New Romney Corporation* v. *New Romney Commissioners of Sewers*, 61 L. J., Q. B. 558; [1892] 1 Q. B. 840; 56 J. P. 756—C. A.

In Tithe Suit.]—Producing map of lands of which the farm was stated to consist, and proving the accuracy of the description of the lands in the map as compared with them in 1803 (with reference to the time of commencing the suit), is no proof of such farm being ancient, nor sufficient even to raise such a presumption, that it may be capable of further proof, as to furnish ground for giving an opportunity of establishing it by issue. *Stuart* v. *Greenall*, 9 Price, 106.

Township Map—Tithe Map.]—A township map, produced from proper custody, made by a competent surveyor (since deceased) who was conversant with the locus in quo, and which map had been recognised by the parish authorities for rating purposes, is admissible in evidence upon an issue raising a question of general or public right in a part of the township. A tithe map is admissible on a similar issue. *Wilberforce* v. *Hearfield* (5 Ch. D. 709), distinguished. *Smith* v. *Lister*, 64 L. J., Q. B. 154; 15 R. 226; 72 L. T. 20.

Ordnance Map.]—Although the ordnance survey map is not evidence of title, it may be given in evidence when the question, e.g. of boundary, is in dispute, to shew the boundary line as represented on the map when the survey was made. *Caton* v. *Hamilton*, 53 J. P. 504.

In an action of trespass to land, the plaintiff gave in evidence a landed estates court conveyance to him of the locus in quo; the defendant tendered a copy of the ordnance map of the premises, which was attached to the conveyance, but not referred to in or by it:—Held, that the map was not admissible in evidence to explain or control the deed. *Wyse* v. *Leahy*, Ir. R. 9 C. L. 384.

—— **Commonable Rights—Maps in British Museum.**]—In an action to establish commonable rights over a piece of land on behalf of all the proprietors and occupiers of lands or tenements in a certain parish, the question raised by the evidence was: whether the land in question was within the parish. The ordnance map, and several other maps, some of which had been kept in the British Museum, were tendered in evidence for the purpose of shewing the position of the boundaries of the parish:—Held, that the maps were not admissible in evidence. *Bidder* v. *Bridges*, 54 L. T. 529; 34 W. R. 514.

Form of.]—A map or plan prepared for the purpose of a trial ought not to contain any reference to transactions and occurrences which are the subject-matter of the investigation before

the court, and not existing when the survey was made; and if it does, and the objection is taken, the court will not allow the jury to look at it. *Reg.* v. *Mitchell*, 6 Cox, C. C. 82.

Where Proved Erroneous.]—A map is a picture of external objects in their relative position; and when it was proved that the site of the house was wrongly placed, the relative position of the house and the boundary line was disturbed, and the question became a further question of fact for the jury, and not of construction for the judge. Semble. *Lyle* v. *Richards*, 35 L. J., Q. B. 214; L. R. 1 H. L. 222; 12 Jur. (N.S.) 947; 15 L. T. 1.

10. WILLS.

Antiquity.]—A will more than thirty years old may be read in evidence without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living. *Doe* d. *Oldham* v. *Wolley*, 8 B. & C. 22; 2 Man. & Ry. 195; 3 Car. & P. 402; 6 L. J. (O.S.) K. B. 286. S. P., *Doe* d. *Spilsbury* v. *Burdett*, 4 A. & E. 1; 6 N. & M. 259; 6 L. J., K. B. 73.

A will, fifty years old, was produced by the plaintiff's attorney, who stated that he received it from B., and that when this very cause was before an arbitrator, the defendant's attorney, in the presence of the defendant, consented to this will being admitted in evidence, on being then produced by B.:—Held, that this was such evidence of proper custody as would allow the will to be read as evidence for the plaintiff. *Doe* d. *Bowdler* v. *Owen*, 8 Car. & P. 751.

It is no objection to a will more than thirty years old being read in evidence, that possession has not followed it, because the court cannot know how the will directs the possession to go till it is made acquainted with the contents of the will by its being read. *Lloyd* v. *Passingham*, 2 Car. & P. 440; 30 R. R. 327.

The thirty years are to be computed from the date of the will, and not from the death of the testator, and are calculated as ending at the time of its production. *Man* v. *Ricketts*, 7 Beav. 93.

A will (about seventy years old) executed under seal, and published and attested as a sealed instrument, proved to have been in the keeping of a person entitled under it as tenant for life, and he was shown to have treated it as his title-deed, and, shortly before his death, to have desired a person to read it over in order to see whether he was empowered by it to dispose of the property by his will, is properly received as a document coming from a custody where it may reasonably be expected to be found, notwithstanding its appearance was calculated to lead to a suspicion that it had been cancelled by the testator after its execution. *Andrews* v. *Motley*, 12 C. B. (N.S.) 526; 32 L. J., C. P. 128.

A will was thirty years old from the date of execution; it came from the custody of the person in whose favour it was made, and containing a proper attestation clause:—Held, that this was sufficient evidence of the fact of due execution. *Orange* v. *Pickford*, 27 L. J., Ch. 808; 4 Jur. (N.S.) 649.

Will, thirty years old, coming from the proper custody, proves itself subject to just exception. *Holton* v. *Lloyd*, 1 Moll. 30.

Attesting Witnesses.] — In ejectment, the plaintiff claimed under a deed executed by C., since deceased, by which—reciting that C. was entitled in fee to the premises under the will of S., her deceased husband—the whole estate in the premises was conveyed to the plaintiff. At the trial, the plaintiff, at the instance of the defendant, produced a will of S., by which C. took an estate in the premises for her own life only; and evidence was given on the part of the defendant that C. had, previously to the execution of the deed, admitted the document produced to be the will of S., but the persons named as the attesting witnesses to the will were not called by the defendant, nor was any evidence given of the handwriting of the alleged testator. The plaintiff's counsel called for a direction, but did not ask the judge to leave any question to the jury, and the judge directed a verdict for the defendant, reserving liberty for the plaintiff to move to change the verdict if the court should be of opinion that he ought not to have allowed the alleged will to be given in evidence:—Held, that the will was properly received in evidence. *Nagle* v. *Shea*, Ir. R. 9 C. L. 389—Ex. Ch.

Held, secondly, that there was no misdirection. *Ib.*

Held, thirdly, that, according to the reservation, it was not open to the plaintiff's counsel to contend that it ought to have been left to the jury to say whether the will produced at the trial was identical with that which had been admitted by C. *Ib.*

—— **Proof of Handwriting.**]—On proof satisfactory to the court of the handwriting of the two attesting witnesses to a will containing a due attestation clause and executed in France by a testatrix domiciled in that country; and upon evidence that diligent search had been made, but without success, for the two attesting witnesses, it was held that sufficient proof had been given that the requisite formalities attending the due execution of the will had been complied with. *Baxendale* v. *De Valmer*, 57 L. T. 556.

—— **Copy in Handwriting of.**]—A copy of a will in the handwriting of one of the attesting witnesses, who was a solicitor's clerk, was found after a lapse of fifty years among the solicitor's papers tied up with other papers belonging to a client who was one of the executors named in the will:—Held, on proof of due search for the original will, that the copy was admissible. *Sly* v. *Dredge*, 46 L. J., P. 63; 2 P. D. 91; 25 W. R. 463.

—— **Witnesses Illiterate and Predeceasing Testator — Presumption.**]—A holograph will, signed at foot by the testator, and containing an attestation clause, appeared attested by two marksmen. Their names, as subscribed to the will, the attestation clause, and the words "mark—his," which appeared written above and below crosses opposite each of their names, were in the handwriting of the testator. At the date of the instrument, two persons of the names so subscribed as those of the attesting witnesses were in his employment; they were both illiterate, and both predeceased him. The document was found shortly after the testator's death in his house, preserved amongst others of his papers. It purported to give all his property to his widow. He stated to her the night before his death that he had left her all he had—that everything was hers. It did not appear that any fourth person was present at the execution of the will, and no

direct evidence of its due execution was given :—Held, that there were reasonable grounds for presuming that the will had been duly executed and attested pursuant to the provisions of the Wills Act, and sufficient to enable the court to pronounce in favour of its validity. *Clarke* v. *Clarke*, 5 L. R. Ir. 47—C. A.

—— **Presence of Testatrix.**]—A testatrix signed a document in the presence of two witnesses, who twenty minutes afterwards subscribed the document in an adjoining room. The door was open, but the testatrix was not aware that they were signing :—Held, that the document was not duly executed. *Jenner* v. *Effinch*, 49 L. J., P. 25 ; 5 P. D. 106 ; 42 L. T. 327 ; 28 W. R. 520.

—— **Two Papers.**]—A will was written twice on different pieces of paper. The two documents were differently worded, but were to the same effect. By mistake one of them was signed by the testator, and the other by the two attesting witnesses :—Held, that the will was not duly attested. *Hatton, In goods of*, 50 L. J., P. 78 ; 6 P. D. 204 ; 30 W. R. 62 ; 46 J. P. 40.

—— **Deaf and Dumb Testator.**]—Where a person, who was deaf and dumb, made his will by communicating his instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will on the nature of the signs and motions by which the instructions were communicated to him, and ultimately refused to grant probate on motion. *Owston, In goods of*, 2 Sw. & Tr. 461 ; 31 L. J., P. 177 ; 6 L. T. 368 ; 10 W. R. 410.

—— **Character of Witnesses.**]—Where a will is contested between the heir-at-law and a stranger, the execution of it must be proved by the most clear and unequivocal evidence ; and if contested at the end of some years, when the subscribing witnesses are dead, evidence may be called to their character. *Doe* d. *Walker* v. *Stephenson*, 3 Esp. 284.

—— **Practice.**]—It has never been laid down as a rule, that a will cannot be proved without examining all the witnesses, though the practice has been to examine all. *Powell* v. *Cleaver*, 2 Bro. C. C. 504.

But a party proving a will in solemn form in the Probate Court, is bound to call at least one of the attesting witnesses. *Bowman* v. *Hodgson*, 36 L. J., P. 124 ; L. R. 1 P. 362 ; 16 L. T. 392.

Declarations of Deceased Person taking Interest under.]—Declarations of a deceased person, claiming a limited interest under a particular will of property of which he was in possession, are admissible to prove the fact that such will had a legal existence, and that certain persons were named executors therein. *Sly* v. *Dredge*, 46 L. J., P. 63 ; 2 P. D. 91 ; 25 W. R. 463.

Loss—Secondary Evidence.]—On proof that a will of lands had been lost, parol evidence of its contents was received from a person who had heard it read over in the presence of the testator's family on the day of his funeral. *Anon.*, 2 Camp. 390. S. P., *Sugden* v. *St. Leonards*, 45 L. J., P. 49 ; 1 P. D. 154 ; 34 L. T. 372 ; 24 W. R. 860.

Acknowledgment of Signature.]—A. requested B. to prepare a will for him, by which B. was appointed sole executor, and when prepared it was signed by A. in the presence of B. and two other persons. B. then sent for C. and D., and in A.'s hearing requested them to attest A.'s signature, which they did, and A. thanked them for their trouble :—Held, following *Inglesant* v. *Inglesant* (L. R. 3 P. 172), that the signature had been duly acknowledged ; and probate granted. *Bishop, In goods of*, 30 W. R. 567 ; 46 J. P. 392.

To constitute a sufficient acknowledgment, within s. 9 of the Wills Act, the witnesses must at the time of the acknowledgment see, or have the opportunity of seeing, the signature of the testator, and if such be not the case it is immaterial whether the signature be, in fact, there at the time of attestation, or whether the testator say that the paper to be attested is his will, or that his signature is inside the paper. *Hudson* v. *Parker* (1 Robert, 14) followed. *Gwillim* v. *Gwillim* (3 Sw. & Tr. 200) and *Becket* v. *Howe* (L. R. 2 P. & D. 1) disapproved. *Gunstan, In goods of*, *Blake* v. *Blake*, 51 L. J., Ch. 377 ; 51 L. J., P. 36 ; 7 P. D. 102 ; 46 L. T. 641 ; 30 W. R. 505—C. A.

As to Age.]—A statement in a will of the date of a person's birth is primâ facie evidence of his age. *Williams* v. *Huskisson*, 3 Y. & C. 80 ; 2 Jur. 656.

Recital in Deed.]—A recital in a deed of a will of real estate, coupled with a parol admission of the authenticity of a document purporting to be the will, made, ante litem motam, by the grantor, who took an interest under the will :—Held, upon production of the document, sufficient proof of the will against the grantee claiming under the deed. *Nagle* v. *Shea*, Ir. R. 8 C. L. 224.

Exemplification.]—Where original will is lost, and from exemplification thereof under seal of prerogative court, there is reason to suspect its validity as to disposition of real estate: such exemplification cannot be admitted as evidence, but party must be left to his remedy at law. *Arthur* v. *Arthur*, 3 Bro. P. C. 568.

Production of Original by Officer of Court.]—Order on the registrar of an ecclesiastical court, to deliver an original will, to be produced here, on security given to return it. *Lake* v. *Causfield*, 3 Bro. C. C. 263.

Will ordered to be delivered out of ecclesiastical court to the solicitor, on security to return it. *Forder* v. *Wade*, 4 Bro. C. C. 476.

Where a man is sole devisee of the real estate, and one of the witnesses to the will resides abroad, upon a commission to examine such witness, the court will make an order that the original will be delivered out of the prerogative office to a person named by the party praying the commission, in order that it may be carried out of the kingdom, the first giving security to return the same to the appropriation of the judge of the prerogative court. *Frederick* v. *Aynscombe*, 1 Atk. 627.

The court of chancery, where necessary, will make an order upon the prerogative office, to deliver a will to the registrar's office in Symond's Inn, and lie there till the court of chancery has no further occasion for it. *Id.* 628.

The prerogative office was ordered to deliver a will to be proved in Gloucestershire, under a commission from chancery, and an officer of the prerogative office was not suffered to attend the execution of the commission. *Ib.*

Will delivered from prerogative court on approved security. *Morse* v. *Roach*, Dick. 65.

Order to registrar of ecclesiastical court should be directed "To the registrar of the court," and security for return of a will to him should be approved of by master. *Qualey* v. *Qualey*, 4 Madd. 213.

Order made upon registrar of consistory court, that an original will may be produced for hearing on giving security. *Hodson* v. ——, 6 Ves. 134. S. P., *Ford* v. ——, *Id.* 802.

Court will not direct ecclesiastical court to deliver out original will to be produced here merely to save expense of copy. *Wells* v. *Corbyn*, 3 Anstr. 648.

Order was made on registrar of Brecon to deliver a will to defendant's attorney, to be produced at the hearing of the cause, on giving security to return it. *Williams* v. *Floyer*, Ambl. 343.

The court will order the registrar of the consistory court to attend with the will in court at the hearing. *Wigan* v. *Rowland*, 17 Jur. 816.

Production of an original will, upon security being given, without requiring the attendance of the officer of the registrar. *S. C.*, 10 Hare (App.) xviii. xxxii.; 17 Jur. 816.

11. Deeds.

Proof by Handwriting.]—The execution of a deed may, on an unopposed petition, be proved under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26. *Mair's Estate, In re*, 42 L. J., Ch. 882; 28 L. T. 760; 21 W. R. 749.

A married woman under a power prescribing no particular form appointed new trustees, and the fund vested in the old trustees having been paid into court under the Trustee Relief Act, petitioned for payment out to the new trustees. Upon this petition the question arose whether the proof of her signature by a stranger who had seen her write is sufficient under s. 26 of 17 & 18 Vict. c. 125:—Held, that the application being for payment out of the fund, and not to carry into effect the instrument, the act did not apply; and that inasmuch as the power did not prescribe any special form, the proof was sufficient. *Hall, In re*, 9 W. R. 776.

Proof by Age.]—Deeds, which being more than thirty years old prove themselves, used at the hearing of a motion for decree, should be inserted in the list of evidence in the decree, although not included in the list of evidence to be read, and not referred to in any affidavit. *Boyd* v. *Petrie*, 19 W. R. 221.

All deeds above thirty years old prove themselves, and there is no occasion to prove their execution. *Rex* v. *Farringdon*, 2 Term Rep. 471; *Marsh* v. *Collnett*, 2 Esp. 665; 5 R. R. 763.

The memorial of a deed upwards of thirty years old, and executed by the grantors, is admissible as primary evidence against persons claiming under them of the facts stated therein without proof of handwriting. *Riggs Miller* v. *Wheatley*, 28 L. R. Ir. 144.

—— **Execution by Attorney.**] — Although the presumption will be made that a deed more than thirty years old, coming from an unsuspected repository, has been validly executed, yet, in the case of the execution by an attorney of a deed purporting to be an appointment under a discretionary power, the court will not assume that the attorney was authorised to and could lawfully make the appointment in the absence of any evidence to that effect. *Airey, In re, Airey* v. *Stapleton*, 66 L. J., Ch. 152; [1897] 1 Ch. 164; 76 L. T. 151; 45 W. R. 286.

Inrolment.]—A. being entitled as quasi tenant in tail to a sum of stock, executed a disentailing deed, which was duly inrolled in chancery, and presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate of the clerk of inrolments, indorsed, but no evidence was given of the deed:—Held, that the petitioner's title was not made out by the production of the deed, and that evidence of his execution of the deed ought to be given. *Bishop* v. *De Burgh*, 15 L. J., Ch. 35.

The inrolment of a lease under 1 & 2 Geo. 4, c. 52, s. 8, does not dispense with proof of the execution of the instrument. *Jenkins* v. *Biddulph*, 1 Ry. & M. 339.

Custody.]—It must be proved that deeds come from such custody as to afford a reasonable presumption that they were honestly and fairly obtained, and preserved for use, and are free from all suspicion of dishonesty. *Roe* d. *Brune* v. *Rawlings*, 7 East, 291; 3 Smith, 254; 8 R. R. 632. S. P., *Swinnerton* v. *Stafford (Marquis)*, 3 Taunt. 91; *Lygon* v. *Strutt*, 2 Anst. 601; 3 R. R. 631. *Potts* v. *Durant*, 3 Anst. 789; 4 R. R. 864.

In order to render a document admissible in evidence, it is not necessary that it should come from the most proper place of custody; it is sufficient if it comes from a place where it may reasonably be expected to be found. *Croughton* v. *Blake*, 12 M. & W. 205; 13 L. J., Ex. 78; 8 Jur. 275.

An ancient agreement between an owner of land and the inhabitants of a parish that the land should maintain its own poor, is a document which may reasonably be expected to be found among the title-deeds of a large estate in the parish, and is properly receivable to shew that the particular estate is part of the parish. *Reg.* v. *Mytton Overseers*, 2 El. & El. 557; 29 L. J., M. C. 109; 6 Jur. (N.S.) 341; 2 L. T. 12; 8 W. R. 275.

In ejectment, by the mortgagee against the son of the mortgagor, he produced a marriage settlement more than thirty years old, made prior to the marriage, whereby the mortgagor conveyed the premises to trustees for himself for life, with remainder to the issue of the marriage. It being proved that the deed was found among the papers of the mortgagor:—Held, that although this was not strictly proper custody, the deed was nevertheless admissible without proof of its execution. *Doe* d. *Neale* v. *Samples*, 3 N. & P. 254; 8 A. & E. 151; 1 W. W. & H. 228; 7 L. J., Q. B. 140; 2 Jur. 841.

The rule as to the proof of custody, which entitles ancient deeds to be so read, is satisfied by proof of their coming out of the possession of any one so connected with them as not to raise any suspicions of fraud. *Ib.*

Documents more than thirty years old are admissible, without proof of execution, if produced

from custody which may be reasonably accounted for, though not the strictly proper legal custody. *Doe* d. *Jacobs* v. *Phillips*, 8 Q. B. 158; 15 L. J., Q. B. 47; 10 Jur. 34. S. P., *Slater* v. *Hodgson*, 9 Q. B. 727.

A deed thirty years old, a link in the chain of the defendant's title to the property to recover possession of which the action was brought, was produced by a witness who received it from the defendant's attorney:—Held, on the authority of *Doe* d. *Jacobs* v. *Phillips*, supra, that there was sufficient evidence of proper custody. *Johnson* v. *Tyrrell*, 2 L. T. 429.

A suit to establish the will, and administer the estate of a testator, in which his executors and trustees were defendants, was compromised by a deed to which the executors and trustees were parties, re-settling the lands in effect with some variations, to the uses of the will:—Held, that the production of this deed by the solicitors for the trustees and executors was production from proper custody. *Riggs Miller* v. *Wheatley*, 28 L. R. Ir. 144.

Upon the expiration of a lease for lives, T. W. was in possession of the premises as tenant from year to year to W., to whom he paid his rent. T. W. obtained the lease from W. and J. (who were not attorneys), and carried it to his landlord W., and took a fresh demise. The amount of rent paid by T. W. was the same as that reserved by the indenture. W. and J. claimed no interest in the document. In an action against T., W.'s tenant:—Held, that the custody of the lease was properly accounted for. *Rees* v. *Walters*, 3 M. & W. 527; 7 L. J., Ex. 138; 2 Jur. 378.

A deed more than thirty years old, creating a lease for lives, which had expired, was produced from the custody of W., a land agent of plaintiff, in the following manner:—W. was expected by the attorney of plaintiff to have been at the trial, but left the assize town the evening before, and the deed was taken out of his carpet bag, and produced by the attorney for the plaintiff:—Held, that there was sufficient primâ facie evidence of proper custody. *Doe* d. *Shrewsbury* (*Earl*) v. *Keeling*, 11 Q. B. 884; 17 L. J., Q. B. 199; 12 Jur. 433.

Recitals.]—Recitals in a deed tendered but not executed were held admissions by the parties on whose behalf the deed was prepared, but capable of being rebutted. *Bulley* v. *Bulley*, 44 L. J., Ch. 79; L. R. 9 Ch. 739; 30 L. T. 848; 22 W. R. 779.

Recitals in documents are no evidence of what is there recited, though actual possession, in conformity therewith, would constitute a primâ facie title. *Bristow* v. *Cormican*, 3 App. Cas. 641.

A recital in a deed executed in 1739, that, by a separate deed in 1733, A. declared he was seised of the freehold of lands in trust for B., to whom he had on the same day granted a lease of the same lands for one thousand years, is not evidence of the contents of the deed declaring the trust; neither is the receipt of a master, acknowledging such deed to have been lodged with him, evidence of its contents, though it may be of its existence. *Kelly* v. *Power*, 2 Ball & B. 236.

A recital shewing that a prior absolute conveyance was in fact a mortgage, was held not to be conclusive on the party claiming the benefit of the prior deed, though he entered under the second, inasmuch as he had not executed it. *Tull* v. *Owen*, 4 Y. & Coll. 192; 9 L. J., Ex. Eq. 33; 4 Jur. 39.

Where a purchaser of equity of redemption had the legal estate conveyed to him by deed, dated the 24th August, 1796, in which it was recited that the purchaser had some time since paid to the mortgagee the money due on the mortgage, &c., bill to redeem was filed on the 29th January, 1816:—Held, that the recital was an acknowledgment of the mortgage title within twenty years from the filing of the bill. *Price* v. *Copner*, 1 Sim. & S. 347; 1 L. J. (o.s.) Ch. 178.

In the absence of evidence of a contrary custom, it will be presumed that a surrender will bar an estate tail in copyholds. Copyholds were sold subject to a condition that all statements and recitals in any of the title-deeds or muniments of title should be considered as satisfactory evidence of the facts stated or recited; and in case any purchaser should not, within fourteen days from the delivery of the abstract, declare his dissatisfaction with the title, and point out some valid objection thereto, the same should be considered as accepted. The first surrender on the abstract was dated in 1801, and was a conditional surrender by A. and J. his wife, "which said J. had then lately been admitted there tenant in tail, according to the custom of that manor." The purchaser objected that there was nothing to show how the estate tail had been barred, and subsequently the purchaser required evidence that the custom of the manor warranted estates tail. In 1815 an absolute surrender in fee was made by the persons who had made the conditional surrender of 1801. The property had, ever since the surrender of 1815, been possessed and enjoyed under that surrender. The purchaser having objected to the title, on the grounds that there was no sufficient evidence of the facts that the custom of the manor warranted estates tail, and that the estate tail of J. had ever been barred:—Held, that the recital in the surrender of 1801 was conclusive evidence under the conditions of sale of the fact that J. had been admitted tenant in tail, but not that this was according to the custom of the manor, because that was not a single fact but rather a deduction from a series of facts:—Held, also, that this recital, coupled with the conditional surrender of 1801, the absolute surrender of 1815, and the subsequent possession, consistently with that title, was sufficient evidence that the custom of the manor did warrant estates tail. *Goold* v. *White*, Kay, 683; 2 Eq. Rep. 1100.

In conveyances by lease and release, it seems not to be the practice in Ireland to make lease for year; but recital in release is evidence of lease. *Daly* v. *Kelly*, 4 Dow, 435.

Decree for raising money under deed of appointment, though the only copy produced appeared not executed; upon recitals of it in two settlements as a subsisting effectual deed, and evidence, from books of a deceased solicitor, of charges for the preparation and execution of it. *Skipworth* v. *Shilrey*, 11 Ves. 64; 8 R. R. 86.

Recitals in a deed-poll made by an ancestor of an owner of pasturage:—Held, admissible to prove marriages, deaths, &c., of ancestors of the owner. *Welcome* v. *Upton*, 6 M. & W. 536.

See also ESTOPPEL.

Indorsements.]—To prove the execution of a deed, by which A. conveyed lands to W. upon certain trusts, which deed was alleged to be lost, it is shewn that L. (in whose office W. had been a clerk) had found a draft of a deed of conveyance, with the following memorandum on the back

of it, in the handwriting of W.:—"Engrossed J. W.; stamps and parchment, with 1*l.* for lease, 3*l.* 3*s.* 8*d.*":—Held, that this memorandum was not admissible. *Doe* d. *Mather* v. *Whitefoot*, 8 Car. & P. 270.

A document indorsed in plaintiff's handwriting, and which plaintiff had directed a witness to give to defendant, is good evidence on the part of defendant, although the instrument be not between the parties on the record. *Agar* v. *Young*, Car. & M. 78.

Copy.]—An old attested copy of a deed of settlement, produced from the proper custody, was received, after proof of unsuccessful searches for the original, and proof that the possession of the estates comprised in the settlement went with it. *Fitzwalter Peerage*, 10 Cl. & F. 193.

A copy of a deed to lead the uses of a fine, and inrolled for safe custody, allowed to be read as evidence at a trial at law. *Combes* v. *Spencer*, 2 Vern. 471. Semble. *S. C.*, id. 591.

Draft.]—Drafts of deeds of which one was objected to on the ground of its being insufficiently proved, and the other on the ground that the deed belonged to the defendant's title, admitted in evidence. *Sutcliffe* v. *James*, 40 L. T. 875; 27 W. R. 750.

A draft of articles of partnership, together with stated account, and the payment of money by the acting partner to the others:—Held, sufficient evidence of partnership to ground decree for account. *Worts* v. *Pern*, 3 Bro. P. C. 548.

Practice.]—The court will, of course, take the word of counsel as to whether any deed was or was not used by him. *Boyd* v. *Petrie*, 19 W. R. 221.

For what purpose admissible—Bond.]—A bond or mortgage is primâ facie good evidence for a debt; but in case fraud appears, the obligee, &c., ought to prove actual payment. *Piddock* v. *Brown*, 3 P. W. 289.

A bond for performance of articles, though cancelled, was made an exhibit, and allowed as evidence to prove the execution of the articles, the limitation being inserted and recited in the condition of the bond. *Anon.*, Gilb. 183.

—— **Appointment.**]—A married woman was alleged to have executed an appointment in 1800, and to have destroyed it. In 1813 disputes having arisen between her and the appointees, she and her husband executed a deed of compromise, which recited the appointment of 1800, and that she had destroyed it:—Held, in a contest between the appointees and a party claiming under her will, that the deed of compromise was admissible in evidence, as was also the draft bill of costs of her solicitor, and a draft of the deed of 1800 found in his possession. Held, also, that this evidence (after a lapse of forty years) established the fact of her execution of the appointment in 1800. *Dyne* v. *Costobadie*, 17 Beav. 140; 23 L. J., Ch. 66.

—— **Deed not inrolled.**]—Whether a deed vesting lands in trustees for a charitable use, not inrolled under the statute 9 Geo. 2, c. 36, and therefore within that act "null and void," is admissible in evidence for the purpose of showing upon what trusts the lands are held, the party having the legal estate admitting that he is a trustee, and claiming no beneficial interest, quære. *Att.-Gen.* v. *Ward*, 6 Hare, 482.

Proof of twenty-five years' usage of a dissenters' meeting-house for worship by persons of a certain religious society, is not, under the statute 7 & 8 Vict. c. 45, conclusive evidence that the trusts of the premises are for the benefit of that society, where such trusts are declared upon the face of the deed by which the premises are dedicated to the charitable use, although such deed, not being inrolled, is "to all intents and purposes null and void" under the Mortmain Act. *Id.* 482.

12. Telegrams.

Production of—Subpœna to Post-Office Officials.]—On a subpœna from the court of bankruptcy to produce all telegrams sent by the bankrupt from a certain date, the secretary of the post-office was ordered to produce the documents sought for, the court intimating that such subpœnas should be prepared so as to meet the convenience of the officials. *Smith, In re*, 7 L. R., Ir. 286.

The post-office authorities may be ordered to produce specified telegrams. *Tomline* v. *Tyler*, 44 L. T. 187.

Privileged Communications by.]—When a communication, libellous in itself, but such that the occasion of it would have rendered it privileged if made by letter to the person alone to whom it was addressed, whereas it was in fact made by means of a telegram, is not privileged, though made bonâ fide, because the mode of conveying the information necessarily involves publication to the post-office clerks:—Held, it was not less a publication because 31 & 32 Vict. c. 110, s. 20, makes the disclosure of the contents of a telegraphic message by any official in the post office a misdemeanour. *Williamson* v. *Freer*, 43 L. J., C. P. 161; L. R. 9 C. P. 393; 30 L. T. 332; 22 W. R. 878.

Mistake.]—The defendant wrote a message for transmission by telegraph to the plaintiff, ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three"; and the plaintiffs thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. He declined to take more than three. In an action against him to recover the price of the fifty rifles:—Held, that he was not responsible for the mistake of the telegraph clerk, and that therefore the plaintiffs were not entitled to recover the price of more than three rifles. *Henkel* v. *Pape*, 40 L. J., Ex. 15; L. R. 6 Ex. 7; 23 L. T. 419; 19 W. R. 106.

13. Historical, Literary and Scientific Books.

Whether Permissible.]—On the argument of a special case, the counsel for the defendant, with a view to illustrate and explain the object and intention of a provision in an old act of parliament, proposed to read an extract from a printed book found in the Bodleian Library,

dated 1706, and professing to contain the rules and regulations of the Company of Mine Adventurers of England; and also a document from the Rolls Chapel, inrolled there as a deed of partnership of the Million Bank, dated 1698. The plaintiff's counsel objecting—the court refused to permit them to be read. *Bank of England* v. *Anderson*, 4 Scott, 83.

Counsel at a trial may refer to matters of general history, provided the licence is exercised with prudence, but cannot refer to particular books of history or read particular passages from them to prove any fact relevant to the cause. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463.

Works of standard authority in literature may, provided the privilege is not abused, be referred to by counsel at a trial in order to shew the general course of composition, and to explain the sense in which words are used, and matters of a like nature, but cannot be resorted to to prove facts relevant to the cause. *Ib.*

The ecclesiastical courts may consult ancient authors, historical and theological works, pictures, engravings and other ancient documents, with respect to the practice of the primitive church, the ritual of the eastern and western churches, the position of the lord's table, the position of the celebrant at the table, and like questions which are beyond the reach of living memory. *Read* v. *Lincoln* (*Bishop*), 62 L. J., P. C. 1; [1892] A. C. 644; 67 L. T. 128; 56 J. P. 725—P. C.

14. Photographs.

When Allowed.]—Photographs were allowed to be used on the trial of an indictment for an obstruction to a highway, to shew the nature of the locus in quo. *Reg.* v. *United Kingdom Electric Telegraph Co.*, 3 F. & F. 73.

So, on an indictment for bigamy, a photographic likeness of the first husband was allowed to be shewn to the witnesses present at the first marriage, in order to prove his identity with the persons mentioned in the certificate of marriage. *Reg.* v. *Tolson*, 4 F. & F. 103.

15. Newspapers.

Report.]—A witness in the cause stated, that a certain report in a newspaper of the proceedings at the meeting when the resolution of appropriation was alleged to have been passed was a correct representation of what passed; but the court rejected not only the newspaper, but also the deposition tending to shew the accuracy of the statement in it. *Rossmore* (*Lord*) v. *Mowatt*, 15 Jur. 238.

To Refresh Memory.]—*See* post, col. 911.

Gazettes.]—*See* ante, cols. 604, 605.

16. Account Books.

Both Sides must be taken.]—If one side of an account produced by the adversary is used, both must be taken. The account must be adopted altogether, or rejected in toto. The rule is the same in this court as at law. *Kilbee* v. *Sneyd*, 2 Moll. 193.

When an account furnished by a party before any suit instituted, is produced to charge him with the items, on the debit side, he is entitled to resort to the credit side in support of his discharge. *Boardman* v. *Jackson*, 2 Ball & B. 382.

When Primâ facie Evidence.]—In a suit to administer the estate of a testator who had died in Jamaica in 1825, an account was directed against the surviving executor and the representative of a deceased executor. In taking the account the books of account, which were proved to have been recorded in the Jamaica court, were allowed to be taken as primâ facie evidence of the truth of the matters therein contained, under 15 & 16 Vict. c. 86, s. 54, without production of vouchers. *Sleight* v. *Lawson*, 3 Kay & J. 292; 26 L. J., Ch. 553; 5 W. R. 89.

Accounts on an information filed for settling a scheme for a charity. Practice not yet settled as to the forum to which a reference will be directed; and semble, special directions as to books of accounts being taken as primâ facie evidence under the 54th section of the act 15 & 16 Vict. c. 86, will not be given at the hearing. *Att.-Gen.* v. *Attwood*, 1 W. R. 64.

A trustee under the will of a testator who died in 1834, kept the trusts accounts open to be inspected by the cestuis que trustent, who all lived near together and in communication. In 1855 an examination of the books of account was made on behalf of two of them. The court allowed the books to be taken as primâ facie evidence of accounts till that examination. *Banks* v. *Cartwright*, 15 W. R. 417.

Circumstances under which books of account were allowed to be taken as primâ facie evidence under 15 & 16 Vict. c. 86, s. 54. *Hardwick* v. *Wright*, 15 W. R. 953.

Books of account, kept by a trustee and her agents, were tendered as evidence of disbursements in reference to the trust estate. The chief clerk, as the trustee could not produce strict vouchers, admitted the books as evidence; and a motion to vary the certificate was refused, with costs. *Cookes* v. *Cookes*, 3 N. R. 97; 9 Jur. (N.S.) 843; 11 W. R. 871.

The meaning of the act 15 & 16 Vict. c. 86, s. 54, is, that where vouchers have been lost, or the accounts cannot be taken in the ordinary way, the court may give special directions; but such directions will not be given unless it appears that the ordinary evidence cannot be had, not merely to save expense. *Lodge* v. *Pritchard*, 3 De G. M. & G. 906.

Semble, that by the ordinary rules of the court partnership books are admissible in evidence for and against all the partners and their estates. *Ib.*

Semble, that the 15 & 16 Vict. c. 18, s. 54, does not operate retrospectively. *Ib.*

A suit was instituted to be relieved against a bond given to a deceased obligee, on the ground of a subsisting account. The plaintiff relied upon a paper in the handwriting of the obligee, to show that an account was open between them. This paper was entered in evidence. The decree directed the accounts to be taken:—Held, that the master had properly allowed the paper to be used in evidence on behalf of the obligee as well as against him. *Dickin* v. *Ward*, 4 De G. & Sm. 266; 20 L. J., Ch. 211; 15 Jur. 834.

The provision in the 54th section of the 15 & 16 Vict. c. 86, which enacts "that it shall be lawful for the court, in any case where an account is required to be taken, to direct that in taking the accounts the books of account in which the accounts required to be taken have been kept, or

any of them, shall be taken as primâ facie evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised" :—Held, to apply to an account directed to be taken by a decree made before the act came into operation; but :—Held, that the power given to the court by the provision is not to be exercised until the court is satisfied that the means of obtaining the ordinary legal evidence has been substantially exhausted. *Ewart* v. *Williams*, 3 Eq. R. 476; 24 L. J., Ch. 414; 1 Jur. (N.S.) 409; 3 W. R. 348. And see *S.C.*, 7 De G. M. & G. 68; 3 Eq. R. 171; 24 L. J., Ch. 366; 3 W. R. 46.

The books of a manufactory being kept by B. while O. was manager:—Held, not binding on O.; but O. having free access to the said books, they were to be taken as primâ facie evidence, with liberty to O. to surcharge and falsify. *Ogden* v. *Battams*, 1 Jur. (N.S.) 791. See also *Orrett* v. *Corser*, 1 Jur. (N.S.) 882.

Where, under a decree directing accounts to be taken, no order was obtained under the 54th section of the statute 15 & 16 Vict. c. 86, that the books of account should be taken as primâ facie evidence, but the judge's chief clerk so admitted them and granted his certificate, the court of appeal, upon a motion to discharge the certificate, refused the same, but without costs. *Newberry* v. *Benson*, 23 L. J., Ch. 1003; 2 W. R. 648—L.JJ.

On an inquiry into very remote transactions, accounts kept by a deceased party at the time directed to be taken as primâ facie evidence, throwing on the other side the onus of impeaching them. *Chalmer* v. *Bradley*, 1 Jac. & Walk. 65; 20 R. R. 216.

Of Deceased Person.]—An account book of a former vicar, produced by a witness who deposed that he got it from his aunt, who resided with his father, who was the son of the vicar; and that he had frequently seen the book in his aunt's possession, and had heard her say it belonged to his grandfather:—Held, not admissible evidence. *Thompson* v. *Perryman*, 1 Younge, 598.

Secondary Evidence.]—Where the account was of twenty years' standing, the defendant was allowed to prove his account upon his own oath for what he could not prove by books or cancelled bond. *Peyton* v. *Green*, 1 Ch. Rep. 146.

And where the account had been delivered fourteen years, and no objection taken, the defendant had lost his books by seizure in a foreign country:—Held, that defendant should not be charged beyond his own oath. *Holtscomb* v. *Rivers*, 1 Ch. Ca. 127.

An account settled explains sufficiently want of care in the safe keeping of vouchers. If a settled account is opened in the absence of fraud, a great latitude is given to the admission of secondary evidence. *Kilbee* v. *Sneyd*, 2 Moll. 193, 4.

To prove Agency.]—The question being whether rent paid by the plaintiff to J. B. had been received by him on his own account, or as agent for defendant, it was proposed by defendant to give in evidence certain accounts rendered to him by J. B., in which he charged himself as agent for defendant, with receipt of the rent. J. B. was living at the time of the trial. The accounts were held inadmissible. *Spargo* v. *Brown*, 9 B. & C. 935; 4 M. & R. 638; 8 L. J. (O.S.) K. B. 67.

D. *PAROL EVIDENCE TO EXPLAIN DOCUMENTS.*

(*See* CONTRACT.)

1. AMBIGUITY.

General Rule.]—Parol evidence may be received to explain a written instrument. *Rex* v. *Laindon*, 8 Term Rep. 379. S. P., *McCollin* v. *Gilpin*, 6 Q. B. D. 516; 44 L. T. 914; 29 W. R. 408; 45 J. P. 828—C. A.

But not unless there is some latent ambiguity. *Coker* v. *Guy*, 2 Bos. & P. 565.

And parol evidence cannot be admitted to contradict or vary the terms of an agreement in writing. *Meres* v. *Ansell*, 3 Wil. 275. S. P., *Ogilvie* v. *Foljambe*, 3 Mer. 53; 17 R. R. 13.

When the document is unambiguous, evidence is not admissible. *De la Warr (Earl)* v. *Miles*, 50 L. J., Ch. 754; 17 Ch. D. 535; 44 L. T. 487; 29 W. R. 809.

Parol evidence is admissible to explain the terms of an ambiguously written agreement, but not to extend it. *Stokes* v. *Moore*, 1 Cox, 219; 1 R. R. 24.

Under certain circumstances, parol evidence is admissible to explain the nature of an agreement in writing, and to shew the conduct of the parties concerning it. *Eden* v. *Bute (Earl)*, 3 Bro. P. C. 679.

In what manner a written agreement may be affected by parol evidence; and upon what grounds the court proceeds in admitting or rejecting such evidence. It cannot be admitted for the purpose of varying the agreement, although it may for the purpose of raising an equity founded on the agreement, by proof of collateral circumstances. *Davis* v. *Symonds*, 1 Cox, 402; 1 R. R. 63.

An agreement in writing cannot be qualified or altered by subsequent conversations, or a presumed intended departure from the terms of the original agreement. *Boun* v. *Stroud*, 21 L. T. 695.

Where an agreement is created by letters, no evidence aliunde is admissible; but otherwise, where the letters are produced only as evidence of the agreement. *Brice* v. *Bletchley*, 6 Madd. 17.

For Court or Jury.]—Where a document produced in evidence is ambiguous on the face of it, the ambiguity is to be explained by the judge. *Smith* v. *Thompson*, 8 C. B. 44; 18 L. J., C. P. 314.

But where an expression in a document produced becomes ambiguous by reason of extrinsic evidence, it is for the jury to construe that ambiguity. *Ib.*

Where the meaning of a document depends upon its terms, and not on matters of fact dehors the document, the question will be for the judge, even although the terms are technical and scientific; but where an ambiguity is raised by evidence dehors the document, which is plain upon the face of it, the ambiguity being as to a term which imports one thing in a scientific sense and another in a commercial sense:—Quære, whether it is for the judge or the jury. *Hills* v. *London Gas Light Co.*, 27 L. J., Ex. 60.

Where parol evidence has been improperly received to explain a supposed latent ambiguity in a written document, the court will decide

upon the construction of the instrument, without regard to the finding of the jury upon such evidence. *Bruff* v. *Conybeare*, 13 C. B. (N.S.) 263; 9 Jur. (N.S.) 78; 6 L. T. 647. But see *S. C.*, 17 L. T. 664—Ex. Ch.

Parol evidence is always admissible to shew what existing thing corresponds to any particular description in a document; but when the thing answering the particular description is ascertained, the question whether that description, as used in any particular instrument, is so controlled and limited as to comprise a part only of that which the uncontrolled description would embrace, is a question of construction and therefore for the court. *Devonshire (Duke)* v. *Neill*, 2 L. R., Ir. 132.

In an action on a policy of insurance, if the evidence discloses a latent ambiguity in the policy requiring a resort to parol evidence, the question at issue ceases to be one of construction for the court, and becomes one of fact for a jury. *Hordern* v. *Commercial Union Insurance Co.*, 56 L. J., P. C. 78; 56 L. T. 240—P. C.

Date.]—When a written instrument shews no date, parol evidence is admissible to shew the time of its operation. *Davis* v. *Jones*, 25 L. J., C. P. 91; 17 C. B. 625; 4 W. R. 248.

Semble, that if a letter, written by a bankrupt to bring him within 6 Geo. 4, c. 16, s. 131, be without a date, the time when it was written cannot be proved by parol evidence. *Hubert* v. *Moreau*, 2 Car. & P. 528.

Punctuation.]—When the meaning of a clause in an instrument is doubtful, the court may insert punctuation, as a means of shewing what construction the words are capable of; and if by such aid the court is enabled to see that the language can bear an interpretation which will make the whole instrument rational and self-consistent, it is bound to adopt that interpretation in preference to another which would attribute to the parties an intention utterly capricious, insensible, and absurd. *Denny's Trusts, In re*, Ir. R. 8 Eq. 426.

Patent Ambiguity.]—A bill of exchange purported, in the body of it, to be drawn for "two hundred pounds," but the figures at the top were 245*l.*; the stamp was for the larger amount:—Held, that, as this was a patent ambiguity, evidence was not admissible to shew that it was the intention of the parties to draw the bill for the larger amount, and that the sum mentioned in words in the body of the bill was that for which it must be taken to be drawn. *Saunderson* v. *Piper*, 7 Scott, 408; 5 Bing. (N.C.) 425; 2 Arn. 58; 8 L. J., C. P. 227; 3 Jur. 773.

Where Fraud.]—No weight is to be given to parol testimony which is contrary to the obvious construction of written documents confirmed by the acts of the parties and their acquiescence, although hardly any length of time would bar them from redress against fraud if proved. *Attwood* v. *Small*, 6 Cl. & F. 232. See *Redgrave* v. *Hurd*, 51 L. J., Ch. 113; 20 Ch. D. 1; 45 L. T. 485.

Fraud in procuring a deed under the circumstances attending it, may be proved by parol evidence. *Blake* v. *Marnell*, 2 Ball & B. 35; 4 Dow, 248; 12 R. R. 68.

Under a power to appoint among several subjects, each must have a share; and by the rule in equity, as to illusory appointment, a substantial share, unless a good reason appears, as another provision by the person executing the power, not from any other quarter. Under such a power, an appointment of a fund, nearly 1,900*l.*, among three children, the objects, 10*l.* to one, 50*l.* to another, and the remainder to the third, all having other provisions aliunde, was set aside as illusory. Evidence that an appointment was improperly obtained, being executed by a will regularly proved, was rejected. *Kemp* v. *Kemp*, 5 Ves. 849; 5 R. R. 182.

Estate settled on marriage upon the husband and wife for their lives, remainder to such child or children as the husband, with the consent of the trustees, should appoint, and in default of appointment to the first and other sons in tail; the father, with the consent of the surviving trustee, appointed to his youngest son. Bill by the eldest son to set aside the appointment for misrepresentation and imposition on the trustee; the trustee's evidence was read to prove the imposition; but the father's evidence, to prove no misrepresentation or imposition, was rejected. *Scroggs* v. *Scroggs*, Ambl. 272.

Defendant at the request of M. signed the following order which M. also signed: "Insert my advertisements for one year in Hotson's (the plaintiff's) local time tables, 'The Great Northern' (and six others, naming them). Charge per insertion to be 10*s.* each monthly book." Plaintiff's time tables consisted of separate books published monthly, one for each of the seven railways. M. was not employed by plaintiff to obtain orders for him, but upon such orders as he obtained, provided they were approved of by plaintiff and the advertisements inserted, the latter allowed him a commission. M. brought defendant's order to plaintiff, who approved of it and allowed M. his commission, and, having inserted the advertisements for one year in each of the seven books, brought this action to recover from defendant 70*s.* per month. At the trial it was proposed to ask defendant what representations M. had made to him to induce him to enter into the written contract; the defence being that defendant was liable only for 10*s.* per month as for one advertisement in one book:—Held, that the order having been adopted in terms by plaintiff, the effect of the evidence was to vary a written contract and was inadmissible. Held, also, that if the issue had been whether defendant was induced to sign the contract by the fraud of plaintiff's agent (assuming M. to have been plaintiff's agent) the evidence would have been admissible. *Hotson* v. *Browne*, 9 C. B. (N.S.) 442; 30 L. J., C. P. 106; 7 Jur. (N.S.) 633; 9 W. R. 233.

Plaintiff having prevented the fulfilment of an agreement in favour of the defendant, M., for purchasing the assignment of a mortgage, by obtaining himself an advance after notice, not allowed to take advantage of it, being mala fides; evidence, therefore, of a parol agreement read against him under these circumstances. *Scott* v. *Merry*, 1 Ves. 2.

Declaration of a party to a deed, previous to the execution, admitted, in support of the deed, against imputations of fraud. Declarations subsequent, impeaching the deed, were rejected. *Conolly* v. *Howe (Lord)*, 5 Ves. 700.

As to Intention.]—In an action for refusing to accept a cargo of linseed, which the plaintiff had sold to the defendant, and which was to arrive by a vessel, fourteen days to be allowed for the delivery of it, and evidence was offered

dehors the contract to shew what the parties intended by the period assigned for the delivery of the cargo:—Held, that, in the absence of any usage or evidence to raise an ambiguity as to the terms of the contract, such evidence was properly rejected. *Sotilichos* v. *Kemp*, 3 Ex. 105; 18 L. J., Ex. 36.

The defendant occupied premises under a written agreement:—Held, that parol evidence was not admissible to show an understanding between the parties that the rent should commence from a later day than that named in the agreement. *Henson* v. *Cooper*, 3 Scott (N.R.) 48.

F. agreed to let, and S. to hire, land and premises at a fixed surface rent, for the purpose of brickmaking. S. was to pay 3*s.* per load for the bricks, and to make at least 4,000,000 a year, or payment equal thereto, and was not to excavate beyond the depth of eight feet, without special licence. A company having taken the land, S. made a claim for compensation, which was submitted to arbitration. Both parties requested the umpire to decide what estate S. had in the premises. The umpire stated the facts, set out the agreement, and adjudged that S. was tenant from year to year only:—Held, that the umpire was right in refusing to admit evidence to shew that, by the custom of the trade of brickmaking, brick-land is always let for a longer period than from year to year. *Stroud, In re*, 8 C. B. 502; 1 L. J., C. P. 117.

Where there is a covenant to pay a certain share of all such money as coal should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him a share of money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties. *Clifton* v. *Walmesley*, 5 Term Rep. 564.

Parol evidence admitted on part of defendant, to shew that agreement was intended to be, that several persons should give a joint and not several bonds. *Gordon* v. *Hertford*, 2 Madd. 106; 17 R. R. 195.

Will.]—Parol evidence as to the intentions of a testator by the attorney who made the will. *Scawin* v. *Scawin*, 1 Y. & C. 65.

Parol evidence to explain a will rejected. *Wilson* v. *Squire*, 1 Y. & C. 654.

A testator, having two nephews named Morgan Morgan, one of whom only resided at Mothvey, gave certain premises after the death of his wife to his nephew Morgan Morgan and afterwards certain other premises "to Morgan Morgan of the village of Mothvey":—Held, that a latent ambiguity was raised sufficient to admit parol evidence in explanation. *Doe* d. *Morgan* v. *Morgan*, 1 C. & M. 235; 3 Tyr. 179; 2 L. J., Ex. 88.

Devise of the "close in the occupation of W." It appeared that W. was in the occupation of two closes:—Held, a latent ambiguity letting in parol evidence to prove which close was known as "the close." Evidence was given by the attorney who prepared the will, which shewed that the testator wished land in Kirton occupied by Watson to go to the devisee:—Held, not admissible. *Richardson* v. *Watson*, 1 N. & M. 567; 4 B. & Ad. 787; 2 L. J., K. B. 134.

A tenant for life of an estate settled in strict settlement, buys up some of the charges on the estate, and has them assigned to a trustee; he next purchases the ultimate remainder, and has it conveyed to him subsequent to the subsisting charges; he then devises the estate subject to the charges that might be thereon at his decease; the intermediate remainders fail at his death. The charges so purchased are merged, and parol evidence is admissible to prove that the testator so intended. *Astley* v. *Milles*, 1 Sim. 298; 27 R. R. 190.

In construing a will, nothing contained in a letter from a solicitor to the testator, written about the time of the execution of the will, is admissible as evidence of the construction of the will. *Wilson* v. *O'Leary*, 41 L. J., Ch. 342; L. R. 7 Ch. 448; 26 L. T. 463; 20 W. R. 501.

As to Dealings.]—In an action for a breach of warranty on the sale of goods upon a written contract, parol evidence is not admissible to shew that the seller's agent, at the time of the sale, represented the goods to be of a particular quality. *Harnor* v. *Groves*, 15 C. B. 667; 3 C. L. R. 406; 24 L. J., C. P. 53; 3 W. R. 168.

By an agreement between an African merchant and an African captain, the latter was to have a commission of "6*l.* per cent. on the net proceeds of the homeward cargo, after deducting the usual charges":—Held, that parol evidence was not admissible to shew that under this kind of contract, according to the course of dealing between African captains and African merchants, the captain was entitled to his commission on the whole amount for which the cargo had been sold, and not merely on the net sum that had come to the hands of the merchant as the result of the sale. *Caine* v. *Horsfall*, 2 Car. & K. 349.

A broker gave the following bought and sold notes:—1. "We have this day bought for your use from J. O. B., 100 tons dry palm oil, at 31*l.* 10*s.* per ton, to be taken from the quay at landing weights, with customary allowances, &c., in cash, at fourteen days from delivery, less 2½ per cent. discount: the above oil to be delivered from the 'Speedy' or 'Charlotte,' expected to arrive about November or December next." 2. "We have this day sold for your use, payment in fourteen days by cash, less 2½ per cent. discount, from delivery, 100 tons dry palm oil, at 31*l.* 10*s.* per ton, ex 'Speedy' and 'Charlotte,' to arrive":—Held, that evidence of mercantile usage was admissible to explain all the variances between these notes; and that, being so explained, the variances were not material, and did not avoid the contract. *Bold* v. *Rayner*, 1 M. & W. 343; 2 Gale, 44; 1 Tyr. & G. 820; 5 L. J., Ex. 172.

The defendant's traveller entered and signed in the plaintiff's order book a contract in the following terms:—"Of E. Y., 39 pockets Sussex hops, Springett's 5 pockets Kenwards, 78*s.*, Springett's to wait orders." In an action by the purchaser for non-delivery of the thirty-nine pockets:—Held, that parol evidence of the course of dealing between the parties was not admissible to shew that the sale was at a credit of six months. *Ford* v. *Yates*, 2 Scott (N.R.) 645; 2 Man. & G. 549; 10 L. J., C. P. 117.

Evidence of former transactions between the parties can be received for the purpose of explaining the terms used in their written contract. *Bourne* v. *Gatcliff*, 11 Cl. & F. 45.

As to Items of Account.]—On reference to the prothonotary he, by accident, having omitted to inspect an account book which was material in support of the answers for which the parties had been reported in contempt:—Held, that he not

having declared himself dissatisfied or that he required any explanation as to the items contained in the book, parol testimony of the clerk by whom the entries had been made, was inadmissible. *Isaacson, In re*, 1 Bing. 272 ; 8 Moore, 214.

As to Premises.]—By a written agreement, the plaintiff undertook to do work for the defendant on the houses "in South-street and Southampton-street." At the date of the agreement the defendant had land and houses in South-street, but had nothing in Southampton-street :—Held, that the agreement being unambiguous, evidence was not admissible to shew that the word "and" was inserted by mistake, and that it was a misdirection to leave it to the jury to say what was the intention of the parties. *Hitchin* v. *Groom*, 5 C. B. 515 ; 17 L. J., C. P. 145.

A., by agreement, promised to surrender into the hands of the lord "all those brickworks, copyhold of inheritance, then in the possession of A., with full liberty," &c., to the use of B. & C. No surrender was made, but B. & C. entered upon the premises. B. afterwards surrendered his interest to C. The question being whether the locus in quo was comprised in the agreement, B. was called by the defendant to prove, by parol declarations of the plaintiff, that the locus in quo was so comprised. His evidence was objected to, because it was not competent to the defendant to extend by parol evidence the terms of the agreement to premises not in the possession of A. at the time : Held, that the terms of the agreement, being ambiguous, might be explained by parol testimony. *Paddock* v. *Fradley*, 1 C. & J. 90.

On an agreement for a lease of "a furnished house and premises, with gardens, pleasure-grounds, coach-houses, and stabling thereto belonging" :—Held, that by these words a meadow adjoining the premises did not pass to the lessees, and that evidence that it should pass was inadmissible. *Minton* v. *Geiger*, 28 L. T. 449.

Deed—Discrepancy between Granting Part and Habendum.]—M., possessed of two contiguous plots of ground, assigned one of them to T., "together with the right to use the walls on the north side" (i.e. on the adjoining plot) for building purposes. T. afterwards assigned the plot so purchased by him to the defendant by deed, the granting part of which was silent as to "right, members and appurtenances," habendum "with the rights, members and appurtenances thereto belonging"; and, subsequently, M. assigned the adjoining plot of ground to the plaintiff :—Held, in an action for trespassing upon the walls, that the right to use them for building purposes passed with the plot of ground to the defendant. *Renwick* v. *Daly*, Ir. R. 11 C. L. 126.

The holder of an estate for life in realty granted the land to A., his executors, administrators and assigns, habendum from a future date for the term of the grantor's life :—Held, to pass an estate for life. *Boddington* v. *Robinson*, 44 L. J., Ex. 223 ; L. R. 10 Ex. 270 ; 33 L. T. 364 ; 23 W. R. 925.

The rule is, that where there is an express grant in the premises of a deed, that grant cannot be prejudiced by the invalidity of the habendum, but where the premises contain only an implied grant, and the habendum is invalid, the conveyance fails. *Ib.*

—— **Intention of Parties—Latent Ambiguity in Reddendum.**]—The plaintiff, in 1868, granted by deed license and authority to use an invention, of which the patent was vested in him, for breech-loading rifles, to the defendants, "yielding and paying unto the licensor the royalty of one shilling for every gun, rifle or breech action manufactured, produced or sold under the powers hereby granted." The exemption of the crown from royalties for the use of patents, laid down by *Feather* v. *Reg.* (6 B. & S. 257), was at that time generally believed to extend to government contractors ; but by *Dixon* v. *London Small Arms Co.* (1 App. Cas. 632), this exemption was limited to the use of the immediate servants of the crown ; upon which the plaintiff brought an action to recover royalties under the deed for the rifles manufactured by the defendants for the government. The jury found that the defendants intended the deed should not apply to government contracts, and that the plaintiff knew this was their intention, and purposely abstained from mentioning the subject in order that they might be bound contrary to their intention :—Held, that the words of the reddendum suggested a latent ambiguity which admitted extrinsic evidence to shew the intentions of the parties : and that the plaintiff under the circumstances could not recover. *Roden* v. *London Small Arms Co.*, 46 L. J., Q. B. 213 ; 35 L. T. 505 ; 25 W. R. 269.

Held, also, that the defendants were entitled to equitable relief from the plaintiff's claim. *Ib.*

—— **Parcels.**]—In 1861, Plowman, a common predecessor in title of both the plaintiff and the defendant, being possessed of twenty-seven rods of land, conveyed to the defendant's predecessor in title "all that piece of garden-ground containing by estimation twenty rods, bounded on the south by other land, or garden-ground belonging to Plowman." In 1866, Plowman conveyed the residue of the property to the plaintiff's predecessor in title, describing it as "fifteen rods more or less ;" the result being that if the measurement of the deed of 1861 was accurate, the defendant took under it twelve rods instead of twenty, while if the measurement of the deed of 1866 was accurate, the plaintiff took under it seven rods instead of fifteen. The plaintiff brought ejectment for the eight rods in dispute :—Held, that the parol evidence of Plowman was admissible to shew that he had conveyed twelve and not twenty rods by the deed of 1861. *Jervey* v. *Styring*, 29 L. T. 847.

—— **Beneficiaries.**]—By deeds, dated in 1704, estates in York were conveyed by Lady Hewley to trustees, and the trusts were declared as follows—that the trustees should, out of the rents, pay such sums of money to such and so many poor and godly preachers, for the time being, of Christ's holy gospel, and to such poor and godly widows, for the time being, of poor and godly preachers of Christ's holy gospel, as the trustees for the time being should think fit, and employ and dispose of such sums of money, and in such manner, for the encouraging and promoting the preaching of Christ's holy gospel in such poor places as the trustees should think fit ; and also, employ and dispose of such sums of money, for exhibitions, towards the educating

of such young men designed for the ministry of Christ's holy gospel, never exceeding five, as the trustees should think fit; and, as to the remainder of the rents, that the trustees should employ and dispose of the same, in and for relieving of such godly persons in distress, being fit objects of the Dame S. H.'s and the trustees' charity, as the trustees should think fit. By deeds in 1707 an almshouse and additional lands were conveyed by Lady H. to the trustees, and the trusts were declared as follows—that the almshouse should be used as an hospital for poor people, in such manner as the same then was, subject to the regulations thereinafter mentioned; and that the trustees should, out of the rents, raise a yearly sum of 60*l.*, and distribute and dispose of the same for the benefit and support of the poor people placed, or which the trustees should from time to time place, in the hospital, in such proportions, and to such purposes, as Dame S. H. should declare, in any writing signed by her, or in any rules appointed by her, for the choosing and government of poor people; and that the trustees should place to the number of ten poor persons in the hospital, whereof nine to be poor widows, or unmarried women, and the tenth person to be a sober and pious poor man. By the rules and regulations provided by the foundress of the almshouse, it was declared that none of evil fame or report should be admitted, but such as were poor and piously disposed, and of the Protestant religion; that every almsbody should be one that could repeat by heart the Lord's Prayer, the Creed, and Ten Commandments, and Mr. Edward Bowles's Catechism; and that all the almspeople, when not disabled by weakness, should duly repair to some religious assembly of the Protestant religion every Lord's day, forenoon and afternoon, and at other opportunities, to attend the ordinances of God:—Held, first, that extrinsic evidence was not admissible for the purpose of determining who were entitled, under the terms "godly preachers of Christ's holy gospel, godly persons," and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of the charity. *Shore* v. *Wilson*, 9 Cl. & F. 355; 5 Scott (N.R.) 958.

Held, secondly, that the trusts of those deeds were applicable to all ministers, congregations, and poor persons, being Protestant Trinitarian Dissenters. *Ib.*

Held, thirdly, that in construing the deed of 1704, the provisions of the deed of 1707 were not to be referred to. *Ib.*

Held, fourthly, that upon the true construction of the deeds of 1704 and 1707, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what are commonly called Unitarian belief and doctrine, were excluded from being objects of the charities of those deeds. *Ib.*

Parol evidence not admissible to raise an equity, that a pension granted by the crown to the defendant was in trust for the plaintiff, against the oath of the defendant in his answer. *Fordyce* v. *Willis*, 3 Bro. C. C. 577.

2. Particular Words, Terms, and Phrases.

Meaning of Words—What amounts to Custom.]—In order to establish a custom in a trade controlling the meaning of words, it must be shewn that the words are used in that trade, and are understood in a defined sense; and a habit of affixing a special meaning to words, when used in one class of contracts, does not amount to a custom in the trade. *Abbott* v. *Bates*, 43 L. J., C. P. 150; 30 L. T. 99; 22 W. R. 488.

If a word has acquired a particular meaning in a trade, that meaning will be applied to it in construing a written contract respecting the trade; but it must be distinctly proved that the word has acquired that particular meaning. *Taylor* v. *Briggs*, 2 Car. & P. 525; M. & M. 28.

—— **Averments on Record.**]—General evidence as to the meaning of words of a contract ought not to be admitted without a distinct averment on the record as to the particular words to which evidence is to be directed, and the precise technical or trade meaning which is intended to be attributed to them. Per Watson (Lord), *Sutton* v. *Ciceri*, 15 App. Cas. 144; 62 L. T. 742.

—— **Trade Term in Deed.**]—In determining the meaning of a word that has both a primary and a secondary signification, the court will admit evidence as to, and will look at, its primary meaning alone, and will not admit technical evidence, unless satisfied that it is to be construed in its secondary sense. *Holt* v. *Collyer*, 50 L. J., Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502.

Terms Insensible in ordinary Meaning.]—If a mercantile document is insensible when read according to the ordinary sense of the words used therein, it is a question for the jury whether the language thereof has not acquired a definite meaning by mercantile usage. *Ashworth* v. *Redford*, 43 L. J., C. P. 57; L. R. 9 C. P. 20.

—— **Term of Credit.**]—A plaintiff sold to the defendants goods; the invoice was dated the 1st of May, and at the foot of it were written the words, "Terms—Net cash, to be paid within six to eight weeks from date hereof." The goods not having been paid for, the plaintiff issued a writ to recover the price on the 18th of June, scarcely seven weeks from the 1st of May. At the trial the judge left to the jury the question whether the credit had expired on the 18th of June according to mercantile usage. The jury having found that the action was not brought too soon:—Held, that the direction to the jury was proper, and that the plaintiff was entitled to the verdict. *Ib.*

"Summerleazes"—"After Grass."]—When by a lease the plaintiff had the use of cows to be depastured on lands described as "summerleazes" and "after grass" respectively from 2nd February to 17th November, evidence was tendered at the trial of a custom in the country that a lessor should, notwithstanding such a lease, put cattle of his own on the lands called "summerleazes" up to 12th May:—Held, that such evidence being in effect evidence of the meaning of the technical word "summerleazes," was admissible to shew what rights passed to the plaintiff under the lease. *Tudgay* v. *Sampson*, 30 L. T. 262.

"Freehold Equities."]—S. signed a written contract with R. to purchase a brickfield for "17,000*l.*," to be paid as follows:—16,000*l.* in cash and 1,000*l.* in freehold equities; to pay on the 1,000*l.* 12 per cent. per annum." Before

signing, S. had made out and given to R. a list of freehold houses in which he was entitled to the equity of redemption, but this document was not in any way referred to in the contract:—Held, that such list was admissible by way of parol evidence to explain the meaning of freehold equities in the contract. *Roots* v. *Snelling*, 48 L. T. 216.

"Arrival in Port."]—By a charterparty, made at Riga, the ship was to proceed, with a cargo of timber, to Liverpool, and to deliver at such dock there as ordered on arrival. On arrival at Liverpool the ship duly entered into dock, but, in consequence of the crowded state of the dock, was unable for some days to obtain a berth alongside the quay from which she was allowed to discharge:—Held, that in an action for demurrage evidence was admissible tending to shew that, by the custom of the port of arrival, timber ships were not considered to have arrived until they had obtained a discharging berth within the dock. *Steamship Co. "Norden"* v. *Dempsey*, 45 L. J., C. P. 764; 1 C. P. D. 654; 24 W. R. 984.

"Forthwith."]—On a written agreement for the hire of a vessel to be made ready to take on board "forthwith," evidence is inadmissible to shew that the parties agreed that the vessel should be ready in two days. But evidence of the known circumstances of the vessel is admissible to shew how soon she might reasonably be expected to be ready. *Simpson* v. *Henderson*, M. & M. 300.

Time of Sailing.]—Commercial men may be called as witnesses to prove the meaning of any particular expression used in a letter on a commercial subject. *Chaurand* v. *Angerstein*, Peake, 43.

Therefore, if it said in a letter that a ship will sail from St. Domingo in the month of October, it is generally understood that she will not sail till the 25th of the same month. *Ib.*

"Shop-front."]—A. by an agreement in writing, let to B. a house at the rent of 60*l.* a year, to be paid quarterly; and B. agreed, within three calendar months, to erect a shop-front, and otherwise repair, paint, paper and whitewash the house. And, if B. did not erect the shop-front within three months, it should be lawful for A. or his agents to retake possession of the premises, and the agreement should be null and void. B. continued in possession of the premises and enlarged the window; but, as A. contended, did not erect a shop-front. It appeared that, after a quarter's rent had become due, and after the expiration of three months from the date of the agreement, A.'s son, the father being too ill to attend to business, made a demand of a quarter's rent, which B. offered to pay if he would indemnify him for a sum which he had paid as a penalty to A.'s lessor for carrying on a trade in the premises, which was refused. At the trial, B. contended that he had made a shop-front which answered the purposes of his trade; and he offered to show that A. held the premises under a lease from C., which contained a clause imposing a penalty upon the lease if he allowed a trade to be carried on upon the premises; from which it was to be inferred that the words "shop-front," in the agreement, were used in a peculiar sense; but this evidence was rejected:—Held, that such evidence was clearly inadmissible to explain the meaning of the words "shop-front" in the agreement. *Doe* d. *Nash* v. *Birch*, 1 M. & W. 402; 1 Tyr. & G. 169; 5 L. J., Ex. 185.

"Privilege."]—By the contract between the owners and captain of an India ship, the latter was to receive a certain compensation in lieu of privilege and primage; a conversation between the parties previously to the contract is evidence to shew in what sense they intended to use the word "privilege." *Birch* v. *Depeyster*, 1 Stark. 210; 4 Camp. 385.

"Building."]—A., by an agreement in writing, agreed to win stones, "for the purpose of building" certain cottages. Parol evidence cannot be given to explain the sense in which the word "building" is used. *Charlton* v. *Gibson*, 1 Car. & K. 541.

"Across a Country."]—In a memorandum respecting a horse race, the run being described as "four miles across a country," evidence is admissible to show that "across a country" means that the riders are to go over all obstructions and not at liberty to avail themselves of an open gate. *Evans* v. *Pratt*, 3 Man. & G. 759; 4 Scott (N.R.) 370; 11 L. J., C. P. 87.

"Cwt."—"Pocket."]—In an action upon a sold note as follows:—"Sold to Mr. S. 18 pockets Kent hops, viz. 10 pockets Burton East Kent, 8 pockets Springall, Goodhurst, at 100*s.*"—parol evidence is admissible either to supply the term "cwt." or to shew that the term "pocket" meant cwt. *Spicer* v. *Cooper*, 1 Q. B. 424; 1 G. & D. 52; 10 L. J., Q. B. 241; 5 Jur. 1036.

"Ware" Potatoes.] — The defendant by a written contract agreed to sell the plaintiff sixty tons of "ware potatoes," at 5*l.* a ton. In the neighbourhood three qualities of potatoes were known, "wares, middlings and chats," wares being the largest and best:—Held, that evidence was not admissible to show that the plaintiff had in fact contracted for the sale to him of a particular kind of ware potatoes, viz. "Regent's Wares," while those offered to him by the defendant were of an inferior kind, viz. "Kidney Wares." *Smith* v. *Jeffryes*, 15 M. & W. 561; 15 L. J., Ex. 325.

"Level."]— When an expression used in a written instrument has a technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where the lessee of a coal mine covenanted to get the whole of the mines "not deeper than or below the level of the bottom of the mine at a particular point," parol evidence of the understanding amongst miners is admissible to shew that the word "level" had a particular technical meaning, different from its ordinary signification of "horizontal line." *Clayton* v. *Greyson*, 4 N. & M. 602; 5 A. & E. 302; 1 H. & W. 159. See *S. C.*, 6 N. & M. 694.

Chemicals.]—The construction of a specification, as the construction of all other written instruments, belongs to the court; but the explanation of the words or technical terms of art, the phrases used in commerce, and the proof

and results of the processes which are described (and in a chemical patent the ascertainment of chemical equivalents) are matters of fact upon which evidence may be given, and contradictory testimony may be adduced, and upon which it is the province and right of a jury to decide. *Hills* v. *Evans*, 31 L. J., Ch. 457; 8 Jur. (N.S.) 525; 6 L. T. 90.

"Same Ground."]—Lace merchants, carrying on business by means of travellers over certain districts in England, verbally agreed with the defendant, who was already in their service in another capacity, to travel for them over one of the districts, which they designated the "midland district," it being at the time understood that the terms of the engagement were to be reduced into writing. A few weeks after the defendant had started on the journey, the following agreement was sent to him, and he signed and returned it: "To H. & W. Mumford. In consideration of my entering upon your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so with the understanding that, in the event of my wishing to travel, and doing so for any other house in the same trade, on any part of the same ground, to pay you 50*l.*" :—Held, that extrinsic evidence was properly admitted to explain the nature of the employment, and what was intended by "the same ground," that such evidence being admitted, the contract was not void as an unreasonable restraint of trade, that even without the evidence to explain the contract, there was ample consideration for the defendant's promise, and that a forfeiture of the 50*l.* was incurred by the defendant's travelling for another house in the same line, "over the same ground," after he had left the service of the plaintiffs. *Mumford* v. *Gething*, 7 C. B. (N.S.) 305; 29 L. J., C. P. 105; 6 Jur. (N.S.) 428; 1 L. T. 64; 8 W. R. 187.

"Premises."]—In order to construe a term in a written instrument, when it is used in a peculiar sense, differing from its ordinary meaning, evidence is admissible to prove the peculiar sense, differing from its ordinary meaning; evidence is admissible to prove the peculiar sense in which the parties understood the term, but evidence is not admissible to contradict or vary what is plain. *Beacon Life and Fire Assurance Co.* v. *Gibb*, 1 Moore, P. C. (N.S.) 73; 1 N. R. 110; 9 Jur. (N.S.) 185; 7 L. T. 574; 11 W. R. 194.

The word "premises," although in popular language applied to buildings, in legal language means the subject or thing previously expressed. *Ib.*

Brokers' Notes — Memoranda of Terms.] — Metal brokers, employed by B. & Co., purchased for them of N. & Co., a quantity of pig iron. They signed bought and sold notes, which only differed in these particulars, that the bought note contained the terms "Deposit, 5*s.* per ton; brokerage, 0 per cent.;" and the sold note contained the terms "Deposit (blank); brokerage, ½ per cent.:"—Held, that parol evidence was admissible to shew that the terms as to deposit and brokerage were, in fact, merely memoranda of the terms on which they were employed as brokers by the buyer and seller, and that when so explained, the bought and sold notes contained no material variance. *Kempson* v. *Boyle*, 3 H. & C. 763; 34 L. J., Ex. 191; 11 Jur. (N.S.) 832; 14 W. R. 15.

"Lace Buyer."]—P., who was known to be acting in the capacity of a lace-buyer, was engaged by M., a lace dealer, under the following memorandum:—"M. agrees to engage P. for three years, from Monday, the 15th of August, 1859, at the yearly salary of 500*l.*, payable monthly, P. to give the whole of his services, and to be advised and guided by M., if necessary." In an action by P. against M. for a wrongful dismissal, pending the term, on the ground of disobedience of lawful orders: — Held, that evidence was admissible to shew the capacity in which P. was engaged, viz. as lace buyer, and that it was properly left to the jury to say whether or not the orders which he was alleged to have disobeyed were such as a person in that position was bound to obey. *Price* v. *Mouat*, 11 C. B. (N.S.) 508.

3. REFERENCE TO OTHER DOCUMENTS.

Admissibility — Parcels.]—Where an agreement expressly refers to a plan as an existing document, forming a term in the contract, parol evidence is admissible for the purpose of identifying the plan. *Hodges* v. *Horsfall*, 1 Russ. & Mylne, 116.

Where the issue between purchasers of two lots at a sale was, as to parcel or no parcel, a handbill, describing the lots, which was circulated in the auction-room at the time of the sale, is admissible, in order to apply the language in the deed of conveyance, which described the premises as those now in the occupation of A., with all buildings &c. known or reputed to be parcel thereof. *Murley* v. *M'Dermott*, 3 N. & P. 356; 1 W. W. & H. 226; 8 A. & E. 138.

In an action by a lessee of a mine to the north, against the lessee of a mine to the south, of a certain boundary, the lease was produced, and the parcel thereof described the boundary in question as a straight line from Vincent's house to a boundstone; "which premises are particularly delineated by the map on the back of this sett." On this map the boundary-line was drawn from the north-east corner of the house. Parol evidence, however, was admitted, which shewed that the site of Vincent's house was incorrectly laid down on the map; and the judge left the whole case to the jury:—Held, that parol evidence was properly admissible to show whether the locus in quo was or was not included in the sett; and that the question parcel or no parcel was properly left to the jury. *Lyle* v. *Richards*, 35 L. J., Q. B. 214; L. R. 1 H. L. 222; 12 Jur. (N.S.) 947; 15 L. T. 1.

Where a person agrees to purchase "the mill property, including six cottages in E. village," parol evidence is admissible to identify "the mill property," part of which was neither in the village nor parish, and the contract is good within the Statute of Frauds. *M'Murray* v. *Spicer*, 37 L. J., Ch. 505; L. R. 5 Eq. 527; 18 L. T. 116; 16 W. R. 332.

When a deed purported to grant all the coal mines in the lands in the occupation of widow K. & Son, and the grantor had not at the time any lands in the occupation of widow K. & Son; and the deed was founded upon a contract of sale executed some months before, to which the grantor's land steward was the subscribing witness:—Held, that for the purpose of explaining the latent ambiguity in the deed, letters written by the latter to the grantees, respecting the sale

of them by the grantor of the coal mines in the deed, and purporting to be written by his directions, were admissible, without showing an express authority from the grantor to write them. *Beaumont* v. *Field*, 1 B. & Ald. 247 ; 2 Chit. 275 ; 19 R. R. 308. And see *Doe* d. *Malden* v. *Miller*, 1 B. & Ald. 699 ; 19 R. R. 427.

When Document referred to not Produced.]—An Irish railway company contracted with the plaintiff to carry certain pigs from a station in Ireland through to London, part of the journey being performed on the London and North Western Railway. In an action against the Irish company for breach of contract in failing to carry the pigs to London within a reasonable time, a letter from I. T., an agent of the London and North Western Railway Company, to the plaintiff, was admitted in evidence, subject to the defendant's objection, which stated: "Mr. S., the defendant's traffic manager, writes that 'the pigs arrived at Dublin on the 29th of October, but as the company' (the defendants) 'only advised us about half an hour before they arrived, and having more on hand than could be shipped that day, they were not sent forward until the 30th of October:'"—Held, 1st, that the letter was properly received, although the written document to which it referred was not produced ; 2ndly, that the letter was evidence of unreasonable delay in the carriage. *Ruddy* v. *Midland Great Western Ry.*, 8 L. R. Ir. 224.

Statute of Frauds.]—The plaintiff had signed a memorandum setting forth the terms of a contract by which the plaintiff agreed to let a carriage to the defendant for the period of a year. The defendant in a subsequent letter to the plaintiff signed by him referred to "our arrangement for the hire of your carriage." There was no other arrangement for the hire of a carriage than that the terms of which were contained in the memorandum signed by the plaintiff:—Held, that the defendant's letter sufficiently referred to the document containing the terms of the contract, to constitute a good memorandum of the contract within the Statute of Frauds, s. 4. *Cave* v. *Hastings*, 50 L. J., Q. B. 575 ; 7 Q. B. D. 125 ; 45 L. T. 348 ; 46 J. P. 56. And see *Shardlow* v. *Cotterill*, 20 Ch. D. 90, infra.

Of Written Agreement to Explain Deed.]—If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right to look at the contract although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract, either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. *Leggott* v. *Barrett*, 15 Ch. D. 306 ; 28 W. R. 962—C. A.

Where, after marriage settlement was prepared but not executed, the parties agreed that the husband should supply a defect of the deed by giving a note, promising that the wife should enjoy the profits of the estate to her separate use, parol evidence cannot be admitted to explain the agreement between the parties ; but as to the occasion of signing the note, it may. *Tyrrell* v. *Hope*, 2 Atk. 560.

Contemporaneous Documents.]—If one of two contemporaneous documents is ambiguous in its terms, and the other is clear, force is to be given to the document whose terms are clear, so as to interpret the one containing ambiguous terms. *Phœnix Bessemer Steel Co., In re*, 44 L. J., Ch. 683 ; 32 L. T. 854.

Contemporaneous documents may be read together, for purposes of explanation, and if they can be read so as to agree in meaning, they are to be so read. *Ib.*

The defendants sent to the plaintiff the prospectus of a company, for whom they acted as agents, on the faith of which the plaintiff took shares in the company. A few days afterwards the defendants sent the plaintiff a circular containing other statements concerning the company, but the plaintiff did not receive it till after he had taken the shares:—Held, that the circular could not be taken as a contemporaneous document with the prospectus, and could not be read for the purpose of explaining it. *Smith* v. *Chadwick*, 51 L. J., Ch. 597 ; 20 Ch. D. 27 ; 46 L. T. 702 ; 38 W. R. 661—C. A. Affirmed 53 L. J., Ch. 873 ; 9 App. Cas. 187 ; 50 L. T. 697 ; 32 W. R. 687 ; 58 J. P. 644—H. L. (E.)

Licence to explain Grant.]—The plaintiff tendered in evidence, for the purpose of showing the meaning of a particular phrase in a grant, a letter of licence from the crown, in 1676, to one of its grantees, to alien the subject matter of the grant:—Held, that the licence was admissible for that purpose. *Bain* v. *Whitehaven and Furness Ry.*, 3 H. L. Cas. 1.

Libellous Placard — Anonymous Letters.]—An information for a libel stated that the prosecutor had received certain anonymous letters, and that of and concerning those letters the defendant published a libellous placard. The defendant was proved to have caused the placard to be published. In the placard it was asked if the prosecutor had not received certain warning. The prosecutor stated that he understood that to refer to the letters, and that he should not have understood the meaning of the placard if he had not received the letters:—Held, that the letters might be read in evidence as explanatory of the placard, without proof of the handwriting of them. *Rex* v. *Slaney*, 5 Car. & P. 213.

Letters to Vary Subsequent Written Contract.]—If the terms of a contract are proposed and accepted by letters, but are afterwards varied by the contract as drawn up, the construction of the contract cannot be affected by the letters. *Farquharson* v. *Barston*, 4 Bligh (N.S.) 560.

Parol Evidence to Connect two Documents—Statute of Frauds.]—See *Oliver* v. *Hunting*, 59 L. J., Ch. 255 ; 44 Ch. D. 205 ; 62 L. T. 108 ; 38 W. R. 618.

4. As to Subject-matter of Contracts.

Identification of Property.]—The plaintiff claimed specific performance of a contract to purchase a house and premises sold by auction. After the sale the auctioneer signed the following memorandum at the foot of the conditions: "The property duly sold to A. S., and deposit paid at close of sale," and he also signed this receipt, "P., March 29th, 1880. Received of A. S. the sum of 21*l.* as deposit on property purchased at

420*l.*, at Sun Inn, P., at above date, Mr. G. C., owner." The Statute of Frauds was set up in defence. The conditions contained no description of the property sold, but posters had been put up describing the property to be sold on the 29th March, at the Sun Inn:—Held, that the word "purchased" was enough to connect the receipt with the conditions of sale, though not with the poster, and that the Statute of Frauds was satisfied. *Shardlow* v. *Cotterill*, 51 L. J., Ch. 353; 20 Ch. D. 90; 45 L. T. 572; 30 W. R. 143—C. A.

A vendor of leaseholds wrote a letter to her solicitor, stating "I have closed with Mr. W. for this place":—Held, a sufficient memorandum in writing within the Statute of Frauds, and that parol evidence was admissible to show what "this place" was. *Waldron* v. *Jacob*, Ir. R. 5 Eq. 131.

On an agreement for a lease of "a furnished house and premises, with gardens, pleasure-grounds, coach-house, and stabling thereto belonging": — Held, that, by these words, a meadow adjoining the premises did not pass to the lessees, and that evidence to show that it was the intention of the parties that the meadow should so pass was inadmissible. *Minton* v. *Geiger*, 28 L. T. 449.

In an action between the parties to an agreement in writing for the purchase of oaks growing on certain lands, "together with all other trees growing through the oak plantations, and mixed with oak," the question in dispute being what trees besides oaks were included in the agreement: — Held, that evidence of conversation between the parties in reference to the sale, prior to the agreement, was properly received in order to identify the subject-matter of the contract. *Chambers* v. *Kelly*, Ir. R. 7 C. L. 231.

Specific Matter.] — The plaintiff, in a conversation with the defendant's agent, stated that the plaintiff had some wool for sale, partly his own clip, partly what he had purchased from other farms, amounting in the whole to 2,300 stones, 100 stones more or less; and offered the whole for sale to the defendant. The plaintiff afterwards wrote to the agent, saying that two of the small clips had been sold, but that the plaintiff had got the promise of another clip of about 550 stones, which would go with his other wool. The defendant's agent afterwards wrote to the plaintiff, saying that the defendant "desires me to offer you for your wool 16*s.* per stone, delivered in Liverpool"; which offer the plaintiff, in writing, accepted. The plaintiff shipped to Liverpool 2,542 stones of his wool, which the defendant refused to accept. In an action against him for not accepting:—Held, that the conversation between the plaintiff and the defendant's agent was admissible to show what was meant by the expression "your wool" in the subsequent letter by such agent. *Macdonald* v. *Longbottom*, 1 El. & El. 977; 29 L. J., Q. B. 256; 9 Jur. (N.S.) 724; 2 L. T. 606; 8 W. R. 614—Ex. Ch.

Extrinsic evidence is admissible to explain what is the subject matter of a contract where the contract relates to some specific thing. *Chadwick* v. *Burnley Corporation*, 12 W. R. 1077.

Where there was a contract by which parties were empowered to obtain from a quarry "all the stone of whatever description they may require in the enlargement of the Old Compensation Reservoir":—Held, first, that extrinsic evidence was admissible to show what particular scheme of enlargement was in the contemplation of the parties at the date of the contract. *Ib.*

Held, secondly, that it was not admissible to limit the quantity of stone which might be taken for that purpose. *Ib.*

To a declaration for not accepting Surat cotton which the defendant bought of the plaintiff "to arrive ex 'Peerless' from Bombay," the defendant pleaded that he meant a ship called the Peerless which sailed from Bombay in October, and the plaintiff was not ready to deliver any cotton which arrived by that ship, but only cotton which arrived by another ship called the Peerless, which sailed from Bombay in December:—Held, that the plea was a good answer. *Raffles* v. *Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

Description in Catalogue.]—In an action by an auctioneer, for the price of a dressing-case sold by auction for less than 10*l.*, and described in the catalogue as having silver fittings, whereas, in fact, they were only plated:—Held, that he might give in evidence declarations made by him at the time of the sale in the hearing of the buyer, that the catalogue was incorrect in describing the fittings to be silver, and that the dressing-case would be sold as having plated fittings only, though no alteration was made in the catalogue. *Eden* v. *Blake*, 13 M. & W. 614; 14 L. J., Ex. 194; 9 Jur. 213.

Time of Performance.]—The general rule of law is, that where a contract has been reduced into writing; the written document alone is the contract; and therefore where P. agreed in writing to engage E. to play a certain part in a drama "during the run of the piece," parol evidence is not admissible to show that in conversations that took place before the contract was reduced into writing, it was guaranteed by the defendant that the run of the piece should last for at least eight weeks, there being no such proviso in the written agreement. *Emery* v. *Parry*, 17 L. T. 152.

Incomplete Contract.]—A contract, which was not required by law to be in writing, had been entered into, and its terms had been reduced into writing; but the writing, by itself, did not form the complete contract:—Held, that parol testimony was admissible to supplement written evidence of the contract. *Loibel* v. *Strampfer*, 16 L. T. 720.

Intention.]—In order to show that land had been bought for certain purposes, it was proposed to adduce as evidence the minutes of the proceedings of the vendees:—Held, that the conveyance having been executed, the minutes of the proceedings were inadmissible as evidence showing the purposes for which the land was bought. *Prison Commissioners* v. *Middlesex* (*Clerk of the Peace*), 51 L. J., Q. B. 433; 9 Q. B. D. 506; 46 L. T. 864; 30 W. R. 881—C. A.

A. entered the service of his employers under a written agreement in the following terms:—"13th April, 1871. I agree to accept the situation as foreman of the works of Messrs. Roe, flock and shoddy manufacturers, and to do all that lays in my power to serve them faithfully, and promote the welfare of the firm, on my receiving a salary of 2*l.* per week, and house to live in from 19th April, 1871":—Held, that this was primâ facie a weekly hiring, and that oral evidence was inadmissible to show that it was intended that

the hiring should be for a year. *Evans* v. *Roe*, L. R. 7 C. P. 138; 26 L. T. 70.

To show Contract merely Colourable.]—By written agreement between a man and a woman, the latter was engaged as servant to the former at a wage. Before the making of the agreement she and her master had carried on an improper intercourse. That intercourse was continued during the service, but she acted in other respects as a servant. On a question as to her settlement:—Held, that evidence was admissible, notwithstanding the written contract of service, to show that such contract was merely colourable, and that the real contract was for the improper intercourse. *Rex.* v. *North Wingfield*, 1 B. & Ad. 712; 9 L. J. (O.S.) M. C. 57.

Ready for Shipment.]—In an action for not accepting twenty tons of lead bought of the plaintiff under a written contract, by which the lead was to be deliverable in the river Thames: the defendant pleaded that the plaintiff was not ready to deliver within a reasonable time, on which issue was joined. The evidence was, that the broker who made the contract for the plaintiff, stated at the time that the lead was then ready for shipment; that the usual ports of shipment for London were either Gloucester or Liverpool, but that the lead was unavoidably delayed in its transit to Gloucester:—Held, that the parol representation of the broker that the lead was ready for shipment, was admissible not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined. *Ellis* v. *Thompson*, 3 M. & W. 445; 1 H. & H. 131; 7 L. J., Ex. 185.

5. As to Parties.

To Charge Principal.]—C., the defendant's broker, offered to buy cotton of the plaintiff, but the latter declined to deal, unless C. disclosed his principal, which he accordingly did. The sold note was made out in the broker's name, and the cotton was charged to him in the plaintiff's books, and the plaintiff applied to him first for payment:—Held, that parol evidence was admissible in order to charge the principal, and that the evidence did not show that the plaintiff elected to make the broker exclusively liable. *Calder* v. *Dobell*, 40 L. J., C. P. 224; L. R. 6 C. P. 486; 25 L. T. 129; 19 W. R. 409, 978—Ex. Ch.

—— **Custom not Inconsistent with Document.**]—M. & W., fruit brokers in London, being employed by the plaintiffs, merchants in London, to sell for them, gave them the following contract note, addressed to the plaintiffs:—"We have this day sold for your account to our principal" so many tons of raisins. (Signed) "M. and W., brokers." The defendants' principal having accepted part of the raisins, and not having accepted the rest, the plaintiffs brought an action on the contract against the defendants, and they sought to make the defendants personally liable by giving evidence that, in the London fruit trade, if the brokers did not give the names of their principals in the contract, they were held personally liable, although they contracted as brokers for a principal; and evidence was also given of a similar custom in the London colonial market:—Held, that the evidence of the custom in the same trade was admissible, as not inconsistent with the written contract, and that the evidence of a similar custom in the colonial market was admissible, being evidence in a similar trade in the same place, and as tending to corroborate the evidence as to the existence of such a custom in the fruit trade. *Fleet* v. *Murton*, 41 L. J., Q. B. 49; L. R. 7 Q. B. 126; 26 L. T. 181; 20 W. R. 97.

Where a corn factor in London received a commission to sell oats of a certain quality, free on board, on account of a principal in Ireland, and sold them on the same day in London in his own name, and sent a sale note to his principal, as "sold on account of his principal":—Held, in an action by the corn factor against the principal to recover damages for the oats not answering the description, and to cover the loss which the corn factor in London had sustained by selling in his own name, that evidence of a custom in the corn trade for the corn factors in London to sell in their own name was admissible. *Johnson* v. *Usborne*, 3 P. & D. 236; 11 A. & E. 549.

Where a defendant, on the face of a charter-party, contracts as principal, it is competent to him, by way of equitable plea to an action against him on the charter-party, to show that, in fact, he signed as agent for a third party; that the plaintiff verbally agreed that he should not be responsible as principal, and is inequitably taking advantage of a mistake in drawing the charter-party, so as to make the defendant personally liable. *Wake* v. *Harrop*, 1 H. & C. 202; 31 L. J., Ex. 451; 8 Jur. (N.S.) 845; 7 L. T. 96; 10 W. R. 626—Ex. Ch.

To Charge Agent.]—When a person contracts in the body of a charter-party and signs "as agent," his principal being undisclosed, evidence is admissible to show a custom that he shall be personally liable if he does not disclose his principal's name within a reasonable time. *Hutchinson* v. *Tatham*, 42 L. J., C. P. 260; L. R. 8 C. P. 482; 29 L. T. 103; 22 W. R. 18.

A person signing a contract in his own name, without qualification, is not exempted from liability on the contract by merely describing himself in the body of the contract as agent for a named principal, without words expressly or by necessary implication showing that he only signs as agent. *Paice* v. *Walker*, 39 L. J., Ex. 109; L. R. 5 Ex. 173; 22 L. T. 547; 18 W. R. 789.

Walker & Strange signed a contract for the sale of wheat in the following form:—"Sold A. J. Paice, Esq., London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig). Signed Walker and Strange":—Held, that they were personally liable upon the contract. *Ib.*

A broker signed and sent to the plaintiffs a note of a contract in the following terms:—"Messrs. Southwell,—I have this day sold by your order and for your account to my principals five tons of anthracene, payment in cash in fourteen days after delivery, less 2½ per cent. discount and 1 per cent. brokerage. W. A. Bowditch." In an action for goods sold and delivered:—Held, that in the absence of usage making the broker personally liable, he was not personally liable upon the contract. *Southwell* v. *Bowditch*, 45 L. J., C. P. 630; 1 C. P. D. 374; 35 L. T. 196; 24 W. R. 838—C. A.

Fruit brokers in Liverpool gave a fruit merchant the following sold-note:—"We have this day sold to you, on account of James Morand & Co., Valencia, 2,000 cases Valencia oranges, of

the brand James Morand & Co., at 12*s.* 9*d.* per case free on board, shipment from commencement of season to not later than the 7th of December next," and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges :—Held, that the words "on account of James Morand & Co." shewed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. *Gadd* v. *Houghton*, 46 L. J., Ex. 71 ; 1 Ex. D. 357 ; 35 L. T. 222 ; 24 W. R. 975—C. A.

By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain work for which J. A. & Co. were to make certain payments, and the agreement contained this clause : "It is further understood between the parties to this contract that J. O. Schuler guarantees payment to Y. & Co. of all moneys due to them under this contract." The attestation clause was "signed and delivered by the said J. A. & Co. in the presence of C. T.," and Schuler, acting under a power of attorney, signed as follows : "P. P. A.—J. A. & Co., J. O. Schuler." Y. & Co. sued Schuler as guarantor, and evidence was given at the trial of statements by Schuler at the time of execution that he intended to sign on his own behalf as well as on that of A. & Co. A verdict was found for the plaintiffs. Schuler moved for a new trial on the ground that he had not signed the guarantee :—Held, that evidence that Schuler intended to sign in his own right as well as on behalf of A. & Co. did not contradict the document, and was admissible, and that Schuler must be taken to have signed as a contracting party. *Young* v. *Schuler*, 11 Q. B. D. 651 ; 49 L. T. 546—C. A.

To relieve.]—Parol evidence is admissible to shew that a person whose name appears at the head of an invoice as vendor, is not in fact a contracting party. *Holding* v. *Elliott*, 5 H. & N. 117 ; 29 L. J., Ex. 134 ; 1 L. T. 381 ; 8 W. R. 192.

Where a party has entered into a written contract, which states him to be the owner, evidence is not admissible, in an action upon the contract by his principal, to shew that he was agent, not owner. *Humble* v. *Hunter*, 12 Q. B. 310 ; 17 L. J., Q. B. 350 ; 12 Jur. 121.

Action on a contract alleged to have been made by the defendant to charter a ship to the plaintiff. Proof, that the defendant made a memorandum of a charter-party in B.'s name, and purporting to be signed by the defendant as agent for B. ; that the defendant had no authority to contract for B., and knew that he had none ; and that B. refused to adopt the contract :—Held, that the defendant was not liable as principal in an action on the contract itself. *Jenkins* v. *Hutchinson*, 13 Q. B. 744.

The plaintiff and the defendants were desirous of starting a company, to take the plaintiff's premises and stock-in-trade. The plaintiff sent a written proposal to the defendants for the sale of his extra stock, and they sent the plaintiff a written acceptance thereof ; the proposal was directed to and accepted by the defendants "on behalf of the proposed G. R. A. H. Co. (Ld.)." The company was not then in existence. The plaintiff brought an action on this agreement :—Held, that as the company was non-existent at the time of the agreement, the defendants were personally liable, and that parol evidence was inadmissible to shew a contrary intention. *Kelner* v. *Baxter*, 36 L. J., C. P. 94 ; L. R. 2 C. P. 174 ; 12 Jur. (N.S.) 1016 ; 15 L. T. 313 ; 15 W. R. 278.

A. and B. join in a bond to secure money, borrowed by B. for the use of a third person ; as between A. and B., A. is only a surety. Parol evidence may be given to shew, as between the two co-obligors in a bond, that one of them was only a surety for the other. *Bolton* v. *Cook*, 3 L. J. (O.S.) Ch. 87.

To Identify.]—Where an attorney encloses an unsigned bill of costs in a letter signed by him, and the bill does not, on the face of it, shew who is the party chargeable therewith, the letter may be referred to, to supply that defect. *Taylor* v. *Hodgson*, 3 D. & L. 115 ; 10 Jur. 355.

To shew Partnership.]—D. & W., being general partners under the firm of D. & Co., and D. & Co. taking a share with three others in a particular adventure, which D. & Co. managed and insured for the account of D. & Co., it is a latent ambiguity, to be explained by evidence, whether the D. & Co., for whose account the insurance is made, means D. & W. only, or all who are partners of D. in that particular adventure. *Carruthers* v. *Sheddon*, 6 Taunt. 14 ; 1 Marsh. 416.

Admissibility of evidence of a parol contract as to the continuance of a partnership where real estate is concerned. *Essex* v. *Essex*, 20 Beav. 442.

6. To Vary or Explain Operation of Contracts.

To vary.]—Neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. *Hickman* v. *Haynes*, 44 L. J., C. P. 358 ; L. R. 10 C. P. 598 ; 32 L. T. 873 ; 23 W. R. 871.

The defendant agreed in writing to buy of the plaintiff iron, of which twenty-five tons were to be delivered in June. The defendant in that month verbally requested the plaintiff to allow the delivery of the twenty-five tons to stand over, to which he verbally assented. On the 1st of August the plaintiff wrote to ask when the defendant would take delivery, and after some correspondence the defendant on the 9th asked for further time. The plaintiff waited a reasonable time before he commenced an action :—Held, that as the delivery was postponed for the defendant's convenience, the plaintiff was entitled to treat the contract as broken by the defendant at the end of June, and to have the damages assessed with reference to the value of the iron at the expiration of a reasonable time after the 9th of August. *Ib.*

Where the vendor of a piece of land, of which he was himself in occupation, contracted to sell the land under conditions of sale, by one of which it was provided that the purchaser should be entitled "to the possession or the receipt of the rents and profits" of the land from a specified date :—Held, that evidence was not admissible to prove an alleged contemporaneous parol agreement by which the vendor was to retain possession of the land to a later date, paying the purchaser in the meantime, by way of rent, interest on his purchase-money. *Anker* v. *Franklin*, 43 L. T. 317 ; 44 J. P. 830.

In an action on a policy of marine insurance,

the declaration set out certain correspondence, shewing that the plaintiff intended to insure the loss of his profit by the ship being lost before arriving at Quebec, and alleged that the correspondence and the nature of the risk intended to be covered were explained to the defendant before signing the policy, and that the premium was at a higher rate than would have been charged for an insurance from Quebec homewards or on goods for the voyage:—Held, that these facts could not be looked at to alter the nature of the contract. *Halhead* v. *Young*, 6 El. & Bl. 312; 25 L. J., Q. B. 290; 2 Jur. (N.S.) 970; 4 W. R. 530.

The plaintiffs brought an action against the defendant, one of five joint and several sureties, to recover the balance of the sum guaranteed. The plaintiffs had previously by letter, without the defendant's knowledge or consent, agreed to release another of the sureties from "all debts due" by him:—Held, that evidence of a verbal agreement, prior to the letter of release, to reserve rights against the sureties, was not admissible, and that parol evidence was not admissible to alter the ordinary legal construction of a document. *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317; 1 R. 371; 57 J. P. 741—P. C.

A written agreement to sell a business may be altered by parol testimony. *Mansfield* v. *Cheslyn*, 2 L. J., K. B. 85.

To shew previous Parol Promise.]—When a written contract has been executed, containing all the terms agreed upon between the parties, a previous parol promise relating to the same subject-matter is invalid. *Angell* v. *Duke*, 32 L. T. 320; 23 W. R. 548.

The defendant let a house and furniture to the plaintiff by a written agreement; evidence of a previous parol promise by the defendant to put in more furniture was tendered at the trial and rejected:—Held, that the rejection was right.

To establish collateral Parol Contract.]—A tenant entered on lands on the understanding that a lease should be signed at a future time. When the lease was presented to him for signature he refused to sign unless the landlord would undertake to destroy the rabbits. This the landlord by word of mouth promised to do, and the tenant thereupon signed. The lease contained a clause by which the tenant agreed not to shoot, hunt, or sport on the land, or destroy any game, but to use his best endeavours for the preservation of the same, and to allow his landlord or friends at any time to hunt, shoot and sport on the land. In an action by the tenant against the landlord, for breach of agreement in not destroying the rabbits:—Held, that this agreement was collateral to, and did not alter or vary the written contract, and that therefore evidence of such agreement was admissible. *Morgan* v. *Griffiths*, 40 L. J., Ex. 46; L. R. 6 Ex. 70; 23 L. T. 783; 19 W. R. 957.

Rule, that written agreement within the Statute of Frauds cannot be varied by parol, does not affect a subsequent distinct collateral agreement. *Rich* v. *Jackson*, cited 6 Ves. 337, 338, n. *See* 4 Bro. C. C. 514.

When a security is taken, which may be supposed, by postponing the time of payment, to restrict the right of suing within that time, and so to release the surety, parol evidence is admissible to prove that there was an agreement that such security should not have that operation. *Wyke* v. *Rogers*, 1 De G. M. & G. 408; 21 L. J., Ch. 611. And see *Pearson* v. *Pearson*, infra.

Date.]—Parol evidence is admissible to shew that a written contract which has no date was not intended to operate from its delivery, but from a future uncertain period. *Davis* v. *Jones*, 17 C. B. 625; 25 L. J., C. P. 91; 4 W. R. 248.

Condition.]—In an action for non-fulfilment of a written agreement, parol evidence is admissible to shew that the defendant signed the document upon the understanding between the parties that it was not to operate as an agreement unless a certain condition was performed. *Pym* v. *Campbell*, 6 El. & Bl. 370; 25 L. J., Q. B. 277; 2 Jur. (N.S.) 641; 4 W. R. 528.

The plaintiff declared upon an agreement by the defendant to transfer to him a farm which the defendant held under S. The defendant pleaded that the agreement was made subject to the condition that it should be null and void if S. should not, within a reasonable time after the making of the agreement, consent and agree to the transfer of the farm to the plaintiff:—Held, that it was competent to the defendant to prove by extraneous evidence this contemporaneous oral agreement, such oral agreement operating as a suspension of the written agreement, and not in defeasance of it. *Wallis* v. *Littell*, 11 C. B. (N.S.) 369; 31 L. J., C. P. 100; 8 Jur. (N.S.) 745; 5 L. T. 489; 10 W. R. 192.

Parol evidence is not admissible to vary the terms of an agreement in writing where such exists; but is admissible to shew that a signed document purporting to be such an agreement is not a contract at all, no contract having, in fact, been concluded between the parties. *Pym* v. *Campbell* (6 El. & Bl. 370; 25 L. J., Q. B. 277), *Gudgen* v. *Besset* (6 El. & Bl. 986; 26 L. J., Q. B. 36), and *Furness* v. *Meek* (27 L. J., Ex. 34) followed. *Pattle* v. *Hornibrook*, 66 L. J., Ch. 144; [1897] 1 Ch. 25; 75 L. T. 475; 45 W. R. 123.

The plaintiff signed an agreement to take a lease of a house from the defendant. The defendant subsequently signed it, but without intending to bind himself till he should be satisfied of the plaintiff's responsibility, and ultimately, not being so satisfied, let the house to another person. The signed document had not been delivered to the plaintiff:—Held, that the defendant might shew that no contract had been arrived at between the plaintiff and himself. *Ib.*

By the terms of a written agreement J. agreed to lease to W. "a shop and premises which are to be built at a cost not to exceed 400*l.*, at the annual rental of 75*l.*" J. expended 750*l.* in building, and refused to grant W. a lease at a rent of 75*l.* In an action by W. against J. for specific performance, the defendant set up as a defence a contemporaneous parol proviso to the agreement to the effect that if the outlay exceeded 400*l.* the rent was to be raised in proportion:—Held, that such parol proviso did not contradict, but merely explained, the terms of the written contract, and that the evidence was admissible. *Williams* v. *Jones*, 36 W. R. 573.

Where a plaintiff declares upon an agreement in writing, the defendant cannot in pleading rely upon oral matter introducing a qualification of the contract declared on, or shew that it was made subject to conditions which do not appear upon the face of it. *Canham* v. *Barry*, 15 C. B.

597; 3 C. L. R. 487; 24 L. J., C. P. 100; 1 Jur. (N.S.) 402.

The court will compel an attorney to perform an absolute written undertaking, notwithstanding a parol agreement that it should not be enforced except upon a contingency. *Wills* v. *Warner*, 1 D. P. C. 680; 2 L. J., Ex. 174.

A bankrupt, previous to his bankruptcy, gave a bond to trustees for the payment of 5,000*l.* and interest, as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging that, when the bond was given, it was understood between him and the obligees, that it was only to be available in the event of the success of a certain speculation:—Held, that such parol evidence was not admissible to control the absolute effect of the bond. *Morley*, *Ex parte*, 2 Deac. & C. 50.

Intended to be inoperative.]—Evidence to shew, not that an agreement in writing was a mere blind, and never intended to have any operation at all, but that it was only to have a partial operation, is inadmissible, as in effect altering by parol the terms of the written agreement. *Fenwick* v. *Brinkworth*, 2 F. & F. 86.

For purpose of rectification.]—Letters offered in evidence to shew that during negotiations for a sale the vendor had declined to enter into a proposed covenant not to solicit the old customers, were admissible, not to construe the agreement, but as shewing a collateral verbal agreement which would be a defence to an action for specific performance, the defendant also seeking by counter-claim rectification of the agreement. *Pearson* v. *Pearson*, 54 L. J., Ch. 32; 27 Ch. D. 149—C. A.

—— **But not to construe.**]—Parol evidence is admissible where you have a case of specific performance with compensation, but an express bargain to make a good title cannot be modified by parol evidence. Such evidence would be admissible in an action to reform the contract, but is not admissible for the purpose of construing it. *Cato* v. *Thompson*, 9 Q. B. D. 620—C. A.

Application for cancellation.]—Where it is sought to cancel a lease, or executed conveyance, upon equitable grounds, parol evidence is admissible, even where there has been an antecedent agreement in writing for the lease or conveyance. *Gun* v. *M'Carthy*, 13 L. R., Ir. 304.

As to State of Document when signed.]—A. signed a proposal for a contract in a certain form. B. then altered it, and signed it in the altered form, and brought it to A. Parol evidence having been given in an action against A. that he verbally agreed that the altered document should be the contract:—Held, that such evidence was rightly admitted, as shewing what was the state of the document when it became an agreement. *Hudson* v. *Stuart*, 43 L. J., C. P. 204; L. R. 9 C. P. 311; 30 L. T. 333; 22 W. R. 534.

To limit Application of restrictive Covenant.]—A railway company having taken for the purposes of their railway lands on the north of C. street belonging to a corporation, and having constructed their railway in an open cutting, afterwards covered over the top of the cutting so as to restore the surface of the lands, and entered into an agreement to let part of this surface on a building lease. It was provided by their act that the railway company should not take any lands belonging to the corporation without their consent in writing, and this provision was not complied with in taking the lands on the north of C. street. Subsequently an agreement was, in July, 1869, made between the corporation and the railway company, whereby the corporation were to take immediate possession of all the land on the north side of C. street not used for the railway, except a small piece of land immediately adjoining the railway in that street, and which the company had agreed to let, together with the whole of the land over their railway, for building purposes, but that in the lease of such land the railway company were to insert a covenant that the premises should not be used for the sale of meat or poultry. At the date of this agreement the company had let part of the excepted land to K., and afterwards they let another part of it, to which they thought the restrictive covenant did not apply, to S., who immediately began to build butchers' shops on it. This fact was known in September to the corporation, who, however, took no steps to interfere with the building till the following January:—Held, that parol evidence of what took place at a meeting between deputations from the corporation and the railway company, at which meeting the terms of the agreement, which was afterwards reduced to writing, were discussed, was not admissible to shew whether the restrictive covenant was intended to apply to the whole of the land on the north side of C. street which the railway company had taken from the corporation, or only to that part of it which they had let to K., and that such parol evidence being inadmissible, the restrictive covenant applied to the whole of the land. *London Corporation* v. *Sandon*, 26 L. T. 86—L.JJ.

Imperfect Contracts.]—When a document appears on the face of it to contain the terms of a written agreement, parol evidence is admissible to shew that it was not intended to be an agreement, but was written for some other purpose, and the question whether this is so or not is for the jury. *Clever* v. *Kirkman*, 33 L. T. 672; 24 W. R. 159.

The defendant gave the plaintiff a paper stating, "The terms upon which I agree to sell you the business . . . are as follows: . . .," addressed to the plaintiff, signed by the defendant. The plaintiff afterwards wrote below, "I agree to the above terms, and accept the same," and signed. In an action for not selling, the defence was that the paper was not meant to be a contract of sale. The judge left it to the jury whether the defendant signed the paper as an agreement or an offer to the plaintiff, or as a memorandum of terms on which the plaintiff might offer the business for sale to a purchaser:—Held, a proper direction. *Ib.*

When letters contain certain terms which may form the basis of a contract, it is necessary to ascertain from the letters whether the terms are finally arrived at, and, if they are not, verbal evidence is admissible to shew that a different contract has been entered into. *Johnson* v. *Appleby*, 43 L. J., C. P. 146; L. R. 9 C. P. 158; 30 L. T. 261; 22 W. R. 515.

To add Terms to Written Agreement.]—At the time of hiring a horse, a note of the agreement was made, stating the time and the price:—Held, that the plaintiff was not precluded from proving, by parol evidence, additional terms of agreement. *Jeffery* v. *Walton*, 1 Stark. 267.

When a written memorandum of the terms on which work is to be done does not shew where it is to be done, nor by measurement or otherwise identify the work or define the quality of work to which it applies, parol evidence is admissible to explain it in this respect, and shew to what it refers. *Pharoah* v. *Lush*, 2 F. & F. 721.

A trader being indebted to various persons, procured from A. an advance of 200*l*., for which he verbally agreed to give a bill of sale of all his property, if called upon to do so. On receiving the money he gave to A. a promissory note for 200*l*., a memorandum of agreement to assign some property expectant on the death of his wife's father, together with a policy of insurance; and also another memorandum of agreement to pay 10*l*. yearly as a bonus:—Held, that evidence of the original verbal agreement was admissible, inasmuch as the subsequent written agreement did not contain, and was not intended to contain, the whole agreement between the parties. *Harris* v. *Rickett*, 4 H. & N. 1; 28 L. J., Ex. 197.

A., by parol, made arrangements with a railway company to convey cattle for him to K. station; he at the same time, without noticing its contents, signed a consignment note, by which the cattle were directed to be taken to E., an intermediate station on the line to K.:—Held, that parol evidence was admissible to shew that the company agreed to carry on the cattle to K., as it did not contradict, but only supplemented, the written contract. *Malpas* v. *L. & S. W. Ry.*, 1 H. & R. 227; 35 L. J., C. P. 166; L. R. 1 C. P. 336; 12 Jur. (N.S.) 271; 13 L. T. 710; 14 W. R. 391.

Not only contrary to the Statute of Frauds, but to the common law before the statute, to add anything to an agreement in writing by parol evidence. *Parteriche* v. *Powlet*, 2 Atk. 383.

A. and B. carried on business together. B. agreed to buy A.'s share, the consideration being the payment by B. to A. of an annuity, based upon the estimated profits of the business. The date when the annuity was to commence was not specified. It was subsequently agreed that the annuity should commence from the date when the profits were last divided, such annuity to be in lieu of profits. B. afterwards agreed to sell to A. his share of the business upon the same terms upon which he had previously agreed to purchase. Upon taking an account of the profits, it was found more advantageous for B. to receive the profits than to have the annuity from the date of the last settlement of accounts. A. filed a bill for specific performance on the terms of the annuity being payable from the date of the settlement of accounts:—Held, that this was no part of the original contract; and the bill was dismissed. *Bonville* v. *Bonville*, 6 Jur. (N.S.) 414.

Surrounding Circumstances.]—Extrinsic circumstances not only may but must always be looked at, because an agreement can never be made intelligible unless the persons and subject-matter with which the parties are dealing can be identified. *Brown* v. *Fletcher*, 35 L. T. 165.

Parol evidence to explain the circumstances under which a guarantee to a bank for advances was given, is admissible to aid the court in construing the document. *Grahame* v. *Grahame*, 19 L. R., Ir. 249.

Parol evidence is admissible to shew under what circumstances deed or bond is executed. *Stratford* v. *Powell*, 1 Ball & B. 14.

Parol evidence of the attorney admitted to prove a party to a settlement had notice of a proper incumbrance. *Shelburne* v. *Inchiquin*, 1 Bro. C. C. 340.

Sale of Lease—Payment for Licence.]—On the sale by auction of a lease, containing a covenant against alienation without the consent of the lessor, the auctioneer announced that the landlord would give his consent for a certain sum, then mentioned, which the vendor verbally agreed to pay; and the auctioneer, on the day of the sale, signed and delivered to the purchaser a memorandum of the names of the vendor and purchaser, the price and the amount to be paid for the landlord's consent, containing a stipulation that the latter sum should not be charged to the purchaser. A deed of assignment, not specifying by whom the sum requisite to obtain the landlord's consent should be borne, having been executed, the purchaser was compelled, by the default of the vendor, to pay it, in order to render his title valid:—Held, that the memorandum was a sufficient note of an agreement by the vendor, collateral with the deed of assignment, and not merged therein, to pay the sum necessary to obtain the landlord's consent to the assignment, and that the plaintiff was entitled to recover the amount which he had paid for that purpose from the defendant. *Carrigy* v. *Brock*, Ir. R. 5 C. L. 501.

Accord.]—Upon a negotiation between the plaintiff and the defendant for the sale of the fixtures, furniture and goodwill of a business (the agreement for which was afterwards reduced into writing), a distinct and separate promise was made by the defendant, in consideration of the plaintiff's signing the agreement, that the defendant would settle an action pending against the plaintiff at the suit of C.:—Held, that evidence of this prior oral agreement was admissible, notwithstanding the written agreement contained an authorisation to the defendant to settle C.'s action out of the purchase-money. *Lindley* v. *Lacey*, 17 C. B. (N.S.) 578; 34 L. J., C. P. 7; 10 Jur. (N.S.) 1108; 11 L. T. 273; 13 W. R. 80.

To an action for goods sold, the defendant pleaded that it was agreed that, in consideration of his giving up possession of a public-house and stock-in-trade, the plaintiff should pay the defendant 100*l*., and give up and discharge him from all debts and the goods, and averred payment of the 100*l*., and delivering up of possession of the premises:—Held, that evidence of a parol agreement by way of accord and satisfaction was admissible in support of the plea, although to enforce a delivery of possession it might be necessary to shew a contract in writing to satisfy the 4th section of the Statute of Frauds. *Lavery* v. *Turley*, 6 H. & N. 239; 30 L. J., Ex. 49.

A written document, from which a particular contract would in ordinary cases be implied, may be shewn by parol to have been made under circumstances which exclude such implication. *Bartlett* v. *Parnell*, 6 N. & M. 299; 4 A. & E. 792; 5 L. J., K. B. 169.

Therefore, in an action for goods sold at an auction, evidence of prior declaration by the plaintiff, that the defendant was entitled to a legacy of 100*l.*, and that she might buy to that amount, and have it set off against her legacy, is admissible. *Ib.*

Acceptance.]—A. sold a pianoforte to B. for 15*l.* 10*s.*, and delivered it at B.'s shop. B. kept it, but refused to pay for it, alleging that it was delivered upon an agreement that it should remain as security for payment of certain outstanding bills of exchange which he had discounted for A. In an action for the price of the pianoforte:—Held, that there was a sufficient acceptance within the 17th section of the Statute of Frauds, and that parol evidence was admissible to shew the terms of the bargain. *Tomkinson* v. *Staight*, 17 C. B. 697; 25 L. J., C. P. 85; 2 Jur. (N.S.) 354; 4 W. R. 299.

Suretyship.]—M. and D. about to advance 400*l.* to A. on mortgage, the parties met their solicitor, G., who was to act for them all, and draw up an agreement and prepare the securities. The agreement set forth that of the money to be advanced M. was to be liable for only 100*l.* and D. for 300*l.*, and M. and D. accordingly drew bills on each other, which were discounted and the proceeds advanced to A. Afterwards D. became insolvent, and G., being a creditor of D. got the bills indorsed to himself, G., and sued M. for the whole amount:—Held, on the trial of an issue whether G. had not been retained by M. as his solicitor to prepare proper securities to protect M. against liability beyond the amount of 100*l.*, it was competent to prove by parol that at the time the written agreement was made and executed, M. gave directions to G. so to prepare such securities, for this was not an attempt to vary a written instrument by parol evidence. *Gemmill* v. *Macalister*, 9 Jur. (N.S.) 825; 7 L. T. 841; 11 W. R. 486—H. L.

A company borrowed from a bank a sum of money, to be repaid with interest, and deposited a lease as a security. Afterwards a document was drawn up by the company, stating that the lease had been deposited as a security for the loan, without mentioning interest. The bank refused to give up the deed until the whole of the interest as well as the loan had been repaid:—Held, in an action of detinue for the lease, that the written document was not conclusive against the bank as to the terms of the loan, and that parol evidence was rightly admitted to shew that the lease had been intended as a security as well for the interest as the principal. *Pentreguinny Fuel Co.* v. *Young*, 12 Jur. (N.S.) 56.

To modify Collateral Document.]—The principle that parol testimony cannot be received to contradict or modify the terms of a written contract does not apply to a document which forms no part of the contract, and cannot be used to exclude parol evidence of the circumstances attending the signature of one of the parties to such document. *Bank of Australasia* v. *Palmer*, 66 L. J., P. C. 105; [1897] A. C. 540—P. C.

To rebut Equity.]—Parol evidence may be admitted on the part of the defendant (there being no written agreement between him and the plaintiff) to establish a fact to rebut the equity set up by the bill, the case not being affected by the Statute of Frauds. *Walker* v. *Walker*, 2 Atk. 98.

And see CONTRACT.

7. AS TO CONSIDERATION.

In Deeds.]—The consideration expressed in a deed of conveyance was 28*l.*, but parol evidence was admitted to prove that 30*l.* was the real consideration. *Rex* v. *Scammonden*, 3 Term Rep. 474; 1 R. R. 442.

Where there is one consideration stated in a deed, proof may be given of any other consideration which did take place, and which is not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated. *Clifford* v. *Turrell*, 1 Y. & C. C. C. 138; 14 L. J., Ch. 390.

Where a deed purports to be made "in consideration of esteem for A. T., and for divers other good considerations," evidence is admissible that it was made in consideration of an intended marriage with A. T. *Tull* v. *Parlett*, M. & M. 472; 31 R. R. 751.

A conveyance to husband and wife and their heirs as joint tenants, "in consideration of 200*l.* now in hand duly paid by husband and wife," may be explained by extrinsic evidence, shewing that the money belonged to the wife only, so as to defeat the claim of the husband's assignees under 21 Jac. 1, c. 15, s. 5. *Doe* d. *Bainbridge* v. *Statham*, 7 D. & R. 141.

Parol evidence not admissible to shew that the consideration for a deed of conveyance of property, not in settlement, by a father to his second son (an object of a power of appointment contained in his father's marriage settlement) was the relinquishment by the son of his right, as one of the issue male under the settlement. *Barron* v. *Barron*, 2 Jones, 226.

A grant of an annuity to the grantor's sister, though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner* v. *Byne*, 1 Sim. 160; 5 L. J. (O.S.) Ch. 125.

To add to Consideration.]—By an agreement in writing G. agreed that Y. should receive all the money that was then due, and which should become due, to G. upon the winding-up of a society, Y. paying to G. out of such money the sum of 100*l.* The consideration was stated to be, "In consideration of a sum of money this day paid," &c.:—Held, that evidence was admissible to shew that, in addition to the consideration expressed, there was another consideration, namely, that Y. should vote for the winding-up of the society. *Barnstaple Second Annuitant Society, In re*, 50 L. T. 424.

To reduce Commission.]—Where A. employs a broker, B., to procure a charter-party on a commission of 5 per cent., to be paid whether the contract be executed or abandoned, A. cannot under a plea of payment of a smaller sum and non assumpsit ultra, give evidence of a subsequent agreement to accept 2½ per cent. only on account of the abandonment of the contract; but where the terms of the original contract are only inferred from the usage of the trade, a conversation, in which B. agrees to take 2½ per cent. only on account of the abandonment of the contract, is admissible, to shew that such reduction was, as a contingent reduction, part of the original contract. *Broad* v. *M'Calmer*, 5 N. & M. 413.

Amount.]—An order for advertisement sent to a monthly magazine dated September 29th, 1856, stated the date of appearance of the advertisement as 1856, October to October, the number of insertions as one, and the price as 4*l.* 10*s.* :—Held, by Williams, Camden and Willes, JJ., that even if this was a contract which was doubtful, its meaning was that 4*l.* 10*s.* was to be paid for each advertisement. Per Byles, J., that it was not a contract, but if it was that was the true interpretation of it. Quære, per Williams, J., whether if it was a contract, parol evidence was admissible to shew what the price intended was. *Baillie* v. *Jay*, 7 W. R. 283.

To ascertain Balance.]—A deed whereby it was agreed to pay a balance then unascertained, stipulating for the accounts being taken by arbitration. Held, sufficient to take the case out of the Statute of Limitations, and extrinsic evidence admitted to ascertain the sum due. *Cheslyn* v. *Dalby*, 4 Y. & Coll. 238 ; 10 L. J., Ex. Eq. 21.

Payment—In Goods.]—Although evidence is not admissible to shew, contrary to the terms of a deed, that by the contract the consideration was not to be paid, as stated in the deed, but in goods, such evidence is admissible to shew that, in point of fact, the consideration was so paid, and that goods were accepted in payment. *Smith* v. *Battams*, 26 L. J., Ex. 232.

In Contract for Annuity.]—Upon the construction of certain letters, aided by parol evidence :—Held, that a testator, for valuable consideration, contracted to grant an annuity for the lives of certain persons. *Moneypenny* v. *Mascall*, 2 Coll. 212.

Contract in Restraint of Trade.]—In contracts in restraint of trade which are partly verbal and partly in writing, parol evidence is admissible to shew what was the consideration therefor. *Cooper* v. *Southgate*, 63 L. J., Q. B. 670 ; 10 R. 552.

In Bills and Notes.]—In an action by a payee against the maker of a promissory note, though it is not competent to him to controvert or vary by parol the contract that appears on the face of the note, he may shew that there was no consideration, or that the consideration has failed. *Abbott* v. *Hendricks*, 2 Scott (N.R.) 183 ; 1 Man. & G. 791 ; 1 Drink. 31 ; 10 L. J., C. P. 51 ; 4 Jur. 1113.

It is an inflexible rule not to admit parol evidence to contradict a written instrument, unless the consideration is illegal, and, therefore, where a testatrix gave in her lifetime to the plaintiff a promissory note to pay him or order "on demand the sum of 100*l.* for value received and his kindness to me," with a verbal engagement on the part of the plaintiff that the note should not be demanded until after her death :—Held, in an action upon the note, that parol evidence could not be received to shew that it was not given for a valuable consideration. *Woodbridge* v. *Spooner*, 3 B. & Ald. 233 ; 1 Chit. 661 ; 22 R. R. 365.

On the 8th of August, 1881, the defendant agreed with S., her partner in a business, (1) that S. should retire as from the 31st of July, 1881 ; (2) that the defendant should pay S. 2,000*l.* within three years, with interest at 5 per cent. on the same, or the instalments thereof for the time being remaining unpaid computed from the said 31st of July ; (3) that S. should accept the 2,000*l.* in full satisfaction for all his share in the stock, credits, and effects of the partnership ; (4) that a proper deed should be executed to carry the agreement into effect. Subsequently in September the defendant by a promissory note dated the 31st of July, 1881, promised to pay S. on demand 2,000*l.* with interest at 5*l.* per cent. In an action on the note by the executrix of S. parol evidence of the circumstances under which the note was given was admitted subject to objection, and thereupon the jury found that the 2,000*l.* and interest covered by the note were the same moneys as those covered by the agreement of the 8th of August, and that the note was given by the defendant to S. and accepted by him subject to the conditions of the agreement of the 8th of August :—Held, that the plaintiff was entitled to recover, as there was a good consideration for the promissory note ; for that where there is a debt existing in presenti, but payable within a period of time and not on a day fixed in futuro, so that the debtor is entitled to pay the sum owed at any time at his option, there is good consideration for a promissory note payable on demand given by the debtor and accepted by the creditor for the amount of that debt ; and that such a case falls within the principle of the decision in *Currie* v. *Misa* (L. R. 10 Ex. 153), and that the alleged collateral agreement between the defendant and S. could not be taken into consideration. *Stott* v. *Fairlamb*, 53 L. J., Q. B. 47 ; 49 L. T. 525—C. A.

To contradict Note.]—A parol agreement contemporaneous with a promissory note, to the effect that the note, though on the face of it payable on demand, should not be enforced for three years, is immaterial and inoperative to contradict the terms of the note. *Ib.*

To an action by payee against the drawer of a bill payable twelve months after date, he pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him ; that it was agreed between the plaintiff and himself and the acceptor that the acceptor should deposit with the plaintiff securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that until the plaintiff should have so sold the securities, he should not be liable to be sued on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that he had not sold but still held them :—Held, that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill. *Abrey* v. *Crux*, 39 L. J., C. P. 9 ; L. R. 5 C. P. 37 ; 21 L. T. 327 ; 18 W. R. 63.

In an action by payee against the maker of a note, parol evidence is inadmissible to prove an agreement that he should not be liable if the assets of a third party should be sufficient to pay the debt for which it was given. *M'Dougall* v. *Field*, Ir. R. 6 C. L. 185.

Parol evidence is inadmissible to prove a note expressed to be a security for 500*l.* and interest, to have been intended to secure the interest only. *Hill* v. *Wilson*, 42 L. J., Ch. 817 ; L. R. 8 Ch. 888 ; 29 L. T. 238 ; 21 W. R. 757.

It is not competent to an acceptor of a bill of exchange to set up a parol contract inconsistent

with the contract on the face of the bill. *Besant* v. *Cross*, 10 C. B. 895 ; 2 L. M. & P. 351 ; 20 L. J., C. P. 173 ; 15 Jur. 828. S. P., *Adams* v. *Wordley*, 1 M. & W. 374 ; 2 Gale, 29 ; 1 Tyr. & G. 620 ; 5 L. J., Ex. 158.

In Guarantees.]—Where the terms of a guarantee apply equally to a past as to a future consideration, evidence of the circumstances of the parties at the time when the guarantee was made, is admissible to explain its meaning. *Bainbridge* v. *Wade*, 16 Q. B. 89 ; 20 L. J., Q. B. 7 ; 15 Jur. 572.

The plaintiffs wrote to the defendant, "We are doing business with B., and require a guarantee to the amount of 200*l.*, and they refer us to you." The defendant wrote an answer, "I have no objection to become security for B., and subjoin a memorandum to that effect." The memorandum subjoined was, "I hereby engage to guarantee to Messrs. Colbourn, ironmasters, 200*l.* for iron received from them for B., as annexed": —Held, that these three documents were to be read together, and that the words, "we are doing business," taken with the rest, shewed that the consideration for the defendant's undertaking was, that the plaintiff should continue to supply B. with goods, and that if the last document alone had constituted the contract, parol evidence would have been admissible to construe the words, "for iron received." *Colbourn* v. *Dawson*, 10 C. B. 765 ; 20 L. J., C. P. 154 ; 15 Jur. 680.

A guarantee, purporting to be given in consideration of Messrs. E. giving credit to Mr. D. J., is good, as those words may apply to future as well as to past credit, and evidence is therefore admissible in an action on such a guarantee to shew that it was intended to apply to future credit. *Edwards* v. *Jevons*, 8 C. B. 436 ; 19 L. J., C. P. 50 ; 14 Jur. 131.

A guarantee was in these terms addressed to the plaintiff: "Sir, In consideration of your having this day advanced to our client Mr. V. D. 780*l.*, secured by his warrant of attorney, payable on the 22nd August next, we (the defendants) undertake to pay the same on default. Dated this 22nd day of June, 1840. Yours," &c. :— Held, that evidence was admissible to shew that the guarantee had in fact been executed on the 22nd of June, simultaneously with the payment of the money by the plaintiff to the party guaranteed. *Goldshede* v. *Swan*, 1 Ex. 154 ; 16 L. J., Ex. 284.

Since 19 & 20 Vict. c. 97.]—Since 19 & 20 Vict. c. 97, parol evidence, though it may supply the consideration for a guarantee, cannot explain the promise. *Holmes* v. *Mitchell*, 7 C. B. (N.S.) 361 ; 28 L. J., C. P. 301 ; 6 Jur. (N.S.) 73.

Therefore, a letter from the defendant to the plaintiff, relating to a proposed mortgage of leasehold property belonging to A. and B., who were desirous to borrow 400*l.* on the security thereof from the plaintiff, in these words, "I will take any responsibility on myself respecting it, should there be any," is not sufficient to satisfy the Statute of Frauds, because the whole promise cannot be made out without the aid of extrinsic parol evidence. *Ib.*

8. Usages and Customs of Country.

Usage—Question for Jury.]—Evidence of usage is admissible to explain an ambiguous grant, and the construction of such a grant is for the jury, and not for the judge. *Doe* d. *Kinglake* v. *Beviss*, 18 L. J., C. P. 128.

All ancient grants may be explained by evidence of modern usage upon a question as to what passed by such documents. *Beaufort* (*Duke*) v. *Swansea Corporation*, 3 Ex. 413.

Where a charter is ancient and ambiguous in its language, evidence of usage is admissible to explain it. *Newcastle-upon-Tyne* (*Master, Pilots, and Seamen*) v. *Bradley*, 2 El. & Bl. 428 ; 16 Jur. 494.

Where parcels are described in old documents by words of a general nature or of doubtful import, evidence of usage is proper to be received to shew what they comprehended. *Waterpark* (*Lord*) v. *Fennell*, 7 H. L. Cas. 650 ; 5 Jur. (N.S.) 1135 ; 7 W. R. 634.

Where a right of election is given by an old deed to any number of persons, usage is admissible evidence as to its construction and meaning. *Withnell* v. *Gartham*, 1 Esp. 322 ; 6 Term Rep. 388 ; 3 R. R. 218.

In the construction of a deed, parol evidence of prior, contemporaneous and subsequent enjoyment of a right claimed is admissible to shew the condition of the property, so as to place the court in the position of the parties to the instrument. *Baird* v. *Fortune*, 4 Macq. H. L. 127 ; 7 Jur. (N.S.) 926 ; 5 L. T. 2 ; 10 W. R. 2—H. L. (Sc.).

To explain an ambiguous award of a road under an inclosure act, evidence of contemporaneous acts of the occupiers of the land may be received. *Wadley* v. *Bayliss*, 5 Taunt. 752 ; 15 R. R. 645.

Long usage is of no avail against plain statutory enactments, and it can be binding only as the interpreter of a doubtful law, and as affording a contemporaneous exposition. *Dunbar* (*Magistrates*) v. *Roxburghe* (*Duchess*), 3 Cl. & F. 335.

Where a statute, expressive as to some points, is silent as to others, usage may well supply the defect, if not inconsistent with the express directions of the statute. *Ib.*

Custom to control Covenant.]—A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable. *Abbott* v. *Bates*, 43 L. J., C. P. 150 ; 30 L. T. 99 ; 22 W. R. 488. Affirmed, 33 L. T. 491 ; 24 W. R. 101.

Custom—Varying Documents.]—A custom cannot vary or alter the construction of written documents. *Menzies* v. *Lightfoot*, 40 L. J., Ch. 561 ; L. R. 11 Eq. 459 ; 24 L. T. 695 ; 19 W. R. 578.

——Excluded by express Terms.]—The express terms of a lease cannot be controlled by the custom of the country ; but if the lease is entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time. *Webb* v. *Plummer*, 2 B. & Ald. 746 ; 21 R. R. 479. *And see* as to the custom of the country, *Dalby* v. *Hirst*, 1 Br. & B. 224 ; 3 Moore, 536 ; 21 R. R. 577. *Roxburghe* (*Duke*) v. *Robertson*, 2 Bligh, 156 ; 21 R. R. 60. *Senior* v. *Armytage*, Holt, N. P. 197 ; 17 R. R. 627. *Wigglesworth* v. *Dallison*, 1 Dougl. 207. *Hutton* v. *Warren*, 1 M. & W. 466 ; 2 Gale, 71 ; 1 Tyr. & G. 646 ; 5 L. J., Ex. 234.

—— Manuring.]—In an action by a landlord against an incoming tenant, the declaration

stated, that, in consideration that the landlord would give up to the tenant possession of the farm, on which manure had been laid, and would permit him to have the benefit of the manure, he promised to pay the landlord for the same according to the custom of the country. Breach, non-payment. In support of this custom, the landlord put in evidence a written agreement, which stated that the land had been manured with eight loads of manure per acre, and that the tenant agreed to leave the land, when given up by him, in the same state, or to allow a valuation to be made:—Held that the written agreement excluded the custom of the country, as being inconsistent with it, and that there was a variance between that agreement and the one stated in the declaration. *Clarke* v. *Roystone*, 13 M. & W. 752; 14 L. J., Ex. 143.

—— **As to Straw.**]—By the terms of a farm lease for seven years, expiring at Michaelmas, the tenant agreed to cultivate the land according to the custom of the country, and "during the term to consume with stock on the farm all the hay, straw and clover grown thereon, which manure shall be used on the farm"; and the landlord agreed to let the tenant occupy part of the homestead until Midsummer-day after the expiration of the term, if necessary, "to end the cropping of the tenant grown on the premises": —Held, that the lease did not exclude the custom of the country, by which the tenant, having paid for straw on his incoming, was entitled to be paid for straw on his quitting; and that an action was maintainable against the succeeding tenant for the straw left by the outgoing tenant on the farm, at the expiration of the term. *Muncey* v. *Dennis*, 1 H. & N. 216; 26 L. J., Ex. 66.

—— **Selling Flints—Reservation of Mines and Minerals.**]—By an agreement for a lease the tenant agreed to cultivate the land according to the most approved system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all mines and minerals, sand, quarries of stone, brick-earth and gravel pits." The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases:—Held, that such a custom was reasonable and good. *Tucker* v. *Linger*, 51 L. J., Ch. 713; 21 Ch. D. 18; 46 L. T. 894; 30 W. R. 578—C. A. Affirmed, 52 L. J., Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4—H. L. (E.)

Held, further, that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of his right. *Ib.*

In ascertaining the nature of an agricultural custom regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district. *Ib.*

—— **Counting Rabbits.**]—In a lease it was provided that at the end of the term, the tenant should leave not less than 10,000 rabbits on the premises, to be taken and paid for by the landlord, at the rate of 60*l.* "per 1,000":—Held, that evidence was admissible to shew that the custom of that part of the country, in counting rabbits, was to allow six score to the hundred. *Smith* v. *Wilson*, 3 B. & Ad. 728; 1 L. J., K. B. 194.

—— **Particular Estate—Knowledge.**]—The rule of law, as to importing into the terms of a tenancy the custom of the country, does not admit of evidence of the usage of a particular estate, or the property of a particular individual, however extensive it may be, it not being shewn that the tenant was aware of it. *Womersley* v. *Dally*, 26 L. J., Ex. 219.

—— **Right to let down Surface.**]—To a statement of claim for working mines under the plaintiff's land without leaving sufficient support for the surface, the defendant pleaded in his statement of defence that he was the lessee of the mines from the lord of the manor; that the plaintiff's land had, previously to the passing of an inclosure act under which the waste of the manor was inclosed and allotted, formed part of such waste; that the lord of the manor from time immemorial had been accustomed to work the mines under the waste without leaving sufficient support for the surface, and without making any compensation for injury so caused; that by the Inclosure Act it was provided that the lord of the manor, his successors or assigns, might hold all mines and quarries lying under the waste, together with liberty of searching for, winning and working the same as fully and freely as he or they might have had and enjoyed the same in case the act had not been passed, and that without making or paying any satisfaction for so doing; and that it was further provided by the act that compensation for damage caused to any person's allotment by such working of the mines should be assessed by a justice of the peace, and should, when so assessed, be paid by the occupiers of the other allotments in the same township:—Held, that the statement of defence was good, on the ground that, whether any valid custom such as alleged in the statement of defence existed previously to the act or not, the act expressly gave to the lord of the manor and his assigns the right to let down the surface by mining without making any compensation. *Beckett* v. *Bradley* (31 L. J., Q. B. 65) not followed. *Gill* v. *Dickinson*, 49 L. J., Q. B. 262; 5 Q. B. D. 159; 42 L. T. 510; 28 W. R. 415; 44 J. P. 587.

9. Usages and Customs of Trade.

a. Principle of Admissibility.

In General.]—In all mercantile contracts and adventures, parol evidence of usage in such cases allowed. Parol evidence in the above case as to usage and custom on the written articles taken on behalf of the plaintiffs, but, not being read by them at the hearing, allowed to be called for and used by the defendants. Parol evidence on one side called for by the other. So at law, though to prove matter in writing. On mercantile contracts, evidence of merchants allowed. *Blunt* v. *Cumyns*, 2 Ves. 331.

All contracts relating to matters of trade shall

be expounded by usage of trade. *Baker* v. *Paine*, 1 Ves. 459.

When the terms of a contract are plain, usage can little affect the construction to be placed upon it, but when it is ambiguous, the usage for a long time may influence the judgment of the court, by shewing how it was understood by the original parties to it. *Boldero* v. *East India Co.*, 26 Beav. 316.

A witness may be examined as to mercantile usage, or as to the meaning of a term of art; but he must not be asked, even upon cross-examination, to construe a written document. *Kirkland* v. *Nisbet*, 3 Macq. H. L. 766.

Number of Instances.]—Mercantile usage is provable by the multiplication or aggregation of a great number of particular instances, shewing a given course of business, and a general, established understanding respecting it. *Mackenzie* v. *Dunlop*, 3 Macq. H. L. 22; 2 Jur. (N.S.) 957; 4 W. R. 815.

If A. gives an iron scrip note to B., and B. sells it to a third party, that third party may prove that the document has, in the usage of trade, an import not expressed on the face of it. *Ib.*

But such third party cannot put a special construction on the document by proving that, in the contract between A. and B., there was a specialty not actually appearing on the face of the document. *Ib.*

In order to prove that a particular usage exists in a trade carried on at A., evidence that the usage prevails at B., where the same trade is carried on, is admissible, provided it is in the vicinity of A., and there is an interchange of the trade in question between the two places. *Plaice* v. *Allcock*, 4 F. & F. 1074.

In order to prove a usage in a particular trade, it must be shewn that the usage is certain and reasonable, and so universally acquiesced in that everyone engaged in the trade knows it, or might know it if he took the trouble to inquire. *Ib.*

In an administration action a horsedealer made a claim for charges connected with the purchase and sale of horses for the testator, pursuant to agreement. He alleged that he had not sold the horses on commission as agent, but on the terms that he should pay the testator a fixed sum for each horse, and sell it again on his own account, retaining any difference as profit; and that this was the custom of all horsedealers of good standing:—Held, that evidence of the course of dealing of other horsedealers was admissible to show that the alleged agreement not unreasonable. *Leigh, In re, Rowcliffe* v. *Leigh*, 6 Ch. D. 256; 37 L. T. 557; 25 W. R. 783.

New Usage.]—In respect to evidence of mercantile usage, to support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these grounds becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in, that it may be reasonably presumed to be an ingredient imported by the parties into their contract. *Juggomohun Ghose* v. *Manickchund*, 7 Moore, Ind. App. 263.

Particular Place.]—Evidence of the usage of a particular place, to add to or in any manner to effect the construction of a written contract, is admitted only on the principle that the parties who made the contract were both cognisant of the usage, and are presumed to have made the agreement with reference to it. *Kirchner* v. *Venus*, 12 Moore, P. C. 361; 5 Jur. (N.S.) 395; 7 W. R. 455.

No such presumption arises, if one of the parties is ignorant of such usage or custom. *Ib.*

Goods were shipped at Liverpool for Sydney. By a bill of lading the goods were made deliverable to the shipper's order or assigns, "he or they paying freight for the goods here as per margin"; and in the margin the stated amount for freight was made payable in Liverpool to M. (who was not the shipowner) one month after the sailing of the vessel:—Held, that, as against an indorsee for value of the bill of lading, the master could not detain the goods at the port of delivery on the ground of non-payment of the freight, although the jury found that, by the usage of Liverpool, the shipowner does not lose his lien for the freight by making it payable at the port of shipment. *Ib.*

Such a local usage cannot bind a bonâ fide holder for value without notice. *Ib.*

Reasonableness.]—A custom or usage of trade, to be binding, must be reasonable, and is not so if it is such as honest and rightminded men would deem unfair and unrighteous. *Paxton* v. *Courtnay*, 2 F. & F. 131.

To explain, not vary.]—Evidence of general usage in the trade to which a contract refers is admissible to interpret the contract. But, to vary the ordinary meaning of plain words, such evidence must be clear and irresistible. *Lewis* v. *Marshall*, 7 Man. & G. 729; 8 Scott (N.R.) 477; 13 L. J., C. P. 193; 8 Jur. 848.

A custom cannot vary or alter the construction of written documents. *Menzies* v. *Lightfoot*, 40 L. J., Ch. 561; L. R. 11 Eq. 459; 24 L. T. 695; 19 W. R. 578.

b. What Customs.

Bankers Selling Stock.]—Evidence of the course of business and custom of London bankers is admissible, to explain the authority meant to be given to a London banker by a power of attorney to sell stock sent through a country broker. *Adams* v. *Peters*, 2 Car. & K. 723.

Broker's Commission.]—The defendant, a shipowner, being desirous of chartering a vessel, the plaintiff, a shipbroker, introduced him to S., another broker, who introduced the defendant to L., who mentioned to B. that the charter was wanted, and through the negotiations of B. with the defendant, D. chartered the vessel. The plaintiff sued for commission, alleging that an "introducing broker" was entitled by custom to a share of the commission. The plaintiff's counsel proposed to ask a witness the following question, "What is the custom with regard to payment of broker's commission, when a broker introduces another broker to a shipowner, who subsequently negotiates with the broker introduced?"—Held, that the evidence was properly rejected. *Gibson* v. *Crick*, 1 H. & C. 142; 31 L. J., Ex. 304; 6 L. T. 392; 10 W. R. 525.

The defendants, who were shipbrokers, being employed by an agent of the French government to procure for them the charter of two ships, L., who was also a shipbroker, informed the defendants of two ships, called the "New York" and the "Glasgow," which might be chartered. After some negotiation and correspondence between L., the defendants, and the owners of the ships, the "New York" was chartered for six months, and the defendants wrote to L. stating, that, "in consideration of his having assisted them in procuring the charter of the 'New York' they engaged to pay him a commission of 2½ per cent." The "Glasgow" was afterwards chartered, and the charter of the "New York" was renewed for another six months, and L. then claimed commission at the same rate on the charter of the "Glasgow," and also on the renewed charter of the "New York":—Held, first, that evidence was admissible of a custom among shipbrokers that an "introducing broker" should receive renewed commission on every renewal of a charter effected through him, since such a custom was not inconsistent with the written agreement. *Allan* v. *Sundius*, 1 H. & C. 123; 31 L. J., Ex. 307; 6 L. T. 359; 10 W. R. 648.

Held, secondly, that it should have been left to the jury to say whether the agreement to pay commission extended also to the Glasgow. *Ib.*

Terms of Hiring.]—By a written contract the plaintiff agreed to perform at the defendant's theatre, and the defendant agreed to engage her for three years and pay her a salary of 5*l.*, 6*l.* and 7*l.* per week in those years respectively:—Held, that parol evidence was admissible to shew that, according to the uniform usage of the theatrical profession, the plaintiff was to be paid only during the theatrical season, i.e. during the time when the theatre was open for performance in each of those years. *Grant* v. *Maddox*, 15 M. & W. 737; 16 L. J., Ex. 227.

Where, by a written contract, a workman engages to work at a particular trade for a year, parol evidence may be given, that, by the custom of the trade, the workman is entitled to certain holidays in the course of the year, for as the contract is in general terms, and does not specify the particular times of service, such evidence explains and does not contradict the written contract. *Reg.* v. *Stoke-upon-Trent*, D. & M. 357; 5 Q. B. 303; 13 L. J., M. C. 41; 8 Jur. 34.

An agreement was entered into between A. and B. in the following terms:—"A. engages to serve B. as agent or representative, at the salary of 150*l.* per annum; also provided, at the end of the year, B. finds A. has done sufficient business to justify him in recompensing, by making up his salary to 180*l.* to do so, being a donation of 30*l.* to his present stipulated amount of 150*l.*" It being proved at the trial that, by a general custom of the trade, a yearly hiring is determinable by a month's notice at any time:—Held, that there was nothing in the proviso to exclude the application of the custom to the particular case. *Parker* v. *Ibbetson*, 4 C. B. (N.S.) 346; 27 L. J., C. P. 236; 4 Jur. (N.S.) 536; 6 W. R 519.

In an action upon the agreement charging a wrongful dismissal within the year, the judge left it to the jury to say whether the proviso was meant by the parties to exclude the custom:—Held, a misdirection, there being no ambiguity in the contract, and its construction being for the court. *Ib.*

Usage of Stock Exchange—Unreasonableness.]—An alleged usage of the Stock Exchange, relied upon as authorising stockbrokers who are entitled to sell stock or shares of a customer for the realisation and payment of money due to them by such customer, to take over to themselves, at the price of the day, stock or shares of the customer, for which there is an inadequate demand, or where a forced sale would lower the selling price:—Held, unreasonable, and incapable of being supported against a customer who was not proved to be acquainted with the existence of such alleged usage. *Hamilton* v. *Young*, 7 L. R., Ir. 289.

The defendant, a stockbroker, who had undertaken to sell shares of a joint stock bank for the plaintiff, a shareholder, sold them to a jobber on the Stock Exchange and sent an advice-note of such sale to the plaintiff, but in accordance with the custom of the Stock Exchange, the bought and sold notes between the defendant and the jobber omitted to state the name of the registered proprietor of the shares, as required by 30 and 31 Vict. c. 29, s. 1, by reason of which the contract for sale was void, and the bank having stopped, and an order for its winding-up having been made before the day on which the jobber was entitled to name the person willing to be the purchaser, the contract for sale was repudiated, and the plaintiff remained the holder of the shares:—Held, that the defendant had committed a breach of duty in not making a valid contract for sale, notwithstanding the custom of the Stock Exchange to disregard the said statute, as such custom was both unreasonable and illegal, and that for such breach of duty the plaintiff was entitled to recover from the defendant by way of damages the price at which the shares had been sold. *Neilson* v. *James*, 51 L. J., Q. B. 369; 9 Q. B. D. 546; 46 L. T. 791—C. A.

—— **To explain Charter as to Primage.**]—A charter of Jac. 2 granted to the corporation of the master pilots and seamen of Newcastle-on-Tyne primage described in the charter as an ancient duty upon goods brought by ship into the Tyne, or any of the creeks of Newcastle, of which Sunderland was to be rated and accounted, in manner and form following; that is to say, aliens and strangers born and all other persons arriving with ships in Newcastle within any of the creeks, and not belonging to the same, to pay before they departed with their ships, and every free merchant and inhabitant of Newcastle arriving in the Tyne with a ship within ten days after landing the goods. The charter also granted to the corporation all other perquisites, ancient duties and profits which they had heretofore lawfully had and enjoyed; and also provided that the sums granted by the charter should be in lieu of all other duties theretofore received:—Held, first, that the charter was not inconsistent with the claim of primage in respect of goods imported into Sunderland by merchants resident there; secondly, that evidence of usage was admissible in support of the claim. *Bradley* v. *Newcastle* (*Pilots, &c.*), 2 El. & Bl. 427; 23 L. J., Q. B. 35.

c. As to Parties to Contracts.

Bill Brokers—Liability.]—It being proved to be the common and almost invariable practice of bill brokers in the city of London, not to indorse

each bill of exchange which they have discounted for a customer when they re-discount it with their bankers, but to give to the bankers a general garantee for all bills which they re-discount with them :—Held, that when an accommodation bill is drawn and accepted for the purpose of raising money for the drawer and the acceptor, the drawer in discounting the bill with bill brokers in the city of London has an implied authority from the acceptor to deal with them in the ordinary course of their business, and, consequently, that the bill brokers have an implied authority from the acceptor to make themselves liable on the bill under their guarantee to their bankers, and are, in the event of the bankruptcy of the acceptor, entitled to prove against his estate for what they have paid to the bankers in respect of the bill under their guarantee. *Bishop, Ex parte, Fox, In re*, 50 L. J., Ch. 18 ; 15 Ch. D. 400 ; 43 L. T. 165 ; 29 W. R. 144—C. A.

Held, also, that the bill brokers are entitled to prove against the estate of the acceptor for interest upon the amount which they have paid under their guarantee. *Ib.*

Petre v. *Duncombe* (2 L. M. & P. 107) and *Hitchman* v. *Stewart* (3 Drew. 271) approved and followed. *Ib.*

Principal or Agent—Fruit Market.]—M. and W., brokers, being employed by P., to purchase raisins, sent the following, addressed to F. and D. :—"We have this day sold for your account to our principal to arrive per steamer from Trieste 50 to 70 tons of good sound Chesne raisins, usual market terms. Customary allowances. M. and W., brokers." A portion of the raisins was accepted and paid for by M. and W. on behalf of P., whose name was declared before delivery. P. having subsequently made default in accepting the residue :—Held, in an action by F. and D. against M. and W. for not accepting the residue, that evidence of a custom in the fruit market, that if the principal's name is not declared on the contract, the broker is personally liable on default of the principal, was admissible. *Fleet* v. *Murton*, 41 L. J., Q. B. 49 ; L. R. 7 Q. B. 126 ; 26 L. T. 181 ; 20 W. R. 97.

Held, also (dubitante Cockburn, C.J.), that evidence of an analogous usage in the colonial trade was properly admitted to prove the usage in the fruit trade. *Ib.*

—— **Hide Market.**]—A written contract made by brokers on behalf of undisclosed principals for the sale of hides provided that "if any difference or dispute shall arise under this contract, it is hereby mutually agreed between the sellers and buyers that the same shall be settled by the selling brokers, whose decision in writing should be final and binding on both sellers and buyers." In an action against the brokers in respect of inferior hides delivered under the contract, the buyers made a claim for the breach against the brokers as principals by custom of the trade :—Held, that evidence of a custom of the trade that a broker who does not disclose his principal is personally responsible for the performance of the contract and liable for the breach was rightly rejected, as such custom was inconsistent with the arbitration clause, which would, if the custom were incorporated, make the brokers judges in their own cause. *Barrow* v. *Dyster*, 13 Q. B. D. 635 ; 51 L. T. 573 ; 33 W. R. 199.

—— **Hop Market.**]—The defendants, who were hop-brokers, gave to the plaintiffs the following sold-note : "Sold by Ongley & Thornton (the defendants) to Messrs. Pike, Sons, & Co., for and on account of owner, 100 bales . . . hops . . . (Signed) for Ongley & Thornton, S. T." In an action for non-delivery of hops according to sample, the plaintiffs sought to make the defendants personally liable on the above contract, and tendered evidence to shew that by the custom of the hop trade, brokers who do not disclose the names of their principals at the time of making the contract are personally liable upon it as principals, although they contracted as brokers for a principal. No request was made by the plaintiffs to the defendants to name their principal :—Held, that the custom gave a remedy against the brokers as well as against the principals, that it was not in contradiction of the written contract, and that evidence of the custom was properly admitted at the trial. *Hutchinson* v. *Tatham* (L. R. 8 C. P. 482) considered. *Pike* v. *Ongley*, 56 L. J., Q. B. 373 ; 18 Q. B. D. 708 ; 35 W. R. 534—C. A.

—— **Charter-party.**]—An agent contracting and signing, as such, for an undisclosed principal, may be rendered personally liable on the contract, if a custom among merchants in the course of ordinary trade constantly entering into similar contracts, can be shewn to exist, that an agent so signing shall be personally liable in the event of his not disclosing his principal's name within a reasonable time, and evidence is admissible to prove the existence of such a custom, and, by inference, the implied presence of such a term in the written contract—a liability so incurred not being considered as inconsistent with the general terms of such a contract. *Hutchinson* v. *Tatham*, 42 L. J., C. P. 260 ; L. R. 8 C. P. 482 ; 29 L. T. 103 ; 22 W. R. 18.

In an action upon a charter-party expressed to be made between the shipowners, and T. & Co., "as agents to merchant," and signed "T. & Co., as agents for merchant" :—Held, that although T. & Co. were primâ facie not personally liable upon this contract, yet that parol evidence was admissible to prove a custom of trade rendering agents who enter into such an agreement for an unnamed principal themselves personally liable if the name of their principal was not disclosed within a reasonable time, and that the jury was justified in finding a delay of two months before the name of the principal was given, unreasonable. *Ib.* See also *Jones* v. *Jackson*, 22 L. T. 828.

—— **London Dry Goods Market.**]—According to the usage of the London dry goods market, a broker who buys for an undisclosed principal is personally liable to the seller for the price of the goods. *Imperial Bank* v. *London and St. Katharine's Dock Co.*, 46 L. J., Ch. 335 ; 5 Ch. D. 195 ; 36 L. T. 233.

—— **Liverpool Wool Market.**]—A usage in the wool trade in Liverpool, that, when a broker is employed to buy wool, he may either contract in the name of his principal, or, at the request of the seller, may (without communicating the fact to his principal) make himself personally responsible for the price :—Held, a good and reasonable usage. *Cropper* v. *Cook*, L. R. 3 C. P. 194 ; 17 L. T. 603 ; 16 W. R. 596.

—— **Oil Market.**]—D. M. & Co., brokers in London, being employed by S. to purchase oil,

dealt with T. & M., brokers, who were employed by the plaintiff to sell oil, without either broker disclosing the names of their principals. D. M. & Co. delivered to T. & M. a note as follows:—"Sold this day for Messrs. T. & M. to our principal, ten tons of oil," specifying the terms and price, which was above 10*l*. This note was signed D. M. & Co., brokers. Quarter per cent. brokerage to D. M. & Co. D. M. & Co. did not disclose the name of their principal, S., till after the lapse of an unreasonable time, when S. had become insolvent. The plaintiff sued D. M. & Co. for not accepting the oil, laying the sale as by himself to D. M. & Co. D. M. & Co. denied the contract; on the trial, the plaintiff proved a custom in the trade that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as principal:—Held, that evidence of the custom was admissible, as not contradicting the written instrument, but explaining its terms, or adding a tacitly implied incident; and that the note thus explained was a sufficient memorandum of the contract sued upon, to satisfy the Statute of Frauds, and that the action lay. *Humfrey* v. *Dale*, El. Bl. & El. 1004; 27 L. J., Q. B. 390; 5 Jur. (N.S.) 191; 6 W. R. 854—Ex. Ch.

d. Mode, Amount and Time of Payment.

Imperfect Contract.]—The defendant ordered goods by letter, which did not mention any time for payment; the plaintiff sent the goods and an invoice:—Held, that parol evidence was admissible to shew that the goods were supplied on credit, the letter not being a valid contract within the Statute of Frauds. *Lockett* v. *Nicklin*, 2 Ex. 93; 19 L. J., Ex. 403.

"During next Two Months."]—A contract was entered into between the plaintiffs and the defendants, on the 17th June, 1872, whereby the latter agreed to supply the former with a certain quantity of puddled iron, "for immediate delivery, or say during the next two months." The defendants did not deliver any iron in June or July, but on the 15th August they sent a small portion of iron to the plaintiffs, and on the 21st of the latter month the plaintiffs, acting on the notion that under the contract the time for the delivery had expired on the 17th of that month, wrote to the defendants that as the time for delivery had expired, they would receive no more iron, and they afterwards commenced the present action for breach of contract in not delivering the iron on or before the 17th August. At the trial the judge received evidence that in the iron trade a usage or custom prevails whereby the entire months of July and August would be included in the terms "during the next two months":—Held, that the evidence was properly admissible. *Bissell* v. *Beard*, 28 L. T. 740.

Delivery upon Payment.]—In a contract for the sale of thirty bales of goats' wool, containing the following stipulation:—"Customary allowance for tare and draft, and to be paid for by cash in one month less 5 per cent. discount"; evidence is inadmissible, to shew that by the usage of the trade vendors are not bound under similar contracts to deliver wool without payment, for such evidence seeks to annex to the contract an incident inconsistent with its terms. *Spartali* v. *Benecke*, 10 C. B. 212; 19 L. J., C. P. 293. Overruled in part, *Field* v. *Lelean*, infra.

Measurement.]—The plaintiffs contracted (in writing) to build for the defendant the front and back walls of a house "for the sum of 3*s*. per superficial yard of work nine inches thick, and finding all materials, deducting all lights." The lower part of the walls, to the height of eleven feet, was of stone two feet thick, the remainder of brick, fourteen inches thick:—Held, that evidence of the usage of builders at the place to reduce brickwork for the purpose of measurement to nine inches, but not to reduce stonework unless exceeding two feet in thickness, was admissible, and that the proper construction of the contract was that it provided only for the price of the brickwork, leaving the stonework to be paid for on a quantum meruit. *Symonds* v. *Lloyd*, 6 C. B. (N.S.) 691.

Weekly Accounts.]—In a contract under seal, by which a plaintiff contracted to build for the defendant a house and premises, it was provided that "no alterations or additions should be admitted unless directed by the defendant's architect, by writing, under his hand, and a weekly account of the work done thereunder should be delivered to the architect every Monday next ensuing the performance of such work." In an action on the contract:—Held, that parol evidence was admissible to shew that by the usage of the building trade "weekly accounts" meant accounts of the day work only, and did not extend to extra work capable of being measured. *Myers* v. *Sarl*, 30 L. J., Q. B. 9; 7 Jur. (N.S.) 97; 9 W. R. 96.

Warehouse Rent.]—A written contract for the sale of goods was silent as to the time for which warehouse room rent was allowed by the seller to the purchaser:—Held, that it was competent for either party to shew by parol evidence what time is allowed in such transactions by general custom, but not to shew that the parties themselves agreed by word of mouth that a certain time should be allowed. *Fawkes* v. *Lamb*, 31 L. J., Q. B. 98; 8 Jur. (N.S.) 385; 10 W. R. 348.

Sale of Shares.]—A broker in mining shares sold to another broker certain of them, under this sold note:—"June 18, 1859.—Sold 250 shares in Wheal Charlotte, at 2*l*. 5*s*. per share; 562*l*. 10*s*.; for payment, half in two months and half in four months." The bought note agreed mutatis mutandis. In an action by the vendor against the vendee for not accepting the shares, evidence of the usage of mining sharebrokers, that on such contracts for sales the delivery of the shares is to take place at the time fixed for the payment of the price, and at no other time, is admissible. *Field* v. *Lelean*, 6 H. & N. 617; 30 L. J., Ex. 168; 7 Jur. (N.S.) 918; 4 L. T. 121; 9 W. R. 387—Ex. Ch.

Re-exchange.]—A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when bills are returned from the colonies dishonoured, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange. *Willans* v. *Ayers*, 47 L. J., P. C. 1; 3 App. Cas. 133; 37 L. T. 732—P. C.

In an action against the drawer of a bill of exchange drawn and indorsed in England, and payable abroad, and dishonoured, evidence is not admissible to prove a usage among merchants

here to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill—this being a usage which in terms contradicts the written instrument. *Suse* v. *Pomp*, 8 C. B. (N.S.) 538; 30 L. J., C. P. 75; 7 Jur. (N.S.) 166; 3 L. T. 17; 9 W. R. 15.

Interest.]—Neither by the English nor Hindoo law, unless there is a mercantile usage, can interest be imported into a contract which contains no stipulation to that effect. *Juggomohun Ghose* v. *Kaisarcechund*, 9 Moore, Ind. App. 256.

Sale of Timber—Duty.]—By the custom of trade, when timber is sold in bond at a sale by auction in London, the buyer contracts to buy at a price including the duty payable, and he may, by giving notice on the following day so to do, elect to take the timber in bond, and if he does so, he is then only bound to pay the price less the duty. On the 10th February, 1860, the defendant bought timber in bond at a sale by auction at a price including duty, the contract to be completed within fourteen days, and the Chancellor of the Exchequer on the evening of that day gave notice that a resolution would be moved to reduce the duty on timber, and he accordingly moved and carried out such resolution on the 8th March. An act of parliament passed to that effect on the 5th May, the reduction commencing from the 8th March. On the 11th February the defendant gave notice to the seller that he elected to take the timber in bond, and on the 24th February offered the price less the then duty, which the seller refused to take, and he also refused to give a delivery order for the timber. In an action by him to recover the price of the timber:—Held, that the custom was admissible, and that the defendant was entitled to judgment. *Clarke* v. *Smallfield*, 4 L. T. 405.

Sales by Sample.]—In an action for the price of tobacco sold, evidence is admissible to shew that, by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes. *Syers* v. *Jonas*, 2 Ex. 111.

e. Quality and Description of Goods.

Implied Contract that Goods are of Vendor's make, if he be a Manufacturer.]—On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make. The plaintiffs, who were manufacturers but not dealers in iron, by a written contract, on the margin of which was their trade-mark (a crown with their initials), contracted to sell to the defendants, who thereby contracted to buy of the plaintiffs, 2,000 tons of ship-plates of the quality known as "crown," to pass Lloyd's survey to be delivered monthly at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the contract by delivery of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract. At the trial the defendants tendered evidence to shew that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. The learned judge at the trial rejected this evidence, and gave judgment for the plaintiffs:—Held, that such evidence was improperly rejected. *Johnson* v. *Raylton*, 50 L. J., Q. B. 753; 7 Q. B. D. 438; 45 L. T. 374—C. A.

Meaning of "Best Oil."]—The plaintiff sold to the defendant "fifty tons best palm oil, expected to arrive, per the Chalco, at 40*l.* 10*s.* per ton; wet, dirty, and inferior oil, if any, at a fair allowance." The oil, on arrival, contained one-fifth only of best oil. In an action for not accepting the oil, oral evidence is admissible to shew that, according to mercantile usage, the contract was satisfied if the oil delivered contained a substantial portion of "best oil"; and such evidence is for the jury. *Lucas* v. *Bristow*, El. Bl. & El. 907; 27 L. J., Q. B. 364; 5 Jur. (N.S.) 68; 6 W. R. 685.

"Savannah Timber."]—The plaintiff sold to the defendant, "deliverable in London, ex Ion, from Savannah, 400 loads of pitch pine timber, the timber warranted of fair average quality, to be taken of fair average of the cargo." Evidence was given that pitch pine timber is an article which comes from several parts in Central America, and that pitch pine timber from Darien has more heart in it, being better butted, and with fewer holes than that from Savannah:—Held, that the evidence was admissible to explain the contract, and that upon this evidence the contract must be construed as for timber of a fair average of Savannah pitch pine timber. *Jones* v. *Clark*, 2 H. & N. 725; 27 L. J., Ex. 165.

Wheat.]—By a contract made at S., between A., who resided at S., and B., who resided in London, B. sold to A. a cargo of St. Gilles Marais wheat free on board at a French port. The grain was unknown at S., but is known elsewhere in the trade to contain a mixture of barley. The judge rejected evidence to prove this, unless it could also be proved that this fact was well known at S.:—Held, that the ruling was wrong. *Ryder* v. *Woodley*, 10 W. R. 294.

Gambier.]—Upon a contract for the sale of bales of gambier, expected to arrive by a particular ship, evidence is admissible to shew, that, by usage of the trade, a bale of gambier is understood to mean a package of a particular description. *Gorrissen* v. *Perrin*, 2 C. B. (N.S.) 681; 27 L. J., C. P. 29; 3 Jur. (N.S.) 867; 5 W. R. 709.

f. Invoices, Bills of Lading, Charter-parties and Insurance Policies.

Invoices.]—An invoice worded to sell goods at "2*l.* 10*s.* per cent. monthly," may be explained by parol evidence, shewing the meaning of the words by the custom of the trade. *Schreiber* v. *Horsley*, 11 Jur. (N.S.) 675.

So, to shew that a person whose name appears at the head of an invoice as vendor is not in fact

a contracting party. *Holding* v. *Elliot*, 5 H. & N. 117; 29 L. J., Ex. 134; 1 L. T. 381; 8 W. R. 192.

Receipt for Goods.]—Evidence of the usage of trade is admissible to shew the meaning of ambiguous words in a packer's receipt for goods. *Bowman* v. *Horsey*, 2 M. & Rob. 85.

Bills of Lading—Custom of Liverpool—Discount.]—In an action for freight by a shipowner against the indorsee of a bill of lading, to whom goods had been delivered at Liverpool, and who had accepted them, the bill of lading making them deliverable, "he paying freight for them five-eighths of a penny sterling per pound, with 5*l.* per cent. primage and average accustomed": —Held, that evidence was admissible that by the custom of Liverpool the shipowner was entitled to a deduction of three months' discount from the freight; though such custom applied only to goods coming from ports in the southern states of America. *Brown* v. *Byrne*, 3 El. & Bl. 703; 2 C. L. R. 1599; 23 L. J., Q. B. 313; 18 Jur. 700; 2 W. R. 471.

There was a custom at Liverpool of allowing a discount of three months on freights payable on all bills of lading from ports in North America; when Texas was annexed to the United States of America, 1846, the custom was in practice extended to ports in that territory:—Held, that this was evidence from which a jury might infer that the custom extended to ports in California after that country was also annexed. *Falkner* v. *Earle*, 3 B. & S. 360; 32 L. J., Q. B. 124; 9 Jur. (N.S.) 847; 7 L. T. 672; 11 W. R. 307.

—— **Custom of London—Discharge of Goods.**]—Goods were shipped under a bill of lading at Calcutta to be delivered in like good order and condition from the ship's tackles at the port of London. On arrival in the port of London the consignees demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to certain dock charges, which he paid. In an action by the consignee to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (the defendants' ship being such) coming into the port of London and using the docks, to discharge the goods on the quay, and thence into lighters:—Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge the goods on to the quay, and was not liable for the charge sought to be recovered. *Marzetti* v. *Smith*, 49 L. T. 580; 5 Asp. M. C. 166—C. A. Affirming 1 Cab. & E. 6.

A bill of lading stipulated (inter alia) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agents, &c., the merchandise to be received and delivered according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within the twenty-four hours, and it was landed on the quay:—Held, that the custom was not inconsistent with the terms of the bill of lading, and that therefore the merchant was bound to pay the expenses incurred in weighing out the cargo and the quay rates. *Aste* v. *Stumore*, 1 Cab. & E. 319—C. A.

Rate of Freight.]—By a bill of lading of wool from Odessa, freight was to be paid in London, on delivery, at the rate of 80*s.* per ton of 20 cwt. gross weight, tallow, and other goods, grain or seed, in proportion, as per London Baltic printed rates:—Held, that extrinsic evidence was admissible to shew that, by the usage of the trade, the meaning of the bill of lading was, that 80*s.* per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian Steam Navigation Trading Co.* v. *Silva*, 13 C. B. (N.S.) 610.

Charter-parties—Measurement of Cargo, how ascertained.]—By a charter-party it was agreed that "a ship should load a cargo, and proceed to a port in Great Britain, and deliver the same on being paid freight at and after the rate of 35*s.* per 180 English cubic feet taken on board, as per Gothenburg custom":—Held, that the freight was to be ascertained by measuring the cargo, according to the method used at Gothenburg, and not according to the method used at the port of discharge. *The Skandinav*, 51 L. J., P. 93—C. A.

In an action upon a charter-party for freight upon goods shipped at Bombay for London, stating that cotton was to be "calculated at fifty cubic feet per ton":—Held, that evidence was admissible, first, on the part of the defendant to shew a usage in the trade, that the measurement was to be calculated when the cotton was taken from a screw at Bombay, though it appeared that it afterwards expanded considerably before it was shipped, and again when it was unloaded at the port of delivery; secondly, on the part of the plaintiff, to shew that the captain of the vessel refused to receive the cotton according to such measurement, and that he measured it when on board, and delivered an account of such admeasurement to the shippers. *Bottomley* v. *Forbes*, 6 Scott, 816; 5 Bing. (N.C.) 121; 1 Arn. 481; 8 L. J., C. P. 85; 2 Jur. 1016.

—— **Freight.**]—A., a shipbroker, engaged with a shipowner, to have a full cargo for the ship, the rates of freight for which would average 40*s.* per ton, and at least nine cabin passengers, passage-money to average 75*l.* The contract was fulfilled as to the cabin passengers, but the average rate of freight for goods put on board by A. amounted to 32*s.* only per ton; he shipped on board, however, several steerage passengers for the voyage, the passage-money paid by whom, after deducting the expense of their diet, &c., when added to the freight of the cargo properly so called, made the average earnings of the whole ship, per ton, amount to more than 40*s.*:—Held, that, as this was an unusual contract, evidence was not admissible to shew that the terms "cargo" and "freight," used with reference to the voyage on which the ship was engaged, would, by the general usage and course of the trade, be considered to comprise steerage passengers and the net profit arising from their passage-money. *Lewis* v. *Marshall*, 7 Man. & G. 729; 8 Scott (N.R.) 477; 13 L. J., C. P. 193; 8 Jur. 848.

—— **Packing.**]—A ship was chartered to bring home a cargo of wool, tallow, bark, or other legal merchandise: bark not to exceed fifty tons, tallow and hides not to exceed eighty tons, "and to deliver the same, on being paid freight as follows:—for wool, one penny half-penny per pound pressed, and one penny halfpenny and one-eighth of a penny per pound unpressed"; for the other three articles separate rates were fixed, and the captain was to sign bills of lading at any rate of freight, without prejudice to the charter-party. The ship returned with a full cargo, consisting of a small portion only of wool, and the residue, tallow, bark, hides and other legal merchandise:—Held, that there was no ambiguity upon the face of the charter-party to admit parol evidence for the purpose of shewing who was to pay for pressing any wool that might be shipped. *Cockburn* v. *Alexander*, 6 C. B. 791; 18 L. J., C. P. 74; 13 Jur. 13.

By a charter-party the charterer agreed to load on board a vessel at Trinidad a full and complete cargo of sugar, molasses, and other produce. It was the custom at Trinidad to load sugar in hogsheads and molasses in puncheons, in which mode they were carried more conveniently and with less loss to the merchant, and that a full and complete cargo of sugar and molasses meant a cargo so packed:—Held, that the custom was admissible in evidence; for it was applicable to such a charter-party, and did not control but only explained the contract, which ought to be construed with reference to the usage at the port of lading, and that the custom was reasonable and good in law. *Cuthbert* v. *Cumming*, 11 Ex. 405; 24 L. J., Ex. 310; 1 Jur. (N.S.) 686; 3 W. R. 553—Ex. Ch.

—— **State of Corn Trade.**]—By a charter-party it was agreed that the good ship the "Elizabeth," A 1, then bound to Havre, should with all convenient speed sail and proceed to the north of England for coals, and thence proceed to Limerick, where the charterer engaged to put on board a full cargo of grain or other lawful merchandise for London. The charter-party contained the usual exception of the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation. In consequence of sea perils the vessel was so long delayed on her voyage to the north of England, that she did not arrive at Limerick until the grain export trade from that place was over, and she had in the meantime run out of her letter. In an action against the charterer for not loading a cargo:—Held, that there was no warranty that the ship should continue A 1; that evidence as to the state of the corn trade at Limerick was irrelevant and inadmissible; and that the exception as to the dangers of the seas, &c., was inapplicable. *Hurst* v. *Usborn*, 18 C. B. 144; 25 L. J., C. P. 209; 4 W. R. 458.

—— **Duty of Agent—Commission.**]—A declaration stated that by charter-party it was agreed between the owner of a ship called the "Maggie," being in the London Docks, and the plaintiffs, that the ship should load a cargo, and therewith proceed to Hong Kong and deliver the same on being paid freight, "the ship to be consigned to the charterers' agents in China free of commission on this charter." Averments, that according to the custom of merchants in London, whenever a ship chartered in London for China is agreed to be consigned to the charterers' agents, whether consigned free of commission on that charter or not, it is the right and duty of such agents, as the consignees of the ship, to procure a charter or cargo for the ship for any voyage from such port, and they are entitled to be paid the usual broker's commission on the amount of freight payable under such contract, unless excluded by special contract; but in case the owners of the ship procure a charter or a cargo for the ship for a voyage from such port without any default of the consignees, the consignees are entitled to the broker's commission on any freight payable under such charter-party, unless such right is excluded by special contract. Breach, that although the ship was loaded and arrived in China, and the plaintiffs' agents, as consignees performed their duty free of commission on the outward voyage and cargo, and were ready to procure a charter or a cargo from Hong Kong, and although the plaintiffs performed all conditions precedent, the defendant would not permit the plaintiffs' agents to procure a charter or cargo for any voyage from Hong Kong, and the defendant, without any default of the plaintiffs' agents, procured a cargo to the United Kingdom, the usual broker's commission on which amounted to a large sum, yet the defendant had not paid or allowed the same to the plaintiffs or their agents, whereby the plaintiffs were obliged to pay their agents a compensation in respect thereof:—Held, that the declaration was bad, since the custom did not explain or annex an incident to the contract, but added a new term to it. *Phillipps* v. *Briard*, 1 H. & N. 21; 25 L. J., Ex. 233; 4 W. R. 486.

—— **Unloading—Custom of Port.**]—Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge afloat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself. A vessel was chartered to proceed with a cargo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge afloat." The vessel was ordered to Lowestoft. Her draft of water, when loaded, was such that she could not lie afloat in Lowestoft harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo:—Held, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. *The Alhambra*, 50 L. J., P. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655; 4 Asp. M. C. 410—C. A.

Held, also, that evidence that it was the custom of the port of Lowestoft for vessels to be lightened in the roads before proceeding into the harbour was not admissible. *Ib.*

By a charter-party the vessel was to deliver at H., "or so near thereto as she could safely

get"; to discharge as customary; the cargo to be brought to and taken from alongside the ship at merchant's risk and expense. The draft of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel, part of her cargo was discharged into lighters at S. and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses:—Held, that a defence alleging that by the custom of the port of H. the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a custom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. *Hayton* v. *Irwin*, 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665—C. A.

A charter-party contained two clauses, "cargo to be taken from alongside at merchant's expense," and "to be discharged according to custom of the port":—Held, that these clauses were not contradictory, and therefore evidence of custom was inadmissible to charge the shipowner with the cost of unloading. *The Nifa*, 62 L. J., P. 12; [1892] P. 411; 1 R. 540; 69 L. T. 56; 7 Asp. M. C. 324.

—— **Turn of loading and delivering.**]—The duty of providing, and making proper use of, sufficient means for the discharge of a cargo, when a ship, which has been chartered, arrives at its destination, and is ready to discharge, lies upon the charterer. But that general duty may be qualified by words in the charter-party, and by the circumstances of the case. If, by the terms of the charter-party, the charterer has agreed to discharge the ship within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it. If there is no fixed time, the law implies an agreement, on his part, to discharge the cargo within a reasonable time. *Postlethwaite* v. *Freeland*, 49 L. J., Ex. 630; 5 App. Cas. 599; 42 L. T. 845; 28 W. R. 833—H. L. (E.)

Per Lord Hatherley: When the covenant merely engages that the merchant shall with all dispatch, according to the custom of the port, unload the vessel, he will fulfil his contract if he employs all the usual methods of dispatch at the port *Ib.*

A charter party was entered into by which a vessel was to take on board a cargo of steel rails and fastenings, and proceed therewith to the port of East London, in South Africa. In the charter-party was this stipulation: "The cargo is to be discharged with all dispatch according to the custom of the port." The discharge of such a cargo could only be effected there by a warp and lighters. These were under the absolute control of a company, to which the governmental authorities had transferred all their powers. The company allowed vessels the use of the warp and lighters in turn, making no exception in favour of any vessel except mail steamers, which on arriving were provided for to the exclusion of other vessels, whether of the government or of private individuals. The ship on arriving at the port, found a great number of vessels there, the number of lighters was insufficient, and the ship could not obtain its "turn" until more than thirty-one working-days had elapsed after its arrival. There was no delay attributable to the master or crew except what was thus occasioned by the custom of the port:—Held, that in this case the shipowner was not entitled to maintain an action against the charterer for demurrage. *Ib.*

A ship being chartered to take coals to Algiers, it was stipulated in the charter-party that the ship should be unloaded, weather permitting, at a certain rate per diem, to reckon from the time of the vessel being ready to unload, and in turn to deliver. In an action by the owner against the charterers for an alleged detention, they proved that the coals were for the use of the French marine, who made special regulations with all their contractors with respect to the turn to deliver; that, according to these regulations, the delivery was in turn, and that these regulations formed part of the general regulations of the port:—Held, that the charterers had a right to prove that the contract was entered into with reference to a known recognised use of the words "in turn to deliver" among persons conversant in the trade. *Robertson* v. *Jackson*, 2 C. B. 412; 15 L. J., C. P. 28; 10 Jur. 98.

By a charter-party it was agreed that the plaintiff's vessel should proceed to the river Tyne, and on arrival there be ready forthwith "in regular turns of loading," to take on board by spout or keel, as directed, a full cargo of four keels of coal, and the remainder coke. In an action for detention in not loading the vessel with coke in a reasonable time, the judge at the trial construed the words "in regular turns of loading" to mean that the coal was to be loaded first and the coke afterwards, and he rejected evidence of usage at the port of the Tyne to enter a vessel on the fitter's list for her turn for coke, and to load coke accordingly:—Held, that such evidence was admsssible, and ought to have been received to explain the words "in regular turns of loading," as these words presented an ambiguity, and were not confined to the meaning given to them by the judge. *Schultz* v. *Leidemann*, 14 C. B. 38; 2 C. L. R. 87; 23 L. J., C. P. 17; 18 Jur. 42; 2 W. R. 35.

The defendant chartered a ship from Sunderland to Carthagena, engaging that she should "with all possible dispatch load in the South Dock, in the customary manner, from the defendant's agents, a full and complete cargo of coke, to be loaded in regular turn." In an action for not loading the ship in regular turn, pursuant to the charter-party:—Held, that evidence was not admissible to shew that, according to the custom of the port of Sunderland, under such a contract, the shipowner was bound to wait his turn according to a list kept by a coke manufacturer not named in the contract, but mentioned at the time the contract was entered into, provided reasonable dispatch was used. *Hudson* v. *Clementson*, 18 C. B. 213; 25 L. J., C. P. 234.

Insurances—Practice of Average Adjusters.] Where a ship is compelled to put into port to repair damage occasioned by a general average sacrifice, the expenses of warehousing and reshipping cargo, necessarily unloaded in order to repair, and the port and pilotage charges and other expenses on leaving the port, are the subject of a general average contribution. *Attwood* v. *Sellar*, 49 L. J., Q. B. 515; 5 Q. B. D. 286; 42 L. T. 644; 28 W. R. 604—C. A.

A long-continued practice of average adjusters

who prepare their statements according to the law as laid down by the courts is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner and owner of cargo. The defendants, who were the owners of cargo, in an action against them by the shipowner to recover a general average contribution in respect of expenses caused by the ship putting into a port of refuge, landing, storing, and reshipping the cargo, and leaving the port, alleged a custom of trade that in such a case the expenses incurred in and about warehousing the cargo were apportioned among the owners of the cargo alone, and the expenses of reshipping the cargo, port dues, &c., were borne by the owners of the ship and freight. Several witnesses were called who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by the defendants, but that, in consequence of the decision in *Attwood* v. *Sellar* (5 Q. B. D. 286), some average adjusters had altered their mode of adjustment in such a case:—Held, that this was not evidence of a custom of trade which could be left to the jury. *Svenden* v. *Wallace*, 46 L. T. 742; 30 W. R. 841; 4 Asp. M. C. 550.

A policy of assurance contained a stipulation that freight was warranted free from average under 5*l.* per cent. unless general. The interest assured was described as money advanced to the assured as owner of the ship, on account of the freight of the cargo loaded on board and subject to the risk of the voyage. Plea, that the policy was made in London, and that by custom there, insurers, on money advanced on account of freight, are not liable to make good a general average:—Held, that the custom set up in the plea was inconsistent with the terms of the written policy, which expressly stipulated that the assurer should be liable to make good such a loss, and was therefore inadmissible. *Hall* v. *Janson*, 4 El. & Bl. 500; 3 C. L. R. 737; 24 L. J., Q. B. 97; 1 Jur. (N.S.) 571; 3 W. R. 213.

—— **Custom of Lloyd's that Amount should be Payable in London.**]—The plaintiff, owner of a vessel belonging to the port of Belfast, instructed N., a Belfast insurance agent, to effect a policy of insurance on the vessel; the insurance agent, through his London agent R., effected the policy in London with the defendants, and the owner paid N. the premium in Belfast, and there received the policy from him. The defendants alleged that they carried on business at Lloyd's, in the city of London only; that they neither accepted risks, received premiums, paid losses, or had any agents out of London; that the policy was underwritten at Lloyd's in consequence of a proposal made by R. at Lloyd's; that the premium was paid and the policy delivered by and to R. in London; that they did not, nor did N. or any other person on their behalf, receive the premium or deliver the policy at Belfast, and that, in accordance with a well-known custom of Lloyd's, any money which might become due under the policy was payable at Lloyd's, and not elsewhere. The plaintiff alleged that he had no notice or knowledge of that custom before effecting the policy. The defendants refused to pay the amount of the policy to the plaintiff:—Held, that the plaintiff, who had no knowledge or notice of the alleged custom before effecting the policy, was not bound thereby, that the defendants were bound to pay the amount (if any) due on the policy to the plaintiff in Belfast, that the non-payment constituted a breach of their contract with the plaintiff, within the jurisdiction, and that he was entitled to an order for leave to serve a writ to recover the amount of the policy on the defendants out of the jurisdiction. *Ward* v. *Harris*, 8 L. R., Ir. 365—C. A.

—— **As to Set-off.**]—The usage of practice of Lloyd's Coffee-house, that persons insuring there are bound to admit payment of a loss to them, made by way of set-off, between their broker and underwriter, of the premiums due to the underwriter, against the loss, does not apply where they are not shewn to be personally cognisant of such usage. *Sweeting* v. *Pearce*, 7 C. B. (N.S.) 449; 6 Jur. (N.S.) 753. Affirmed on appeal, 9 C. B. (N.S.) 534; 30 L. J., C. P. 109; 7 Jur. (N.S.) 800; 5 L. T. 79; 9 W. R. 343—Ex. Ch.

—— **As to Deck Cargoes.**]—A custom that underwriters are not liable, under the ordinary form of policy, for general average in respect of the jettisons of goods stowed on deck, is a valid custom, and does not contradict the terms of the policy. *Miller* v. *Tetherington*, 6 H. & N. 278; 7 Jur. (N.S.) 214; 3 L. T. 893; 9 W. R. 437. Affirmed on appeal, 7 H. & N. 954; 31 L. J., Ex. 363; 8 Jur. (N.S.) 1039; 9 L. T. 231; 10 W. R. 356—Ex. Ch.

10. As to Terms of Deed.

Parcels.]—In 1861, Plowman, a common predecessor in title of both the plaintiff and defendant, being possessed of twenty-seven rods of land, conveyed to the defendant's predecessor in title, "all that piece of garden ground, containing by estimation twenty rods, bounded on the south by other land or garden ground belonging to Plowman." In 1866, Plowman conveyed the residue of the property to the plaintiff's predecessor in title, describing it as "fifteen rods more or less"; the result being that if the measurement of the deed of 1861 was accurate, the defendant took under it twelve rods instead of twenty, if the measurement of the deed of 1866 was accurate the plaintiff took seven rods instead of fifteen. The plaintiff brought ejectment for the eight rods in dispute:—Held, that the parol evidence of Plowman was admissible to shew that he had conveyed twelve and not twenty rods by the deed of 1861. *Jervey* v. *Styring*, 29 L. T. 847.

Where parcels are described in old documents by words of a general nature or of doubtful import, evidence is admissible to shew the meaning of the words used. *Waterpark (Lord)* v. *Fennell*, 7 H. L. Cas. 650; 5 Jur. (N.S.) 1135; 7 W. R. 634.

A demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of B., another tenant of the lessor; and the lessor, in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. *Doe* d. *Freeland* v. *Burt*, 1 Term Rep. 701; 1 R. R. 367.

Where a deed purports to convey a messuage with the appurtenances, purchased at an auction, neither the conditions of sale at the auction, signed by the purchaser, nor his own declarations as to the extent of his purchase, are admissible, to shew that a garden, which had been usually enjoyed with the messuage, is expressly excepted

from the sale. *Doe* d. *Norton* v. *Webster*, 4 P. & D. 270; 12 A. & E. 442; 9 L. J., Q. B. 373; 4 Jur. 1010.

Parol inadmissible to prove that particular estate was left out of lease, under agreement between parties. *Lawson* v. *Laude*, Dick. 346.

Parol evidence admissible upon a latent, but not upon a patent, ambiguity; to rebut equities grounded upon presumption, and perhaps to support presumption, to oust an implication, and to explain what is parcel of the premises granted or conveyed. *Druce* v. *Denison*, 6 Ves. 397.

In the case of the loss of the map or plan referred to in an agreement, extrinsic evidence to prove the parcels mentioned in the agreement admitted. *Andrew* v. *Andrew*, 1 Jur. (N.S.) 885.

To Shew Intention.]—In order to shew that land had been bought for certain purposes, it was proposed to adduce in evidence the minutes of the proceeding of the vendees:—Held, that the conveyance having been executed, the minutes were inadmissible as evidence shewing the purposes for which the land was bought. *Prison Commissioners* v. *Middlesex (Clerk of the Peace)*, 51 L. J., Q. B. 433; 9 Q. B. D. 506; 46 L. T. 864; 30 W. R. 881—C. A.

On a question of construction of a deed, parol evidence is inadmissible to shew the intention of the parties thereto. *Palmer* v. *Newell*, 20 Beav. 32.

Although parol evidence cannot be used to add to or detract from the description in a deed, or to alter it in any respect, it is admissible to shew the condition of the property, and all other circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. *Baird* v. *Fortune*, 4 Macq. H. L. 127; 7 Jur. (N.S.) 926; 5 L. T. 2; 10 W. R. 2—H. L.

Parol evidence is admissible to enable the court rightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables one to translate a foreign language, or by a book of science, which gives the meaning of words of art; but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, such evidence is inadmissible. *Att.-Gen.* v. *Clapham*, 4 De G. M. & G. 591; 3 Eq. R. 702; 24 L. J., Ch. 177; 1 Jur. (N.S.) 505; 3 W. R. 158.

Settlement, on marriage, of stock belonging to the wife in trust, after death of the wife, if the husband survived, for him for life; if no issue, the whole to revest in the wife with power of appointment; if none, to her next of kin: the wife eloped and lived in adultery. On the bill of the husband to have the dividends paid to him during their joint lives, evidence of such intent, or that they should be to the separate use of the wife, refused, but held to belong to the husband for the mutual support of both. Decreed, that the costs, and also the expenses of the husband in a groundless suit instituted against him by the wife in the Ecclesiastical Court, should be paid out of the accumulation, and, the only surviving trustee appearing not to be indifferent, that the future dividends should be paid into court. *Ball* v. *Montgomery*, 2 Ves. J. 191; 4 Bro. C. C. 339; 2 R. R. 197.

Evidence to prove the intention of the parties to a settlement, refused. *Brydges* v. *Chandos (Duke)*, 2 Ves. J. 417.

If a creditor execute a deed of compromise with the principal debtor, he thereby discharges the surety; not so, if it be stipulated, in the deed of composition, that the remedies against the sureties shall be reserved. Parol evidence of the understanding of the parties to the deed, that the remedies against the sureties should be reserved, cannot be admitted. *Glendinning, Ex parte*, Buck. 517. See *Carstairs, Ex parte, Ib.*, 560.

A husband in his lifetime gave a bond in trust to secure to his wife 400*l.* in case she survived him. Parol evidence, to shew it was intended in lieu of dower, and that the wife acknowledged it to be so, cannot be allowed. *Tinney* v. *Tinney*, 3 Atk. 8.

In the conveyance of an estate there was a covenant that the premises were free from incumbrances, except particular leases. Quære, whether these would affirm the leases, and whether parol evidence is admissible to shew it was so intended. *Doe* v. *Roberts*, 4 Doug. 306.

To Determine the Meaning of a Trade Term.]—In determining the meaning of a word that has both a primary and a secondary signification, the court will admit evidence as to, and will look at its primary meaning alone, and will not admit technical evidence unless satisfied that it is to be construed in its secondary sense. *Holt* v. *Collyer*, 50 L. J., Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502.

Custom to control Covenant.]—A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable. *Abbot* v. *Bates*, 43 L. J., C. P. 150; 30 L. T. 99; 22 W. R. 488. Affirmed, 33 L. T. 491; 24 W. R. 101.

Rent—Arbitration—Subsequent Agreement.]—A. let premises by deed, stipulating that the rent should be ascertained by two valuers, who were appointed, but who never ascertained the rent; but the defendant occupied the premises, and, after the death of A., a parol agreement was made between A.'s administrator and the defendant that the valuation should not be carried out, but that the defendant should pay a certain sum for his occupation, and that neither would call upon the other to execute the stipulations of the deed:—Held, that such parol agreement did not conflict with the terms of the deed, and that there was a good consideration for the defendant's promise. *Nash* v. *Armstrong*, 10 C. B. (N.S.) 259; 30 L. J., C. P. 286; 7 Jur. (N.S.) 1060; 9 W. R. 782.

Written Agreement to explain Deed.] — If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right to look at the contract although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract, either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. Per James and Brett, L.JJ. *Leggott* v. *Barrett*, 15 Ch. D. 306; 43 L. T. 641; 28 W. R. 962—C. A.

Articles previous to settlement cannot, in general, be read to construe the settlement, unless the bill is brought to rectify the settlement, or the settlement refers to them. *Pritchard* v. *Quinchant*, Ambl. 147.

The effect of an instrument under seal cannot be altered by a memorandum not under seal. *Wenham* v. *Fowle*, 3 D. P. C. 43.

Parol Evidence to rebut Deed.]—In an action for trespass to a several fishery, evidence of fishing by the public as of right was admitted in derogation of the plaintiff's title. *Smith* v. *Andrews* [1891], 2 Ch. 678 ; 65 L. T. 175.

In ascertaining the meaning and effect of a charter, contemporaneous documents, proceedings in causes relating to it, and parol testimony may be resorted to, in order to explain and give to the charter a construction, but not to contradict it. *Scarlet* v. *Lucton School*, 4 Cl. & F. 1 ; 10 Bli. (N.S.) 592.

Affidavits held inadmissible to control the operation of a deed. *Cowlishaw* v. *Hardy*, 25 Beav. 169.

A rent-charge till a debt paid granted by a tenant for life having a power to raise, by sale or mortgage, a certain sum for payment of his debts ; a good execution of the power, though referable to his interest, as well as to his power. Parol evidence to show that the deed was not intended to be in execution of his power, inadmissible, as going to contradict it. *Blake* v. *Marnell*, 2 Ball & B. 35 ; 12 R. R. 68. Affirmed, 4 Dow. 248.

Where a deed is in writing, it cannot be altered by parol evidence. *Ib.* 47.

Where the terms of a demise are sufficiently explicit to pass the lands in question, no ambiguity as to its meaning will be raised by collateral facts. *Doe* d. *Templeman* v. *Martin*, 4 B. & Ad. 771 ; 1 N. & M. 512.

Parol Evidence to modify Terms of Mortgage Deed.]—Where the appellant had deposited with the respondent bank his title-deeds to certain property in order to secure a cash credit, and afterwards executed an absolute conveyance thereof to the bank in pursuance of an agreement recited therein to the effect that the price paid should be by deducting 400*l.* from the amount due :—Held, that, although collateral evidence was admissible to shew that notwithstanding the plain terms of the deed, the relationship of mortgagee and mortgagor still subsisted between the parties, yet in this case it was wholly insufficient to overcome the presumption that the deed of conveyance truly stated the transaction. *Barton* v. *Bank of New South Wales*, 15 App. Cas. 379—P. C.

Parol evidence not admitted of agreement between A. and B., that the remainder in tail of B. (who had joined in mortgaging the estate tail as surety for A.) should be resorted to in case of A.'s personal estate. *Robinson* v. *Gee*, 1 Ves. 251.

Where a married woman mortgages her separate estate, her husband being a party to the deed, and thereby covenants to pay the money, parol evidence is admissible to shew the true nature of the transaction. *Gray* v. *Dowman*, 27 L. J., Ch. 702 ; 6 W. R. 571.

Costs.]—No evidence dehors deeds can be received in deciding on their effect ; but on the question of costs, such evidence may be taken into consideration. *Stewart* v. *Stuart*, 1 L. J., (O.S.) Ch. 61.

11. Judicial Proceedings and Records.

In what Cases.]—In an action between A. and B. it became a question whether damages had been recovered in a previous action against A. by a third party in respect of certain acts. A., to prove the affirmative, produced the record in the previous action, which shewed counts on different causes of action, one count being only on the acts now in question. The damages were entered on all the counts, and damages entered generally on all. Evidence that the damages had in fact been given for the matters in the one count only, is receivable as explaining the former record and not contradicting it. *Preston* v. *Peeke*, El. Bl. & El. 336 ; 27 L. J., Q. B. 424 ; 4 Jur. (N.S.) 613 ; 6 W. R. 591.

Oral evidence as to what had taken place on the occasion of an issue being directed by the Court of Chancery is not admissible to explain it, the minutes of the decree or order directing the issue being alone the proper evidence. *Green* v. *Alston*, 1 F. & F. 12.

And see ante, B. Judicial Documents, cols. 648 et seq.

12. Erasures or Alterations.

Explanation, when Allowed.]—The defendant became tenant to the plaintiff of a farm from year to year, by parol, but afterwards signed an agreement containing stipulations as to the mode of tillage. In an action by the landlord for breaches of these stipulations, the agreement, on being produced, contained an erasure in the term of years mentioned in the habendum, which was altered from seven to fourteen :—Held, that in this action the agreement might be received in evidence without any explanation of the erasure, the term of years being immaterial to the parol contract between the parties to hold from year to year, subject only to the terms of the agreement as to the cultivation of the land. *Falmouth* (*Earl*) v. *Roberts*, 9 M. & W. 469 ; 1 D. P. C. 633 ; 11 L. J., Ex. 180.

Presumption.]—As a deed cannot be altered after execution without fraud or wrong, the presumption, if an alteration appears, is, that it was made before execution. *Doe* d. *Tatham* v. *Cattamore*, 16 Q. B. 745 ; 20 L. J., Q. B. 728 ; 15 Jur. 728.

But this presumption does not apply to a will, which may be altered by the testator without fraud or wrong. *Ib.*

The presumption is, that an alteration apparent on the face of a will was made after the will was executed. *Doe* d. *Shallcross* v. *Palmer*, 16 Q. B. 747 ; 20 L. J., Q. B. 367 ; 15 Jur. 836.

Therefore the party who seeks to derive an advantage from such an alteration must adduce some evidence from which the jury may infer that the alteration was made before the will was executed. *Ib.*

Evidence of previous declarations by the testator, that he intended to dispose of his property in the manner in which it is disposed of by the will in its altered form, is receivable. *Ib.*

In ejectment by heir-at-law against devisee, declarations by the testator, before the execution of the will, that he intended to make provision by his will for the defendant, coupled with the fact, that without the alteration in question the will, which disposed of the whole of his property, real and personal, made no provision for him, are admissible to rebut the presumption that the alteration was made after the will was executed. *Ib.* *And see also* ante, cols. 590—592.

E. SECONDARY EVIDENCE AS TO DOCUMENTS.

1. When Originals Necessary.

Notice to Pay.]—By a joint and several bond A. and B. became sureties for the payment of any balance not exceeding a given amount, due

from C. The defeasance provided that it should be void if A. and B. or either of them should pay such balance within one calendar month next after notice in writing requiring payment should have been given to A. and B. or their representatives:—Held, in an action against the executors of A., upon a replication denying notice to them and B., that a duplicate of the notice served upon B. was not admissible, and that B. should have been subpœnaed to produce the original he received, or it should have been shewn to have been lost or destroyed. *Robinson* v. *Brown*, 3 C. B. 754; 16 L. J., C. P. 46.

Letters.]—Where a letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court:—Held, that secondary evidence of its contents was not admissible, it being in the power of either party to make an application to that court to produce it. *Williams* v. *Munnings*, R. & M. 18.

A witness produced a copy of a letter which he said was made by him, and he swore that he should in the ordinary course of business have posted the original:—Held, that this was evidence of posting, and that, the original not being produced, the copy was good secondary evidence. *Trotter* v. *MacLean*, 49 L. J., Ch. 256; 13 Ch. D. 542; 42 L. T. 677; 28 W. R. 722.

The defendant, as surety for N., having received and promised to pay an account which he was informed had been agreed to by N., and refusing to produce it on the trial of an action brought against him by the plaintiff, the employer of N.:—Held, that without calling N., the plaintiff might prove by the witness who produced a duplicate, that that was the account N. had gone over, and that he had said it was correct. *Ward* v. *Suffield*, 5 Bing. (N.C.) 381; 7 Scott, 352; 2 Arn. 4; 8 L. J., C. P. 207.

The plaintiff in an injunction case relied on the defendants' knowledge of the fact, said to have been communicated to them in a letter, of which no copy was kept, but the receipt of which the defendants admitted. The defendants denied that it contained the statement alleged, but did not produce the letter or satisfactorily account for its non-production:—Held, under these circumstances, that the plaintiff's representation must be taken to be true. *Lumley* v. *Wagner*, 1 De G. M. & G. 604; 21 L. J., Ch. 898; 16 Jur. 871.

Agreed Account.]—A witness called to prove the terms of a verbal agreement stated that he was in company with the plaintiff and defendant when it was entered into, and referred to an entry which he made a few hours afterwards to refresh his memory. This entry was made by him from a paper written in pencil by the plaintiff during the interview between the parties, and read by him to the defendant, as embodying the terms of their agreement. The defendant assented to this; but he neither signed nor was asked to sign it, nor was it shewn to him:—Held, that it was not necessary to produce this paper as constituting the real agreement. *Trawhitt* v. *Lambert*, 3 P. & D. 676; 10 A. & E. 470; 3 Jur. 629. See *Hope* v. *West*, 7 Scott, 876.

Defendant Setting up Contract.]—Where a plaintiff closes his case without its appearing that there is any written contract relating to the subject-matter of the action, the defendant, if he means to set up that there is such a contract, must produce it, properly stamped, so as to be receivable in evidence; and it makes no difference that the plaintiff has had notice to produce the document. *Magnay* v. *Knight*, 2 Scott (N.R.) 64; 1 Man. & G. 944; 1 Drink. 13; 4 Jur. 1088.

Invoices.]—A merchant in Spain agreed to consign to an agent in London all the raisins which should be shipped by him for this country, to sell them for a certain commission on the invoice price. In an action to recover the amount of the commission on two shipments consigned by the merchant, in breach of his agreement, to third persons:—Held, that it was competent to the agent to shew the proximate value of the consignments upon which he claimed commission without producing the invoices. *Plank* v. *Garila*, 3 C. B. (N.S.) 807; 6 W. R. 210.

Memoranda of Sale.]—The defendants were sued for the price of growing trees, which they had bought, cut down, and removed from the spot where they stood: at the trial an admission by one of them that something was due, and a promise to pay, was proved. At the time the trees were sold, written memoranda of the transaction were made; one of which (being an item in a book of accounts, and neither stamped nor signed with the name of the parties) was not produced in evidence; in consequence of which the plaintiff was nonsuited, and the court on motion refused to set it aside. *Teal* v. *Auty*, 4 Moore, 542; 2 Br. & B. 99; 22 R. R. 656.

In an action for work and labour, the plaintiff having proved the value of the work done, and closed his case, one of the defendant's witnesses swore that there was a memorandum in writing containing an estimate at which the work was to be performed, and produced a copy in the plaintiff's handwriting unstamped, and not signed either by him or the defendant:—Held, that the plaintiff was not thereby precluded from recovering on the common counts, as it did not appear whether the original memorandum was in existence, and as the defendant had given him no notice to produce it; or that, at all events, the testimony should have come from one of the plaintiff's witnesses on cross-examination. *Stevens* v. *Pinney*, 2 Moore, 349; 8 Taunt. 327.

Foreign Bill.]—The plaintiff declared on a promise by the defendants to pay over to him the proceeds of a foreign bill, negotiated by them for his account:—Held, that he might give parol evidence of its contents; and that he was not bound to produce either the bill itself or a notarial copy of it. *Hunt* v. *Alewyn*, 1 M. & P. 433; 6 L. J. (O.S.) C. P. 103.

As to Tenancy.]—Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. *Rex* v. *Holy Trinity (Inhabitants)*, 7 B. & C. 611; 1 M. & Ry. 444; 6 L. J. (O.S.) M. C. 24; 31 R. R. 267.

Quære, whether in an action for an injury done to the reversionary interest of the plaintiff, it can be proved orally, when it appears that the premises are in the possession of a tenant who holds them under a written agreement, which is not produced. *Strother* v. *Barr*, 5 Bing. 136; 2 M. & P. 207; 6 L. J. (O.S.) C. P. 245; 30 R. R. 545.

The facts of occupation and payment of rent will be sufficient to raise a presumption, that the person who so occupied and paid was the tenant,

and for the purpose of raising merely this presumption, those facts may be ascertained by parol, although the tenancy was under a written agreement, which is not produced. But if it is sought to carry this presumption any further, or to alter it by shewing either the terms of such tenancy, or that the person who so appeared to be tenant, was tenant with others, the written agreement must be produced. *Rex* v. *Rawden*, 8 B. & C. 708 ; 7 L. J. (O.S.) M. C. 35.

Where in trespass qu. cl. fr., plaintiff and defendant held of the same landlord, lands abutting on opposite sides of a lane, and defendant's lease was not produced :—Held, that the declaration of the landlord "that he had let the lane jointly to the plaintiff and the defendant, as much to one as to the other," was admissible. *Noye* v. *Reid*, 1 Man. & Ry. 63 ; 6 L. J. (O.S.) K. B. 5.

—— **Under 59 Geo. 3, c. 50.**]—Upon a question of settlement since 59 Geo. 3, c. 50, the term as well as the fact of the tenancy becomes material ; and, therefore, where the tenancy is the subject of a written agreement between the parties, and the agreement is in existence, parol evidence of the tenancy is inadmissible. *Rex* v. *Merthyr Tydvil*, 1 B. & Ad. 29 ; 8 L. J. (O.S.) M. C. 114.

Banker's Clearing Book.]—The cashier of a banking-house, upon his examination as a witness, stated that he had ascertained from the clearing book, kept by him in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book, and of his own handwriting, and not from any recollection of the fact deposed to, and the book was not produced :—Held, that under these circumstances the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry. *Dupuy* v. *Truman*, 2 Y. & Coll. C. C. 341.

Written Appraisement.]—If a broker speak of the value of goods from recollection, he need not put in a written appraisement on a stamp. *Stafford* v. *Clark*, 1 Car. & P. 24.

Extract from Colonial Register.]—As to the reception of an extract from the register of deaths kept at the consulate of Madeira, and verified by the signature of the consul and the seal of the consulate. *Forbes*, *In re*, 9 Hare (App.) xx. n ; 1 W. R. 32.

Acknowledgment of Title.]—Parol evidence of the acknowledgment of title rejected. *Incorporated Society for Protestant Schools* v. *Richards*, 1 Dr. & War. 258 ; 1 Con. & L. 58 ; 4 Ir. Eq. R. 177.

Service.]—The case of the plaintiff (a claimant under a bequest by a testator to servants on his domestic establishment at the time of his decease) was proved by a written document as well as by the examination of a witness, who was also examined in chief by the defendants, and in the course of such examination referred to the document. The plaintiff relied on the document before the Vice-Chancellor, but on appeal before the Lord Chancellor, rested his case upon the examination of the witness only :—Held, that it was competent for him to do so, and that the defendant's objection to the reception of this evidence as secondary could only be supported by his producing the written document. *Ogle* v. *Morgan*, 1 De G. M. & G. 359 ; 16 Jur. 277.

Refusal to Produce.]—Where a written document is in the possession of a witness who is not compellable to produce it, and refuses to do so, secondary evidence of the contents is admissible. *Newton* v. *Chaplin*, 10 C. B. 356 ; 19 L. J., C. P. 374.

Where therefore a person not party to a suit attends on a common subpœna, and is called as a witness, and refuses to permit the production of a document which his attorney has brought into court in obedience to a subpœna duces tecum, but which the latter also declines to produce ; the plaintiff, having done everything that could be done to make apparent the impossibility of using the primary means of proof, is entitled to resort to secondary evidence of the contents, and is not precluded from so doing by his omission to serve the client with the subpœna duces tecum. *Ib.*

In an action upon a lease, executed on behalf of the lessor under a power of attorney, there being notice to the defendant to produce the power, but no subpœna duces tecum to the party who executed the lease :—Held, that the power of attorney was the property of the party who executed the lease under its authority, and that secondary evidence of its contents was not admissible. *Hibberd* v. *Knight*, 2 Ex. 11 ; 17 L. J., Ex. 119 ; 12 Jur. 162.

Where an attorney's clerk is called upon to produce an instrument known to have been in his possession, and to which he was the attesting witness, and he refuses, alleging that the document is out of his possession and in that of his employer. Quære, can secondary evidence be given of the contents ? *Houlditch* v. *Cauty*, 4 Bing. (N.C.) 411 ; 6 Sc. 209 ; 7 L. J., C. P. 217.

And see post, cols. 830, 831.

On Interlocutory Application.]—On interlocutory applications which are necessarily heard upon affidavits the court does not dispense with the rule that on disputed points the best evidence in the power of the parties must be given ; and, therefore, it is not sufficient for a party to state, upon affidavit, the purport and effect of a document which he has the means of producing. *Stamps* v. *Birmingham, Wolverhampton, & Stour Valley Ry.*, 7 Hare, 255. And see *S. C.*, 2 Ph. 673 ; 17 L. J., Ch. 431.

Waiver.]—Under a commission to take evidence abroad in an action, copies of certain documents and answers of witnesses with regard to the contents of such documents were received by the commissioners in evidence on behalf of the plaintiff, without objection on the part of the defendant who joined in the commission. The copy documents were appended to the depositions and returned by the commissioners :—Held, that the secondary evidence of the documents having been taken under the commission, without objection on the part of the defendant, was receivable before an arbitrator to whom the action was referred, and that it was too late then to take objection on the ground that the original documents were not produced. *Robinson* v. *Davies*, 49 L. J., Q. B. 218 ; 5 Q. B. D. 26 ; 28 W. R. 255.

2. WHEN ORIGINALS LOST OR DESTROYED.

Insurance Policy.]—In an action on a policy of insurance it was necessary for the plaintiffs to prove that the policy had been executed, and to prove that they tendered a document which had been sent them as a copy of the policy by the defendant's brokers; the defendant objected that the judge ought, before admitting the copy, to decide whether an original had existed or not; the judge refused to decide this question, and admitted the document in evidence:—Held, that, as the objection was not that the evidence was defective in some collateral matter, but was an objection which, if allowed, might have decided the very case itself, the judge was right in the course he had taken. *Stowe* v. *Querner*, 39 L. J., Ex. 60; L. R. 5 Ex. 155; 22 L. T. 29; 18 W. R. 466.

A loss having been settled on a policy against fire six years ago, the plaintiff in an action for a libel charging him with fraud respecting such loss, not being able to produce the original policy, called the agent of the company, who stated that the policy was returned to him after the fire; and that, on the loss being settled, it became a useless paper; it was also proved, that it was not in the plaintiff's possession, although a diligent search had been made for it:—Held, that this evidence was sufficient to entitle the plaintiff to give secondary evidence of its contents. *Brewster* v. *Sewell*, 3 B. & Ald. 296; 22 R. R. 395.

Deeds.]—On loss of a deed, &c., the same rule of evidence here as at law. Loss of a deed can only be made out by circumstances. The destruction of a deed, &c., by affidavit. *Askew* v. *Poulterers' Co.*, 2 Ves. 89.

Where the deed creating a rent was lost, so that it could not appear what sort of rent it was, a bill was sustained for payment of twelve years' arrears, upon proof that it had been constantly paid before that time. *Collet* v. *Jaques*, 1 Ch. Ca. 120.

Deed lost, person swearing he saw the deed, not sufficient; he must swear he saw it sealed and delivered. Cary, 31. See also *Benson* v. *Olive*, 1 Barnard. K. B. 348.

Evidence may be given at law of a lost deed; sed secus of a bond lost, for a profert in curia must be made. *Snellgrove* v. *Bailey*, 3 Atk. 214.

When secondary evidence of the contents of a deed is admissible. *Parkhurst* v. *Lowten*, 2 Swanst. 213; 19 R. R. 63.

Where deed is wilfully destroyed, everything is to be presumed against the party in odium spoliatoris, and, therefore, parol evidence of the person who prepared the draft, though at the distance of several years, is admissible to prove the general contents of it. *Delany* v. *Temson*, 3 Bro. P. C. 659.

The contents of a deed destroyed, and the destruction of it admitted to be proved. *Saltern* v. *Melhuish*, Ambl. 247.

Where a deed is destroyed, in order to have the benefit of it, the contents of it must be proved. *Ib.*

The best evidence to be given which the nature of the thing admits. *Cole* v. *Gibson*, 2 Ves. 505.

All deeds, &c., must be proved, unless in the hands of adverse party, or destroyed; then parol evidence of contents allowed. *Ib.*

Evidence of the loss of a deed and of its contents, though not strictly formal:—Held, to be sufficient. *Green* v. *Bailey*, 15 Sim. 542; 11 Jur. 258.

The word "and" in the last sentence of the 21 Geo. 3, c. 11, s. 8 (the act for validating recoveries after twenty years, notwithstanding the deed making the tenant to the præcipe should be lost and not appear), is to be read "or"; and it is not necessary, in order to bring a case within that statute, to give strict proof of the loss of the deed. *Townsend* v. *Kingston (Earl)*, 6 Ir. Eq. R. 118.

Evidence the same in equity as at law on a casual destruction of deeds; but otherwise where a spoliation. *Cookes* v. *Hellier*, 1 Ves. 234.

A deed lost may be proved by circumstances, first shewing that it once existed, and next, that it is lost, or cannot be come at. *Whitfield* v. *Fausset*, 1 Ves. 389.

To admit secondary evidence of a deed, it is not sufficient that the attorney who prepared it swears that he delivered it to A. and B. and believes it to be lost. *Horlock* v. *Priestley*, 1 L. J. (o.s.) Ch. 73.

Permission to exhibit an interrogatory as to the loss of a deed omitted to be proved by mistake, given to the plaintiff at the hearing under the circumstances. *Cox* v. *Allingham*, Jac. 337.

—— **Bond.**]—Mode of proof in bankruptcy, in case of loss of security. Gen. Ord. 14th May, 1836, 2 Mont. & Ayr. App. 33. *Wallas, Ex parte*, *Humbly, In re*, 2 Mont. & Ayr. 586; 1 Deac. 496.

Where a creditor, who proved a bond debt, had subsequently lost the bond, the court made an order that he might receive the dividends on his debt, without producing the bond, upon affidavit of the facts, and indemnifying the assignees. *Robins, Ex parte*, 1 Deac. 587.

Where a bond is burnt or cancelled by accident or mistake, or where it is procured to be delivered up by fraud, equity will set it up against a surety, though extinguished at law. *Skip* v. *Huey*, 3 Atk. 93.

—— **Settlements.**]—A suit was instituted for the appointment of new trustees of a marriage settlement. The settlement was lost, but the husband and wife swore directly to the circumstances under which it was executed; to the execution of it by them; and to the contents of it. The solicitor who prepared the settlement was dead; but, in addition to the evidence of the husband and wife, there was the indirect testimony of several other parties to the same effect:—Held, that there was sufficient evidence for the court to assume that the settlement was actually executed and to the effect contended for. *Hall* v. *Dawson*, 7 L. T. 519.

The husband had become insolvent after the marriage, and his assignee subsequently objected that no sufficient notice of the settlement had been given to the proper party. That party was the trustee of the husband's father's settlement, and the family solicitor; but he was dead. The husband made an affidavit, stating that certain verbal communications had passed, both before and after his marriage, between him, his father, and the solicitor, as to the settlement:—Held, sufficient evidence of due notice had been given. *Ib.*

In 1860 a husband, through the intervention of his wife, obtained possession of their marriage settlement from the trustee. The husband, in

order to raise money upon the property comprised in it, destroyed the settlement, mortgaged part of the settled property, and was proceeding to sell other parts of it. In 1864 the trustee filed a bill to restrain the intended sale, and prayed a declaration that the cancelled settlement should be established, and the trusts of it carried into effect. The husband did not deny the fact of his having destroyed the settlement; but the trustee and the wife denied many of his allegations, especially those with respect both to the circumstances under which the settlement was obtained by her from the trustee, and the precise contents of it. No draft or other copy of the settlement was produced to the court; but there was the evidence of the trustee and the wife on the one side, and that of the husband and other persons who were not parties to the settlement, but who had subsequently read it, on the other. There was also the evidence of the solicitor who had prepared the settlement, and who had acted as solicitor to the husband in the mortgage transaction, and in the proposed sale of part of the settled property:—Held, that, upon a full consideration of all the evidence in the case, the trustee was entitled to the relief which he sought. *Brandon* v. *Barlow*, 13 L. T. 6.

A pre-nuptial agreement to settle property on a wife will be enforced even though the letters which constituted such agreement have been lost, if the loss can be proved to have occurred through an unforeseen and an inevitable accident, and if the existence and substance of the letters can be clearly established by the evidence. *Gilchrist* v. *Herbert*, 26 L. T. 381; 20 W. R. 348.

A wife, who in ignorance of her right in equity to enforce a pre-nuptial agreement for a settlement accepted a settlement of a far inferior sum, is not by doing so debarred from enforcing her claim to the full amount of property agreed to be settled upon her. *Ib.*

—— **Of Apprenticeship.**]—An expired indenture of apprenticeship sometimes remains with the master and sometimes with the apprentice, but the more proper custody is with the apprentice; and although shortly after the expiration of the apprenticeship search might be required amongst the papers of both, yet, after the lapse of some years, proof of search among the papers of the apprentice is sufficient to warrant justices in admitting secondary evidence of its contents. *Reg.* v. *Hinckley*, 3 B. & S. 885; 32 L. J., M. C. 158; 9 Jur. (N.S.) 1054; 8 L. T. 270; 11 W. R. 663.

Proof that an indenture of apprenticeship twenty-five years old, to pay for the stamp of which the overseers of a parish had advanced money, was sent to those overseers and is not to be found in the parish chest, is sufficient to raise a presumption of the loss of the indenture, and to entitle such parish in a settlement case to give secondary evidence of its execution and contents. *Rex* v. *Stourbridge*, 8 B. & C. 96; 2 M. & Ry. 43; 6 L. J. (O.S.) M. C. 65.

Will.]—The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence. *Sugden* v. *St. Leonards* (*Lord*), 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 372; 24 W. R. 860—C. A.

Will destroyed, plaintiff decreed to enjoy the land. *Hayne* v. *Hayne*, Dick. 18.

A. devises lands to several persons, and after his death, one who was a friend to the heir-at-law snatches the will out of the executor's hands, and tears it in pieces; the pieces being gathered up and stitched together, a bill is brought to establish the will, and decreed the devisees to hold and enjoy, and the heir to convey to them. *Haines* v. *Haines*, 2 Vern. 441.

Newspaper.]—In an action for a libel in a newspaper, after proof of the publication by the production of a copy of the paper, a witness was called, who said that a newspaper bearing the same title, and so far as he could judge from a glance, containing the libel, had been sent to the reading-room of a literary institution of which he was the secretary, by a person unknown; and that it had since been taken away by some of the members, and never returned:—Held, first, that sufficient proof of the loss of that copy had been given to let in secondary evidence of its contents. *Gathercole* v. *Miall*, 15 M. & W. 319; 15 L. J., Ex. 179; 10 Jur. 337.

Held, secondly, that there was evidence to go to the jury that the newspaper sent to the reading-room was a copy of the number which contained the libel. *Ib.*

Bill of Exchange.]—Upon a plea of non acceptavit, in an action by indorsee against acceptor of a bill of exchange, the plaintiff proving that the bill is destroyed, secondary evidence of its contents is admissible. *Blackie* v. *Pidding*, 6 C. B. 196.

In an action for money had and received, where it is shewn that the defendant admitted that he had received a bill drawn on a third party, to which the plaintiff was entitled, and that he had paid it into his banker's on his own account, the banker's clerk cannot be called to prove that the defendant received benefit from a bill of similar description, the bill itself not being produced, nor its absence accounted for. *Atkins* v. *Owen*, 4 N. & M. 123; 2 A. & E. 35; 4 L. J., K. B. 15.

Note.]—So, in an action on a note not negotiable, where the issue is only on the plea of non fecit, after proof of the loss of the note, the plaintiff is entitled to give secondary evidence of its contents. *Charnley* v. *Grundy*, 14 C. B. 608; 2 C. L. R. 822; 23 L. J., C. P. 121; 18 Jur. 653.

Where an original note is lost, and a copy of it is offered in evidence, sufficient probability that the original note was genuine must be shewn before the copy will be allowed to be read. *Goodier* v. *Lake*, 1 Atk. 446.

Warrant.]—In an action for a malicious arrest, where parol evidence was given of the loss of the information and warrant upon which the plaintiff was arrested:—Held, that he was at liberty to go into secondary evidence of their contents. *Freeman* v. *Arkell*, 3 D. & R. 669; 2 B. & C. 494; 1 Car. & P. 135, 326; 2 L. J. (O.S.) K. B. 64.

Where a warrant is issued against a bankrupt for non-compliance with an order of the court, and the warrant is lost, the court will renew the warrant, or grant a copy of it, as a matter of course. *Giles, Ex parte*, 3 Deac. & C. 620.

Petition.]—A petition presented at the Rolls was afterwards heard by the Lord Chancellor, who made an order upon it, but before the order

was passed the original petition was lost. The Lord Chancellor allowed a copy of it, certified by the under-secretary at the Rolls to be a true copy, to be filed, in pursuance of the 27th of the Orders of December, 1833, instead of the original petition. *Sanderson* v. *Walker*, 1 Myl. & C. 359.

Commission of Lunacy.]—On the accidental loss of a commission of lunacy, after inquisition found, order for a duplicate commission, and the inquisition, which was recovered, to be annexed to it. *Rain, Ex parte*, 19 Ves. 589.

Possession of Foreign Government.]—In order to justify the reception of secondary evidence of an agreement, it was proved that A., in whose possession it was, on landing at New York, was arrested on suspicion of being the bearer of secessionist despatches, and deprived of all his papers (amongst which was the agreement, which had reference to shipments in this country of goods intended to run the blockade at Charleston); that all were subsequently restored to him except the agreement; and that, on his making inquiry for it of the agents of the federal government at New York, he was told that it had been sent to Washington, the seat of government:—Held, that it was sufficiently shewn that reasonable efforts had been made to procure the original agreement, and that therefore a copy was properly received. *Quilter* v. *Jorss*, 14 C. B. (N.S.) 747; 11 W. R. 888. *S. C.*, at nisi prius, 3 F. & F. 644.

3. Proof of Search.

Hearsay Answers to Inquiries.]—In order to shew that a sufficient search has been made for a lost deed to admit of secondary proof of its contents, evidence is admissible of inquiries made of persons who would be likely to have the documents in their possession, and of the replies given by them to such inquiries, without affidavits or depositions of those persons themselves as to the extent and result of the searches made by them. *Smith* v. *Smith*, Ir. R. 10 Eq. 274; *But see* 1 L. R. Ir. 206—C. A.

To allow secondary evidence of a document, hearsay evidence of the answers given by persons of whom inquiry was made for it, and who were likely to have it, is receivable for the purpose of shewing that a bonâ fide diligent search has been made for the documents in the proper place, and with the proper parties, and its failure. *Reg.* v. *Kenilworth*, 2 New Sess. Cas. 66; 7 Q. B. 642; 14 L. J., M. C. 160; 9 Jur. 898.

Where an attesting witness to a deed cannot be found, after strict and diligent inquiry, evidence of his handwriting is admissible. In accounting for the absence of an attesting witness, or loss of a written instrument, general answers to inquiries, that nothing is known concerning them, are admissible in evidence, but not declarations as to particular facts, if the party making them is capable of being called. *Doe* d. *Johnson* v. *Johnson*, 2 Chit. 196.

Reasonable Efforts.]—To render secondary evidence admissible in proof of the contents of a lost document, it is sufficient to prove that every reasonable search for the document has been made, although every possible search may not appear to have been made. *Hart* v. *Hart*, 1 Hare, 1; 11 L. J., Ch. 9; 5 Jur. 1007.

In order to render secondary evidence of a private document admissible, it is necessary and sufficient to shew that all reasonable efforts have been made to procure the original. *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

But the degree of diligence to be used in searching for a deed must depend on the importance of the deed, and the particular circumstances of the case. *Gully* v. *Exeter* (*Bishop*), 4 Bing. 290; 12 Moore, 591; 29 R. R. 565. See *Brewster* v. *Sewell*, ante, col. 779.

Date.]—In order to let in secondary evidence of a document, it is not necessary that the search for that document should have been recent, or made for the purpose of the cause. *Fitz* v. *Rabbits*, 2 M. & Rob. 60.

Place.]—Proof of search for a document will not let in secondary evidence thereof when it is not shewn that the document was ever deposited where the search was made. *Reg.* v. *St. Mary's, Islington*, 1 W. R. 34.

Circumstances.]—What is a sufficient search for witnesses to prove handwriting to allow secondary evidence to be given, must depend on the circumstances of each case. *Miller* v. *Miller*, 2 Scott, 123; 2 Bing. (N.C.) 76; 1 Hodges, 187; 4 L. J., C. P. 259.

Mortgage.]—Where an assignment of turnpike tolls had been executed by way of mortgage to A.:—Held, in an action, by his personal representative, after his death, against the trustees for arrears of interest, that a search for the security in the office of A.'s solicitor,—where his papers had been deposited, except some deposited, in a suit against A.'s representative, in the office of one of the masters in chancery,—and also in the latter office, without finding the security among any of such papers, was sufficient evidence of its loss to let in secondary evidence. *Pardoe* v. *Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

Marriage Settlement.]—By a marriage settlement lands were limited to E. B., the settlor, for life, remainder to trustees for a term of years to secure a jointure and younger children's portions, remainder to the sons of E. B., in tail, remainder to the heirs of E. B. The estate descended to the heirs of E. B., all the prior limitations being spent. On a bill filed by the representatives of the surviving younger child, an alleged copy of the settlement was produced, and an ineffectual search proved among her papers for the original, and that the copy was found there; a witness believed that part of the document was in the handwriting of W. B., who was clerk to his father, the solicitor in the cause, and had died twenty years before; he had never seen W. B. write, but believed the writing to be his, by comparison, and also an indorsement, "compared, W. B.," but did not know when it had been made. The original deed was registered and the memorial of it was proved:—Held, that the copy was not admissible in evidence, no search having been made among the papers of the trustees of the term, or of the inheritor, and the handwriting of W. B. not having been sufficiently proved. *Cruise* v. *Clancy*, 6 Ir. Eq. R. 552.

Bond.]—The respondents, on appeal, proved that a deceased rated inhabitant had stated

several times to the pauper that the appellant parish had taken a bond from A. touching the support of a child of the pauper's wife; and that the rated inhabitant had the bond in his possession. This person did not appear ever to have been a parish officer. Notice had been given to the appellants to produce the bond; but it did not appear that any search had been made among the papers of the deceased, nor were his representatives examined:—Held, that parol evidence of the contents of the bond was not admissible. *Rex* v. *Hinckley*, 9 L. J. (o.s.) M. C. 75.

Affidavit.]—A party in whose possession an affidavit was, by proving that he had made diligent search and could not find it, renders secondary evidence of its contents admissible. *Harper* v. *Cook*, 1 Car. & P. 139.

Letters.]—To admit evidence of the contents of letters, it is not enough to shew that the party in whose possession they are, has searched in a particular box in which he thought they were, without having looked into any other place, although he was of opinion that they were in his possession. *Bligh* v. *Wellesley*, 2 Car. & P. 400.

Appointment of Executor.]—Where a search for a document was made among the papers in the custody of an executrix of a person who had acted as executor of another person:—Held, sufficient for the purpose of considering the person who had so acted, to have been, in law, the executor, although the probate was not produced. *Rex* v. *Witherly*, 4 M. & R. 724; 8 L. J. (o.s.) M. C. 43.

Lease.]—The muniment-chest of the lessor and his assigns is the proper custody for an expired lease. *Plaxton* v. *Dare*, 5 M. & R. 1.

Warrant of Distress.]—To prove the warrant of distress made by the mayor of a borough under 5 & 6 Will. 4, c. 76, for the non-payment of borough rates, the high constable of the borough, who had been served with a subpœna duces tecum, was called. He stated that he had deposited a warrant in his office; that he had searched for it but could not find it, that he did not know what had become of it, and that the town clerk had access to his office:—Held, that secondary evidence might be given of the contents of the warrant. *Fernley* v. *Worthington*, 1 Man. & G. 491; 10 L. J., M. C. 81.

In trover against the sheriff, the warrant under which goods were seized under a fi. fa. was not produced at the trial, nor was notice to produce it given. The bailiff who made the levy was proved to have delivered the warrant to his son; the son could only state his belief that he had either returned it to his father or to the sheriff's officer. It was alleged to be the custom to deliver the warrant to the auctioneer, to be by him forwarded, together with the auction-sheet, to the supervisor of the district, whose duty it was to transmit them to the head office of excise in London. Search had been made for it among the bailiff's papers, and at the sheriff's office; as also among the auctioneer's papers, and at the head office of excise; but the supervisor was not called, and no proof was given of a search among his papers:—Held, that sufficient proof was given from which the loss of the warrant might be inferred, so as to let in secondary evidence to connect the sheriff with the act of the bailiff. *Minshall* v. *Lloyd*, 2 M. & W. 450; M. & H. 125; 6 L. J., Ex. 115; 1 Jur. 336.

Cheques.]—A cheque drawn on account of a parish was delivered to A., who was then the paying clerk of the parish. It was shewn that the bankers of the parish, on the same day, paid a sum of that amount, and that their custom was to return the cancelled cheques to the paying clerk, and that they were deposited in an apartment of the workhouse. A. having gone out of office, application was made to his successor at that place for inspection of the cheques. He handed to witness several bundles, which he searched, without finding the cheque:—Held, a sufficient search to let in secondary evidence of its contents. *M'Gahey* v. *Alston*, 2 M. & W. 206; 2 Gale, 238; 6 L. J., Ex. 29.

Apprenticeship Deed.]—A pauper proved, that, on the expiration of his apprenticeship, his master told him the deed was in the possession of the parish officers. The latter proved that they had searched for it among the parish papers, but could not find it:—Held, not sufficient to admit parol evidence of the contents, as the master, who was alive, ought to have been produced to prove delivery to the parish officers. *Rex* v. *Denio*, 7 B. & C. 620; 1 M. & Ry. 294. Sub nom., *Rex* v. *Rhodegeidio*, 6 L. J. (o.s.) M. C. 10.

Appellants against an order of removal relied on the settlement of a deceased party by apprenticeship; and to let in parol evidence of the indenture, they called the widow of the deceased, who stated that her husband, in his last illness, told her, that he got his indentures from his master at the end of his apprenticeship, and wore them out in his pocket. The sessions confirmed the order subject to the opinion of this court as to the admissibility of the evidence:—Held, that without further proof of inquiry after the indentures, evidence of this conversation was not admissible, and they refused to send the case back to be re-stated. *Rex* v. *Rawden*, 2 Ad. & E. 156; 4 N. & M. 97.

The pauper was bound apprentice, there being but one indenture which was taken by the master. He failed, and his books and papers came into possession of an attorney, who examined such of them as related to accounts. At that time he saw no indenture. Thirty years afterwards, upon a question as to the pauper's settlement, the foregoing facts were given in evidence, and it also appeared that the master was dead, but his widow was living. No application had been made to her for the indenture:—Held, not enough to let in secondary evidence. *Rex* v. *Piddlehinton*, 3 B. & Ad. 460; 1 L. J., M. C. 43.

The appellants against an order of removal set up a settlement of the pauper by apprenticeship under an indenture, which had been lost. To prove proper search they proposed to ask certain witnesses what inquiries they had made of, and what answers they had received from, parties who were likely to have the document in their possession; but the parties themselves were not called. The sessions refused to allow the questions to be put:—Held, that the evidence was admissible, upon the preliminary inquiry whether proper search had been made, though it might not be admissible as evidence in the main issue before the court; and the case was sent back

to be re-heard. *Reg.* v. *Braintree*, 1 El. & El. 51; 4 Jur. (N.S.) 1238; 7 W. R. 48.

Reasonable diligence in searching for an indenture of apprenticeship thirty-seven years old, and supposed to be lost, is sufficient to let in secondary evidence. *Rex* v. *East Farleigh*, 6 D. & R. 147; 3 L. J. (O.S.) K. B. 172.

Justice's Warrant.]—Where ineffectual search has been made for a justice's warrant, parol evidence may be given of its contents. *Weatherall* v. *Watson*, 1 L. J. (O.S.) K. B. 2.

Person to whose Possession Document traced must be called.]—A plaintiff is not at liberty to give secondary evidence of the contents of a document, if his witnesses trace it to a person who is not connected with the cause, without calling that person. *Freeman* v. *Arkell*, 3 D. & R. 669; 2 B. & C. 494; 1 Car. & P. 135, 326; 2 L. J. (O.S.) K. B. 64.

A deed, alleged to be a conveyance of freeholds and leaseholds to two trustees, was delivered by the grantor to a witness, who stated that he afterwards, at the request of the grantor, who was also a cestui que trust, re-delivered it to her. A fruitless search was made for it among her papers after her death. One of the trustees was also dead, having left an executrix, who had taken possession of all his papers. The surviving trustee and the heir of the other only were called, and they negatived all knowledge of the existence of the deed:—Held, that the circumstances did not dispense with an inquiry in all the places of custody; and that as the executrix of the deceased trustee had not been called, sufficient search had not been made, so as to admit secondary evidence. *Doe* d. *Richards* v. *Lewis*, 11 C. B. 1035; 20 L. J., C. P. 177; 15 Jur. 512.

An agreement having been traced to the possession of P., a witness was called, who stated that he went to P. and asked him whether there was any agreement between himself and the pauper respecting a house. P. said, "I cannot say for a certainty; I will search," and then directed his clerk to search. The witness and the clerk then searched P.'s office, and could not find the agreement. P. was not called as a witness. The sessions held that there was no sufficient proof of search without calling P. The court refused to interfere with the decision. *Reg.* v. *Saffron-Hill* (*Liberty*), 1 El. & Bl. 93; 22 L. J., M. C. 22.

Where a letter has been traced to be in the hands of A., evidence that the defendant employed B. to search in all places where he kept letters, is not sufficient primâ facie evidence of loss, so as to let in secondary evidence of its contents. *Parkins* v. *Cobbett*, 1 Car. & P. 282.

Objection, when to be Taken.] — A party objecting to the production of a copy, on account of due search not having been made for the original, must make the objection at the time of the trial, distinctly on that ground; if he does not, the court will not afterwards entertain it. *Williams* v. *Wilcox*, 8 A. & E. 314.

4. Proof of Stamp.

See post, IV. 6, c. (cols. 840 et seq.)

5. Originals not Capable of Production.

Banners at Meetings.] — Parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals. *Rex* v. *Hunt*, 3 B. & Ald. 566; 22 R. R. 485. S. P., *Jones* v. *Tarlton*, 1 D. (N.S.) 625.

Posted Placards.] — The plaintiff and the defendant agreed by charter-party that the plaintiff's ship should, after discharging her outward cargo, proceed to Galatz or Ibralia, as ordered at Constantinople by the charterer's agents, and there receive a full cargo of wheat, and, being so loaded, should therewith proceed to Cork for orders to discharge at a safe port in the United Kingdom, and deliver the same agreeably to bills of lading, and so end the voyage (restraints of princes and rulers, the dangers of the seas or navigation, fire, pirates, or enemies during the voyage, always mutually excepted). The ship, after discharging her outward cargo, proceeded to Constantinople, and, in consequence of orders there given by the defendant's agent, the master took the ship to Ibralia. Before her arrival there, a proclamation had been promulgated by the Russians, who had invaded Wallachia, prohibiting the exportation of wheat:—Held, that a copy of a printed placard, with the name of the Russian commander attached to it, and posted on the walls of Ibralia, was admissible as evidence of the prohibition. *Bruce* v. *Nicolopulo*, 11 Ex. 129; 3 C. L. R. 775; 24 L. J., Ex. 321; 3 W. R. 483.

A great number of placards announcing a public meeting having been printed, a party, who was indicted for treason, took twenty-five of them away from the printer's:—Held, that one of the remaining placards might be read without any preparatory evidence as to the original manuscript, and without any notice to produce the twenty-five copies, the whole impression being duplicates in the nature of originals. *Rex* v. *Watson*, 2 Stark. 129.

In an action for shooting a dog, brought against the owner of a plantation and his gamekeepers, it appeared that in the plantation in which the dog was shot, there was fixed on a pole, a board on which was painted, "All dogs found trespassing in this plantation will be shot":—Held, that a copy of that which was painted on the board might be given in evidence without notice to produce the original board. *Bartholomew* v. *Stephens*, 8 Car. & P. 728.

Monument.]—So, where a vicar brings ejectment, claiming in right of his vicarage, a witness for him may be asked as to what is inscribed on a tablet fixed up in the church. *Doe* d. *Coyle* v. *Cole*, 6 Car. & P. 359.

Letter Destroyed.]—A letter containing the intimation of an aunt's intention to benefit her niece was destroyed by the niece, in pursuance of a direction contained in it:—Held, that the verbal evidence of the niece and a person who had seen the letter, was sufficient to satisfy the court as to its contents. *Beecher* v. *Major*, 6 N. R. 284.

Original filed in a Foreign Court.] — To let in secondary evidence of a document filed in a foreign court, it should be proved that an unsuccessful application for it has been made to the person who has the legal custody of the document, viz. to the court. Application to an inferior officer of the court, though he may have the actual custody of it, is insufficient. *Crispin*

v. *Doglioni*, 3 Sw. & Tr. 44; 32 L. J., P. 109; 11 W. R. 500.

Matrices de Roles.]—The Matrices de Roles or assessments to the land-tax of the year 1791, the primary evidence required by the convention No. 7, for the purpose of ascertaining the value of the confiscated estates, not being forthcoming, it was held by the judicial committee that the commissioners for liquidating the claims of British subjects in France were at liberty to adopt any other evidence which might appear to them most satisfactory in respect to the estate which was to be valued, such as the original purchase-money; the valuation of the parties themselves in any subsequent transactions; where there was a lease, the rack-rent; the rent allowing a certain number of years' purchase; or the sum for which the property had been sold at the time of the confiscation. *Wall's (Count de) Case*, 6 Moore P. C. 216; 12 Jur. 145.

Privilege.]—When a document cannot be produced by reason of privilege, independent secondary evidence of it is admissible. *Reg.* v. *Leatham*, 3 El. & El. 658; 30 L. J., Q. B. 205; 7 Jur. (N.S.) 674; 3 L. T. 777; 9 W. R. 334; 8 Cox, C. C. 498. S. P., *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 D. (N.S.) 471; 12 L. J., Ex. 1.

In an action against a mortgagor, the attorney of the mortgagee who has the mortgage deed, cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents; but (he may be asked for what purpose the money was raised, and) secondary evidence may be given of the contents of the deed. *Murston* v. *Dawnes*, 6 Car. & P. 381.

6. What is Good Secondary Evidence.

No Degrees.]—There are no degrees of secondary evidence; but where a party is entitled to give secondary evidence at all, he may give any species of secondary evidence within his power. *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; 8 D. P. C. 389; 4 Jur. 321; 10 L. J., Ex. 201. S. P., *Brown* v. *Woodman*, 6 Car. & P. 206.

Deeds—Counterparts and Copies.]—Counterparts of old leases from the repository of a lord of a manor are evidence of the demise of premises without proof of enjoyment. *Clarkson* v. *Woodhouse*, 3 Dougl. 189; 5 Term Rep. 412, n.

Though there are more parts of a deed than one which is in the defendant's possession, but who does not produce it after notice, the plaintiff is not obliged to produce in evidence one of the originals, but may give a copy in evidence. *Doxon* v. *Haigh*, 1 Esp. 409.

Possession by one party of the other party's part of a deed is presumptive evidence that the counterpart had been executed. *East India Co.* v. *Lewis*, 3 Car. & P. 358.

In trover for an expired lease by the lessor, the lease (or counterpart executed by the lessor) not being produced by the defendant, upon notice, the lessor may give parol evidence of the contents without producing the counterpart executed by the lessee. *Hall* v. *Bull*, 3 Man. & G. 242; 3 Scott (N.R.) 577; 10 L. J., C. P. 285. And see *Paul* v. *Meet*, 2 Y. & J. 116; 31 R. R. 559.

An examined copy of the registry of a deed, in the registry of the county of Middlesex, is admissible as secondary evidence of its contents. *Doe* d. *Ubele* v. *Killnes*, 2 Car. & P. 289. But see *Collins* v. *Maule*, 8 Car. & P. 502; *Doe* d. *Loscombe* v. *Clifford*, 2 Car. & K. 448; and *Doe* d. *Padwick* v. *Wittcomb*, 4 H. L. Cas. 425.

In an action for rent on a demise, the plaintiff produced a deed properly stamped as a counterpart lease, and proved it to have been executed by the defendant:—Held, that although there was no evidence of any lease having been executed by the plaintiff, the presumption was that there was such; and the deed produced was therefore rightly admissible. *Hughes* v. *Clark*, 10 C. B. 905; 15 Jur. 430.

In an action for rent upon an indenture of lease, the defendant pleaded non demisit:—Held, that the counterpart lease was sufficient evidence of the demise. *Houghton* v. *Koenig*, 18 C. B. 235; 25 L. J., C. P. 218.

In 1763, lands were conveyed upon trust for a charitable corporation, and in 1783, the corporation granted a lease of part of such lands to G. for 99 years at a peppercorn rent. In 1877 the corporation commenced an action against K., who was in possession of the demised lands, on the ground that the lease being voidable under 13 Eliz. c. 10, they had the option to determine it at any time during its continuance, and that the Statute of Limitations did not commence to run against them until they exercised such option:—Held, that in the absence of evidence to the contrary, the counterpart lease was prima facie evidence of the title in fee of the corporation, and that the defendant being admittedly in possession of land included in the lease, the presumption, in the absence of proof to the contrary, was that he was in possession under some title derived through G. *Magdalen Hospital* v. *Knotts*, 47 L. J., Ch. 726; 8 Ch. D. 709; 38 L. T. 624; 26 W. R. 646.

An engrossment and draft of a settlement made in 1845 had been both destroyed in a fire. The court directed that a copy proved to have been examined with the draft and engrossment, and made an exhibit in the cause should be inrolled, and that the trusts of the settlement should be carried into effect. *Barnett* v. *Dickens*, 10 W. R. 794.

A document, more than thirty years old, purporting to be a copy of a lost instrument, and coming out of the proper custody, is not made evidence by an indorsement in the handwriting of a deceased family solicitor of the person claiming under the lost instrument, that he has compared the copy with the instrument, and knows the handwriting of the witnesses to the original, and of one of the parties to be genuine. *Kerin* v. *Davoren*, 12 Ir. Ch. R. 352.

A claim under a lost deed allowed on the production of an unauthenticated copy of it coupled with its being recited and recognised in other deeds and instruments, and its being memorialised in the register for the West Riding of Yorkshire, where the lands alleged to be comprised in the lost deed were situate, and the long acquiescence of parties interested in disputing the claim. *Tunstall's Case*, 3 Sim. 308.

A counterpart may be read if an original deed be lost; and if no counterpart, a copy, and if no copy, parol evidence of the manner of its being lost; if destroyed by fire, or lost by any unforeseen accident, they are of themselves sufficient excuses. *Villiers* v. *Villiers*, 2 Atk. 71.

Quære, whether the court will order the counterpart of an assignment of a bankrupt's estate to be inrolled, on an affidavit that the original was lost. *Robson, Ex parte*, Ambl. 180.

The production of a paper, purporting to be an attested copy, may, with other evidence, have considerable weight. *Ward* v. *Garnons*, 17 Ves. 140.

Memorials.]—The memorial of a conveyance that has been registered is not evidence of the contents of such conveyance, unless notice has been given to the opposite party to produce the conveyance. *Molton* v. *Harris*, 2 Esp. 549.

A memorial admitted as secondary evidence of an indenture. *Sadleir* v. *Biggs*, 4 H. L. Cas. 435.

A registered memorial of a lost deed is good secondary evidence. *Carthrow* v. *Eade*, 4 De G. & S. 527.

A memorial is good secondary evidence of a lost deed. *Allen* v. *Allen*, 1 Con. & L. 427; 2 Dr. & War. 307; 4 Ir. Eq. R. 472.

A memorial of articles for a settlement held to be good secondary evidence of those articles, possession having been shewn to have gone along with them, and that execution of the memorial by the grantee was sufficient to satisfy the statute. *Peyton* v. *M'Dermot*, 1 Dr. & Wal. 198.

On the question whether a person, found a lunatic, was sane at a particular time, a memorial of registry, executed by him before the time in question, is admissible in evidence, though the deed is not produced or not accounted for. And orders and reports made in the matter of the lunacy are admissible to shew that such orders and reports were made upon the grounds stated therein, but not as evidence of the truth of the facts therein mentioned. *Creagh* v. *Blood*, 2 Jo. & Lat. 509; 8 Ir. Eq. R. 434.

To prove a conveyance for value within s. 25, the defendant, who was the eldest son of H., offered in evidence, as proof of a lost deed, a memorial in the registry of deeds office of a deed, to which H., A., M. and G. were parties, whereby H. conveyed the lands to M. and G. upon certain trusts, which were not, however, disclosed by the memorial. It was also proved that in the same year in which the deed bore date a marriage was solemnized between H. and A.; and that H. until his death in 1862, and thenceforward the defendant, had been continuously in possession and in receipt of the rent for their own use and benefit:—Held, that it might be inferred that the lost deed was a settlement executed on the marriage of H. and A., under which H. took a life estate, and the defendant an estate in remainder, and that under it the defendant was a purchaser for value. *Smith* v. *Smith*, Ir. R. 10 Eq. 273.

An examined copy of a memorial of a purchase deed registered in Middlesex, is only receivable as secondary evidence of the deed against the parties to the deed, and all persons claiming under them; and the fact that A. mortgaged the property to B., and delivered this deed to B., as mortgagee, is not sufficient to make it secondary evidence against A. *Doe* d. *Loscombe* v. *Clifford*, 2 Car. & K. 448.

Inrolment.]—The inrolment of a lease under 1 & 2 Geo. 4, c. 52, s. 8, which enacts that a deed so inrolled, "shall be as good and available in law, and of the like force and effect in all respects, as if the same had been inrolled in any of his majesty's courts of record at Westminster, or as if a memorial of any such deed had been entered or registered in the office or offices appointed for registering deeds and other conveyances of lands and tenements in the counties in which the same are situate," is not admissible as evidence of the deed, without proof of the execution. *Jenkin* v. *Biddulph*, R. & M. 339.

An inrolment in the office of the Duchy of Cornwall of a lease purporting to be granted by the king, vacante ducatu, is primary evidence of such lease. *Row* v. *Brenton*, 3 M. & Ry. 214; 8 B. & C. 765.

So is an inrolment of a lease purporting to be granted by the Duke of Cornwall. *Ib.*

A copy of an inrolment of a deed of bargain and sale requiring inrolment is secondary evidence of the deed. *Devonshire* (*Duke*) v. *Neill*, 2 L. R., Ir. 132.

Abstracts.]—An abstract which has been compared with the deed of feoffment is good secondary evidence of the contents, no proof being given on either side of the existence of any copy of the deed. *Doe* d. *Rowlandson* v. *Wainwright*, 5 A. & E. 520; 1 N. & P. 8; 2 H. & W. 391; 6 L. J., K. B. 35.

A. being seised in fee in 1797, afterwards became bankrupt. A conveyance in 1815 from his assignees, and certain mortgagees, recited several deeds affecting the property, the greater number of which were missing. The vendor produced an old abstract of the missing deeds, from which it was said the deed of 1815 was drawn; the recitals in the conveyance of 1815, coupled with the production of the abstract, are sufficient secondary evidence of the missing deeds. *Moulton* v. *Edmonds*, 29 L. J., Ch. 181; 6 Jur. (N.S.) 305; 1 L. T. 391; 8 W. R. 153.

An abstract of a deed not admitted as secondary evidence of the deed. *Lewis* v. *Leatham*, 11 L. J., Ch. 176; 6 Jur. 501.

The abstract of a deed is no evidence, and much less an attested copy of such abstract. *Peterborough* (*Earl*) v. *Germaine*, 3 Bro. P. C. 539.

Drafts.]—Where proof was given of the loss of a written instrument the court received as secondary evidence a draft of such written instrument, produced at the hearing with such a stamp as the instrument itself required, although the instrument appeared to have been only lost by the party sought to be charged, and was not proved to have been fraudulently destroyed by him. *Blair* v. *Ormond*, 1 De G. & Sm. 428; 11 Jur. 665.

Held, that drafts produced from the proper custody and bearing indorsement in the handwriting of W., shewing that the deeds were engrossed from them, and were duly executed and stamped, and the diary of a deceased clerk containing entries in his handwriting made in the regular course of his business, and shewing that he had drawn the drafts, and had attended the execution and stamping of the deeds, were good secondary evidence of the mortgages. *Waldy* v. *Gray*, 44 L. J., Ch. 394; L. R. 20 Eq. 238; 32 L. T. 531; 23 W. R. 676.

In an action for recovery of land, drafts of deeds in the possession of the defendant and which he refused to produce were admitted as secondary evidence. *Sutcliffe* v. *James*, 40 L. T. 875; 27 W. R. 750.

Letters as to Deeds.]—And letters between the defendant or his solicitor and the solicitors of his predecessor in title were also admitted on such evidence thereof. *Ib.*

Solicitor's Copies.]—An attorney stated that after the execution of a deed, which he held for his client, a document was delivered out of his office to the defendant as a copy. The attorney having refused to produce the deed:—Held, that the document so delivered was not admissible as secondary evidence of its contents. *Volant* v. *Soyer*, 13 C. B. 231; 22 L. J., C. P. 83.

An action on a bond of indemnity stood for trial at the Flintshire assizes. The bond was in the possession of W., who held it as the representative of a former attorney of the obligors, and was himself the defendant's general attorney, and who had undertaken to produce it at the trial, if the judge should think he was bound to do so. Before the assizes the bond had been sent by W. to the defendant's attorney in the action, in London, for the purpose of inspection and admission; and the plaintiff's attorney had there taken a correct copy of it. At the trial, W. had the bond in court, but objected to produce it, on the ground of privilege; and the objection was allowed:—Held, that the copy so taken by the plaintiff's attorney was admissible as such evidence, notwithstanding the objection of privilege. *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 D. (N.S.) 476; 12 L. J., Ex. 1.

Entry in Bill of Costs.]—The entries in the bill of costs of a deceased attorney:—Held, to be good secondary evidence of the execution of deeds. *Skeffington* v. *Whitehurst*, 3 Y. & Coll. 1; 7 L. J., Ex. Eq. 65. Affirmed 9 Cl. & F. 219.

Extract—Foundation Deed of Charity.]—An extract of the foundation deed of a charity, purporting to be signed by the founder, which had been hung up in the board-room of the charity for many years, and on its cessation was given into the care of one of the governors and secretary of the charity, was admitted as evidence of its trusts. *Hospital for Incurables, In re*, 13 L. R. Ir. 361.

Of Agreement—Reference in Affidavit.]—In a claim for specific performance of an agreement, which is not produced nor proved by plaintiff, and the only evidence respecting which is a reference in an affidavit of the defendant's solicitor, himself one of the defendants, to the "agreement in the plaintiff's claim set forth," and a correspondence between the solicitors of plaintiff and defendants, the court may be satisfied that the agreement in the terms so set forth was executed, though it has not been proved according to the strict rules of evidence. *Tynte* v. *Buller*, 23 L. J., Ch. 504; 2 W. R. 309.

—— **Replevin — Admission of Terms of Holding.**]—In replevin, the admissions of the plaintiff are evidence to shew the terms upon which he held the premises, though he held under an agreement in writing that is not produced. *Howard* v. *Smith*, 3 Scott (N.R.) 574; 3 Man. & G. 254; 10 L. J., C. P. 245. S. P., *Slatterie* v. *Pooley*, 6 M. & W. 664; 10 L. J., Ex. 8.

Tolls.]—Where an assignment of turnpike tolls had been executed by way of mortgage, entries in a book of the trustees, indorsed "Mortgage Book," containing an abstract of the names of the creditors, the amounts of their securities, and the interest due upon them, are good secondary evidence of such security. *Pardoe* v. *Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

Printed copies of the statements of the annual accounts of a turnpike trust, produced from the office of the clerk of the peace (to which the originals, signed by the chairman at the annual general meeting, had been returned pursuant to 3 Geo. 4, c. 126, c. 78), are not admissible in an action against the trustees, without shewing the originals to have been lost or destroyed. *Pardoe* v. *Price*, 13 M. & W. 267; 14 L. J., Ex. 212.

Chancery Decrees.]—In support of a custom of a manor that the lord was entitled to take only one heriot from each tenant, whatever number of tenements he might hold, an old decree of the Court of Chancery in a suit between copyholders and the lord, and establishing the custom produced by a witness who succeeded his brother as lord of the manor, and who stated that he found it amongst his brother's papers, is admissible against a subsequent lord of the manor, as a copy of the original, for which an ineffectual search has been made. *Price* v. *Woodhouse*, 3 Ex. 616; 18 L. J., Ex. 271.

So secondary evidence is admissible of an office copy of the decree delivered by a prior lord to a tenant, when asked by him for evidence to prove the customs of the manor, when a proper but an ineffectual search for it has been made. *Ib.*

Will.]—A copy of a will produced from the Prerogative office was received, after proof of unsuccessful searches for the original, and that the practice in the office at the time of the date of the will was to give out the original wills after taking copies. *Fitzwalter Peerage*, 10 Cl. & F. 946.

Declarations of a testator are admissible, whether made before or after the execution of his will, in the event of its loss, as secondary evidence of its contents. *Sugden* v. *St. Leonards (Lord)*, 45 L. J., P. 49; 1 P. D. 154; 34 L. T. 369; 24 W. R. 479—C. A. S. P., *Anon.*, 2 Camp. 390.

Where original will is lost, from the exemplification thereof under seal of Prerogative Court, there is reason to suspect its validity as to disposition of real estate, such exemplification cannot be admitted as evidence, but party must be left to his remedy at law. *Arthur* v. *Arthur*, 3 Bro. P. C. 568.

Scotch wills registered in the Court of Session are retained there, and if it is necessary to prove any such wills in England a certified copy is given out, and is admitted to probate in the English ecclesiastical courts; the Lords' Committees for privileges will not, on claims of peerage, receive such copy, unless it is shewn that the original will cannot be produced. *Wharton Peerage*, 12 Cl. & F. 295.

An office copy of a will relating to real estate only, will be admitted by the court as sufficient proof of the will itself. *Danby* v. *Poole*, 5 L. T. 240; 10 W. R. 240.

Report — Notice to Produce.] — Action to restrain an alleged libel, to the effect that the plaintiff was infringing the patent rights of the defendant, a rival tradesman. The defendant, in cross-examination, stated that he had been in the habit of consulting A., an engineer (one of his witnesses), as to his patents, and had received from him a written report. The plaintiff had not required from the defendant an affidavit of documents, and on the twelfth day of the trial notice by leave was given to the defendant to produce the report next day. The report not

being produced next day, the plaintiff's counsel, after the evidence for the defendant was closed, asked leave to recall the defendant or A., to be examined as to the contents of the report, or that A. might produce a copy of it. The court refused to allow parol evidence to be given at that stage of the trial, with respect to a document as to which no proper notice to produce had been given. *Sugg* v. *Bray*, 54 L. J., Ch. 132; 51 L. T. 194.

Minutes of Contract made by Third Party.]—The production of an entry of the minutes of a contract made by a third party, in the presence of and by the direction of two contracting parties, but not signed by either of them, is not the only medium of proving the contract, unless there is evidence that the writing in fact constituted the agreement, and was taken to be so, and assented to as such by the parties; parol evidence of the terms of the contract is, therefore, admissible without accounting for the non-production of the written minutes. *Rex* v. *Wrangle*, 4 N. & M. 375; 2 A. & E. 314; 1 H. & W. 41; 4 L. J., M. C. 43.

Copy—Accompanying Letter.]—A copy of a document sent by the plaintiff to the defendant, with a letter stating it to be a copy, is receivable for the defendant, where the document itself would be so, without production of or accounting for the original. *Ansell* v. *Baker*, 3 Car. & K. 145.

Letters.]—A copy of a document, taken by a machine worked by the witness, who produces it, is admissible as secondary evidence. *Simpson* v. *Thoreton*, 2 M. & Rob. 433.

See also *Everingham* v. *Roundell*, 2 M. & Rob. 138; 2 Lewin, C. C. 157.

Admission under a judge's order of the copy of a letter with notice to produce the original, does not dispense with proof of the original. *Sharp* v. *Lamb*, 11 A. & E. 805; 3 P. & D. 454; 9 L. J., Q. B. 185; 4 Jur. 965.

Where a person examined before commissioners of bankruptcy produced a machine copy of a letter sent to a third party and the solicitor of the assignees made a copy of it, in an action against that person by the assignees:—Held, that the last made copy was not admissible without reading his examination, although notice had been given to A. to produce the original copy. *Holland* v. *Reeves*, 2 Car. & P. 36.

And see cases, ante, cols. 686, 687.

Act of Parliament.]—As secondary evidence of a contract there was produced an office copy of a special verdict, returned upon the trial of a feigned issue in H. T. 13 & 14 Car. 2, wherein the jury found, that, at a parliament, &c., holden, &c., it was enacted, &c. The act was then set out:—Held, that the special verdict being res inter alios acta, was not admissible per se, and that it was not receivable as containing an authenticated copy of the act, inasmuch as it was strictly the finding of a matter of fact, not professing to set forth a copy of the act according to its tenor, not stating the title of the act so as to identify it with the lost act. *Doe* d. *Bacon* v. *Brydges*, 6 Man. & G. 282; 7 Scott (N.R.) 333; 13 L. J., C. P. 209.

Rules of Court.]—Where a court prints and circulates copies of its rules, for the guidance of its officers, the production of one of these copies is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court and the copy is not shewn to have been examined with the original. *Dance* v. *Robson*, 1 M. & M. 294.

Note.]—Copies of a note, bill of sale, and stated account, if attended with concurring circumstances of undeniable credit, will be admitted as evidence. *Lloyd* v. *Wynne*, 2 Bro. P. C. 377.

Copy of a note taken by one who had been entrusted with the note, and was since dead, under which was written an acknowledgment that nothing was due, allowed to be read as evidence, though not proved to be a true copy, and though the defendant had sworn there was no such acknowledgment under the note, it appearing, when the note was produced, that the bottom of it was torn off. *S. C.*, 2 Vern. 603.

—— **When Lost.**]—*See* supra, 2.

Debenture.]—A suit having been instituted in the Court of Chancery in England, to carry into execution the trusts of a deed executed by D., in 1799, for the benefit of creditors holding debentures. The assignees of a bankrupt firm under two debentures, which had been deposited with the firm, for the balances due, and to become due to them, went in under the decree to prove their claim. The master reported as to one of the debentures, No. 26, that the sum secured by it was due under the deed of trust, but that there was not sufficient proof to establish the right of the claimants. Pending this suit, a bill was filed in the Court of Chancery in England, for the administration of the estate of a bankrupt firm, in which, by an order of court, a receiver of that estate was appointed. In this state of the proceedings, and while the creditors' suit in England was pending, a bill was filed in the Court of Chancery in Ireland, by the assignees of the bankrupt firm and the receiver, for the same purpose as the suit then pending in England, viz. the execution of the trusts of the deed of 1799, and payment of the creditors holding debentures. In this suit proof was given before the master of the execution and assignment of the debenture No. 26, of the search for and loss of the original, and of an examined copy. Upon this proof a decree was made, declaring the right of the assignees for payment of a certain portion of the sum due upon the debenture to the receiver in the English suit. This decree was affirmed on appeal. *Donegal* v. *Salt*, 8 Bli. (N.S.) 853.

Order to pay Money.] — Defendant being indebted to plaintiff in 150*l.*, and being employed by T. to perform work for which he was receiving a percentage, wrote an order to T. to pay plaintiff 150*l.* out of the first monies due to defendant. Afterwards, being indebted to B. in 997*l.*, he executed a deed reciting the above facts, assigning and transferring to B. such sums as then were or should become due to him, defendant, from T. in trust first to pay plaintiff 150*l.*, and then to retain the residue towards payment of the 997*l.*, with covenants that he should not receive the money nor revoke, &c. Afterwards defendant received 150*l.* from T., and plaintiff sued him for money had and received and on an account stated:—Held, that plaintiff

was entitled to give secondary evidence of the order, upon proof of a bonâ fide search for the original among plaintiff's papers only, and that such secondary evidence was furnished by a paper, admitted by defendant's attorney to be a true copy of an affidavit sworn, but not filed, by defendant in proceedings against another party, such paper stating the order to have been written by defendant, and setting it out, though no evidence was given that the attorney had compared the paper with the original affidavit or order. *Pooley* v. *Goodwin*, 4 Ad. & E. 94; 5 N. & M. 466.

Construction of Contents on Admission.]—Where a written instrument has been lost, and parol evidence of its contents has been received, its construction is still for the court, and not for the jury. *Berwick* v. *Horsfall*, 4 C. B. (N.S.) 450; 27 L. J., C. P. 193; 4 Jur. (N.S.) 615; 6 W. R. 471.

After Notice to Produce.]—*See* ante, col. 778; and post, cols. 830, 831.

Primary or Secondary Evidence.]—See *Lucas* v. *Williams*, 61 L. J., Q. B. 595; [1892] 2 Q. B. 113; 66 L. T. 706.

IV. PRODUCTION AND ADMISSION OF EVIDENCE.

1. In General.

a. Function of Judge.

To determine Admissibility.]—All questions relative to the admissibility of evidence, and all preliminary matters of fact, are to be determined by the judge, not by the jury. *Bartlett* v. *Smith*, 11 M. & W. 483; 12 L. J., Ex. 287; 7 Jur. 448.

If evidence is tendered to shew that evidence primâ facie admissible ought to be rejected, it is the duty of the judge to receive the evidence so tendered, and decide upon it himself. *Ib.*

A judge will reject evidence in itself illegal, notwithstanding the admissions or omissions of the litigants. *Shaw* v. *Roberts*, 2 Stark. 455.

A court of justice cannot delegate its jurisdiction, and ought not to be guided by any foreign opinion upon a question of law, e.g. the admissibility of evidence. *Dunbar* v. *Harvie*, 2 Bligh, 351.

It is the province of the judge at Nisi Prius to decide all preliminary questions of fact upon which the admissibility of the evidence depends. *Boyle* v. *Wiseman*, 11 Ex. 360; 3 C. L. R. 1071; 24 L. J., Ex. 284; 1 Jur. (N.S.) 894; 3 W. R. 577.

In an action of libel the plaintiff, in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant a document was produced as the original:—Held, that the judge was, at that stage of the cause, bound to hear the evidence on both sides, and to decide whether the document offered was the original or not, and that if it was, the secondary evidence was inadmissible. *Ib.*

A judge is bound to try a collateral issue, where the reception of evidence depends on a preliminary question of fact. *Cleave* v. *Jones*, 7 Ex. 421; 21 L. J., Ex. 105.

The court, and not the witness, is to judge of the reasonableness of an excuse for withholding papers of which production is required under a subpœna duces tecum. *Amey* v. *Long*, 9 East, 473; 6 Esp. 116; 1 Camp. 16, 180, a.; 9 R. R. 589.

When the grounds of privilege are before the court, it is for the court, and not the witness, to decide as to their sufficiency. *Aston, Ex parte*, 28 L. J., Ch. 631; 5 Jur. (N.S.) 615; 7 W. R. 539.

Where a valid objection is taken to the admissibility of evidence, it is discretionary with the judge whether he will allow the objection to be withdrawn. *Barbat* v. *Allen*, 7 Ex. 155; 21 L. J., Ex. 155; 16 Jur. 339.

On a motion for a new trial, no objection to the admission of evidence can be taken into account except those made at the hearing. *Essex (Earl)* v. *Hodgson*, 15 W. R. 960.

—— **Where Preliminary Question Identical with Main Issue.**]—As to the duty of the judge where a question of fact preliminary to the admissibility of evidence happens to be identical with the main issue to be tried in the case, see *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314; 16 L. J., Q. B. 218; and *Stowe* v. *Querner*, 39 L. J., Ex. 60; L. R. 5 Ex. 155.

To prevent Production of Public Document.]—It is the duty of a judge, if it is sought to produce any official document of state at the trial of an action, to interpose and prevent its being produced or any secondary evidence of it being given. *Chatterton* v. *Secretary of State for India*, 64 L. J., Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596—C. A.

To prevent Exclusion of Admissible Evidence.]—Where a party tendered evidence primâ facie admissible:—Held, that the other party ought not to be allowed to interpose with evidence for the purpose of excluding it; but that it should be received and expunged, if afterwards shewn not to be properly receivable. *Jones* v. *Fort*, M. & M. 196.

To determine Stage for Admitting Evidence.]—The court will not interfere on the suggestion that the judge at Nisi Prius has admitted evidence at an improper stage of the cause, if the evidence is not in itself inadmissible, unless it appears that an irregularity has occurred causing actual injustice. *Doe* d. *Nicoll* v. *Bower*, 16 Q. B. 805.

It is in the discretion of the judge, subject to the reviewal of the court, to determine in what stage of the cause evidence may be produced. *Wright* v. *Willcox*, 9 C. B. 650; 19 L. J., C. P. 333; 14 Jur. 746.

—— **False Imprisonment.**]—In an action for false imprisonment, the defendant pleaded that the plaintiff had stolen the defendant's chaff; he also pleaded that his chaff had been stolen, and that he had reasonable ground to suspect the plaintiff. The plaintiff gave evidence, in the first instance, to account for her possession of chaff. The defendant's witnesses proved that the chaff in the plaintiff's possession was similar in quality to that lost by the defendant, and that in both there was linseed:—Held, that the judge had rightly exercised his discretion in allowing the plaintiff to call a witness in reply to account for the presence of linseed in the chaff found in the plaintiff's possession. *Ib.*

Power to call Witness.]—Where an order for an issue, from chancery, directs all witnesses

to be examined, but the plaintiff declines to call some, conceiving his case made out, it seems the judge will himself call the others. *Groom* v. *Chambers*, 2 Mont. & Ayr. 742.

—— **Right of Parties to Cross-examine.**]—A judge at trial may, for the discovery of truth, himself call a witness and examine him, and neither side may cross-examine such witness without leave of the judge. *Coulson* v. *Disborough*, [1894] 2 Q. B. 316; 9 R. 390; 70 L. T. 617; 42 W. R. 449; 58 J. P. 784—C. A.

—— **Court of Appeal.**]—The Court of Appeal has jurisdiction under s. 39 of the statute 15 & 16 Vict. c. 86, to require the production and examination before itself of a party to a cause, although he may not have been orally examined in the court below. The expression "upon the hearing" in the 39th section means whenever or wherever a cause is heard. *Hope* v. *Threlfall*, 2 Eq. Rep. 307; 23 L. J., Ch. 631. And see *Jacobson, Ex parte, Pincoffs, In re*, infra.

Evidence Vivâ Voce.]—The making of an order under r. 3 of the General Order of the 5th of February, 1861, to take evidence vivâ voce at the hearing of a cause, is a matter within the discretion of the judge who has the conduct of the cause, and his decision upon an application to have the evidence so taken cannot be appealed from. *Ohlsen* v. *Terrero*, 44 L. J., Ch. 155; L. R. 10 Ch. 127; 31 L. T. 811; 23 W. R. 195.

To order Admission of Documents.]—The court has no jurisdiction under r. 20 of Hilary Term, 4 Will. 4, to order the admission of documents; but if a judge at chambers desires parties coming before him under that rule to go before the court, they will be heard; but the court will pronounce no judgment, leaving that to be done by the judge at chambers. *Smith* v. *Bird*, 3 D. P. C. 641.

Agent or bailiff, confounding his principal's property with his own, charged with the whole, except what he can prove to be his own; and, in this instance, viz. the case of a breach of the terms upon which the court dissolved an injunction, the inquiry was directed with costs. The court refused in such a case a prospective direction to admit books, not legal evidence; usual in a fair case, as where, from want of notice of an adverse claim, a strict account cannot be given: merely giving liberty to apply upon any question of evidence. *Lupton* v. *White*, 15 Ves. 432; 10 R. R. 94.

To refuse Contradictory Evidence.]—Where a party in a first cause has examined a great number of witnesses to establish a particular point, the court will never suffer him, in a second, to contradict what he attemptad to prove in the first. *Bennet* v. *Lee*, 2 Atk. 531.

Right to decide without hearing Evidence.]—If a judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given. *Jacobson, Ex parte, Pincoffs, In re*, 22 Ch. D. 312; 48 L. T. 197; 31 W. R. 554—C. A.

If, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be heard before reversing the decision. *Ib.*

To refuse Evidence where Statement of Claim Admitted.]—The statement of claim in salvage actions should contain such facts as, if admitted, will constitute the whole of the plaintiff's case as the court will decline to admit evidence at the hearing, except on special grounds, where the facts alleged in the statement of claim are admitted. *The Hardwick*, 53 L. J., P. 23; 9 P. D. 32; 50 L. T. 128; 32 W. R. 598; 5 Asp. M. C. 199.

To leave Subsidiary Questions of Fact to Jury.]—In an action for malicious prosecution, when the plaintiff makes out a primâ facie case the judge, in order to enable himself to determine the issue of reasonable and probable cause, may leave subsidiary questions of fact to the jury; in which case the onus of proving the existence of such facts as go to establish reasonable and probable cause lies upon the plaintiff. *Abrath* v. *North-Eastern Ry.*, 52 L. J., Q. B. 620; 11 Q. B. D. 440; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692—C. A.

Right to decide without consulting Jury.]—Where a fact is distinctly sworn to upon a trial, which is not contradicted by other evidence, and there is no doubt cast upon the credibility of the witnesses who attest it, the judge need not take the opinion of the jury upon it, though he may be requested to do so. *Michell* v. *Williams*, 11 M. & W. 205; 12 L. J., Ex. 193.

Rules of Evidence.]—The rules as to evidence are the same in equity as at law. *Manning* v. *Lechmere*, 1 Atk. 453; *Glynn* v. *Bank of England*, 2 Ves. 41.

—— **Best Evidence.**]—A shorthand writer having been allowed to refer to his notes as to the testimony of witnesses at the trial of an indictment:—Held, that such evidence was improperly received, as the witnesses themselves ought to have been called. *Willans* v. *Taylor*, 3 M. & P. 350; 31 R. R. 379.

—— **Legal Evidence.**]—On the trial of an issue, the jury is confined to legal evidence, and evidence which is not legal cannot be admitted. But the Chancellor, although he performs the office of a jury in trying questions of fact arising before him, is not confined, as a jury is, to legal evidence. *Kilbee* v. *Sneyd*, 2 Moll. 493.

b. Facts in Issue or Relevant to the Issue.

In issue on the Pleadings.]—Action for libel alleging that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress. Defence, that the allegation was true:—Held, that even assuming that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged, and of particular facts tending to show misconduct in the plaintiff as a theatrical critic, was material; it was rightly rejected, for the particular facts were not stated or referred to in the pleadings as required by Ord. 19, r. 4. *Scott* v. *Sampson*, 51 L. J., Q. B. 380; 8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541.

The evidence of facts not put in issue on the record is inadmissible. *Blake* v. *Marnell*, 2 Ball & B. 47. Affirmed 4 Dow, 284. And see *Brown* v. *Chambers*, Hayes, 597.

It is most material in equity pleading, that all the evidence intended to be relied on at the hearing should be founded on some allegation, distinctly put on record, of fact, which it is calculated to support, or otherwise it will not be admitted on the hearing. *Hall* v. *Maltby*, 6 Price, 240.

Application for leave to exhibit interrogatories in the master's office, for the examination of an executor, the object being to charge him with a breach of trust not raised by the pleadings, refused with costs. *Ford* v. *Bryant*, 9 Beav. 410; 15 L. J., Ch. 261; 10 Jur. 484.

Evidence not admitted of facts, not alleged in the pleadings. *Gordon* v. *Gordon*, 3 Swanst. 472; 19 R. R. 230.

Bill brought by wife for maintenance, on suggestion of cruel usage by the husband: and on the part of the defendant, as an excuse for his ill usage, depositions were offered to prove a criminal conversation; unless it is expressly charged by the answer, the court will not suffer such depositions to be read. *Watkyns* v. *Watkyns*, 2 Atk. 96.

Answer, charging the wife had behaved in an indecent manner, will entitle the husband to read evidence against her of criminal conversation. *Ib.*

Plaintiff having in ignorance and mistake set out by his bill a supposed defect in his title, which was as lessee with covenant for renewal, and praying that his lease might be declared valid, and the covenant binding notwithstanding the defect, and a decree for specific performance, Lord Chancellor, being clear that the defect was fatal, and that the bill must be dismissed with costs, it was discovered before order made that the supposed defect in the plaintiff's title did not exist:—Held, that evidence of the true state of the title may be received, although, strictly speaking, it is evidence of a fact not in issue on the pleadings, and even contrary to the statement, there being no surprise, the parties having equal means of knowledge; the counterpart of the instrument of demise creating the title being in the hands of the defendant. *Sadler* v. *Lovatt*, 1 Moll. 162.

Evidence of a distinct substantive fact, without an allegation on the record, not received. *Smith* v. *Clarke*, 12 Ves. 477; 8 R. R. 359.

Depositions to a fact not put in issue, not permitted to be read. *Clarke* v. *Turton*, 11 Ves. 240.

Evidence of a declaration by a plaintiff, that when a lease was about to be executed, he had contrived to introduce a deed instead of the lease, and the grantor, under the impression he was executing the lease, executed the deed, rejected; the declaration not being put in issue by an averment in the answer, "that the deed has been executed under circumstances of gross fraud and imposition practised by the plaintiff": for the defendant ought to have stated in his answer, the declaration, as evidence of the fact, constituting the fraud and imposition he relied on; whereby the plaintiff would have had an opportunity of impeaching the testimony of the witnesses, by cross-examination, or by producing witnesses to contradict him. The defendant did not prove he was ignorant of the declaration when he put in his answer. *Mulholland* v. *Hendrick*, Beat. 277.

Evidence cannnot be read even on behalf of an infant as to a fact not stated in the bill, unless it is put in issue by his answer. *Powys* v. *Mansfield*, 6 Sim. 565.

On a bill filed to set aside the sale of an estate on the ground of fraud practised by the defendant on the plaintiff, the plaintiff is not at liberty to give evidence of the defendant's having stood in the relation of his attorney at the time of the sale, with the view of raising an inference that he had acted fraudulently by taking advantage of that character, the fact of his having been such an attorney not being stated, nor put in issue by the bill. *Williams* v. *Llewellyn*, 2 Y. & J. 68.

A decree directed an inquiry whether certain younger children had made any and what assignments of their shares, and under what circumstances. One of the defendants, claiming to be an assignee of a share, carried into the master's office a state of facts setting forth the assignment under which he claimed. A co-defendant (one of the children) carried in a counter state of facts, impeaching the assignment as having been executed for an inadequate consideration, and without legal assistance. A motion to suppress interrogatories filed in support of the counter state of facts, as relating to the question in dispute between co-defendants only, and not in issue in the cause, was refused. *Lennard* v. *Curzon*, 1 De G. & Sm. 350.

Whether evidence of conversations with the parties, or those under whom they claim, which are not specifically put in issue by the pleadings, will be received, is a question to be decided according to the circumstances of each case, and there is no inflexible rule upon the subject. *Incorporated Society* v. *Rose*, 3 Ir. Eq. R. 257.

Where the fact of bankruptcy is not put in issue by the bill, evidence of it is not admissible at the hearing of the cause. *Archbold* v. *Charitable Bequests Commissioners for Ireland*, 2 H. L. Cas. 440.

A party after failing in the defence set up by his answer, cannot be permitted to try another defence depending on matters not put in issue by the answer, and which, therefore, his adversary had no means of disproving. *Persse* v. *Persse*, 7 Cl. & F. 279; West. 110.

A defendant cannot avail himself of a matter in defence which appears only upon his evidence, and was not stated in his answer. But if plaintiff, upon his own case, is not entitled to the relief prayed, the court will not assist him. *Stanley* v. *Robinson*, 1 Russ. & M. 527.

In a suit for the administration of a trust, where the parties beneficially interested are before the court, the trustees, although plaintiffs, ought not to enter into evidence as to facts relating to or shewing the respective rights of the cestuis que trustent. *Girdlestone* v. *Creed*, 8 Hare, 208.

Parol evidence cannot be received of acts which are not properly put in issue by the pleadings. *Attwood* v. *Small*, 6 Cl. & F. 232; 2 Jur. 200, 226, 246.

It is a rule to be observed in all courts, that a party complaining of an injury and suing for redress, can recover only secundum allegata et probata. *Malcolmson* v. *Clayton*, 13 Moore, P. C. 198.

Circumstances allowed to be proved by evidence by defendant, which he had not put in issue by his answer. *Hodgson* v. *Thornton*, 1 Eq. Abr. 228.

Documents not put in Issue.]—A. brought bill against B. for specific performance of covenants in a lease, and particularly a covenant to leave a certain quantity of alum on the premises at end of term; B., by answer, insisted covenant was not intended to be performed, but at hearing produced a paper, purporting to be a receipt for the alum from the lessor:—Court held, that no regard ought to be paid to this paper, not only because it had a suspicious appearance in itself, but because it was not insisted on in the pleadings. *Ward* v. *Buckingham (Duke)*, 3 Bro. P. C. 581.

A party having been examined as a witness in a former cause:—Held, that his depositions were sufficiently put in issue to entitle them to be read by a general reference in the pleading to his deposition. *Houlditch* v. *Donegal (Marquis)*, 1 Moll. 366.

Documentary evidence may be read at the hearing, although not put in issue by the pleadings. *Fitzgerald* v. *O'Flaherty*, 2 Moll. 394.

It is not the rule that no letter nor document can be produced in evidence that has not been put in issue by the pleadings. A party may prove his case by parol, or by written evidence, and is under no restriction in respect of one more than the other: evidence of substantive extrinsic facts, therefore, whether parol or documentary, need not be put in issue; but evidence of admissions of conclusions of law must be put in issue, and that equally, whether such admissions be in writing or otherwise. *S. C.*, 1 Moll. 350. S. P., *Blacker* v. *Phepoe*, 1 Moll. 354.

In a bill for an account, the plaintiff, in general terms, charged errors in the accounts between him and the defendant; and stated, that they appeared in a certain report of an accountant; but the bill did not state the report, nor specifically point out the errors:—Held, that the plaintiff could not, on this record, give evidence of the report, or of such errors; and that notwithstanding the defendant had stated the report in his cross-bill, and had explained some of the errors. *Shepherd* v. *Morris*, 4 Beav. 252.

A plaintiff claiming under a deed, not stated particularly by him, and not particularly and explicitly admitted by the defendant, cannot be entitled to a judgment or decree founded upon such deed against such defendant, without producing and proving such deed. *Berney* v. *Moore*, 2 Ridgw. P. C. 323.

Documentary evidence of confessions is not inadmissible in equity, merely because it is not specifically put in issue. *M'Mahon* v. *Burchell*, 2 Ph. 127; Coop. C. C. 457. Varying 3 Hare, 97.

Any documents which could be used at law as admissions to prove an agreement pleaded, may be used in evidence in equity for the same purpose, though not notice, in the bill; subject to inquiry, if the defendant be taken by surprise; but such a mode of proving a case may effect the costs of the suit. *Crosbie* v. *Thompson*, 11 Ir. Eq. R. 404.

A document not in issue by the bill, and a motion for the introduction of which, by amendment, has been refused, cannot be used at the hearing. *Swift* v. *M'Tiernan*, 11 Ir. Eq. R. 602.

A deed not mentioned in the pleadings, some of the facts referred to in which were sworn to in one answer and denied in the other and also in the bill, was permitted to be read as part of the transaction spoken to by a witness who was examined, and who was an attesting witness to it. *Jillard* v. *Edgar*, 13 Jur. 1114.

To warrant the reading of a document at the re-hearing, it must have been put in issue by the pleadings. It is not sufficient to have put in issue the fact intended to be proved by the document. *Lysaght* v. *Callinan*, Hayes, 141.

An application by relators (after the information set down for hearing, upon notice of motion) to be at liberty to produce and read, at the hearing, as evidence, a will not stated in the pleadings, refused; as, if evidence, the party might use it, and if not, it could not be made evidence by interlocutory motion. *Att.-Gen.* v. *Fishmongers Co.*, 4 Myl. & C. 1. See *S. C.*, C. P. Cooper, 385.

Where, in a suit to raise an incumbrance, a defendant omitted to put in issue by her answer a deed of a certain date, under which she claimed an annuity, and upon motion founded upon an affidavit stating that the omission arose from inadvertence, but not stating any of the circumstances under which the deed was executed, she obtained an order that she should be at liberty to prove the deed, and to rely on it at the hearing, although it had not been put in issue in the cause:—Held, that under that order, evidence that the deed was executed upon a day different from that on which it bore date was inadmissible at the hearing; and that the evidence of its execution merely could then be received. The court, however, inserted in the decree a declaration that the defendant should be at liberty to rely, before the master, on the deed in relation to such rights as she might claim. *Ramsay* v. *Huffington*, 13 Ir. Eq. R. 185.

—— **Letters.**]—Letters of the plaintiff in the hands of the defendant may be proved and used as evidence of facts, although not as naked admissions, without being put in issue. *Houlditch* v. *Donegal (Marquis)*, 1 Moll. 364.

Letters proved in the cause, but not referred to in the pleadings, are inadmissible in evidence, even on the question of costs. *Whitley* v. *Martin*, 3 Beav. 226.

Letters proved, but not particularly mentioned in the pleadings, are not therefore admissible: but if the production of such evidence would operate as a surprise on the other party, the court will not give effect to it without giving the party to be affected by it an opportunity of controverting it. *Malcolm* v. *Scott*, 3 Hare, 39. And see *S. C.*, 14 L. J., Ch. 57; 8 Jur. 1059.

Specific Allegation—Notice through Solicitor.]—A statement in a bill "that the defendant was aware and had notice of," &c., is sufficiently specific to let in evidence that the defendant had notice through his solicitor. *McMahon* v. *McElroy*, Ir. R. 5 Eq. 1.

Relevancy—Evidence as to Collateral Facts.]—In an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiffs proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhoods. Per Lord Selborne, L.C.: Evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained, would be admissible and material. *Metropolitan Asylum District Managers* v. *Hill*, 47 L. T. 29—H. L. (E.)

Per Lord Watson: Evidence relating to collateral facts is only admissible when such facts will, if established, afford a reasonable presumption as to the matter in dispute, and when such evidence is reasonably conclusive. *Ib.*

Proof by other Instances.]—To prove that a publican was supplied with good beer by a brewer, it is not sufficient merely to shew that the beer supplied at that time to other publicans was good. *Holcombe* v. *Hewson*, 2 Camp. 391; 11 R. R. 746.

On the trial of an action by the plaintiff against the defendant for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses or the real principal, evidence is admissible that other persons had received orders from the defendant to do work at the same houses, without shewing that the plaintiff knew of these orders at the time he did his work. *Woodward* v. *Buchanan*, 39 L. J., Q. B. 71; L. R. 5 Q. B. 285; 22 L. T. 123.

In a question between landlord and tenant, whether rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid is not admissible. *Carter* v. *Pryke*, 1 Peake, 130.

Where the defendant defamed the plaintiff in his business of a schoolmaster, by stating that the scholars were ill fed and badly lodged, and which he justified as being true; to rebut which the plaintiff's counsel asked, how boys were treated at another particular school, or as to the manner of their education:—Held, that such questions were improperly put, and were not required to be answered. *Boldron* v. *Widdows*, 1 Car. & P. 65.

If, in an action for goods sold, the question is whether the credit was given to the defendant's wife or to her father, evidence that other persons had given credit to the father is not receivable. *Smith* v. *Wilkins*, 6 Car. & P. 180.

Where in an action it is required to be proved that L. had committed a felony by hiring a pianoforte, and selling it immediately:—Held, that evidence could not be given respecting optical instruments which were alleged to have been obtained by L. from another tradesman. *Wilton* v. *Edwards*, 6 Car. & P. 677.

If A. and B. rent a ready furnished bedroom jointly, and both are taken into custody in the bedroom, charged with jointly stealing feathers from the bed, and, on a search, pawnbroker's duplicates are found on one of them:—Held, that these duplicates are receivable in evidence against the other, on a plea of justification to an action for false imprisonment brought by that other. *Atkinson* v. *Warne*, 6 Car. & P. 687.

Where special damage is alleged, that C. declined to deal with the plaintiff because his bill was dishonoured, the letter C. received announcing to him the dishonour of the bill may be read in evidence to shew that he received such a letter, but is no proof of the statements contained in it:—Held, also, that C. might be asked questions, to shew that other causes in addition to the letter induced him to cease from dealing with the plaintiff, and that other witnesses might be asked whether other bills of the plaintiff's had not been dishonoured, but that they could not be asked as to any particular bill without its being produced. *Whitaker* v. *Bank of England*, 6 Car. & P. 700.

On an issue ordered, whether the bankrupt had lost 20*l.* on a particular day, evidence cannot be given of gaming on another day. *Fife, Ex parte. Phibbs, In re*, 2 Mont. & Ayr. 577.

—— **Custom at School.**]—In an action for a quarter's salary for taking away a child from a school without a quarter's notice, evidence was given, on the part of the plaintiff, that a prospectus was given to the defendant when he came to inquire the terms of the school, and that it was usual to send a prospectus of the terms of the school with each child who went home for the holidays; and it was proposed on the part of the defendant, to call a witness to prove that she, the witness, had taken her children from the plaintiff's school without notice, and without being called on for the quarter's salary:—Held, that this evidence was not admissible; but that the witness might be asked whether she had ever received any prospectus when the children came home for the holidays. *Delamotte* v. *Lane*, 9 Car. & P. 261.

—— **Choking up of Harbours.**]—Where the question was whether an embankment had the effect of choking up a harbour:—Held, that evidence might be given that other harbours similarly situated, where there were no embankments, had begun to be choked and filled up. *Folkes* v. *Chadd*, 3 Dougl. 157.

—— **Nuisance — Rubbish by Roadside.**]—The plaintiff's horse shied at a heap of road-scrapings placed by the defendants by the side of a public highway on land belonging to them, and personal injuries were, in consequence, sustained by the plaintiff's wife. Upon the trial of an action brought in respect of such injuries, evidence that other horses had shied at the same heap on the same day was rejected, and judgment of non-suit entered. Upon motion for a new trial:—Held, that such evidence was admissible; for if the heap was of such a nature as to be likely to cause horses to shy, it was a public nuisance, and, accordingly, whatever shewed it to be likely to cause horses to shy was evidence for the plaintiffs. *Brown* v. *Eastern and Midlands Ry.*, 58 L. J. Q. B. 212; 22 Q. B. D. 391—C. A. Affirming 60 L. T. 266; 53 J. P. 342.

—— **Customs of different Manors.**]—Where in each of several manors belonging to the same lord, and part of the same district, it appeared that there was a class of tenants answering the same description, and to whom their tenements were granted by similar words:—Held, that evidence of what rights had been enjoyed by those tenants in one manor might be received to shew what were their rights in another. *Rowe* v. *Brenton*, 8 B. & C. 758; 3 M. & Ry. 143.

Upon a question as to right of minerals between the lord of the manor and his tenants holding by a peculiar customary tenure pervading a district which has several manors held for many centuries by the same lord in capite, and during that time governed and administered by persons acting under one commission, issued by the lord at stated intervals, and extending to the whole district, acts of ownership exercised over the minerals in a customary tenement in another manor within the district are admissible, although within the time of legal memory the manors may have been held by different lords and under a subject. *Ib.*

Where, in an action for digging gravel on the waste, the defendant justifies under an usage for the tenant of a particular copyhold tenement to dig gravel, he will not be allowed to give evidence of a general usage to that effect in all the copyholders. *Wilson* v. *Page*, 4 Esp. 71.

Where, in an action for pulling down a wall, the issue was, whether certain common land was the soil and freehold of the lord of the manor, on which the plaintiff was entitled to a right of common, or the soil and freehold of the plaintiff:—Held, that leases of minerals granted by the lord to other persons, in other parts of the uninclosed waste land, were not receivable, unless it was first shewn that the locus in quo formed part of one entire waste to which those leases were applicable. *Tyrwhitt* v. *Wynne*, 2 B. & Ald. 554; 21 R. R. 398.

In a dispute between lord of manor and his tenants as to a custom, deeds between lords and tenants of neighbouring manors are admissible evidence as to custom. *Lowther* v. *Raw*, 2 Bro. P. C. 451.

—— **Particular Parish.**]—Where to an action quare clausum fregit, the defendant pleaded a custom applicable to all farms within the parish which were not exempt by special agreement or otherwise, and the plaintiff traversed the custom generally:—Held, that it was not competent for him to prove that his particular farm was exempted by special agreement or otherwise. *Evans* v. *Ogilvie*, 2 Y. & J. 79.

—— **Similar Contracts.**] — In an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition:—Held, that it was not competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons, subject to the condition suggested. *Hollingham* v. *Head*, 4 C. B. (N.S.) 388; 27 L. J., C. P. 241; 4 Jur. (N.S.) 379; 6 W. R. 442.

But the judge allowed the plaintiff to be asked, on cross-examination, whether he had not made such conditional contracts with others, with a view of testing his credit or the accuracy of his memory. *Ib.*

Credit — To whom given.] — In an action brought by a contributor to a newspaper against one who was registered as the sole proprietor, his counsel, for the mere purpose of proving an admission by one S., that he was the real proprietor, proposed, on cross-examination, to ask the editor, whether he had not agreed with S. that the whole expense of editing the paper should not exceed a certain sum. The judge ruled the question to be irrelevant, and refused to allow it to be put:—Held, that it was properly disallowed. *Watts* v. *Lyons*, 7 Scott (N.R.) 1000; 6 Man. & G. 1047; 13 L. J., C. P. 91.

The contest in a cause was, as to whether the order which formed the subject-matter of the action was given by A. as a principal, or as an agent for the defendant. A. was called as a witness by the defendant, and he stated that he gave the order as principal. He was then asked the following question: "At the time of your bankruptcy how was the balance of account between you and the defendant?" And he answered, "The balance was against me to a considerable amount":—Held, admissible. *Gerish* v. *Chartier*, 1 C. B. 13; 14 L. J., C. P. 84; 9 Jur. 69.

In an action for goods sold, the question being whether the credit was given to the defendant or to her uncle, who lived in the same house, and who had brought the plaintiff on one occasion a bill of exchange for the sum due on account:—Held, that the plaintiff could not be asked what the uncle said to the plaintiff on that occasion. *Justice* v. *Elstob*, 1 F. & F. 256.

Nor could the plaintiff be asked what the uncle had said, nor what the servants at the house said on occasions when applications were made on the part of the plaintiff for money. But evidence was admitted that the defendant had been sued on the bill. *Ib.*

In such an action evidence was admitted on the part of the plaintiff to shew that the defendant, and not the uncle, was rated as occupier of the house. *Ib.*

In an action for goods sold, the question being whether credit had been given to the defendant or to a third party, a letter relating to the sale, written by the plaintiff to his agent, who made the contract, and not communicated to the defendant, is inadmissible for the plaintiff. *Smethurst* v. *Taylor*, 15 M. & W. 545; 14 L. J., Ex. 86.

Act of Party to Fraud.]—In trover by the assignees of a bankrupt, it appeared that the goods had been assigned by the bankrupt, to B., who assigned them to C., to whom the purchase-money, as was contended, was advanced by the plaintiff, to whom C. subsequently transferred the goods by bill of sale. In order to shew that these transactions were fictitious, evidence was adduced, and a question was asked, whether C. had not made a claim to those goods after the bankruptcy:—Held, that the question could properly be asked, as the claim was an act done by one of the parties to the alleged fraud. *Ford* v. *Elliott*, 4 Ex. 78; 18 L. J., Ex. 447.

Circumstantial Evidence.]—In dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But, on the other hand, you may have a number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and, when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel—per Lord Cairns. *Belhaven and Stenton Peerage*, 1 App. Cas. 278.

Circumstances forming pieces of evidence, which, taken, separately, are not conclusive, cannot become so by being united. *Hume* v. *Burton*, 1 Ridgw. P. C. 210.

Knowledge of Lunacy.]—Upon the trial of an action for the recovery of a sum of money paid as a deposit on the purchase of an estate upon the ground that the plaintiff was, at the time of the transaction, a lunatic, and incapable of contracting, which the defendant knew, the sole issue being whether, at the time of such transaction, the defendant knew the fact of the plaintiff's insanity:—Held, that the conduct of the plaintiff upon various occasions, both before and after the date of the transaction, was admissible to shew that the plaintiff's malady was of such a character as would make itself apparent to the defendant at the time he was dealing with him. *Beavan* v. *M'Donnell*, 10 Ex. 184; 23 L. J., Ex. 326.

Accident — Statements of Bystanders.] — A married woman was a passenger in an omnibus, and whilst on her journey a concussion took place, which nearly upset the omnibus, and threw her from her seat, and caused her serious injury. Upon her getting out, one of the other passengers was standing outside; and upon the trial it was proposed by her counsel to ask her if anything was then said by this person about the accident, and if the omnibus conductor made any reply. This being objected to, the judge ruled that it could not be put, and as there was no other evidence of how the accident happened, she was nonsuited. Had the question been put it would have been as follows:—"Did anyone say anything about the accident?" To which the reply would have been—"A bystander who had got out of the omnibus, said, alluding to the driver, 'By Jove, this fellow's conduct must be reported!'" whereupon the conductor said, "Sir, he has been reported, for he has been off the points five or six times to-day: he is a new driver":—Held, that the question was properly rejected, for it did not form part of the res gestæ, nor, if it did, did it explain the actual cause of the collision. *Agassiz* v. *London Tramway Co.*, 27 L. T. 492; 21 W. R. 199.

c. Burden of Proof.

Proof of Issue.]—To prove an issue it is not necessary to prove every fact or conclusion on which the issue depends. From every fact proved legitimate and reasonable inferences may be drawn. In deciding, therefore, whether there is evidence to go to the jury, the court has only to consider whether, assuming the facts proved to be true, and adding to them the inferences which a jury might reasonably draw from them, there is sufficient evidence to support the issue. *Parfitt* v. *Lawless*, 41 L. J., P. 68; L. R. 2 P. 462; 27 L. T. 215; 21 W. R. 200.

Affirmative of the Issue.]—The party upon whom the affirmative of an issue lies, must call the witness who proves that affirmative. *Palmer, Ex parte* and *In re*, 1 Deac. & C. 372.

A plea of purchaser without notice is a bar to the discovery, as well as the relief; but if not insisted on by the defendant, he must answer, and confess the notice, or the plaintiff may except to the answer; but if he does not except, the affirmative of proving notice will be on him, comme semble. *Eyre* v. *Dolphin*, 2 Ball & B. 303; 12 R. R. 94.

Presumption.]—Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So, where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burden of proving the negative on the party who insists on it. *Williams* v. *East India Co.*, 3 East, 192; 6 R. R. 589.

Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson* v. *Hodges*, 2 East, 312; 6 R. R. 427.

Where a servant is in the habit of receiving sums of money for his master, and by the established course of dealing the servant pays these over to the master from time to time, without any written vouchers passing between them, the presumption of law is, that all sums so received by the servant are regularly paid over to the master. *Evans* v. *Birch*, 3 Camp. 10.

Where there is primâ facie evidence of any right existing in any person, the onus probandi is always upon the person calling such right in question. *Banbury Peerage*, 1 Sim. & S. 155; 24 R. R. 159.

Where a creditor holds his debtor's title-deed, with a written and signed proposal of the debtor that he shall hold that deed as security for the debt, a strong presumption arises in favour of the creditor that he holds the deed for the purpose mentioned in the proposal, and the burden of proof lies on the debtor, who disputes the deposit by way of security. *Chapman* v. *Chapman* (13 Beav. 308) observed upon. *Burgess* v. *Moxon*, 2 Jur. (N.S.) 1059.

And see supra, II.

On Plaintiff or Defendant.]—A plaintiff is to prove his case to the satisfaction of the jury; and if he leaves it doubtful, either from the circumstances which surround it, or from the character of his witness, the defendant is entitled to the verdict. *Long* v. *Hitchcock*, 9 Car. & P. 629.

The onus may at the hearing be thrown on a defendant, which, on interlocutory motion for injunction, lies on the plaintiff. *Welch* v. *Knott*, 4 Jur. (N.S.) 330.

Appeal.]—On appeal, the burden lies upon the appellant. He must shew the order appealed against to be clearly wrong. *Lloyd* v. *Trimleston* (*Lord*), 2 Moll. 81.

Fulfilment of Condition.]—Where G. S., being in partnership with J. S., signed an agreement on behalf of both, to pay the plaintiff 100*l.* in consideration of his not consigning any herrings of a particular description to the London market, and in particular to the house of M., for the space of one year; and the plaintiff declared against the executors of J. S., who had survived G. S., and averred that he had not consigned any herrings to the London market, and in particular to the house of M., within the year; and in support of such averment, proved that he had not consigned any herrings to that house:—Held, that such evidence was sufficient to entitle him to recover, as it was incumbent on the defendants to have shewn that herrings had been consigned by the plaintiff to the London market. *Calder* v. *Rutherford*, 3 Br. & B. 302; 7 Moore, 158.

In assumpsit for refusing to allow plaintiff to proceed with certain work according to agreement, defendant pleaded that the work was to be done to the satisfaction of A.; and that part of it which was done was not done to his satisfaction, and that, therefore, he discharged the plaintiff:—Held, that upon this issue it was not necessary for defendant to call A. *Doe* v. *Roberts*, 4 Doug. 306.

Validity of Deed.]—Where an instrument is shewn to be false, it lies upon the party claiming benefit under it to support it. *Watt* v. *Grove*, 2 Sch. & Lef. 502.

Acting on Deed not duly executed.]—The onus of shewing that both parties had acted on the terms of an agreement which had not been, in due form, executed by either, lies upon the party who rests his case on that circumstance. *Brogden* v. *Metropolitan Ry.*, 2 App. Cas. 666.

Undue Influence.]—If the feme covert insists upon the exercise of undue influence by the husband, she must prove it, and it is for the plaintiff to prove a negative. *Field* v. *Sowle*, 4 Russ. 112.

Fraud.]—In a suit by principal against agent, involving charges of fraud against the defendant, the latter was held to lie under the burden of disproving several particulars of the plaintiff's case, although the truth of those particulars was not directly proved, but rested on circumstantial evidence only. *Barker* v. *Harrison*, 2 Coll. 546.

Discharge.]—A bond from the owner of an estate charged, to the person entitled to the charge, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security, and the estate not thereby released; it is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it is on the owner of the estate to make out that the estate is discharged. *Saunders* v. *Leslie*, 2 Ball & B. 509; 12 R. R. 114.

Suit to set aside Release of Equity of Redemption—Misrepresentation.]—In a suit by the respondent (lately an insolvent) to set aside on the ground of misrepresentation or mutual mistake a release by the official assignee of the respondent's equity of redemption of a certain mortgage, for accounts against the appellants, the mortgagees, and in effect to have the benefit of a subsequent resale by the releasee's purchaser, it appeared that the official assignee had in the release admitted the truth of the representations made to him, and that the respondent had thereafter taken a conveyance from him of all the estate vested in him under the insolvency:—Held, that the onus was upon the respondent, who was primâ facie bound by the admissions under seal of his vendor to prove the falsehood of the representations, and not upon the appellants to establish their truth. *Melbourne Banking Corporation* v. *Brougham*, 51 L. J., P. C. 65; 7 App. Cas. 307; 46 L. T. 603; 30 W. R. 925—P. C.

Indemnity.]—Two ladies intrusted much of the management of their affairs to A., who was not a professional person. In the course of business, A. became bound with them in a bond for 10,000*l.* given on their account. On the same day they executed a bond to A. for 12,000*l.* The survivor of the two ladies afterwards, by her will, left a legacy of 2,000*l.* to A. The bond for 12,000*l.* was, on the face of it, a simple money bond, unless impeached by evidence which shewed that it was partly for indemnity, and that the burden of proving it to be an indemnity bond lay on the party impeaching the bond. *Nicol* v. *Vaughan*, 1 Cl. & F. 49; 6 Bligh (N.S.) 104.

Legitimacy.]—The privilege to husband or wife protecting them from answering any questions as to access or non-access applies to a case where the child, whose legitimacy is disputed, is born only three months after marriage. In such a case where the husband takes no step to repudiate the child, the burden of proof lies upon those who dispute its legitimacy. *Anon.* v. *Anon.*, 23 Beav. 273.

Survivorship.]—The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again; on the question being raised between the next of kin of the testator and J. W., who claimed under the limitations of the will:—Held, first, that the onus of proof that the husband was the survivor was upon J. W. *Wing* v. *Angrave*, 8 H. L. Cas. 183; 30 L. J., Ch. 65. *S. C.*, sub nom. *Underwood* v. *Wing*, 19 Beav. 459; 4 De G. M. & G. 633; 3 Eq. R. 794; 24 L. J., Ch. 293; 1 Jur. (N.S.) 159; 2 W. R. 641.

Under Sailing Rules.]—If a ship bound to keep her course, under the 18th sailing rule of 1863 justifies her departure from that rule under the 19th rule, she takes upon herself the obligation of shewing not only that her departure was at the time it took place necessary, in order to avoid immediate danger; but also that the course adopted by her was reasonably calculated to avoid that danger. *The Agra and Elizabeth Jenkins*, 4 Moore, P. C. (N.S.) 435; 36 L. J., Adm. 16; L. R. 1 P. C. 501; 16 L. T. 755; 16 W. R. 735.

Accounts—Prima Facie Evidence.]—*See* supra, col. 716.

Usury.]—Distinction between a charge of usury in bankruptcy and in courts of law and equity; where it must be established by legal evidence, or in equity by admission, with an offer to pay the real debt. In bankruptcy the proof is imposed upon the creditor; and if it fails, the debt is wholly expunged. *Scrivener, Ex parte*, 3 Ves. & B. 14.

In Particular Cases.]—*See* SPECIFIC TITLES.

d. In Reply.

Evidence in Reply to Counter-claim.]—The issues of fact on the claim and the counter-claim being identical:—Held, that the plaintiff was not entitled to adduce fresh evidence in reply on the counter-claim. *Green* v. *Sevin*, 13 Ch. D. 589; 41 L. T. 724.

When allowed to rebut Defendant's Evidence.]—The plaintiff rested his case partly on an alleged conversation between himself and the defendant at the plaintiff's house on a certain evening in the presence of plaintiff's wife. Plaintiff's wife was cross-examined as to the substance of the alleged conversation, but not as to the fact of the defendant having been in the house on that occasion. The defendant having in his examination in chief denied that he was in the house at all on the evening in question; leave was given to the plaintiff, after the evidence on both sides was closed, to call further evidence to rebut the defendant's denial. *Rogers* v. *Manley*, 42 L. T. 585.

In an action to restrain the defendants from erecting a urinal in Old Burlington Mews, the statement of claim alleged that the soil of the mews was vested in and was the absolute property of three of the plaintiffs. The statement of defence did not admit this allegation, but alleged that the mews had long been a highway dedicated to the public, and belonged to the parish as one of the public streets thereof. At the trial of the action several witnesses were

examined on both sides; and at the close of the defendants' evidence the plaintiffs applied for leave to call evidence in reply, to shew that the soil of the mews had not been dedicated to the public:—Held, that as the plaintiffs were distinctly apprised by the pleadings before the trial of the action what the nature of the defence would be, the application must be refused. *Vernon* v. *St. James' Vestry*, 49 L. J., Ch. 130; 42 L. T. 82.

Mere Confirmation.]—Any evidence that is a confirmation of the original case cannot be given as evidence in reply; and the only evidence that can be given in reply is that which goes to cut down the defence, without being any confirmation of the original case. *Rex* v. *Hilditch*, 5 Car. & P. 299.

In a claim of peerage, where evidence has been produced for the purpose of establishing a certain point, the party who has produced it will not, should the Crown call evidence of a contradictory kind, be allowed to produce additional evidence confirmatory of the first. Before the claimant's junior counsel summed up the evidence previously to the opening of the case on the part of the Crown, the counsel for the Crown were required by the committee to declare whether they would or would not call evidence on a question of foreign law, so as to enable the claimant's counsel to determine whether they would then (as they could not afterwards) produce any additional evidence on that question. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

Contradiction.]—Where, in an action to try the right to work certain mines, the plaintiff at the trial relies upon his possession, and then calls upon the other side to shew title, and afterwards goes into evidence to shew his own title, the defendant may go into evidence to rebut such title. *Rowe* v. *Brenton*, 3 M. & Ry. 301; 8 B. & C. 758.

In ejectment to recover garden ground, it was proved by the plaintiff that the defendant had been let into possession of the garden by M., who had paid rent to the plaintiff. The defendant's case was, that M. had rented a part of his garden of the plaintiff, and that that had been given up, and that the defendant had the residue of the garden, which was now in dispute, devised to him by his father's will in 1791. The plaintiff proposed to give evidence in reply, to shew that from 1794 the plaintiff and his father received rent for the piece of ground in question:—Held, receivable. *Doe* d. *Sturt* v. *Mobbs*, Car. & M. 1.

A plaintiff in an action gave as confirmatory evidence of the defendant having committed the tort proved at Layton, proof that he was seen near the spot at the time in question; and the defendant called witnesses who swore that the defendant was at Richmond at the time. The plaintiff was allowed to give in reply additional evidence of the defendant being at Layton, such evidence being a direct contradiction of the new fact of the defendant being at Richmond. *Briggs* v. *Aynsworth*, 2 M. & Rob. 168.

Declarations.]—In an action for an infringement of a patent taken out in 1849, the defendant, in support of a plea that the invention was not new, gave evidence that O., who was dead, had in 1846 used a process identical with that in the patent. On the cross-examination of the witnesses it appeared that, if O. used the invention, and sold the product before the date of the patent, it was only in very small quantities, and that it was not brought into general use; and one of the witnesses was asked in cross-examination whether O. had not sold some of the product to S., and said he had. The plaintiff in reply called S., who gave evidence that in 1850 or 1851, O. sold him a small quantity of the product, and at the time of the sale said that it was a new article, that he did not wish it to be publicly known, and that he would sell him all he could manufacture:—Held, that evidence of what O. said at the time of that sale was not admissible in reply, as it would not have been admissible in chief on an issue whether O., before 1849, used the invention. *Hyde* v. *Palmer*, 3 B. & S. 657; 32 L. J., Q. B. 126; 11 W. R. 433.

Action for timber sold and delivered. The plaintiff proved that the timber was supplied by him, upon the order of the defendant, for finishing some houses; and the defence was, that the houses belonged to F., and that the plaintiff had contracted with the defendant as agent of F.:—Held, that the plaintiff could not give, in reply, evidence of declarations by the defendant that the houses were his, because such evidence went to the very point in question between the parties. *Darch* v. *Toser*, 13 Jur. 959.

Recall of Plaintiff's Witness—Common Law Procedure Act, 1854, s. 23.]—Where a defendant, who claimed to be the owner of a mill, denied on cross-examination that he had ever stated that he was tenant only, the plaintiff was allowed, under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 23, to call a witness to prove that on a certain occasion the defendant had described himself as such, though the same witness had previously been called and examined. *Sykes* v. *Haig*, 44 L. T. 57.

Jurisdiction of Judge to allow further Evidence.]—A judge may at any period in a case allow further evidence to be called by either party for his own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right. *Budd* v. *Davison*, 29 W. R. 192.

Surprise.]—Where a party is taken by surprise by a point made against him at the hearing, the judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal. *Bigsby* v. *Dickinson*, 46 L. J., Ch. 280; 4 Ch. D. 24; 35 L. T. 679; 25 W. R. 89—C. A.

In a suit for an injunction to restrain a nuisance caused by a chemical manufacture, the plaintiff's counsel applied at the close of his speech for liberty to adduce evidence to explain (as the plaintiff's witnesses had had no opportunity of doing) certain evidence of the defendant's witnesses as to noxious vapours arising from a material (asphalt) stated to be used in the manufacture of varnish made by the plaintiff, and to shew that the word "asphalt" had a double meaning:—Held, that the evidence should be admitted. *Ib.*

e. Summing up.

Under 17 & 18 Vict. c. 125, s. 18.]—Under this enactment counsel who has not announced his intention to adduce evidence, in consequence of

which the party who began sums up his case, cannot be allowed afterwards to alter his mind and adduce evidence. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 6 W. R. 463.

The right of the party who begins, to sum up the evidence at the trial, is confined to the case where the judge holds that there is evidence to go to the jury. *Hodges* v. *Ancrum*, 11 Ex. 214; 24 L. J., Ex. 257; 1 Jur. (N.S.) 547; 3 W. R. 518.

After the counsel for the plaintiff had commenced his summing up, the defendant was allowed to be called. *Rockcliffe* v. *Pearce*, 1 F. & F. 300.

The defendant's counsel, in addressing the court a second time after calling evidence, has only a right to sum up that evidence on his own side, and not to comment generally on the case. *Gilford* v. *Davis*, 2 F. & F. 23.

Order.]—Where, at the trial of an action with witnesses, the leading counsel has opened his case, and put in his evidence, either the leading counsel or his junior may sum up the evidence, but so that only one counsel shall be heard after the evidence has been put in. *Metzler* v. *Wood*, 47 L. J., Ch. 139; 37 L. T. 523; 26 W. R. 125.

Mistake by Judge.]—If a judge mistakes the evidence in summing up a case, the party complaining should correct the misstatement at the time, as a mistake in a matter of fact, which is no ground for a new trial on the ground of misdirection. *Payne* v. *Ibbotson*, 27 L. J., Ex. 341.

2. Where Evidence in Writing.

How proved.]—The circumstances which are necessary to make a document evidence must be proved aliunde, and cannot be gathered from the document itself. *Davis* v. *Morgan*, 1 C. & J. 587; 1 Tyr. 457; 9 L. J. (O.S.) Ex. 153.

In an action for use and occupation, one of the plaintiff's witnesses, on cross-examination, said that he had heard from the plaintiff's attorney that there was an agreement in writing:—Held, that this was no evidence of the existence of an agreement, so as to render its production by the plaintiff necessary. *Watson* v. *King*, 3 C. B. 608.

C., having applied for shares in a company, received a letter of allotment, and thereupon paid a deposit into the banking-house of the company, and received the following document:—"London and Westminster Water Company:—London, Feb. 8, 1841. Received 100*l*., to be placed to the account of W. C., T. D., J. P. and J. W. For Messrs. Jones, Lloyd & Co., 100*l*.—A. P. This receipt not transferrable. The party to whom these shares are allotted is requested to attend immediately at the offices of the company, No. 7, St. Martin's-lane, Trafalgar-square, with this receipt, to sign the parliamentary contract, when the receipt will be exchanged for the shares":—Held, in an action brought by C. against one of the directors to recover his deposit, in consequence of the company abandoning the scheme, that he was bound to produce the letter of allotment, as it shewed the terms of the contract on which the money had been paid. *Clarke* v. *Chaplin*, 1 Ex. 26; 16 L. J., Ex. 246. Affirmed 4 Ex. 403—Ex. Ch.

A plaintiff claiming under a deed, not stated particularly by him, and not particularly and explicitly admitted by the defendant, cannot be entitled to a judgment or decree founded upon such deed, against such defendant, without producing and proving such deed. *Berney* v. *Moore*, 2 Ridgw. P. C. 323.

An order had been obtained to read, inter alia, the examinations of A. taken before the commissioners under C.'s bankruptcy; they cannot be read unless proved in the cause that there were such examinations so taken. *Eade* v. *Lingood*, 1 Atk. 203.

Objection to Reading.]—An objection to the reading of documents, because they have not been proved against the party objecting, must be made when they are tendered; and this rule is equally applicable to the case of a minor as of an adult defendant. *Stoughton* v. *Crosbie*, 5 Ir. Eq. R. 451.

Lease.]—In an action against a sheriff for negligence in not levying under a fi. fa., the defence was, that the sheriff had withdrawn on notice from the landlord that rent was due. At the trial the landlord stated that rent was due, but on cross-examination it appeared that the execution debtor held under a lease, which was not produced:—Held, that the fact of rent being due could not be proved without production of the lease, and that the plaintiff was entitled to a verdict. *Augustin* v. *Challis*, 1 Ex. 279; 17 L. J., Ex. 73.

A plaintiff declared upon an agreement by the defendant to transfer to him a farm which he (the defendant) held under Lord Sydney, "upon the terms and conditions of the agreement under which the same was held by the defendant under Lord Sydney":—Held, that, in support of his claim to damages for a refusal on the defendant's part to perform the contract, it was not necessary for the plaintiff to produce the agreement under which the defendant held. *Wallis* v. *Littell*, 11 C. B. (N.S.) 369; 31 L. J., C. P. 100; 8 Jur. (N.S.) 744; 10 W. R. 192.

Where two leases are set up, you cannot read one of them until you have proved possession under it. *Manning* v. *Lechmere*, 1 Atk. 453.

Board and Lodging.]—A witness for the plaintiff, in an action for board and lodging, having stated that he had never heard of an agreement in writing respecting the board and lodging, the agreement was put into his hands, and he was asked by the defendant whether he had seen an agreement respecting the subject-matter of the action; he replied, "Never before I came into court":—Held, that the defendant, if he wished the agreement read, must put it in as his own evidence. *Keys* v. *Harwood*, 2 C. B. 905; 15 L. J., C. P. 207.

Bills of Exchange.]—In an action by indorsee of a bill against acceptor, he pleaded only new matter by way of confession and avoidance, but failed to establish the matter of avoidance:—Held, that the plaintiff could not recover interest upon the bill from the date of its maturity, as stated in the declaration, without producing it. *Hutton* v. *Ward*, 15 Q. B. 26; 19 L. J., Q. B. 293.

In an action to recover the amount of a cheque, where the defendant does not deny giving the cheque, but pleads that it was given for a gambling transaction, the plaintiff is not bound to make it part of his case, nor to produce it for the purpose of the defendant giving it in evidence, unless he has received notice to produce it. *Reeves* v. *Gambell*, 5 N. & M. 433; 1 H. & W. 567.

Where an account for goods sold is settled, and the party gives a bill of exchange for the amount, in an action on it the party cannot go into evidence to impeach the charges in the account. *Knox* v. *Whalley*, 1 Esp. 59; and see *Bacon* v. *Chesney*, 1 Stark. 192.

Other Contracts.—In an action for the price of goods, supplied under a written contract which referred for the terms of payment to an arrangement in writing, which could not be produced for want of being stamped:—Held, that the plaintiff could not recover, as he could not prove the terms of payment. *Delay* v. *Alcock*, 4 El. & Bl. 660; 24 L. J., Q. B. 68; 1 Jur. (N.S.) 498.

In an action for contribution or for money paid upon a written contract, there being evidence of an authority to the plaintiff to enter into it on the part of the defendant, and of the work being done under it, and the money paid; it is not necessary for the plaintiff to put in the contract, at all events if there is evidence of the defendant being informed of and not objecting to the amount. *Chappell* v. *Bray*, 6 H. & N. 145; 30 L. J., Ex. 24; 3 L. T. 278; 8 W. R. 17.

A notice to determine an agreement may be received in evidence, though the agreement has not been put in, where such notice has been acted on by both parties. *Reg.* v. *Annett*, 1 F. & F. 89.

Practice.]—If counsel, in opening for the plaintiff, reads a letter of the defendant's, merely as introductory to the plaintiff's case, the letter is not to be considered as given in evidence by the plaintiff, but must afterwards be proved by the defendant as part of his own case, if he means to rely upon it. Aliter, if the plaintiff's counsel reads it as part of the plaintiff's case. *Willis* v. *Dyson*, 1 Stark. 164.

Whole must be read.]—At the trial of a cause, if the party who offers in evidence a paragraph from a book or a paper reads but a portion of it, the opposite party may insist on the whole being read as the evidence of the party producing it; but if the opposite party means to rely on anything else in the same book or paper relating to the subject-matter he must put it in evidence himself. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463. See also *Cooke* v. *Hughes*, R. & M. 122.

At law, a party producing a letter or other document in evidence, cannot use it partially, but makes the whole evidence. *Boardman* v. *Jackson*, 2 Ball & B. 386.

If the entire of a correspondence be not produced, no reliance ought to be placed upon detached parts of it. *Blennerhasset* v. *Day*, 2 Ball & B. 120.

If a party uses a document as evidence in a court of justice, the whole of it will be evidence against him on a subsequent occasion. *Hamilton* v. *Patten*, 1 Ir. Eq. R. 341.

In a suit by the assignees of an uncertificated bankrupt, for the recovery of property fraudulently delivered by him to the defendants, the plaintiffs read the examination of one of the defendants taken before the commissioners on the first day, but declined to read the examination taken on the second day: ruled that the whole must be read. A plaintiff cannot read the cross-examination of one of the defendant's witnesses, if the defendant declines to read the examination in chief. The evidence of a bankrupt, which, in one respect, is in his own favour, but in another respect against himself, is receivable. *Smith* v. *Biggs*, 5 Sim. 391.

A plaintiff may give in evidence answers to interrogatories exhibited by the defendant in the cause; but if he does so, he cannot object that some of them are not evidence, on account of their appearing to state the contents of written papers. *M'Intyre* v. *Layard*, 1 R. & M. 203. *S.C.*, 1 Car. & P. 606.

Admissions in Pleadings.]—Bill setting forth a settlement, and to compel the execution of it by defendant, a trustee; defendant by answer, said that he believed there was such a deed as in the said bill is set forth. At the hearing, plaintiff would have read this deed, though not proved, supposing it to have been confessed by the answer; but the court would not permit it, because the confessing went no farther than what was set forth in the bill, and would not warrant the reading of the deed produced, though it had such clauses in it. *Anon*, 2 Vent. 361.

A will admitted in answer under which defendant claims, and where nothing turns on it, may be read from the bill, although the answer refers to the will for certainty. *Owen* v. *Jones*, 2 Anstr. 505.

A document which is stated in the bill, and which the answer admits and refers to, cannot be read from the bill at the hearing, but must be produced. *Cox* v. *Allingham*, Jac. 339.

An admission in an answer of a document as stated in the bill, qualified by a reference to the document itself for greater certainty, will not authorise the reading of the document from the bill. *Dowling* v. *Legh*, 9 Ir. Eq. R. 413; 3 Jo. & Lat. 716.

An admission in the answer that the defendant's solicitor wrote a letter "to some such effect as that in bill stated; but for certainty as to the contents thereof, the defendant begs leave to refer thereto, when produced and proved," does not authorise the plaintiff to read the passage in the bill referred to, in order to shew what were the contents of that letter. *Kent* v. *Roberts*, 3 Ir. Eq. R. 279.

A deed mentioned in the answer of a defendant is admissible in evidence on a motion for decree against such defendant, without notice of his intention to use it. Semble. *Cousins* v. *Vasey*, 9 Hare (App.) xxxi.

The usual reference in a bill to a document itself, part of which alone is stated, does not entitle the plaintiff, on demurrer, to read the parts of the document which are not set out. *Harmer* v. *Gooding*, 3 De G. & Sm. 407; 13 Jur. 400.

Deed set out in a defendant's answer made evidence for the plaintiff generally. *Att.-Gen.* v. *Higham*, 2 Y. & Coll. C. C. 634.

—— **Document not identified.**] — The bill stated a deed which was admitted by answer. On hearing on bill and answer, the plaintiff offered to read a deed corresponding with that stated in the bill, but which had not been identified with it:—Held, that it could not be read. *Hughes* v. *Cowley*, 5 Ir. Eq. R. 588.

Onus of producing Document.]—Where a party has made out and closed a primâ facie case, in doing which it does not appear that there was any written agreement, the other side cannot,

when they go into their case, and shew that there was a written agreement, throw upon the first party the onus of producing that agreement. *Rex* v. *Padstow* (*Inhabitants*) 4 B. & Ad. 218; 1 N. & M. 9; 2 L. J., M. C. 15.

Production at the Hearing.]—If a plaintiff has proved a document in a defendant's possession, the latter must produce it at the hearing, although he has not been served with an order to that effect. *Wheat* v. *Graham*, 7 Sim. 61.

Defendant proved a deed in the cause, and referred to it in his deposition. Plaintiff cannot compel him to produce the deed at the hearing, the reference thereto not making it part of his deposition. *Hodson* v. *Warrington* (*Earl*), 3 P. W. 34.

Document produced by a party, as evidence in his behalf, must be accompanied with proof of the custody whence he derived it, to satisfy court of its authenticity: otherwise it will not be permitted to be read. *Randolph* v. *Gordon*, 5 Price 312; 19 R. R. 633.

In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made, under the particular circumstances, though the prints which had been exhibited to the witness who proved the offence were not produced at the hearing. Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time. *Fradella* v. *Weller*, 2 Russ. & M. 247.

It is the duty of the parties to have in court at the hearing the originals of all material documents in the cause. *Gallemore* v. *Gill*, 2 Jur. (N.S.) 1178.

A document was made an exhibit in the cause, but not produced at the hearing. The signature to it and the contents of it were admitted by the answer:—Held, that it need not be produced at the hearing. *M'Gowan* v. *Smith*, 26 L. J., Ch. 8; 4 W. R. 690.

3. Notice to Produce Documents.

See Discovery.

a. When Necessary.

Purpose.]—The principle on which notice to produce a document is required by law, is, merely to give a sufficient opportunity to the opposite party to have the document in court to produce if he likes, and so secure the best evidence of its contents, and, if he does not, to enable his adversary to give secondary evidence. *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J., Ex. 225; 16 Jur. 569.

Therefore, where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice, and, in the event of his refusing, the opposite party may give secondary evidence. *Ib.*

As Proof of Handwriting.]—In an action on a bill against the acceptor, the acceptance was traversed. No evidence was offered by the plaintiff on this point, but the bill and a letter were produced at the trial, in accordance with a notice by the defendant to produce, in which notice the bill was described as the bill accepted by the defendant, and the letter as being a letter of the defendant's:—Held, that as the jury had an opportunity of comparing the handwriting if they had thought it necessary, there was some evidence of the defendant's handwriting. *Beard* v. *Jackson*, 24 W. R. 159.

Action on Bill of Exchange.]—In an action by drawer against acceptor of a bill of exchange he pleaded that, at the time of the acceptance, he was a bankrupt, and indebted to the plaintiff in a certain sum, which debt was provable by the plaintiff under the fiat, and was barred by the defendant's certificate, since obtained; and that the defendant accepted the bill as part payment of the debt due to the plaintiff, in consideration that the plaintiff would prove his debt under the fiat. Replication, that defendant did not accept the bill by way of part payment of any debt provable under the fiat:—Held, that the defendant could not give secondary evidence of the bill, to show that it was accepted under the circumstances alleged, without a notice to produce. *Goodered* v. *Armour*, 3 G. & D. 206; 3 Q. B. 956; 12 L. J., Q. B. 56.

In an action on a bill of exchange, where the only issue was, that the acceptance was obtained by fraud and covin, the defendant cannot compel the plaintiff to produce the bill in support of the plea, unless he has given a notice to produce. *Lawrence* v. *Clark*, 3 D. & L. 87; 14 M. & W. 250; 15 L. J., Ex. 40.

An examined copy of a letter containing notice of the dishonour of a bill, which is not produced, nor the subject-matter of action, is not admissible without notice to produce the letter sent. *Lanauze* v. *Palmer*, M. & M. 31; 31 R. R. 709.

But where notice of the dishonour of a bill of exchange has been given in writing, it is not necessary to give a notice to produce that writing to let in parol evidence of its contents. *Swain* v. *Lewis*, 2 C. M. & R. 261; 4 D. P. C. 261; 1 Gale, 182; 5 Tyr. 998; 4 L. J., Ex. 249.

Cheque.]—Assumpsit against drawer of a cheque. Plea, that the amount was illegally won at play and issue thereon. Unless notice has been given to produce the cheque, plaintiff is not bound to produce it. *Reeves* v. *Gamble*, 5 N. & M. 433.

Proof of Possession.]—Proof, that an instrument is in the hands of the opposite party, does not amount to a notice to produce the instrument, so as to authorise the court to receive secondary evidence of the contents. *Knight* v. *Waterford* (*Marquis*), 4 Y. & C. 283; 10 L. J., Ex. Eq. 57.

Where a letter is proved to have come into the opposite party's possession, a copy may be read against him, without notice to produce, &c., as, if it is not a true copy, he has the means of contradicting it in his own hands. *Lyne* v. *Lockwood*, 2 Moll. 321.

For which Trover is brought.—In trover for a written instrument, it is not necessary to give the defendant notice to produce it. *Scott* v. *Jones*, 4 Taunt. 865; 14 R. R. 686.

As the nature of the action gives sufficient notice to the defendant of the subject of inquiry, to prepare himself to produce it, if necessary, for his defence. *How* v. *Hall*, 14 East, 274; 12 R. R. 515.

The plaintiff may prove the nature and description of the document by secondary evidence,

though the defendant offers to produce it. *Whitehead* v. *Scott*, 1 M. & Rob. 2.

In trover for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice has been given to produce the certificate itself. *Bucher* v. *Jarratt*, 3 Bos. & P. 143.

Notice to produce a written demand of a thing for which trover is brought, is unnecessary. *Hammond* v. *Place*, Peake Ad. C. 90. S. P., per Bayley, in *Colling* v. *Treweek*, 6 B. & C. 394; 9 D. & R. 456; 5 L. J. (O.S.) K. B. 132; 30 R. R. 366.

In an action against a carrier for the non-delivery of written instruments, it is not necessary to prove a notice to him to produce them, before giving parol evidence of their contents. *Jolley* v. *Taylor*, 1 Camp. 143.

Notice hung up in Office or affixed to Freehold.]—In an action against a carrier, where the question is whether the goods are rightfully detained by him in satisfaction of a general lien, parol evidence cannot be given of the contents of a portable notice, hung up in his office, containing a statement that all goods carried by him are subject to such general lien, but the notice itself must be produced. *Jones* v. *Tarleton* or *Tarlton*, 9 M. & W. 675; 1 D. (N.S.) 625; 11 L. J., Ex. 267; 6 Jur. 348.

Aliter, if the notice is fixed to the freehold. *Ib.*

Conflicting Wills.]—In ejectment by the heir of A., the defendant set up a will of A., whereby he devised all his property in fee to B., through whom the defendant claimed. One of the attesting witnesses stated that he had prepared this will; that a fortnight afterwards he prepared another will for A., which A. executed and delivered to him, and which the witness, upon A.'s death, delivered to B. No notice to produce the last-mentioned instrument had been given:—Held, that the plaintiff's counsel could not ask the witness whether, at the time of executing the instrument, A. declared it to be his last will; and if so, whether it was attested by three witnesses. *Doe* d. *Phillips* v. *Morris*, 4 N. & M. 598; 3 A. & E. 46; 1 H. & W. 226.

Broker's Card.]—A defendant's card, shewing that he acted in the character of a ship-broker, cannot be given in evidence, unless it can be proved to have been given to the witness by the defendant himself. A notice should be given him to produce his cards, and one of them should be proved as a copy, or parol evidence given of the contents. *Clark* v. *Copp*, 1 Car. & P. 199.

Copies.]—If a plaintiff's attorney, previously to bringing an action for a distress under the warrant of a magistrate, makes out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to 24 Geo. 2, c. 44, s. 6, and signs both for his client, and then delivers one to the defendant, the other will be sufficient evidence at the trial. *Jory* v. *Orchard*, 2 Bos. & P. 39; 5 R. R. 537.

Where a notice has been given to a party to produce an instrument, of which at the same time another copy was made, it may be given in evidence without notice to produce that in the other party's possession. *Gotlieb* v. *Danvers*, 1 Esp. 455.

Where an assignment has been executed of property due by a third person, and the party to whom the assignment is made, for the purpose of giving notice to such third person, prepares two notices at the same time, which he signs, and serves one of them on such person; if an action is afterwards brought by the assignee, he can give that notice in evidence which he retained, without notice to produce that served on the other person. *Surtees* v. *Hubbard*, 4 Esp. 203; 6 R. R. 853.

Stolen Letter.]—An indictment alleged that the prisoner, being in the employ of the Post-office, stole a post-letter: to wit, a post-letter directed and addressed as follows (setting out the address), which contained property. At the trial, a witness having deposed that he employed a man to post a letter containing the property in question:—Held, that he might be asked how that letter was addressed, although no notice to produce the letter had been given. *Reg.* v. *Clube*, 3 Jur. (N.S.) 698.

Notice to pay.]—A. was surety for B., and bound himself to pay to C. the balance of an account between B. and C. within the space of six months after notice. In an action by C. against A., parol evidence of such notice cannot be given without proof of the usual notice to produce. *Grove* v. *Ware*, 2 Stark. 174.

Notice to quit.]—A written notice to quit may be proved by production of a copy, though no notice has been given to produce the original. *Doe* d. *Fleming* v. *Somerton*, 7 Q. B. 58; 14 L. J., Q. B. 210; 9 Jur. 775.

Attorney's Bills.]—On the trial of an action for an attorney's bill, it is not necessary to prove a notice to produce the bill delivered before action brought; it is sufficient to give an examined copy in evidence. *Colling* v. *Treweek*, 9 D. & R. 456; 6 B. & C. 394; 5 L. J. (O.S.) K. B. 132; 30 R. R. 366. S. P., *Anderson* v. *May*, 2 Bos. & P. 237; 3 Esp. 167; *Phillipson* v. *Chase*, 2 Camp. 110.

Policy of Insurance.—On an indictment for arson on the prosecution of an insurance company, their books are not evidence of the insurance without notice to produce the policy. *Rex* v. *Doran*, 1 Esp. 127.

b. Proof of Identity or Character of Document.

Question for Judge.]—A document being called for under a notice to produce, and such a document being produced, and it being alleged that it was not the document in question, the judge ruled that he must decide whether it was so before he would rule as to the admissibility of secondary evidence. *Froude* v. *Hobbs*, 1 F. & F. 612.

In an action for libel, the plaintiff, in order to prove its publication, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant a document was produced as the original:—Held, that the judge was at that stage of the cause bound to hear the evidence on both sides, and to decide whether the document offered was the original or not; and that, if it was, the secondary evidence was inadmissible. *Boyle* v. *Wiseman*, 11 Ex. 360; 3 C. L. R. 1071; 24 L. J., Ex. 284; 1 Jur. (N.S.) 894; 3 W. R. 577.

c. Form of Notice.

Title.] — In an action by "A. and B., as assignees of C. *v.* E." a notice to produce a document entitled "A. and B., assignees of C. and D. *v.* E." is insufficient, although A. and B. are, in fact, the assignees of C. and D. *Harcey* v. *Morgan*, 2 Stark. 17.

Documents—How specified.]—A notice to produce, served by the defendants on the plaintiffs, giving them notice to produce "all letters written to and received by you between 1837 and 1841, both inclusive, by and from the defendants or either of them, during the time aforesaid, or by or to any person on their or your behalf respectively," is good, and is not too general, although it does not specify the date of each particular letter. *Morris* v. *Hannen*, Car. & M. 29. *S. C.* nom. *Morris* v. *Hauser*, 2 M. & Rob. 392.

So a notice to produce "all and every letters written by the plaintiff to the defendant relating to the matters in dispute in the action," is sufficient to let in secondary evidence of a particular letter, though it does not specify the date of such letter. *Jacob* v. *Lee*, 2 M. & Rob. 33.

In an action for work and labour, a notice to produce "all accounts relating to the matters in question in this cause," is sufficient to let in secondary evidence of an account of work done, given by the plaintiff to the defendant, without specifying it by date or otherwise. *Rogers* v. *Custance*, 2 M. & Rob. 179.

In order to let in secondary evidence of a letter, the notice to produce must specify the letter intended; a notice to produce "all letters, papers, and documents, touching or concerning the bill of exchange mentioned in the declaration, and the debt sought to be recovered," is too general. *France* v. *Lucy*, R. & M. 341. S. P., *Jones* v. *Edwards*, M'Clel. & Y. 139.

Notice to produce a letter which refers to an inclosed account is sufficient to entitle the sender to give secondary evidence of the inclosed account if it is not produced. *Engall* v. *Druce*, 9 W. R. 536.

d. Service of Notice.

Time of.]—If a defendant four days before the trial is served with a notice to produce certain of the plaintiff's letters to him, it is sufficient, although it was objected that the defendant was a foreigner, and had only been in England since the time the letters were received by him, and that therefore he might have left them abroad. *Drabble* v. *Donner*, 1 Car. & P. 188; R. & M. 47.

A defendant was served four days before the trial with a notice to produce certain letters written by him to his partner in New South Wales. The action was commenced in 1832, and proceedings had taken place in chancery also, in respect of the subject-matter of the letters:—Held, that they must be presumed to have been sent back from New South Wales, and that the notice was, therefore, sufficient to let in secondary evidence. *Sturge* v. *Buchanan*, 2 P. & D. 573; 10 A. & E. 598; 2 M. & Rob. 90; 8 L. J., Q. B. 272.

In an ejectment trial at Liverpool, notice to produce a deed of feoffment was given to the defendant on the commission-day of the assizes, and the trial took place fourteen days after. The judge having held this to be sufficient notice to let in secondary evidence, the court refused to disturb the ruling. *Doe* d. *Rowlandson* v. *Wainwright*, 5 A. & E. 520; 2 H. & W. 391; 1 N. & P. 8; 6 L. J., K. B. 35.

If a forged deed is in the possession of a prisoner who is indicted for forging it, the prosecutor is not entitled to give secondary evidence of its contents, unless he has, a reasonable time before the commencement of the assizes, given the prisoner notice to produce it; and a notice given to the prisoner during the assizes is too late; but if the prisoner has said that he has destroyed the deed, no notice to produce it will be necessary. *Rex* v. *Haworth*, 4 Car. & P. 254.

A prisoner tried at the assizes for arson, on Wednesday, the 20th of March, was, on Monday, the 18th, served at the prison with a notice to produce a policy of insurance. The commission-day was Friday, the 15th, and the prisoner's home was ten miles from the assize town:—Held, that the notice was served too late. *Rex* v. *Ellicombe*, 5 Car. & P. 522; 1 M. & Rob. 260.

Notice to produce policies of insurance, served on the prisoner's attorney on Tuesday evening, the prisoner then in Maidstone, the policies being twenty miles off, and the trial taking place on Thursday, is sufficient. *Reg.* v. *Barber*, 1 F. & F. 316.

Notice to produce an agreement, served upon the defendant's attorney at five o'clock on the commission-day of the assizes, is too late, the attorney having then left home for the assize town, which was nine miles distant from his office, and the opposite party refusing to furnish him with a conveyance. *George* v. *Thompson*, 4 D. P. C. 656.

A cause was tried at the assizes on Monday, the commission-day being on the Thursday before. A paper was called for under a notice to produce, which was served on the Saturday before the trial. The attorneys on whom the notice to produce was served, and also the party who was their client, lived in the assize town:—Held, that the service of the notice to produce was not too late, and that the question in such cases is, whether, under all the circumstances, reasonable notice has been given. *Firkin* v. *Edwards*, 9 Car. & P. 478.

A notice to produce served on the defendant's attorney at his residence, twenty miles from the place of trial, at 8 p.m. on the night before the trial; the defendant residing in the same town with the attorney, but not at home on that evening until twelve o'clock, is too late. *Howard* v. *Williams*, 9 M. & W. 725; 1 D. (N.S.) 877; 11 L. J., Ex. 279; 6 Jur. 585.

A cause at the sittings at nisi prius was called on upon Thursday, the 4th February, and the plaintiff's case was closed on that day at 4 p.m.; the case was then adjourned to Friday, the 5th of February at 10 a.m. All the parties lived in town, and in the evening of the 4th of February, before 9 p.m., a notice to produce a letter of the defendant to the plaintiff served on the plaintiff's attorney, is served in time. *Sturm* v. *Jeffree*, 2 Car. & K. 442.

Service of a notice on the attorney in the cause on the day before the trial, and at a distance from the place of business, is bad. *Hughes* v. *Budd*, 8 D. P. C. 315; 4 Jur. 150.

Service of a notice to produce on a Sunday, is bad. *Ib.*

A notice to produce, in a town cause, served the evening before the trial, at the residence of the attorney, too late for the attorney to communicate with his client, is not in time, so as to

let in secondary evidence. *Bryne* v. *Harvey*, 2 M. & Rob. 89.

A notice to produce a tradesman's books, served upon the plaintiff's attorney at seven o'clock of the evening previously to the trial, is too late. *Atkins* v. *Meredith*, 4 D. P. C. 658.

A notice to produce served on a defendant in London on a Saturday, the cause being tried on the following Monday, is too late. *Houseman* v. *Roberts*, 5 Car. & P. 394.

In a town cause a notice to produce a paper in the hands of the opposite attorney was served at 8 p.m. on the evening before the trial, at his office, on one of his clerks, who had the management of the cause:—Held, that the service was not too late, and the paper not being produced, secondary evidence was given of its contents. *Gibbons* v. *Powell*, 9 Car. & P. 634. S. P., *Leaf* v. *Butt*, Car. & M. 451; *Meyrick* v. *Woods*, Car. & M. 452.

A notice to produce a letter from defendant to plaintiff was served on plaintiff's attorney at a quarter before nine on the night before the trial. It related to the promissory note, the subject of the action, in answer to a letter from plaintiff to defendant:—Held, that the notice was served too late. *Holt* v. *Miers*, 9 Car. & P. 191.

Where previous Inspection.]—In an action on a bond, which has been seen by the defendant's attorney some time before the trial, and a copy of it furnished to the opposite party under a judge's order, notice to him to produce the bond served before the trial is sufficient to let in secondary evidence of its contents. *Lloyd* v. *Mostyn*, 10 M. & W. 478; 2 D. (N.S.) 476; 12 L. J. Ex. 1; 6 Jur. 794.

At great Distance.]—A notice to produce letters in the country, served in London on the day of the trial in London, is too late. *Coombs* v. *Bristol and Exeter Ry.*, 1 F. & F. 206.

Notice served on the attorney at nine o'clock on Saturday night to produce papers at a trial in London on Wednesday, his client being absent in Scotland at the time, is too late. *Vice* v. *Anson* (*Viscountess*), 3 Car. & P. 19; M. & M. 96.

A notice to produce deeds was served on the defendant's attorney in Essex on Saturday, the commission-day of the assizes being Monday; the attorney went to London and fetched them. A notice was served on the Monday evening to produce another deed. The attorney stated that he had been to town to fetch the deeds; and if the plaintiff would pay the expenses of sending for this from town, where it was, it should be had. No offer to pay was made, and the trial was on Thursday:—Held, that, under these circumstances, the plaintiff was not entitled to give secondary evidence of the last-mentioned deed. *Doe* d. *Curtis* v. *Spitty*, 3 B. & Ad. 182; 1 L. J., K. B. 88.

A notice to produce a letter from Vienna, served on the 7th June, at a trial in London, which took place on the 11th June, is too short, and the defendant was therefore not bound to produce the letter. *Loibel* v. *Strampfer*, 16 L. T 720.

Notice to produce must be served before the commission-day on parties living out of the assize town. *Trist* v. *Johnson*, 1 M. & Rob. 259.

A cause came on, to be tried at assizes on a Wednesday morning. On the previous Monday evening, defendant's attorney, being at the assize town, was served with notice to produce a book, which would probably be at his office, which was nineteen miles from the assize town:—Held, that this service was too late. *Hargest* v. *Fothergill*, 5 Car. & P. 303.

Place of Service.]—A notice to produce a letter at the Hertford spring assizes, 1848, served on the 3rd of February, 1848, on the defendant in London, his firm having no place of business there, does not entitle the plaintiff to give secondary evidence of the contents of the letter. *Ehrensperger* v. *Anderson*, 3 Ex. 148; 18 L. J., Ex. 132.

In a town cause, a service of a notice to produce by putting the notice into the letter-box at the office of the attorney in London, on the evening before the trial, is not a good service. *Lawrence* v. *Clark*, 3 D. & L. 87; 14 M. & W. 250; 15 L. J., Ex. 40.

If a party to a cause is abroad, but employs an attorney to conduct it, he will be presumed to have left in the hands of that attorney all papers material to the cause. *Bryan* v. *Wagstaff*, 8 D. & R. 208; 5 B. & C. 314. *S. C.*, R. & M. 329; 2 Car. & P. 126.

Notice to produce a letter relating to the matters in dispute, served on the attorney of the party on the evening next but one before the trial, is sufficient to let in secondary evidence of the contents, though the party was out of England. *Ib.*

On whom.]—A notice to produce served on the party himself a week before the trial is in sufficient time, although he has employed an attorney in the cause. *Hughes* v. *Budd*, 8 D. P. C. 315; 4 Jur. 150.

If a notice to produce has been duly served on a party in the cause, that is not invalidated by a subsequent bad service of notice on the attorney. *Ib.*

It is not necessary in penal actions to give notice to the defendant himself to produce papers; notice to his agent or attorney is sufficient. *Cates* v. *Winter*, 3 Term Rep. 306.

Where the attorney in a cause has been changed, a notice to produce (served before the change) on the first attorney is sufficient to call for production of the paper on the trial without fresh service on the second attorney. *Doe* d. *Martin* v. *Martin*, 1 M. & Rob. 242.

Service of notice to produce on an attorney who had served a notice on behalf of a prisoner as to an application to bail him upon the charge, is sufficient. *Reg.* v. *Boucher*, 1 F. & F. 486.

A notice to produce a document delivered to an attorney, suggested to be the prisoner's attorney, is not (in the absence of evidence that he was so) a valid notice, so as to enable secondary evidence to be given; and the attorney was not allowed to be asked whether he had shewn the notice to his client. *Reg.* v. *Downham*, 1 F. & F. 386.

Service on a prisoner in gaol is sufficient. *Reg.* v. *Robinson*, 5 Cox, C. C. 183.

Objection to Time of Service removed.]—Where none of the parties lived in the assize town, the plaintiff's attorney served the defendant's attorney, in the assize town, on the commission-day, with notice to produce a paper, and offered the expenses of going to fetch it. The defendant's attorney said that that was of no use, as the paper was not in existence:—Held, that the plaintiff on the trial might give secondary evidence of the contents of the paper, as the statement of the defendant's attorney, that the

paper was not in existence, got rid of any objection as to the lateness of the service of the notice to produce. *Foster* v. *Pointer*, 9 Car. & P. 718.

Second Trial.]—When a new trial is granted, notices to produce, given for the first trial, are available on the second trial. *Hope* v. *Beadon*, 17 Q. B. 509; 2 L. M. & P. 593; 21 L. J., Q. B. 25; 16 Jur. 80.

Where a trial has been postponed from one session to another, a notice to produce served on the prisoner in time for the first session is available for the subsequent one without any fresh service. *Reg.* v. *Robinson*, 5 Cox, C. C. 183.

e. Documents in Hands of Third Party.

Question for Judge.]—Where a document is called for after notice to produce by the plaintiff, the defendant may, during the plaintiff's case, produce evidence to shew the document lawfully out of his possession, and the sufficiency of such evidence is solely for the judge to decide, who will determine whether secondary evidence is admissible, and such evidence gives the plaintiff's counsel no reply to the jury. *Harrey* v. *Mitchell*, 2 M. & Rob. 366.

Agent of Party.]—Where a document is proved to have been in the actual possession of a party to an action, or to be in the possession of his attorney in another action, secondary evidence is admissible, notice having been given to that attorney to produce it. *Irwin* v. *Lever*, 2 F. & F. 296.

Notice to the defendant to produce an order relating to a ship, which it appears the defendant has delivered to the captain, is sufficient (in default of production) to enable the plaintiff to give parol evidence of the order, since the possession of the captain is for this purpose the possession of the defendant. *Baldney* v. *Ritchie*, 1 Stark. 338.

In an action for rent by the assignee of the reversion against the assignee of the term, the plaintiff's attorney was called by his client to prove the execution of a deed; on cross-examination he admitted that there had been another deed between the same parties, relating to the premises, executed after the former, and that he had that deed in court; but he refused to produce it, relying on his privilege; the defendant then offered to produce parol evidence of the contents of the deed (without stating what evidence); no notice to produce had been given:—Held, that the parol evidence was rightly rejected. *Bate* v. *Kinsey*, 1 C. M. & R. 38; 4 Tyr. 662; 3 L. J., Ex. 304.

If a paper is traced into the hands of the agent of a party in a suit, and notice has been given to such party to produce it, he is bound to do so, and the other side is not bound to call the agent; and if he has delivered it to the stamp-office to get certain duties allowed, and does not tell that circumstance to the party serving the notice to produce, parol evidence of the contents may be given. *Sinclair* v. *Stephenson*, 1 Car. & P. 582; 2 Bing. 514; 10 Moore, 46.

In an action against the directors of an intended company, it was proved (in order to let in secondary evidence of their minute-books, called for under a notice to produce), that, four months before the trial, the late secretary had the books in a desk at the office of the company, and that he then gave up the key of the desk to the manager of the company, who acted for the directors:—Held, sufficient. *Bell* v. *Francis*, 9 Car. & P. 66.

Stakeholder.]—Secondary evidence of a document, to produce which notice has been given, is not admissible, where the document is held by a stakeholder, between the party in the cause and a third person. *Parry* v. *May*, 1 M. & Rob. 279.

Independent Person.]—Where, in an action for an assault, notice was given to the defendant to produce a written paper which had been delivered to A., under whom the defendant justified, and acted under his direction:—Held, that the plaintiff was not entitled to give secondary evidence of its contents, as it was merely traced into the hands of a person acting in an independent character. *Evans* v. *Sweet*, R. & M. 83; 1 Car. & P. 277.

The plaintiff had been employed as secretary to a charitable institution; his appointment was made in pursuance of a resolution of the committee for managing the affairs of the society, which was entered in a book remaining in the plaintiff's hands as secretary, but to which entry the plaintiff was no party, nor did it appear to have been expressly brought to his notice; the society dissolving, the plaintiff quitted the employ, leaving this book in the office; in an action against three of the committee for arrears of salary:—Held, that the plaintiff was bound to produce the book, inasmuch as it would shew the terms on which he had been engaged; and that a notice to the defendants to produce it was not sufficient to entitle him to give secondary evidence under the quantum meruit; the book appearing not to be in the possession of the defendants, but in that of another member of the committee, without the knowledge or control of the defendants. *Whitford* v. *Tutin*, 4 M. & Scott, 166; 10 Bing. 395; 6 Car. & P. 228; 3 L. J., C. P. 106.

Sheriff's Warrant.]—In an action against a sheriff, after the expiration of his year of office, a notice served on his attorney to produce a warrant returned to the deputy sheriff of London during the sheriff's year of office, is sufficient to let in secondary evidence. *Suter* v. *Burrell*, 2 H. & N. 867; 27 L. J., Ex. 193.

Where a sheriff's warrant to levy execution had, after the levy, been returned by the bailiff to the under-sheriff, while the sheriff was yet in office, and the bailiff upon being called as a witness did not produce it:—Held, that proof of notice to the sheriff's attorney to produce it was sufficient to entitle the party to give parol evidence of its contents. *Taplin* v. *Atty*, 3 Bing. 164; 10 Moore, 564; 3 L. J. (o.s.) C. P. 218; 28 R. R. 616.

With Banker.]—Notice to a defendant to produce a cheque drawn by him and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the cheque remains in the banker's hands. *Partridge* v. *Coates*, R. & M. 156; 1 Car. & P. 534.

And he need not call the banker's clerk to produce it. *Burton* v. *Payne*, 2 Car. & P. 520; 31 R. R. 692.

In an action upon a contract, in which the consideration was a bill of exchange given by the plaintiff to the defendant, who had notice to produce it, but on the voir dire stated that,

before the notice, he had discounted it with his banker:—Held, that it must be proved, either by production or by secondary evidence under the notice to produce. *Wright* v. *Bunyard*, 2 F. & F. 193.

Person out of Jurisdiction.]—It is no ground for admitting secondary evidence of the contents of a private letter, that the person who has possession of the letter is beyond the jurisdiction of the court, and has refused to deliver it up when requested by a person who did not disclose the purpose for which it was wanted. *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482: 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

Control of Party—Document deposited in Court.]—A document deposited in a court of equity by a party to a suit there, and scheduled in his answer, but which remains with an officer of that court after an order to deliver it to the party, is sufficiently in the control and power of such party to let in secondary evidence after notice to produce and non-production by the party. *Bush* v. *Peacock*, 2 M. & Rob. 162.

f. Consequence of Production.

Party bound to put in.]—If the plaintiff's counsel calls on the defendant to produce a paper, and looks at it, he is bound to give it in evidence, if it is material to the issue; but if it is not, the plaintiff's counsel need not give it in evidence, although required by the defendant to do so. *Wilson* v. *Bowie*, 1 Car. & P. 10.

If during the examination of one of the plaintiff's witnesses, the defendant's counsel, under a notice to produce, call for a book, which the plaintiff's counsel produces, the defendant's counsel if he looks over the book so as to see the contents of several pages of it, will be bound to put it in as his evidence. *Calvert* v. *Flower*, 7 Car. & P. 386.

Whole must be read.]—In an action of detinue for a promissory note, the note was called for by the plaintiff's counsel, and produced by the defendant's counsel:—Held, that if the plaintiff had the note read in evidence, he was, if required by the other side, bound to read an indorsement on the note, as well as what was written on the face of it. *Richards* v. *Francum*, 9 Car. & P. 221.

Evidence for whom.]—The plaintiff had given notice to the defendant to produce certain letters written by the defendant to the defendant's partner in New South Wales, and had called upon him to admit an extract from a letter-book kept by the defendant. A judge made an order on the defendant to make the admissions contained in the notice, and the defendant consented to produce the letter-book at the trial:—Held, that the letters contained in the letter-book were secondary evidence of those described in the notice, although no other proof was given that the letters had been actually sent. *Sturge* v. *Buchanan*, 2 P. & D. 573; 10 A. & E. 598; 2 M. & Rob. 90; 8 L. J., Q. B. 272.

Held, also, that the defendant was not entitled to read other letters contained in the letter-book. *Ib.*

Where notice has been given to produce books, if the party calls for them and inspects them, it does not therefore make them evidence for the party whose books they are. *Sayer* v. *Kitchen*, 1 Esp. 210.

But a party, who calls for the other's books, has not the option to use them or not; he thereby makes them evidence. *Wharam* v. *Routledge*, 5 Esp. 235; 8 R. R. 851.

And he cannot ask for the book, and determine upon the inspection of it whether he will use it or not. *Ib.*

Under a notice to produce a letter, which is produced and mentions that it covers other papers, those papers are not thereby made evidence unless they are referred to in the letter. *Johnson* v. *Gilson*, 4 Esp. 21.

An indorsement on a feoffment (purporting to have been made by the attorney thereby appointed to deliver seisin), that he had done so in the presence of A., is not evidence of that fact, although the deed is produced by the defendant at the desire of the plaintiff, unless the defendant claims under it. *Doe* d. *Wilkins* v. *Clevelland* (*Marquis*), 9 B. & C. 864; 4 M. & Ry. 666; 8 L. J., K. B. 74.

g. Consequence of Non-Production.

When Secondary Evidence let in.]—Unless a defendant has received a proper notice to produce a deed, evidence that he has admitted that he has it with him is not admissible. *Doe* d. *Wartney* v. *Grey*, 1 Stark. 283.

The attorney of a client, not a party to the suit, having brought a book into court, in obedience to a subpœna duces tecum, refused to produce it, on the ground of privilege. The client himself, who had been served with a common subpœna, on being examined as a witness also objected to its being produced:—Held, that secondary evidence might be given of the contents of the book, although the client had not been served with a subpœna duces tecum. *Newton* v. *Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; 14 Jur. 1121.

In an action against A. and B., as executors, A. suffered judgment by default. The probate of the will was produced, and notice had been given to both to produce a receipt which had been given to A. as one of the executors:—Held, that if it was not produced, secondary evidence might be given of its contents, and that A. having suffered judgment by default made no difference. *Beckwith* v. *Benner*, 6 Car. & P. 681.

Where notice to produce a document had been given to the defendant, and there was merely evidence to go to the jury that such document was in his possession:—Held, that the document not having been produced when called for, the plaintiff might give secondary evidence thereof. *Robb* v. *Starkey*, 2 Car. & K. 143.

If a deed is in the possession of a third person as mortgagee, and he, having the deed in court though not subpœnaed in the cause, declines to produce it, secondary evidence may be given of its contents; but if the deed is not in court, and he has not been subpœnaed to produce, it is otherwise. The person thus declining to produce a deed must not state the contents, but he must state the date of the deed and the names of the parties, in order to identify it. *Doe* d. *Loscombe* v. *Clifford*, 2 Car. & K. 448.

Where a witness served with a subpœna duces tecum to produce a document either does not attend or does attend and refuses to produce the document (not on the ground of privilege), the party seeking to avail himself of the document

cannot give secondary evidence of its contents: the remedy is to punish the witness for a contempt. *Reg.* v. *Llanfaethly*, 2 El. & Bl. 940; 2 C. L. R. 230; 23 L. J., M. C. 33; 2 W. R. 61.

A party declining to produce a document ought simply to answer that he does not produce it, and should not enter into a statement of the reasons why he does not produce it. *Laxton* v. *Reynolds*, 18 Jur. 963.

Notice "to produce letters and copies of letters, also all books relating to the cause" is too uncertain to admit parol evidence. *Jones* v. *Edwards*, 1 M'Clel. & Y. 139.

A merchant's copy-book of letters has been allowed to be read where the person who has the original letters refuses to produce them. *Sturt* v. *Mellish*, 2 Atk. 611.

Secondary evidence of an instrument will not be received without notice to produce, upon the mere proof of its being in possession of the opposite party. *Knight* v. *Waterford* (*Marquis*), 4 Y. & Coll. 284; 10 L. J., Ex. Eq. 57; 5 Jur. 88.

The mere refusal of a witness to produce a document, where he is not justified in withholding it, is not a ground for going into secondary evidence of that document. *Jesus College* v. *Gibbs*, 1 Y. & Coll. 145.

A party cannot, at the hearing, give secondary evidence of the contents of a document in his adversary's possession, unless he has given him notice to produce it. The depositions are not sufficient notice. *Stulz* v. *Stulz*, 5 Sim. 460.

Answer to a bill by a rector, for an account of tithes, setting up a simoniacal contract, supported by evidence of the contents of a letter alleged to have been written by the witness (one of the patrons of the living) to the plaintiff, previous to the admission to the living, containing the terms of the agreement, which were afterwards accepted; and the letter containing such acceptance had been subsequently returned to the plaintiff, and destroyed by him. On an objection to the admissibility of evidence of the letter containing the proposal, on the ground of want of notice to the plaintiff to produce the original:—Held, that the evidence was admissible, the depositions being sufficient notice. At law such evidence would not be admissible without notice, because it not being known till the time of trial what evidence will be offered on either side, non constat, otherwise, that the original might not be produced. But even at law, notice is not necessary, where, from the nature of the proceeding, the party must know that the contents of a written instrument in his possession will come into question. *Wood* v. *Strickland*, 2 Mer. 461.

A solicitor, who claimed a lien on deeds, was summoned as a witness with a subpœna duces tecum, brought the deeds into court, but refused to produce them:—Held, that secondary evidence of their contents was not admissible, the person proposing to give the secondary evidence being liable to pay the costs to the solicitor. *Att.-Gen.* v. *Ashe*, 10 Ir. Ch. R. 309.

Production of Copy.]—Bill against infant defendants. The plaintiff had served defendant's solicitor with notice to produce a particular deed in his possession. The defendants' solicitor sent to the plaintiff a copy of the deed:—Held, that the production of the copy at the hearing did not amount to secondary evidence of the deed against the infant defendants. *Bacon* v. *Cosby*, 20 L. J., Ch. 213; 15 Jur. 695.

Inference.]—If upon a notice to produce books of account they are not produced, this circumstance affords no legal ground for any inference respecting their contents, and merely entitles the opposite party to prove their contents by parol evidence. *Cooper* v. *Gibbons*, 3 Camp. 363.

Subsequent Production.]—Where a party served with notice refuses to produce the document when called for at the trial, and secondary evidence has been given of its contents, he cannot afterwards produce the document as his own evidence. *Doe* d. *Thompson* v. *Hodgson*, 4 P. & D. 142; 12 A. & E. 135; 2 M. & Rob. 283; 9 L. J., Q. B. 327; 4 Jur. 1202.

Where a party refuses to produce a deed, at the trial, and a copy is duly proved, he cannot afterwards exclude it by producing the original, and requiring it to be proved. *Edmonds* v. *Challis*, 6 D. & L. 581; 7 C. B. 413.

When a document is called for, and its production declined, the party so declining to produce it cannot afterwards make use of it for any purpose. *Collins* v. *Gashon*, 2 F. & F. 47.

Evidence against whom.]—A party is not obliged to produce evidence against himself, though such evidence is in court, and he has had notice to produce it. *Law* v. *Wells* 1 Peake, 128.

4. Notice to Admit.

Proof of Documents at the Hearing.]—A party will not be allowed to prove vivâ voce, at the hearing of a cause, documents affecting a material issue, of which no notice has been previously given given to his opponent. The common order to prove documents vivâ voce at the hearing applies only to making good a merely technical defect or to curing an accidental slip. *Wilson* v. *Thornbury*, 44 L. J., Ch. 242; L. R. 10 Ch. 239; 32 L. T. 350; 23 W. R. 329.

Necessity of Notice.]—A party, who proposes to adduce documentary evidence at a trial, is bound, in every case, to give a notice to admit, although the genuineness of the document is put in issue by the pleadings. *Spencer* v. *Barough*, 9 M. & W. 425; 11 L. J., Ex. 378; 6 Jur. 154.

Or although the document is not in his possession, or even is in a place inaccessible to him. *Rutter* v. *Chapman*, 8 M. & W. 388; 1 D. (N.S.) 118; 11 L. J., Ex. 178; 5 Jur. 610.

When, in a bill to set aside the grant of an annuity made by A. to B., and charged upon A.'s land, with also a personal covenant for payment, the plaintiff is himself the devisee as well as residuary legatee under A.'s will, he ought, under 20 & 21 Vict. c. 79, s. 68 (Ir.), to give notice to the other party that he intends to give in evidence as proof of the devise or testamentary disposition, the probate of the will. But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the court might properly, and would, adjourn the hearing to give an opportunity to remove that technical difficulty. *Hilliard* v. *Eiffe*, L. R. 7 H. L. 39.

Sufficiency of.]—A judge's order for the admission of documents in evidence referred to a notice served by the defendant's attorney, dated 4th March, 1845. The notice produced was dated the 1st March; but the plaintiff's attorney stated that

it was the only notice served in the cause :—Held, sufficient. *Bittleston* v. *Cooper*, 14 M. & W. 399.

General Effect of.]—The admission of a document described in a notice to admit, is not the admission of a fact stated in the description ; it may be some evidence of the fact, which may be rebutted by evidence to the contrary. *Pilgrim* v. *Southampton and Dorchester Ry.*, 8 C. B. 25 ; 18 L. J., C. P. 330.

An admission of a document "saving all just exceptions," does not preclude the party admitting it from objecting that it does not affect him. *Hills* v. *London Gas Light Co.*, 1 F. & F. 346.

In an action on a bill of exchange against H. and others, members of a mining company, a notice to admit the bill was given in the following form :—"Bill of exchange drawn for 12*l.* 10*s.* by the plaintiff upon, and directed to, the defendants, as the N. C. Company, Forest of Dean, Gloucestershire, and accepted by H. B. for the defendants" :—Held, that under this admission, the defendants could not dispute the authority of H. B. to bind them by this acceptance. *Wilkes* v. *Hopkins*, 1 C. B. 737 ; 3 D. & L. 184 ; 14 L. J., C. P. 225.

A plea of set-off referring to an agreement expressed to be made between the plaintiff and the defendant, and a notice (on the part of the defendant) to admit the agreement referred to in the plea, is not a sufficient admission of the agreement sued upon ; and a conversation between the attorneys after the notice to admit is inadmissible to extend the admission under such notice. *Corbett* v. *Lees*, 1 F. & F. 679.

If, in a notice to admit documents, a document is described as a counterpart, but is, in fact, a lease, and the opposite party has consented to admit it, he is bound by his admission, and under it the lease may be given in evidence ; and an objection of its being stamped only as a counterpart cannot be taken. *Doe* d. *Wright* v. *Smith*, 3 N. & P. 335 ; 8 A. & E. 255 ; 2 M. & Rob. 7 ; 1 W., W. & H. 429 ; 7 L. J., Q. B. 158 ; 2 Jur. 854.

Although a judge's order has been made on the plaintiff to admit a copy of a letter from himself to the defendant, and the plaintiff has also had notice to produce the original, the copy cannot be read, unless evidence is given of the existence of the original. *Sharpe* v. *Lamb*, 3 P. & D. 454 ; 11 A. & E. 805 ; 9 L. J., Q. B. 185 ; 4 Jur. 965.

Where documents are indorsed by a solicitor in compliance with a notice under the 164th rule, the practice is to have a consent admitting the documents made a rule of court by a side-bar rule. *Killikelly* v. *Molton*, 10 Ir. Eq. R. 212.

Effect of Saving Clause.]—Where, in an action against acceptor of a bill of exchange, plea non acceptavit, his attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the clause, "saving all just exceptions to the admissibility of the document as evidence" :—Held, that the jury was warranted in finding for the plaintiff, notwithstanding the non-production of the bill. *Chaplin* v. *Levy*, 2 C. L. R. 556 ; 9 Ex. 531 ; 23 L. J., Ex. 117 ; 2 W. R. 241.

Whether a notice to admit contains a saving of all just exceptions or not, the opposite party is entitled to rely on any valid objection to the documents mentioned in the notice. *Sharpe* v. *Lamb*, supra.

Stamp.]—In an action on a bill of exchange, the defendant was required to make the admission specified in a notice to admit, and the notice called on the defendant to admit that the document therein "specified to be original was written, signed, or executed, as it purports to have been, saving all just exceptions to the admissibility of such document as evidence in this cause." The notice then described the bill of exchange in the usual manner :—Held, that an admission does not preclude the defendant from objecting that the bill was not properly stamped, and also that this was not such an admission as dispensed with the production of the bill. *Vain* v. *Whittington*, Car. & M. 484 ; 2 D. (N.S.) 757 ; 7 Jur. 95.

Erasure.]—A plaintiff called on a defendant to admit an authority to sell an estate, "signed by the defendant," and dated "10th of August, 1840," and a judge by consent made an order to admit it. When the document was given in evidence, the date, "August," appeared to be written on an erasure :—Held, that the defendant had precluded himself from calling on the plaintiff to give evidence to explain the altered date. *Poole* v. *Palmer*, Car. & M. 69.

Interlineation.]—A party who has been called upon in the ordinary form to admit a document before trial, and has done so, cannot at the trial object to such document on the ground that it has an interlineation not accounted for by evidence, unless it appears that the interlineation was made after the admission. *Freeman* v. *Steggall*, 14 Q. B. 202 ; 19 L. J., Q. B. 18 ; 13 Jur. 1030.

Addition.]—An admission of original letters in the ordinary form, as in the handwriting of the party admitting, precludes an objection to the authenticity of any part, even an addition to a postscript, obviously in a different handwriting. *Hawke* v. *Freund*, 1 F. & F. 294.

At New Trial.]—On a new trial, an admission of the handwriting of an attesting witness under a judge's order is available, though made before the previous trial, and though, in an action on a bond, the plea on the former trial was non est factum, and on the second trial a special plea that the condition of the bond has been altered after execution. *Langley* v. *Oxford* (*Earl*), 1 M. & W. 508 ; 2 Gale, 63 ; 5 L. J., Ex. 166.

Costs of Proof.]—A plaintiff, after notice, refused to admit a document, purporting to be a receipt for cash and for a promissory note. The jury found that the receipt was valid as to the cash, but not as to the promissory note. A certificate that the refusal to admit was reasonable, having been granted by the judge on an ex parte application of the plaintiff four months afterwards, and after the taxation of costs by the master, the court refused to set it aside. *Day* v. *Vinson*, 33 L. J., Ex. 171 ; 9 L. T. 723.

Who may Admit.]—Assignees in bankruptcy, and a married woman whose husband is a co-defendant, are parties competent to make admissions under the 21 & 22 Vict. c. 27, s. 7. *Churchill* v. *Coller*, 1 N. R. 82.

5. Putting in Documents.

All documents intended to be used in evidence in an action ought to be formally put in at the trial and marked by the registrar. *Watson* v. *Rodwell*, 48 L. J., Ch. 209; 11 Ch. D. 150; 39 L. T. 614; 27 W. R. 265—C. A.

Documents produced by Witness not Party to Proceedings—Putting in en bloc or seriatim.]—Where documents are produced by a witness who is not a party to the proceedings, the proper course is for an adjournment to be made to enable the parties to ascertain which of these documents are material. The parties are not entitled to put in the whole of the documents en bloc, or to ask the witness to produce the documents seriatim, and question him thereon. *Maplin Sands, In re*, 71 L. T. 594—C. A.

6. Admissibility of Unstamped Documents.

a. Generally.

Validity of Document.]—The want of a stamp does not avoid a document; it only prevents its being produced in evidence. *Goodright* v. *Gregory*, Lofft. 339.

If a document which is unstamped, but requires a stamp, is offered in evidence, and, if stamped, would be evidence to establish any point litigated between the parties, it cannot be received. *Matheson* v. *Ross*, 2 H. L. Cas. 286; 13 Jur. 307. See *Evans* v. *Prothero*, 2 Mac. & G. 319; 20 L. J., Ch. 448; 15 Jur. 113.

Distinction between an agreement that may be stamped, paying the penalty, which the party will be permitted to stamp, pending the cause, and one upon which no action can be brought unless stamped. *Huddleston* v. *Briscoe*, 11 Ves. 595.

To prove Admission in a Recital.]—In an action by payee against maker of a promissory note for 485*l*., in which he pleaded that he did not make the note, it was proposed, in addition to proof of his signature of the note, to put in an unstamped agreement between the same parties, of the same date as the note, in which it was recited that the one had bought of the other the lease of a public-house for 485*l*., and had given a note for that sum as a security for the purchase-money, and by which it was agreed that the vendor should hold the lease of the house till the purchase-money was paid:—Held, that as the agreement was one that ought to have borne a stamp, it was not receivable even for the purpose of proving the admission contained in the recital. *Keane* v. *Janes*, 2 Car. & K. 725.

Bill of Exchange.]—An insufficiently-stamped bill of exchange is admissible for the purpose of shewing that it is an unavailable security, and thereby of rebutting an inference which might be drawn from the statement of an account, that a debt due to the plaintiff had been satisfied by such bill. *Smart* v. *Nokes*, 6 Man. & G. 911; 7 Scott (N.R.) 786; 13 L. J., C. P. 79; 8 Jur. 44.

Promissory Note.]—But in an action on a note, the defendant was allowed to produce an unstamped note to prove that it was given in a state of intoxication. *Gregory* v. *Fraser*, 3 Camp. 454.

A promissory note which is insufficiently stamped as a note cannot be made available as evidence of the receipt of money by the maker of the note. *Ashling* v. *Boon*, 60 L. J., Ch. 306; [1891] 1 Ch. 568; 64 L. T. 193; 39 W. R. 298.

An unstamped promissory note may be handed to a witness in order to challenge his recollection, notwithstanding s. 38, sub-s. 1, of the Stamp Act, 1891. *Birchall* v. *Bullough*, 65 L. J., Q. B. 252; [1896] 1 Q. B. 325; 74 L. T. 27; 44 W. R. 300.

Cheque.]—The same evidence is admissible in a civil action to prove a fraud committed by a third party, as if he himself was indebted. Therefore, in an action for money had and received, where it was necessary for the plaintiff to prove that the property had been obtained from him fraudulently, by means of a cheque given by a third party:—Held, that the cheque, though unstamped, was admissible against the defendant, who was no party to the fraud. *Keable* v. *Payne*, 3 N. & P. 531; 8 A. & E. 555; 1 W., W. & H. 383; 7 L. J., Q. B. 218; 3 Jur. 40.

In an action on a cheque, where the instrument was put in and read without objection, but it afterwards appeared that it was post-dated:—Held, that being unstamped, it could not be given in evidence, and that the objection need not be taken on the first production of the cheque. *Field* v. *Woods*, 2 N. & P. 117; 7 A. & E. 114; 6 D. P. C. 23; 8 Car. & P. 52; 6 L. J., K. B. 209.

Sale by Agreement—Agreement Inadmissible—No other Evidence Admissible.]—B. owed A. a sum of money, for which A. had B.'s promissory note as a security. A. applied for payment. B. proposed that an inventory should be made of the goods on his premises, and that A. should take them at a valuation in discharge of the debt. A. consulted his attorney, who prepared a document. After the preparation of the document, B. delivered the inventory to A., and A. and B. insured the goods against fire in their joint names, and A. gave up to B. the note, which was destroyed. A. at the same time credited B. in his book to the amount of the debt. A. took possession of a few articles included in the inventory, for which B. had no use, but B. remained in possession of the rest of the goods as before. The goods being seized by the sheriff in execution, at the suit of a third party against B., A. claimed them as his own, and sued the sheriff in a county court for taking them, and, in order to maintain his claim, offered the document in evidence. This was objected to, and rejected for want of a stamp:—Held, that as B. was in possession of the goods, it lay on A. to prove clearly that they were his; and that as the document which contained the terms of the arrangement between A. and B. was inadmissible for want of a stamp, no other evidence of a sale was admissible, and that, consequently, the facts above stated were no evidence of A.'s title to the goods. *Yorke* v. *Smith*, 21 L. J., Q. B. 53; 16 Jur. 63.

For Collateral Purpose.]—Generally speaking, whenever a written instrument is tendered, not for the purpose of establishing a binding agreement between the parties, but for the collateral purpose of shewing the illegal notice of some transaction, it is not an objection that the instrument is unstamped. *Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J., Ex. 9.

Therefore, where a petition containing charges of bribery was presented to the House of Commons against the return of a member, and the petitioner entered into an agreement, that in consideration of a sum of money and other terms he would not further prosecute his petition:—Held, that the agreement was illegal, and that the papers put in to establish the existence of that agreement did not require to be stamped. *Ib.*

Where A. brings an action against B. for the price of a gun ordered by the latter, he may read in evidence, for a collateral purpose, part of a letter written by B. to him; although the remainder of the letter contains directions for making the gun, and is not stamped as an agreement. *Forsyth* v. *Jervis*, 1 Stark. 437; 18 R. R. 804.

An unstamped document embodying an agreement not falling within the exceptions specified in the Stamp Act (33 & 34 Vict. c. 97), is inadmissible in evidence in civil proceedings for any purpose whatever. *Interleaf Publishing Co.* v. *Phillips*, 1 Cab. & E. 315.

A deed of assignment for the benefit of creditors, not registered through want of the necessary assents, may be used, even though unstamped, as evidence of an act of bankruptcy. *Squire, Ex parte, Gouldwell, In re*, 38 L. J., Bk. 13; L. R. 4 Ch. 47; 19 L. T. 272; 17 W. R. 40.

An article of agreement not stamped, the agreement being carried into effect with colourable variations by an instrument duly stamped, may be read as evidence of the res gestæ. If a stamp may be required by the Stamp Act (56 Geo. 3, c. 56), the unstamped paper may still be read on an undertaking to get it stamped if necessary. *Moore* v. *M'Kay*, 2 Moll. 134.

If the terms of a contract are reduced into writing, the paper must be stamped in order to be read in evidence, though collaterally. *Hearne* v. *James*, 2 Bro. C. C. 309.

Replevin—Evidence of Rent.]—In replevin, the issue being whether the plaintiff held certain closes at a fixed rent, specified in the avowry:—Held, that unstamped receipts tending to shew that he had previously paid for the same premises the like rent so specified, were inadmissible to support the issue. *Hawkins* v. *Warre*, 5 D. & R. 512.

Bill of Sale—Former Bill Unstamped.]—On an issue to try the property in goods, which the plaintiff claimed under a bill of sale, a former bill of sale of the same goods, but which had been cancelled, was tendered to shew that the second bill of sale was given bonâ fide, and not fraudulently. This document having been rejected, on the ground that it was not stamped:—Held, that it was properly rejected, and was inadmissible without a stamp. *Williams* v. *Gerry*, 10 M. & W. 296; 2 D. (N.S.) 201; 11 L. J., Ex. 389.

Documents made Abroad.] — A document which, by the law of a foreign country, is not admissible in evidence, for want of a stamp, may nevertheless be admitted in this country. But where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here. *Bristow* v. *Sequeville*, 5 Ex. 275; 3 Car. & K. 64; 19 L. J., Ex. 289; 14 Jur. 674. See also *James* v. *Catherwood*, 3 D. & R. 190.

An agreement made in a foreign country cannot be used here, if it appears that by the laws of that country it would not have been available there without a stamp. *Alves* v. *Hodgson*, 7 Term Rep. 241; 2 Esp. 528; 4 R. R. 433.

A plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that country, is void for want of a stamp. *Ib.* S. P., *Clegg* v. *Levy*, 3 Camp. 166.

A charter-party executed entirely abroad, and stamped within two months after it has been received in this country, can be received in evidence, since it falls within the provisions of 33 & 34 Vict. c. 97, s. 15, and not of ss. 67 and 68 of that act. *The Belfort*, 53 L. J., P. 88; 9 P. D. 215; 51 L. T. 271; 33 W. R. 171; 5 Asp. M. C. 291.

Receipts.]—*See* ante, col. 694.

Acknowledgment to save Statute of Limitations.]—P. being indebted to the executors of C. in 11,000*l.*, to which A. was beneficially entitled, sent a letter to A. as follows: "I have sent you a note for the money due to you, which your mother left for you." Inclosed in this letter was a promissory note, on a receipt stamp for 11,000*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute:—Held, that there was not a sufficient acknowledgment by P. without referring to the note to see what was the promise made, and this could not be done for the want of a proper stamp. *Parmiter* v. *Parmiter*, 3 De G., F. & J. 461; 30 L. J., Ch. 508; 3 L. T. 799.

In Proof of Fraud.]—A document which purports to be an agreement, and is valid upon the face of it, but which is tendered to shew the transaction with which it is connected to be a fraud, is admissible, although unstamped. *Holmes* v. *Sixsmith*, 7 Ex. 802; 21 L. J., Ex. 312; 16 Jur. 619.

A memorandum stamped as a receipt having been rejected, because requiring a stamp as an agreement, an agreement for the hire of goods, of which the value was mentioned only by reference to the receipt, does not require a stamp, the value of the hire not appearing to exceed the amount of 20*l.*, and the rejected receipt allowed to be looked at, with reference to the real state of the transaction, in order to shew fraud. *Chittenden* v. *Day*, 2 F. & F. 77.

Bond — Many Indorsements — No Room for Receipt.]—Where, from the number of indorsements, there is no room on the back of the bond, receipts written on unstamped paper, annexed to the bond, may be read in evidence. *Orme* v. *Young*, 4 Camp. 336; 17 R. R. 611.

Coming from Opposite Party.]—A written agreement, though coming out of the possession of the opposite party, cannot be given in evidence, unless it is legally stamped. *Doe* d. *St. John* v. *Hore*, 2 Esp. 724.

Form of Stamp.]—Articles of agreement under seal could not be given in evidence unless stamped with a deed stamp, although the agreement stamp was of the same value, but differently formed. *Robinson* v. *Dryborough*, 6 Term Rep. 317; 1 Esp. 243. And see *Chamberlain* v. *Porter*, 1 N. R. 34; *Farr* v. *Price*, 1 East, 55; 5 R. R. 515; *Taylor* v. *Hague*, 2 East, 414.

Stamped with a Denoting Stamp.]—Documents stamped with a denoting stamp by the commissioners, under 13 & 14 Vict. c. 97, s. 14, cannot be objected to, when tendered in evidence, as being improperly stamped. *Prudential Mutual Assurance Investment and Loan Association* v. *Curzon*, 8 Ex. 97; 22 L. J., Ex. 85.

Where the instrument is objected to at the trial as being insufficiently stamped, and afterwards, but before the case is argued in banc, a denoting stamp is affixed to it, such objection to the sufficiency of the first stamp is not thereby removed. *Ib.*

In Criminal Proceedings.]—Before 17 & 18 Vict. c. 83, s. 12, if an agreement or other written instrument was charged to be part of a fraud or other crime, it was immaterial whether it was stamped or not. *Rex* v. *Foule*, 4 Car. & P. 592.

b. On Payment of Penalty.

Not objected to.]—An agreement which has not been duly stamped, cannot be admitted without payment of the penalty, although no objection to its admission is offered by either side. *Harris* v. *Chapman*, 17 L. T. 517.

Insufficiently Stamped.]—Where an instrument has an insufficient stamp, it may at any time be made available by affixing a proper stamp and paying the penalty. *Burton* v. *Kirkby*, 2 Marsh. 480; 7 Taunt. 174.

Before and after 7 & 8 Vict. c. 21.]—An agreement made at a time when the 55 Geo. 3, c. 184, was in force, and under which it required a stamp of 1*l.*, was, subsequently to 7 & 8 Vict. c. 21, coming into operation, stamped, under a penalty, with the stamp of 2*s.* 6*d.*, as required by s. 2:—Held, admissible. *Deakin* v. *Penniall*, 2 Ex. 320; 17 L. J., Ex. 217.

Receipt of Penalty erased.]—If an instrument has been originally unstamped, but has been stamped on the payment of a penalty, it is admissible, though the receipt for the penalty has been erased; provided it is proved that such receipt had been indorsed on it; it is not necessary to prove the commissioners' signatures to such a receipt. *Apothecaries' Co.* v. *Fernyhough*, 2 Car. & P. 438.

Indorsement by Commissioners.]—A memorandum indorsed upon an instrument, purporting to be an acknowledgment by the commissioners of stamps on the payment of a penalty, is not receivable in evidence. *Rex* v. *Preston*, 3 N. & M. 31; 5 B. & Ad. 1029; 3 L. J., M. C. 58.

—— **Before and after 16 & 17 Vict. c. 59.**]—A bill of exchange for 25*l.*, dated 17th January, 1857, was drawn on one of the threepenny receipt stamps, rendered useless by 16 & 17 Vict. c. 59. In 1859, on application to the commissioners of inland revenue, they, on the payment of the penalty, affixed a bill stamp of the required value (3*d.*) to the instrument:—Held, that they had authority to do so, and that the bill so stamped was properly admitted. *Kaiser* v. *Grout*, 5 H. & N. 35; 29 L. J., Ex. 20; 1 L. T. 44; 8 W. R. 79.

c. Secondary Evidence.

Presumption.]—The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. *Marine Investment Co.* v. *Haviside*, 42 L. J., Ch. 173; L. R. 5 H. L. 624.

When there is no evidence on either side it will be presumed to have been stamped. *Ib.*

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped; the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped. *Ib.*

Where secondary evidence is admitted to prove the contents of a lost instrument, the court will presume that the instrument was stamped, unless there is evidence that it was not stamped. *Hart* v. *Hart*, 1 Hare, 1; 11 L. J., Ch. 9; 5 Jur. 1007. S. P., *Pooley* v. *Goodwin*, 5 N. & M. 466; 4 A. & E. 94; 1 H. & W. 567.

When an agreement requiring a stamp is lost, and was without a stamp when last seen, it will be taken that it never was stamped, and secondary evidence of it cannot be received. *Arbon* v. *Fussell*, 9 Jur. (N.S.) 753; 7 L. T. 283; 11 W. R. 26.

The court will presume that an indenture of apprenticeship, executed thirty years before, under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, was properly stamped. *Rex* v. *Long Buckby*, 7 East, 45; 8 R. R. 595.

Document inadmissible for want of Stamp.]—When an agreement in writing is in existence, which ought to be but is not stamped, it is not a nullity, so as to admit of parol evidence being given of the terms of the agreement. *Delay* v. *Alcock*, 24 L. J., Q. B. 68; 1 Jur. (N.S.) 498. *S. C.*, nom. *Alcock* v. *Delay*, 4 El. & Bl. 660.

A party cannot be cross-examined as to the contents of a document not admissible for want of a stamp. *Baker* v. *Dale*, 1 F. & F. 271.

Where goods are claimed under an agreement the terms of which are contained in a written instrument, which is inadmissible by reason of its not being stamped, parol evidence cannot be received of the claimant's title to such goods. *Yorke* v. *Smith*, 21 L. J., Q. B. 53; 16 Jur. 63.

Where an agreement on unstamped paper has been destroyed, no parol evidence can be given of its contents, even if it has been destroyed by the wrongful act of the party who takes the objection. *Rippiner* v. *Wright*, 2 B. & Ald. 478; 21 R. R. 263.

The court refused to admit secondary evidence of a declaration of trust, there being strong circumstantial evidence to shew that the original instrument was not stamped. *Rose* v. *Clarke*, 1 Y. & Coll. C. C. 534.

The court of equity cannot, any more than a court of law, receive parol evidence of the contents of a written agreement, which appears never to have been stamped, although fraudulently destroyed by the party against whom it was sought to be enforced. *Smith* v. *Henley*, 1 Ph. 391; 13 L. J., Ch. 221; 8 Jur. 434.

Evidence in writing not admitted, as an agreement unstamped does not prevent parol evidence,

if otherwise admissible. *Hiern* v. *Mill*, 13 Ves. 114; 9 R. R. 149.

Agreement not produced after Notice.]—An agreement, which by law ought to be stamped, not being produced upon notice given, secondary evidence is not allowed of its contents, if shewn that, at the time of its delivery to the party not producing it, it was unstamped. *Arbor* v. *Fussell*, 9 Jur. (N.S.) 753; 7 L. T. 283; 11 W. R. 26. See *Rippiner* v. *Wright*, 2 B. & Ald. 478; 21 R. R. 263.

Upon the defendant's refusal, after notice, to produce at the trial the original of an agreement on which the plaintiff relied, a witness for the plaintiff produced an unstamped copy; but, on his cross-examination, he stated that the original was not stamped at the time it was executed and acted upon, and it appeared that the plaintiff's attorney had had inspection of the original shortly before the action:—Held, that the presumption of the document being regularly stamped, which would have arisen from the defendant's refusal to produce it, being thus rebutted, the copy was properly rejected. *Crowther* v. *Solomons*, 6 C. B. 758; 18 L. J., C. P. 92.

Insufficiency—Evidence of.]—Where proof is given of the loss of a written instrument by a document, which itself shews that such instrument was originally insufficiently stamped, the court will not presume that the instrument was ever properly stamped, nor admit secondary evidence of its contents. *Blair* v. *Ormond*, 1 De G. & S. 428; 11 Jur. 665.

Lost Document—Evidence of being Unstamped.]—It lies upon the party objecting to secondary evidence of the contents of a lost document, on the ground of the want of a stamp, to shew that it was not stamped. *Closmadeuc* v. *Carrel*, 18 C. B. 36; 25 L. J., C. P. 216; 2 Jur. (N.S.) 474; 4 W. R. 547.

If it is shewn that at one time it was unstamped, that fact by itself will raise the presumption that it continued without a stamp. *Ib.*

But where it appeared that a charter-party at the time of its execution was unstamped, and within the fourteen days allowed by 5 & 6 Vict. c. 79, for stamping such an instrument, it was taken to the district stamp office in the country and the duty and postage paid, in order that it might be sent to London to be stamped, and the clerk to whom it was delivered proved that he sent to London all documents left with him for that purpose; and the clerks in London said they were unable to say whether such a document was or was not returned, but if it was, it would be returned in the usual course to the district office in the country; and the clerk there could not say whether it was returned or not, but on search being made for it, no trace of it could be discovered:—Held, that the evidence left it altogether uncertain whether the document was stamped or not, that the presumption of its being unstamped was done away with, and that the secondary evidence was admissible. *Ib.*

Devise of Lands—Sale—Lost Plans.]—A. devised lands to B. for life, with remainders over. He afterwards contracted to sell part of the lands to C., and the contract partly described them, and partly referred to a plan. C. did not pay the whole purchase-money, but entered into possession, and became bankrupt. The court of review made an order in the bankruptcy, declaring that A. had a lien for his unpaid purchase-money, and directed a sale. A. became the purchaser for a less sum than was due to him, and proved against C.'s estate for the difference. A. entered into possession, and so continued until his death. The plan had never been stamped, and was lost:—Held, that parol evidence was not admissible to shew what was contained in the lost unstamped plan. *Andrew* v. *Andrew*, 8 De G. M. & G. 336; 25 L. J., Ch. 779; 2 Jur. (N.S.) 719; 4 W. R. 520.

Work and Labour—Written Agreement unstamped—Extra Work.]—In an action for work, where it appears that the work was done under a written agreement, which is inadmissible for want of a stamp, parol evidence is not receivable to shew that there was extra work done not included in the original agreement; nor will the judge look at the contract for this purpose. *Buckstone* v. *Cornish*, 1 D. & L. 585; 12 M. & W. 426; 13 L. J., Ex. 91; 8 Jur. 46.

Joint Interest in Document—Admissibility of Stamped Copy.]—In an action founded on a document in which both parties have an interest, and which was in the possession of one, but is said by him to have been lost, a judge cannot order, that if such party does not produce the document to be stamped, a copy, duly stamped, shall be read in evidence at the trial, and that the original shall not be produced on the other side, nor objection taken to the want of a stamp on the original. The court rescinded such an order after it had been enforced by the judge at nisi prius, and made a rule of court. *Rankin* v. *Hamilton*, 15 Q. B. 187; 14 Jur. 930.

Admitted Copy.]—An admitted copy of a document may be received without a stamp, and without proof that the original is stamped. *Travis* v. *Hargreave*, 4 F. & F. 1078.

Agreement in two Parts—Only one Stamp.]—If plaintiffs put in one part of a written agreement which is signed by the defendant only, and is duly stamped, the defendant may put in the other part of the agreement which is signed by one of the plaintiffs for self and the other executors, although that part of the agreement is not stamped. *Turner* v. *Hardey*, Car. & M. 449.

If there are two parts of a written agreement, both executed at the same time, but the one stamped and the other unstamped, the unstamped part is receivable as secondary evidence of the contents of the stamped part. *Waller* v. *Horsfall*, 1 Camp. 501.

If two parts of an instrument are prepared, but only one is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuses, on notice, to produce the stamped part. *Garnons* v. *Swift*, 1 Taunt. 507.

Where a plaintiff lost his part of an agreement under seal, after it had been duly stamped, and at the trial of an action on the agreement, the defendant, upon notice, produced his part unstamped, and the plaintiff the draft of the agreement:—Held, that the defendant's part, unstamped, might be received. *Munn* v. *Godbold*, 3 Bing. 292; 11 Moore, 49; 2 Car. & P. 97; 4 L. J. (O.S.) C. P. 54; 28 R. R. 628.

A lessee who executes the counterpart of a lease, cannot dispute its admissibility in evi-

dence, or impeach its validity upon the ground of the original not being properly stamped. *Paul* v. *Meek*, 2 Y. & J. 116; 31 R. R. 559.

Subject-matter illegal.]—A written agreement, which is in law illegal, is admissible for the purpose of insisting on the illegality of the transaction, in answer to an action for a sum thereby agreed to be paid, without its being stamped. *Coppock* v. *Bower*, 4 M. & W. 361; 8 L. J., Ex. 9.

Bill of Exchange.]—In an action on a bill of exchange given to the drawers for a balance of account on a purchase, and by them indorsed to the plaintiff, the defence being that it was given for a larger amount than really due, the agreement of purchase between the defendant and the drawer was allowed to be given in evidence unstamped. *Ashcombe* v. *Ellam*, 2 F. & F. 306.

A. & Co. being indebted to S. gave him an unstamped letter or order directed to B. & Co. requiring them to pay him 200*l.* out of moneys which would become payable from B. & Co. to them on the completion of a certain contract. A. & Co. became insolvent, and the trustee under their liquidation disputed the validity of the letter:—Held, that the order operated as a bill of exchange, and being unstamped, was not receivable in evidence. *Shellard, Ex parte, Adams and Kirby, In re*, 43 L. J., Bk. 3; L. R. 17 Eq. 109; 29 L. T. 621; 22 W. R. 152.

And see BILLS OF EXCHANGE.

Contract of Marriage.]—A letter read to prove a contract of marriage need not be stamped. *Orford* v. *Cole*, 2 Stark. 351.

Copy of Deed to refresh Memory.]—The copy of a deed produced and read in court, if it is merely used as a memorandum to refresh the memory of a witness, who has read the original, and compared the copy with it, is not liable to the duty imposed by 44 Geo. 3, c. 98, schedule A., and 48 Geo. 3, c. 149, schedule 1, part 1, on copies of documents. *Braithwaite* or *Braythwayte* v. *Hitchcock*, 2 D. (N.S.) 444; 10 M. & W. 494; 12 L. J., Ex. 38; 6 Jur. 976.

Letter to vary Contemporaneous Letter.]—Held, that a letter from defendant to plaintiff, which was written at the same time as another letter, duly stamped, by which the defendant agreed to take certain apartments of the plaintiff, and was offered in evidence in order to vary the terms of the other letter, was not admissible without a stamp. *Atherstone* v. *Bostock*, 2 M. & S. 511; 10 L. J., C. P. 113.

d. Time of Stamping.

Guarantee after Bankruptcy.]—It is no objection to a guarantee given by a bankrupt that it was not stamped at the date of the bankruptcy. The court does not look at the date of a stamp. *Nicholson, Ex parte*, 4 Jur. 1066.

After Proceedings—Deed.]—A deed stamped after proceedings have begun is good ab initio. *Browne* v. *Savage*, 5 Jur. (N.S.) 1020; 7 W. R. 571.

If an instrument of demise in writing of apartments for a period of three months certain requires either an agreement or a lease stamp, it is not necessary that it should be stamped before the rule is granted under 1 Geo. 4, c. 87, it being time enough any time before the trial of the ejectment. *Doe* d. *Phillipps* v. *Roe*, 1 D. & R. 443; 5 B. & Ald. 766.

A deed which wanted a proper stamp being produced at the hearing, the cause was ordered to stand over, to give the plaintiff an opportunity of getting a stamp affixed. This being effected a decree was made. *Curtis* v. *Holcombe*, 6 L. J., Ch. 156.

Where a deed is produced bearing the proper stamp, the court will receive it without entering into the inquiry whether it was affixed upon the payment of a sufficient penalty, and within proper time, although it is proved not to have been stamped when executed. *Rex* v. *Preston*, 3 N. & M. 31; 5 B. & Ad. 1029; 3 L. J., M. C. 58.

—— **Letter.**]—Bill founded on a letter not stamped; decree made, but directed not to be delivered out till letters were produced stamped to registrar. *Cherret* v. *Jones*, 6 Madd. 267.

An original letter stamped, after production, to make it evidence. *Ford* v. *Compton*, 2 Bro. C. C. 32.

—— **Receipt.**]—Receipt for purchase-money allowed to be stamped as an agreement during the hearing. *Coles* v. *Trecothick*, 9 Ves. 234; 1 Smith, 233; 7 R. R. 167.

Where limited by Statute.]—Where a deed bearing the proper stamp is proved not to have been stamped when executed, the court will inquire into the time it was stamped, in cases where stamping within a limited period is required by statute. *Rex* v. *Preston*, supra.

Before and after 1870—Date of Execution.]—A deed executed before the commencement of the Stamp Act, 1870, and at the time of execution requiring a 35*s.* stamp, was not dated nor stamped until afterwards; so that on its face it appeared to be duly stamped with a 10*s.* stamp, under ss. 4 and 78:—Held, that evidence of the real date of execution was admissible; and that, under s. 17, the deed could not be given in evidence. *Clarke* v. *Roche*, 47 L. J., Q. B. 147; 3 Q. B. D. 170; 37 L. T. 633; 26 W. R. 112.

Probate—When Payable under preceding Statute.]—J. died on the 2nd of August, 1879, having previously made her last will, which her executor proceeded to prove, and on the 13th of September, 1879, paid 450*l.*, being the amount of duty then payable. A caveat was lodged by the next of kin, and it was not until the 13th of April, 1880, that the will was established. In the meantime the 43 Vict. c. 14, was passed, altering and increasing the duties payable upon probates on and after the 1st of April, 1880:—Held, that the probate was liable to the increased duty made payable by the 43 Vict. c. 14, s. 9. *Joy, In re, Lalor* v. *Jones*, 5 L. R., Ir. 282.

Bond—After Death of Obligor.]—A bond is valid though not duly stamped until after the death of the obligor. *Handley* v. ——, 8 L. J. (O.S.) Ch. 49.

e. Objections and Proof.

Several Parties—Proof on One making Objection.]—Where an agreement between several parties is offered in evidence, and it is objected to on the ground that it is not sufficiently stamped, by reason of the omission of a stamp, proof of that lies on the party who makes the

objection, it being a fact. *Waddington* v. *Francis*, 5 Esp. 182.

The onus of shewing that an instrument, otherwise regular, has been duly stamped, lies on the party impeaching it. *Doe* d. *Fryer* v. *Coombs* or *Combe*, 3 Q. B. 687; 3 G. & D. 193; 12 L. J., Q. B. 36; 6 Jur. 930. S. P., *Wilson* v. *Smith*, 12 M. & W. 401; 1 D. & L. 633; 13 L. J., Ex. 113.

The burthen of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. *Marine Investment Co.* v. *Haviside*, 42 L. J., Ch. 173; L. R. 5 H. L. 624.

Presumption.]—When there is no evidence on either side, it will be presumed to have been stamped. *Ib.*

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped; the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped. *Ib.*

Against a party who refuses (after notice) to produce an agreement, it will be presumed that it is stamped. *Crisp* v. *Anderson*, 1 Stark. 35; 18 R. R. 744.

But the party refusing is at liberty to prove the contrary. *Ib.*

Claim for Exemption.]—Where an agreement is primâ facie liable to stamp duty, it is for the party offering it to bring it within the exemption. *Chanter* v. *Dickinson*, 2 D. (N.S.) 838; 5 Man. & G. 253; 6 Scott (N.R.) 182; 12 L. J., C. P. 147; 7 Jur. 89.

Obliterated Stamp.]—Where a deed requiring an ad valorem stamp is produced, bearing the appearance of having had a stamp upon it, but the nature of which, by reason of obliteration, cannot be ascertained, it is for the party objecting to the deed to give some evidence that a proper stamp had not been imposed, otherwise a presumption may be made that the deed had been duly stamped. *Doe* d. *Fryer* v. *Coombes* or *Combe*, 3 Q. B. 687; 3 G. & D. 193; 12 L. J., Q. B. 36; 6 Jur. 930.

Agreement to waive Objection.]—The court cannot sanction an agreement between the parties, that an objection for want of a proper stamp shall be waived. *Owen* v. *Thomas*, 3 Mylne & K. 353.

An agreement, that it should become necessary to stamp a document, and pay any penalty for doing so, one of the parties to it should be at liberty to charge the other with the expense of stamping it, is an evasion of the Stamp Act, and will not be enforced by a court of equity as to the penalty. *Abbott* v. *Stratton*, 3 Jo. & Lat. 603.

An agreement which has not been duly stamped cannot be admitted in evidence, although an application is made by both sides that the agreement should be admitted without being stamped, as it would amount to an evasion of the stamp laws. *Harris* v. *Chapman*, 17 L. T. 517.

Objection—by Associates.]—Under 17 & 18 Vict. c. 125, s. 28, the associate can make only such objections, for want of a stamp, as the parties might have made if the statute had not passed. *Travers* v. *Hargreave*, 4 F. & F. 1078.

—— By Party or Counsel.]—The 17 & 18 Vict. c. 125, s. 28, which enacts that it shall be the duty of the officer of the court to call the attention of the judge to any omission or insufficiency of the stamp upon any document produced in evidence, does not preclude a party to the suit, or his counsel, from taking the objection. *Austin* v. *Bunyard*, 6 B. & S. 687.

Question as to whether Original was Stamped is for the Jury.]—On the trial of an action on a policy in which the existence of the policy was in issue, the plaintiffs, pursuant to notice to produce, called on the defendant to produce the original policy. He declined, and they thereupon, with a view of proving that it had been duly executed, proceeded to put in a document, purporting to be a copy of the policy which they had received from the defendant's broker. The defendant objected, and requested the judge to hear evidence to shew that no original policy was or ever had been in existence. The objection was overruled, and the alleged copy admitted. Later in the cause the defendant gave evidence tending to prove that in fact there had never been any duly-stamped policy, or indeed any policy at all executed, and the judge left it to the jury to say whether there had or had not been executed a duly stamped policy by the defendant. The jury found in the affirmative:—Held, that the question was rightly left to the jury, inasmuch as if the judge had himself decided it, he would in fact have decided the main issue between the parties. *Stowe* v. *Querner*, 39 L. J., Ex. 60; L. R. 5 Ex. 155; 22 L. T. 29; 18 W. R. 466.

When Point Doubtful.]—An objection that a document requires a stamp will not be given effect to if the point is doubtful. *Westlake* v. *Adams*, 1 F. & F. 183.

When to be taken.]—Where an instrument was put in evidence as an agreement, properly stamped, but during the trial it was subsequently relied upon as a lease:—Held, that the objection to its inadmissibility, for want of a proper stamp ought to have been taken at that period of the trial when it was first tendered as a lease. *Doe* d. *Phillip* v. *Benjamin*, 2 W. W. & H. 96.

An objection to the admissibility of a document for the want or insufficiency of a stamp must be taken at the time it is tendered in evidence. *Robinson* v. *Vernon* (*Lord*), 7 C. B. (N.S.) 235; 29 L. J., C. P. 310; 7 Jur. (N.S.) 146.

Where, therefore, executors suing had put in evidence probate of the will of their testator, and the same had been read without objection:—Held, that the defendant could not afterwards, by giving extrinsic evidence of the value of the estate, object to the admissibility of the probate for want of a sufficient stamp. *Ib.*

f. Decision as to.

Motion on.]—Semble, that s. 31 of 17 & 18 Vict. c. 125 has deprived the courts of jurisdiction to entertain any motion upon a point reserved on the stamp laws. *Kaiser* v. *Grout*, 5 H. & N. 35; 29 L. J., Ex. 20; 1 L. T. 44; 8 W. R. 79.

Judge at Nisi Prius.]—The question whether or not a document offered in evidence requires to be or is sufficiently stamped is to be decided by the judge at nisi prius, and cannot properly

be reserved for the opinion of the court. *Tattersall* v. *Fearnley*, 17 C. B. 368. S. P., *Siordet* v. *Kuczynski*, 17 C. B. 251; 25 L. J., C. P. 2; 4 W. R. 153.

Unless he decides against its admissibility. *Cory* v. *Davis*, 14 C. B. (N.S.) 370. S. P., *Sharples* v. *Rickard*, 2 H. & N. 57; 5 W. R. 568.

The provision does not apply where on an objection being taken to the sufficiency of the document, the judge with consent of the parties abstains from expressing an opinion on the point and reserves it for decision in banco. *Eames* v. *Smith*, 1 Jur. (N.S.) 1025; 4 W. R. 9.

Appeal.]—Where a judge, trying an action without a jury, rules that the stamp upon any document is sufficient, or that the document does not require a stamp, the decision is final and no appeal lies to the Court of Appeal by way of application for a nonsuit, or to enter judgment, or for a new trial. *Blewitt* v. *Tritton*, 61 L. J., Q. B. 773; [1892] 2 Q. B. 327; 67 L. T. 72; 41 W. R. 36.

Documents—Pending Decision.]—Documents which require to be stamped, may be taken as put in conditionally, on a point reserved as to their sufficiency or necessity. *Webber* v. *Mowbray*, 2 F. & F. 310.

Jurisdiction to order Production of Document to be stamped.]—The court will compel the production, by a defendant, of a letter, with a view to its being stamped as an agreement, at the expense of the plaintiff (such letter being a part of an alleged agreement, which it is necessary for the plaintiff to prove as part of his case), the plaintiff being no party to such document, but claiming only an interest in it. *Hall* v. *Bainbridge*, 3 D. & L. 92; 14 L. J., Q. B. 289; 9 Jur. 451.

—— **When exercised.**]—B. and C. entered into partnership by an unstamped agreement, which was in the hands of S. A. sued B. and C., as partners, for goods sold, and applied to S. to take or send the agreement to the stamp office, that A. might get it stamped. S. refused to do so, and a judge would not order him to do so as he held the agreement for B. and C., and did not in any way hold it for A. *Dyke* v. *Brewer*, 2 Car. & K. 828.

7. Attesting Witnesses to Documents.

a. When Necessary.

In Case of Wills.]—A will more than thirty years old may be read in evidence without proof of its execution, although the testator has died within thirty years, and some of the subscribing witnesses are proved to be still living. *Doe* d. *Oldham* v. *Wolley*, 8 B. & C. 22; 2 M. & Ry. 195; 3 Car. & P. 402; 6 L. J. (O.S.) K. B. 286. S. P., *Doe* d. *Spilsbury* v. *Burdett*, 4 A. & E. 1; 6 N. & M. 259; 6 L. J., K. B. 73.

It has never been laid down as a rule that a will cannot be proved without examining all the witnesses, though the practice has been to examine all. *Powell* v. *Cleaver*, 2 Bro. C. C. 504.

But a party proving a will in solemn form in the Probate Court, is bound to call at least one of the attesting witnesses. *Bowman* v. *Hodgson*, 36 L. J., P. 124; L. R. 1 P. 362; 16 L. T. 392.

In ejectment by the heir-at-law against the devisee to prove the execution of the will, it is not necessary to call the subscribing witnesses. *Doe* d. *Stutsbury* v. *Smith*, 1 Esp. 391.

A will purported to have been executed in the presence of two attesting witnesses. One was abroad and the other in England. The executors, who propounded the will, applied for a commission for the examination, de bene esse, of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity but described him as an elderly person. The court ordered the commission to issue, but intimated that if it was proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *McPherson* v. *Parnell*, 40 L. J., P. 30; 24 L. T. 742; 19 W. R. 784.

A subscribing witness to a will, who swears to the testator's insanity, may be contradicted by other evidence. *Lowe* v. *Joliffe*, 1 W. Bl. 365.

And see cases sub tit. Wills, ante, cols. 705 et seq.

Deeds.]—Where an instrument is proved by a copy as secondary evidence, from which it appears that the original was subscribed by an attesting witness, it is, nevertheless, unnecessary to call him. *Poole* v. *Warren*, 3 N. & P. 693; 8 A. & E. 582; 3 Jur. 23.

Where a title-deed, under which both parties in ejectment claim, comes out of the possession of the defendant upon notice to produce, it may be read against him on behalf of the plaintiff, without calling the attesting witnesses. *Doe* d. *Williams* v. *Williams*, 5 N. & M. 434; 1 H. & W. 574.

In a case where all the parties are represented before the court it is not necessary to prove by the attesting witness a deed for the validity of which attestation is not necessary within the meaning of s. 26 of the Common Law Procedure Act, 1854. *Worthington* v. *Moore*, 64 L. T. 338.

In an action for work and labour in getting an apprentice for the defendant, the plaintiff gave the defendant notice to produce the deed of apprenticeship:—Held, that the production of it did not dispense with the necessity of proving its execution by the subscribing witness. *Reardon* v. *Minter*, 5 Man. & G. 203; 12 L. J., C. P. 139.

Semble, where one of the plaintiffs is an attesting witness to an instrument, the proof of the execution of which is essential to the defendant's case, it is enough for the defendant to prove the handwriting of that plaintiff. *Strange* v. *Dashwood*, 3 L. J. (O.S.) Ch. 194.

Upon a question of settlement of apprenticeship the indenture was produced, apparently executed by all parties; and the name of G. J. affixed to the attestation, as attesting witness; but without any description. It was proved that search had been made where the indenture was executed, but that no one of that name could there be found; and that on inquiry of the parties to the indenture nothing could be learned of him; but that between two and three miles from the place, there was a G. J. who said he knew nothing about the matter. He was not produced. Upon this evidence the sessions refused to receive the evidence of the parties to the indenture to prove its execution; being of opinion that enough had not been done to prove the handwriting of the attesting witness:—Held, that they had decided rightly. *Rex* v. *Macclestone*, 7 L. J. (O.S.) M. C. 96.

In an action of ejectment the counsel for the plaintiff called the defendant as a witness, and

proposed to prove the defendant's execution of a deed, by which he assigned the lands sought to be recovered to the plaintiff by asking him whether he had executed it. Held, that the subscribing witness ought to be called: and that without shewing that it was impossible to procure him, the proposed evidence could not be received. *Whyman* v. *Gath*, 17 Jur. 559; 1 W. R. 373.

In ex parte cases a deed must, generally speaking, be proved by the attesting witnesses. *Reay's Estate, In re*, 3 Eq. R. 512; 1 Jur. (N.S.) 222; 3 W. R. 312.

On an ex parte application, the testimony of the attesting witness to an instrument was dispensed with, there being a difficulty in obtaining his evidence. *Dierdon, In re*, 10 Jur. (N.S.) 673; 10 L. T. 690; 12 W. R. 978.

Where the attesting witness to the signature of certain parties to an agreement for reference to arbitration was the clerk of their solicitor, and he refused to make an affidavit verifying the execution of the agreement by them, the court, on an ex parte application to make the award a rule of court, dispensed with proof of such execution. *S. C.*, nom. *Dierdon's Arbitration, In re*, 4 N. R. 394.

Necessity of proving a deed by the attesting witness, where its validity and the payment of the consideration is contested by a person not a party to it. *Leigh* v. *Lloyd*, 35 Beav. 455.

To Seal of Bank.]—To an indenture of feoffment by the Bank of England, the seal of the bank was affixed by a paper wafered to the indenture, on which paper was written, "Sealed by order of the court of directors of the governor and company of the Bank of England, 12th Dec. 1833, J. K., secretary":—Held, that J. K. was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling J. K. *Doe* d. *Bank of England* v. *Chambers*, 4 A. & E. 410; 6 N. & M. 539; 1 H. & W. 749; 5 L. J., K. B. 123.

Lease.]—In an action by a lessee against the assignee of a lease, the plaintiff having proved the execution of the counterpart of the lease, the defendant put in the original lease, which was produced by a party to whom he had assigned it:—Held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease. *Burnett* v. *Lynch*, 8 D. & R. 368; 6 B. & C. 589; 4 L. J. (O.S.) K. B. 274; Cp. *Nagle* v. *Shea*, Ir. R. 9 C. L. 389—Ex. Ch.

The parties agreed to admit in the cause certain facts in the same manner as if they had been proved by proper and legal evidence, and among others, that a certain exhibit was the notice, and a certain other exhibit a true copy of the lease referred to in the notice:—Held, that the notice was not evidence of the lease so as to relieve the defendant from the necessity of calling the attesting witness. *Mounsey* v. *Burnham*, 1 Hare, 15.

Held, also, that the admission as to the copy of the lease substituted the copy for the original, but did not place the copy in a better situation than the original, if it had been produced. *Ib.*

Assignment of Goods.]—Where a defendant claimed title to goods under an assignment, and in pursuance of notice produced it at the trial when called for by the plaintiffs:—Held, that the plaintiffs were entitled to read it in evidence without calling the attesting witness to prove the execution, although they impugned the validity of the assignment on the ground of fraud. *Carr* v. *Burdiss*, 1 C. M. & R. 782; 5 Tyr. 309.

Appointment under Power.]—An appointment of new trustees, not required to be by deed or to be attested, was made by deed, executed abroad by the donee of the power, who was resident abroad, and his execution of it was attested by a witness, also resident abroad. A vesting order was then applied for, one of the old trustees being of unsound mind, and was supported by proof of the handwriting of the signature of the appointor to the deed:—Held, that the petitioners must prove the handwriting of the attesting witness, or, failing that, must shew that they had endeavoured to find a witness in England who could speak to his handwriting, and failed in doing so, in which case the order might be drawn up on proof of the handwriting of the appointor. *Rice, In re*, 55 L. J., Ch. 799; 32 Ch. D. 35; 54 L. T. 589; 34 W. R. 747—C. A. See also *Baxendale* v. *De Valmer*, 57 L. T. 556.

Partnership Agreement.]—In an action the defence was, that the plaintiff's testator and the defendant were partners, and that the subject-matter of the action was a partnership account. To prove the partnership the defendant called for the production of an agreement, purporting to be by a third person, with the plaintiff's testator and the defendant as a firm, to do work for them:—Held, that on the production of it by the plaintiff the defendant was not entitled to read it without proof of its execution. *Collins* v. *Bayntun*, 4 P. & D. 544; 1 Q. B. 117; 5 Jur. 530; 10 L. J., Q. B. 98.

Contra Spoliatorem.]—It is not necessary to prove the execution of securities against a spoliator or a wrongdoer. *Rex* v. *Ellins*, R. & R. 188. S. P., *Delany* v. *Temson*, 3 Bro. P. C. 659.

Public Officer.]—Proof of execution is not necessary where the opposite party who produces the deed is a public officer, who, in the discharge of his official duties, was obliged to prepare such deed and get it executed. *Scott* v. *Waithman*, 3 Stark. 168.

Bill of Exchange.]—If the subscribing witness to the acceptance of a bill of exchange, being one of acceptor's family, cannot be served with a subpœna in consequence of the conduct of that family, the bill may be paid without his evidence. *Hill* v. *Phillips*, 5 Car. & P. 356.

In assumpsit by indorsee against acceptor, in order to shew that plaintiff had received the bill when it was overdue, a protest which had been made of it by plaintiff's immediate indorsee, being in the hands of the plaintiff, was called for by defendant at the trial on notice to produce. On its production it was found to be attested by a witness:—Held, that the mere circumstance that the protest came out of the hands of the plaintiff, as he did not claim title under it, was not sufficient to dispense with the necessity of calling the witness; but it being proved that on two occasions the paper had been produced by plaintiff's attorney to defendant's attorney as the protest applying to the bill in question, it was admitted in evidence without proof of the attestation. *Martin* v. *Palmer*, 6 Car. & P. 466.

b. Witness denying Attestation.

An attesting witness ought not to be admitted to deny his own attestation. *Goodtitle* d. *Alexander* v. *Clayton*, 4 Burr. 2224.

But if he does deny having seen the deed executed, other evidence of the execution is admissible. *Talbot* v. *Hodson*, 7 Taunt. 251; 2 Marsh. 527.

Witness is not at liberty to contradict his attestation. In such a case other evidence from circumstances is admissible, as where there is no witness or the person does not exist; sealing and delivery may be presumed from proof of handwriting. *Burrowes* v. *Lock*, 10 Ves. 474; 8 R. R. 33, 856.

c. Witness Dead, Absent or Incapacitated.

Witness Dead.]—Proof of the handwriting of the subscribing witness to an instrument is sufficient, he being dead, without any further proof of the identity of the parties, except the identity of name and description. *Page* v. *Mann*, 1 M. & M. 79.

Where attesting witness to deed has lived abroad, a strict proof of his death is required; otherwise, where constantly residing in England. *Henley* v. *Philips*, 2 Atk. 48.

One having order to prove a deed, vivâ voce, at the hearing, not allowed to prove the witnesses' hands, they being dead, but had leave to examine in the office to prove the deed, though publication was passed. *Bloxton* v. *Drewit*, Pre. Ch. 64.

One subscribing witness dead, and another out of jurisdiction, proof of handwriting allowed. *Banks* v. *Farquharson*, Dick. 167.

Mortgage bequeathed to wife of subscribing witness. Proof of his handwriting held sufficient proof of execution of mortgage between mortgagee and mortgagor. *Inman* v. *Parsons*, 4 Madd. 271.

In order to prove a deed a witness was called who stated that it was destroyed and that he had seen the names of the parties to it in their respective handwriting. He also stated that the instrument bore the name of one B. as an attesting witness; that B. was dead, but that he did not know B.'s handwriting or whether the name of B. was written by B.:—Held, that in the circumstances, secondary evidence of the contents of the deed was admissible without further proof of the handwriting of B. Per Erle, J.: Where a document is lost and the attesting witness to it is dead, there is no necessity for proving his handwriting. *Reg.* v. *St. Giles, Camberwell*, 1 El. & Bl. 642; 22 L. J., M. C. 54; 17 Jur. 164; 1 W. R. 181.

Witness Absent.]—In an action on an attested agreement, it was proved that the attesting witness formerly lived at Salford, but that about eleven months ago he had gone on board a ship bound for America; that a letter had been received some months after which was marked in his handwriting "ship letter"; and that he had not since been heard of in a lodge of Oddfellows to which he belonged:—Held, sufficient to let in evidence of his handwriting. *Davidson* v. *Carr*, 12 L. J., Ex. 312.

To account for not calling a subscribing witness, evidence cannot be given of his declarations as to where he lived; to let in proof of that, in answer to an inquiry there, it was stated that he was abroad; but some person should either be called from the house where the witness lived, or else some person who had seen him abroad. *Doe* d. *Beard* v. *Powell*, 7 Car. & P. 617.

Proof by a father that his son, who had parted from him on bad terms, had enlisted in the 11th Dragoons, and that he had inquired at the War Office and been told that the regiment had sailed for India, was held sufficient to let in evidence of the son's handwriting, as subscribing witness to an agreement. *Wyatt* v. *Bateman*, 7 Car. & P. 586.

Where an attesting witness to a deed cannot be found after strict and diligent inquiry, evidence of his handwriting is admissible. *Doe* d. *Johnson* v. *Johnson*, 2 Chit. 196.

In accounting for the absence of an attesting witness, general answers to inquiries that nothing is known concerning him are admissible, but not declarations as to particular facts if the party making them is capable of being called. *Ib.*

Absconding.]—An attesting witness to a bond could not be found after sufficient inquiry:—Held, that evidence of his handwriting was admissible, it being clear that he had absconded, although a letter which did not state where he was concealed had been received from him by his clerk a few days before the trial. *Morgan* v. *Morgan*, 9 Bing. 359; 2 Moore & Sc. 490; 2 L. J., C. P. 27.

Incapable of being examined.]—Proof of the handwriting of an attesting witness, who is incapable of being examined, is not sufficient to maintain an action on a written instrument; but plaintiff must give some evidence of the identity of defendant with the person executing, beyond the mere similarity of the name. *Whitelocke* v. *Musgrove*, 1 C. & M. 511; 3 Tyr. 541; 2 L. J., Ex. 210. *Logan* v. *Alder*, *Ib.*, n.

Witness blind.]—Where an attesting witness to a deed had become blind:—Held, that it was not sufficient to prove the handwriting of the signature, but that he must be also examined. *Rees* v. *Williams*, 1 De G. & Sm. 314.

If since the execution of a deed the subscribing witness to it has become blind, a party suing on the deed must, if non est factum be pleaded, call the subscribing witness; and it is not enough to prove the handwriting of the parties executing the deed and of the subscribing witness. *Crank* v. *Frith*, 9 Car. & P. 197; 2 M. & Rob. 262.

A deed attested by a witness become blind may be read, as proof of the witness's writing, without calling him. *Pedler* v. *Paige*, 1 M. & Rob. 258.

d. Where Party Claims an Interest.

Subscribing Witnesses Unnecessary.]—In an action upon an agreement and a memorandum of even date indorsed thereon, to explain and vary the terms of the original agreement (which was expressly referred to as "the within-mentioned agreement"), the consideration for the defendants' promise was alleged to be the making of the agreement and memorandum, and the undertaking on the part of the plaintiffs to perform the same. At the trial, the plaintiffs called for and proved (the defendants producing it) the part of the agreement and memorandum executed by the plaintiffs; they then offered in evidence the part executed by the defendants, and after proving the execution of the memorandum indorsed thereon, proposed, without calling or accounting for the absence of the

subscribing witness, to read the original agreement. The judge rejected it:—Held, that the agreement ought to have been received, and was admissible without calling the attesting witness. *Fishmongers' Co.* v. *Dimsdale*, 12 C. B. 557—Ex. Ch.

If a defendant calls on a plaintiff to produce at the trial a deed in his custody, to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed when produced. *Pearce* v. *Hooper*, 3 Taunt. 60.

It is not necessary to prove the execution of a deed, if the adverse party claims under it; and this rule applies, where secondary evidence is given of the deed. *Doe* d. *Rowlandson* v. *Wainwright*, 1 N. & P. 8; 5 A. & E. 520; 2 H. & W. 391; 6 L. J., K. B. 35.

A party producing, at the trial of a cause, a deed which has been some months in his possession, is not excused from proving the execution, because he received such deed from the adverse party, who formerly claimed a benefit under it. *Vacher* v. *Cocks*, 1 B. & Ad. 145; M. & M. 353; 8 L. J. (o.s.) K. B. 341.

e. After Notice to Produce.

Not necessary.]—In an action on an indenture of apprenticeship, the plaintiff proved that it was in the possession of the defendant, to whom he gave a notice to produce it:—Held, that, on non-production, parol evidence of its contents might be let in without calling the subscribing witness. *Cooke* v. *Tanswell*, 2 Moore, 513; 8 Taunt. 131.

Where a deed is in possession of a defendant, who has notice to produce it, an examined copy is evidence, without proof of his execution of it. *Doxon* v. *Haigh*, 1 Esp. 409.

In an action against the vendor of an estate, to recover the deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution. *Bradshaw* v. *Bennett*, 1 M. & Rob. 143; 5 Car. & P. 48.

Where defendants, claiming title under a deed produce it at the trial when called for by plaintiffs, after notice to produce, the attesting witness need not be called, although plaintiffs dispute the validity of the deed on the ground of fraud but admit its execution. *Carr* v. *Burdiss*, 1 C. M. & R. 443; 3 Tyr. 136; 4 L. J., Ex. 60.

Assumpsit by a servant against his master for not employing him under a written agreement to serve for a year which had not expired. The agreement was produced under notice:—Held, that it was not necessary to call the subscribing witness to the execution. *Bell* v. *Chaytor*, 1 Car. & K. 162.

f. What must be Proved.

Execution.]—Witness must not only prove his own attestation, but also the execution of the deed by the person executing the deed. *Hill* v. *Unett*, 3 Madd. 370.

Acknowledgment of sealing and delivery, not sufficient evidence thereof. *Grayson* v. *Wilkinson*, Dick. 158.

But otherwise of signature. *Ib.*

Witness to deed must state the circumstances of the execution, the sealing and delivery. *Burrowes* v. *Lock*, 10 Ves. 470; 8 R. R. 33, 856.

Where Plaintiff is Witness.]—Course to be pursued when a plaintiff is attesting witness to a deed which defendant wants to prove. *Strange* v. *Dashwood*, C. P. Cooper, 497.

Effect of Proof.]—A deed proved by the attesting witness, vivâ voce, at the hearing is well proved for all purposes in the cause, unless it is impeached. *Bowser* v. *Colby*, 1 Hare, 109; 11 L. J., Ch. 132; 5 Jur. 1106.

8. Impounding Documents.

Order.]—The judge at the trial of a cause cannot order any paper to be impounded, which is not given in evidence; it is not enough that it should be in court in the possession of one of the witnesses. *Rex* v. *Clifford*, 1 Car. & P. 521.

By 5 & 6 Will. 4, c. 76, a town clerk is required to preserve in his custody the voting papers used at an election of councillors for six months afterwards. A criminal information having been filed against a town clerk for misconduct at such an election, the court refused to direct that the voting papers should be impounded for the purpose of evidence against him, although the six months' custody of them would expire before the trial. *Rex* v. *Nicholetts*, 6 N. & M. 827.

A judge will not order documents which have been given in evidence in a cause to be impounded, unless application is made during the progress of the cause. *Borton* v. *Ockford*, 7 Car. & P. 547.

Inspection—Copies.]—In the case of documents impounded by order of the court, the court cannot, while such documents are in the custody of the court, part with such documents, but will give leave to inspect the same under Order XLII., r. 33A. Copies, however, of such documents may not be taken. *Solicitor, In re, Incorporated Law Society, Ex parte*, 65 L. T. 584.

V. Attendance of Witnesses.

1. Process.

a. Subpœna generally.

Form.]—The name of a witness, though not in the original subpœna, may be inserted therein at any time, if the party has been served with a copy. *Wakefield* v. *Gall*, Holt, N. P. 526.

Issue of—Time.]—Any party may without leave of the court issue a subpœna for the examination of a witness at any stage of an action; but the court will exercise a control over this privilege to prevent its being oppressively used. *Raymond* v. *Tapson*, 22 Ch. D. 430; 48 L. T. 403; 31 W. R. 394—C. A.

In an action for the redemption of a mortgage the usual judgment was obtained and the defendant, the mortgagee, proceeded to vouch his accounts in chambers. The plaintiff subpœnaed a solicitor who had acted for both parties in the mortgage transactions, in order to examine him with respect to the moneys received by him on account of both parties:—Held, that the plaintiff was entitled to issue the subpœna and to examine the witness. *Ib.*

Place of Trial.]—In order to bring a party into contempt for not attending as a witness at a trial at the sittings in obedience to a subpœna, the writ must specify the place at which the cause is

to be tried, viz. Westminster Hall or Guildhall. *Milson* v. *Day*, 3 M. & P. 333.

A subpœna required the attendance of a witness in Westminster Hall, the nisi prius sittings being held, during term, in a detached building, called Westminster Sessions House:—Held, that, notwithstanding the apparent inconsistency of the writ, an attachment might be granted for disobedience to it, by reason of the witness neglecting to appear at the Nisi Prius Court, there being notices affixed to the walls of the court in Westminster Hall, directing witnesses to proceed to the sessions house. *Chapman* v. *Davis*, 1 D. (N.S.) 239; 4 Scott (N.R.) 319; 3 Man. & G. 609; 11 L. J., C. P. 51.

Date.]—A subpœna, tested the 9th May, and served on the 19th, required the witness to appear "on Monday, the 21st day of March instant." The court refused to set aside the service. *Page* v. *Carew*, 1 C. & J. 514; 9 L. J. (O.S.) Ex. 192.

But refused to grant an attachment against a witness for not obeying a subpœna dated on the 18th June, calling on him to attend the trial on the 2nd July, but which subpœna was not served until the 3rd, as the subpœna and service were inconsistent with each other. *Alexander* v. *Dixon*, 8 Moore, 387; 1 Bing. 366; 2 L. J. (O.S.) C. P. 22.

A subpœna requiring the party to attend the trial of a cause on the commission-day extends to the whole assizes, and it need not go on to require his attendance "from day to day until the cause is tried." *Scholes* v. *Hilton*, 10 M. & W. 15; 2 D. (N.S.) 229; 11 L. J., Ex. 332.

A subpœna tested in vacation is a void writ. *Edgell* v. *Curling*, 8 Scott (N.R.) 663; 2 D. & L. 600; 7 Man. & G. 958; 14 L. J., C. P. 27; 9 Jur. 111.

—— **Re-Sealing.**]—If a cause appointed for one sitting is made a remanet, the subpœna must be re-sealed and re-served. *Sydenham* v. *Rand*, 3 Dougl. 429.

A witness is not bound to obey a subpœna altered by the attorney from the sittings for which it was originally sued out to a subsequent sittings without being re-sealed. *Barber* v. *Wood*, 2 M. & Rob. 172.

Irregularity of Service.]—A witness who has attended to be examined in pursuance of a subpœna cannot then refuse to be examined, on the ground of irregularity in the service of the subpœna. *Wisden* v. *Wisden*, 6 Hare, 549.

To Lunatic.]—A lunatic may be brought up by habeas corpus ad testificandum, on an affidavit that he is not a dangerous lunatic, and is in a fit state to be brought up. *Fennell* v. *Tait*, 5 Tyr. 218; 1 C. M. & R. 584.

To Sailor.]—But not a sailor on board a man-of-war, unless it be shewn that he is willing to attend. *Rex* v. *Roddam*, Cowp. 672.

Under Writ of Sequestration.]—When, on a bill filed and an interim order for injunction made, a writ of sequestration was issued in the ordinary form, in order to examine witnesses for discovery under such sequestration, a subpœna will be directed. *D'Alteyrac* v. *Long*, 19 L. T. 45.

Discharge of.]—Subpœna to testify, where no cause depending discharged. *Price* v. *Holland*, Cary, 95.

Preventing Service—Attachment — Costs.]—Although it is the moral duty of a private inquiry agent to afford all reasonable facilities for the service of subpœnas upon his employés, in a case in which they have been professionally engaged, he is not liable to attachment unless he uses actual obstruction to prevent his employés being served. In the absence of evidence of force or actual obstruction, the court refuses to issue an attachment, but, being of opinion that the conduct of the inquiry agent, or of a person acting on his behalf and with his authority, had given the petitioner reasonable ground to apply for an attachment, dismissed the motion, but made no order as to costs. *Wylam* v. *Wylam*, 69 L. T. 500.

Ad Respondendum.]—Process of subpœna ad respondendum may be issued out of the office of pleas, and it is not necessary that such process should be signed by the chief secondary, or a sworn clerk in the office of the king's remembrancer; rules made in respect thereof, in reigns of James and Car. 2, are absolute. *Taylor* v. *Riley*, 9 Price, 385.

b. Witness in Scotland or Ireland.

Powers of Chancery.]—The Court of Chancery has power, under 17 & 18 Vict. c. 34, and 21 & 22 Vict. c. 27, s. 3, to direct the issuing of a subpœna ad testificandum to witnesses residing in England or Scotland, commanding them to attend the trial of questions of fact directed in any proceedings in that court to be tried by a jury before itself. *Underwood* v. *Darracott*, Ir. R. 8 Eq. 348.

The affidavit on which the application for such a writ is founded must disclose facts to shew that the attendance of the witness is reasonably necessary. *Ib.*

On an affidavit that a witness residing in Scotland was a necessary witness, the court ordered a subpœna to issue for his attendance at the trial. *Bruce* v. *Measor*, 4 W. R. 230.

Under 17 & 18 Vict. c. 34.]—A rule under this statute, for a subpœna ad testificandum to a witness not within the jurisdiction of the court, is ex parte and absolute in the first instance. *Readman* v. *Broers*, 1 Jur. (N.S.) 1052; 4 W. R. 24.

A plaintiff, resident in Ireland, may be compelled by a subpœna ad testificandum, issued on the part of the defendant, to attend at the trial of a cause in this country. *Harris* v. *Barber*, 25 L. J., Q. B. 98.

But the court refused an order for a subpœna for the attendance at the trial of a witness resident in Scotland, on the ground that the affidavit did not shew the nature of the action, nor what the evidence wanted was. *Allen* v. *Hamilton* (*Duke*), L. R. 2 C. P. 630; 15 W. R. 866.

When an action and "all matters in difference" between the parties have been referred by consent to an arbitrator, no writ of subpœna will be granted under 17 & 18 Vict. c. 34, s. 1, in order to compel the attendance at the hearing before the arbitrator of witnesses residing within the United Kingdom but out of the jurisdiction of the Queen's Bench Division; for the hearing before the arbitrator is not a "trial" within the meaning of that enactment. *Hall* v. *Brand*, 53 L. J., Q. B. 19; 12 Q. B. D. 39; 49 L. T. 492; 32 W. R. 133—C. A.

And see infra, VII. 7.

c. Prisoners.

See 16 & 17 Vict. c. 30, s. 9; 51 & 52 Vict. c. 43 (The County Courts Act, 1888), and 52 & 53 Vict. c. 49, s. 18(2).

Application, how made.]—The application for a habeas corpus ad testificandum should be made to a judge at chambers, and not in court. *Browne* v. *Gisborne*, 2 D. (N.S.) 963; 12 L. J., Q. B. 297; 7 Jur. 328.

Before 16 and 17 Vict. c. 30, s. 9, a rule for bringing up a defendant from criminal custody on a habeas corpus ad testificandum was nisi only in the first instance. *Rex* v. *Pilgrim*, 4 D. P. C. 89.

When Brought up.]—The court will not grant a habeas corpus ad testificandum to bring up a prisoner of war. *Furley* v. *Newnham*, 2 Dougl. 419.

Or a prisoner in custody for high treason. *Langston* v. *Cotton*, Peake Ad. C. 21.

The court granted a habeas corpus ad testificandum to bring up a prisoner in criminal custody, to give evidence before an arbitration. *Marsden* v. *Overbury*, 18 C. B. 34; 25 L. J., C. P. 200.

So where the witness was in execution for a debt. *Graham* v. *Glover*, 5 El. & Bl. 591; 25 L. J., Q. B. 10; 2 Jur. (N.S.) 160; 4 W. R. 25.

The writ is grantable at common law in the case of an execution debtor. *Geery* v. *Hopkins*, 2 Ld. Raym. 851.

But the court refused a habeas corpus ad testificandum to bring up a prisoner in execution, where the application appeared to be a mere contrivance. *Rex* v. *Barbage*, 3 Burr. 1440.

—— **Party to Action.**]—Where the evidence of the plaintiff is necessary at the trial of a cause, he is entitled to a habeas corpus ad testificandum for himself as much as for any other witness. *Cobbett, Ex parte*, 3 H. & N. 155; 27 L. J., Ex. 199; 4 Jur. (N.S.) 145.

Where there is a question as to the identity of the person of the defendant to an information who is in prison, the Court of Exchequer will grant a habeas corpus to bring him up, to be present at the trial, upon his paying the costs. *Att.-Gen.* v. *Fadden*, 1 Price, 403.

A party in contempt, in a suit in another branch of the court, will be ordered to be brought up, if wanted for examination. *Hill* v. *Travis*, 21 L. J., Ch. 541.

Before House of Commons.]—A habeas corpus ad testificandum issued to bring up a prisoner to give evidence before an election committee of the House of Commons, on an affidavit of service of a rule to shew cause on the different persons concerned, and no cause shewn. *Price, In re*, 4 East, 587; 1 Smith, 284; 7 R. R. 637. S. P., *Pilgrim, In re*, 1 H. & W. 319; 3 A. & E. 485; 4 D. P. C. 89; 4 L. J., M. C. 120.

Form of Order—Time of hearing uncertain.]—Where a plaintiff moved ex parte for an order on the governor of a prison to produce a prisoner in court at the trial, but the time of hearing was uncertain, the court made the order in the form given in Seton (5th ed.), p. 89, but directed that the same should not be drawn up until the case was in the paper for trial. *Jenks* v. *Ditton*, 76 L. T. 591.

Costs.]—A party, who brought two actions, succeeded in one and failed in the other. The plaintiff, being a prisoner under the Insolvent Debtors Act, was brought up to give evidence by habeas corpus ad testificandum, but was only examined in the cause in which he failed:—Held, that, on taxation of his costs in the cause in which he succeeded, the plaintiff was entitled to the costs of the habeas corpus. *Griffin* v. *Hoskyns*, 1 H. & N. 95; 2 Jur. (N.S.) 475.

d. Crown Office.

Attachment.]—The court can attach a person for contempt in disobeying a subpœna from the crown-office, requiring him to attend before justices at petty sessions. *Reg.* v. *Greenaway*, 2 New Sess. Cas. 103; 7 Q. B. 126; 14 L. J., M. C. 190; 9 Jur. 1009.

It is no objection to granting an attachment against a party for disobeying a crown-office subpœna requiring him to appear before justices, to give evidence concerning the place of the last legal settlement of A., that it is not stated in the subpœna or shewn by the affidavit that one of the justices was of the quorum. *Reg.* v. *Vickery*, 3 New Sess. Cas. 193; 12 Q. B. 478; 17 L. J., M. C. 129; 12 Jur. 581.

A subpœna may be issued from the crown-office requiring a witness to attend at the assizes in the county to give evidence in support of an intended prosecution for a felony; and the Court of King's Bench will grant an attachment against him for not attending in obedience to the subpœna. *Rex* v. *Ring*, 8 Term Rep. 585; 5 R. R. 478.

"Parts" of the Kingdom.]—In 45 Geo. 3, c. 92, s. 3, for enforcing the appearance of persons served with a subpœna in one part of the United Kingdom, to give evidence in another in criminal prosecutions, the "parts" signified are England, Scotland and Ireland. *Rex* v. *Brownall*, 1 A. & E. 598; 3 L. J., M. C. 118.

e. Issuing from Quarter Sessions.

The Court of King's Bench has no power to grant an attachment against a witness for disobeying a subpœna issued out of the court of quarter sessions. *Rex* v. *Room*, 3 N. & M. 725.

Where a person has been served with a subpœna, not issued from the crown-office, to appear and give evidence at quarter sessions, and makes default, the Court of King's Bench cannot attach him for contempt, either by its general authority or by virtue of 45 Geo. 3, c. 92, s. 3. *Rex* v. *Brownall*, 1 A. & E. 598; 3 L. J., M. C. 118.

2. Service.

Method of.]—A copy of the subpœna must be delivered personally at the time of service. *Thorpe* v. *Gisborne*, 11 Moore, 55.

If the original writ of subpœna requires the witness to appear on the 27th of May, and the copy served requires him to appear on the 24th, an attachment for disobedience cannot be obtained. *Doe* d. *Clarke* v. *Thomson*, 9 D. P. C. 948.

The original subpœna should be shewn to the party subpœnaed at the time the copy of it is served, or an attachment will not lie against him for disobedience. *Wadsworth* v. *Marshall*, 3 Tyr. 228; 1 C. & M. 87; 2 L. J., Ex. 10. S. P., *Rex* v. *Soloman*, 1 D. P. C. 618; *Pitcher* v.

King, 2 D. & L. 755; 14 L. J., Q. B. 99; 9 Jur. 348.

Even though the party serving it was not asked to produce it. *Ib.*

Or even when the witness, being an attorney, has previously evaded the service of such subpœna. *Smith* v. *Truscott*, 6 Man. & G. 267; 1 D. & L. 530; 6 Scott (N.R.) 808; 12 L. J., C. P. 336.

Difficulty in serving a subpœna will not dispense with the necessity of personal service, unless it is sworn that the person keeps out of the way to avoid personal service. *Barnes* v. *Williams*, 1 D. P. C. 615.

In exchequer it is sufficient (where only one defendant) that a copy of subpœna ad respondendum be left, and the original shewn him; secus in chancery. *Bland* v. *Buckley*, 6 Price, 34.

Substituted Service.]—Application for substituted service of a subpœna ad testificandum, or, in the alternative, that a solicitor might produce his client before the examiner, refused. *Spicer* v. *Dawson*, 22 Beav. 282.

Reasonable Time.]—Whether a subpœna has been served in reasonable time before the trial, is matter for the court. *Barber* v. *Wood*, 2 M. & Rob. 172.

Service on a person living close to the place of trial at half-past eleven o'clock in the morning for a cause called on at two o'clock is not sufficient time. *Ib.*

The question as to whether a subpœna ad testificandum is served within a reasonable time, depends upon the circumstances of each particular case; therefore, where a person was served at twelve o'clock, while standing on the steps of the court-house, and was told the trial would come on the same day, which it did, at five o'clock:—Held, that the service was sufficient. *Maunsell* v. *Ainsworth*, 8 D. P. C. 869; 1 H. & W. 5.

3. Subpœna duces tecum.

a. Generally.

Effect of.]—A subpœna duces tecum, without being ad testificandum also is good; and the party is bound to obey it by producing the document, and is not thereby made a witness. *Evans* v. *Moseley*, 2 D. P. C. 364.

A. was served with a subpœna duces tecum, to produce a deed in his possession, which was to be proved by the subscribing witness, but he refused; ordered that he should produce the deed at his own expense; that the witness should attend at his expense; and that he should pay all the other expenses caused by his refusal. *Bradshaw* v. *Bradshaw*, 3 Sim. 285. Motion to discharge this order was refused by Lord Brougham, 1 Russ. & M. 358.

Must be specific.]—A subpœna duces tecum must distinctly specify what is required to be produced. A general production of documents cannot be enforced against a witness by subpœna duces tecum. *Lee* v. *Angas*, 35 L. J., Ch. 373; 14 L. T. 324; 14 W. R. 667.

A witness, a partner in a bank, was required by subpœna duces tecum to produce all books and accounts in his custody or power, containing any entries relating to 6,500*l.* consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit:—Held, that the witness was not compellable to produce any books, &c., because the language of the subpœna was too general, and because the books, &c. relating to the stock, were partnership property, and his co-partners would not consent to his producing them. *Att.-Gen.* v. *Wilson*, 9 Sim. 526; 7 L. J., Ch. 76; 1 Jur. 890.

It is not an objection to a motion to re-examine a witness on interrogatories which he refused to answer, and to produce a document refused to be produced, that there was an irregularity in the subpœna duces tecum, or that the required document was vaguely described in the subpœna, if the witness has appeared and submitted to be examined, and shewn by his answer that he identified the document inquired after with the document in his possession. A subpœna duces tecum is a requisition to a witness to produce a document; and an interrogatory requiring a witness to set forth the documents in the words is in effect equivalent to a requisition to produce it. The duty of a witness to produce a document called for by the subpœna duces tecum, or inquired after by an interrogatory, is the same, whether the document is called for in order to be proved by himself or by another witness. *Tippins* v. *Coates*, 6 Hare, 16; 11 Jur. 1075. But see *S. C.* on appeal 17 L. J., Ch. 337; 12 Jur. 339, the Lord Chancellor having discharged the order of the Vice-Chancellor.

A defendant being examined as a witness for the plaintiff, under a subpœna duces tecum refuses to produce books of trade, although he brings them with him and refers to them. The plaintiff then moves that he may be ordered to produce them, on the ground that they contain matters which will throw light on the case; and the notice of motion refers to a particular case, as to which there are entries in the books. Motion refused with costs. *Selby* v. *Fraser*, 5 W. R. 341.

Possibility of Compliance—Document belonging to Third Party.]—The court refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Court of Pleas at Lancaster, and of an arbitrator, which required the witness to produce before the latter in London a large number of books and documents belonging to a railway company in Lincolnshire, of which he was the secretary and solicitor, and which the directors (who were no parties to the reference) refused to allow him to bring. *Crowther* v. *Appleby*, 43 L. J., C. P. 7; L. R. 9 C. P. 23; 29 L. T. 580; 22 W. R. 265.

Power of Court of Chancery.]—The Court of Chancery has no power to issue a subpœna duces tecum to a witness residing out of the jurisdiction to produce documents upon the hearing of a claim in chambers. *Power* v. *Webber*, Ir. R. 10 Eq. 188.

The court has jurisdiction, under the 15 & 16 Vict. c. 86, to issue a subpœna ad testificandum, or a subpœna duces tecum, requiring the attendance of witnesses on a motion for a decree. Semble. *Wigan* v. *Rowland*, 10 Hare (App.), xxvi.

It is not necessary, under the Chancery Amendment Act, s. 39, to apply to the court for a subpœna duces tecum upon the hearing of a cause. *Holden* v. *Holden*, 5 W. R. 217.

Where the examination of a witness is closed, and it is necessary that he should produce certain books, &c., at the hearing, the court may require

him to do so by a subpœna duces tecum. An application for a subpœna duces tecum may be made before the hearing. *Vorley* v. *Jerram*, 6 W. R. 734.

Materiality.]—It is not competent for a person served with a subpœna, to shew that the instrument he was required to produce was immaterial in the cause, in answer to a rule for an attachment. *Doe* d. *Butt* v. *Kelly*, 4 D. P. C. 273.

Although a witness cannot refuse to produce documents on the ground that they will not be evidence between the parties, the court may take the circumstances into consideration, and will not order the witness to produce them, unless it is probable that the documents may be used in evidence. *Phelps* v. *Prothero*, 2 De G. & Sm. 274. And see *S. C.*, 17 L. J., Ch. 404; 12 Jur. 667.

Privilege.]—The writ of subpœna duces tecum is of compulsory obligation on a witness to produce papers thereby demanded, which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse the court and not the witness is to judge. *Amey* v. *Long*, 9 East, 473; 6 Esp. 116; 1 Camp. 16, 180, a.; 9 R. R. 589.

Where an attorney of a person, not a party to the action, brought a book into court in obedience to a subpœna duces tecum, but refused to produce it, on the ground of his client's privilege, and the client, being present as a witness under a subpœna, also objected to its production:—Held, that secondary evidence might be given of the contents of the book, although the client has not been served with a subpœna duces tecum. *Newton* v. *Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; 14 Jur. 1121. S. P., *Hibberd* v. *Knight*, 2 Ex. 11; 17 L. J., Ex. 119.

A man served with a subpœna duces tecum cannot be compelled to produce an instrument by virtue of which he committed a trespass. *Miles* v. *Dawson*, Peake, Ad. C. 54; 1 Esp. 405.

A witness called on his subpœna duces tecum, who objects to the production of documents, has no right to have the question of his liability to produce argued by counsel. *Doe* d. *Rowcliffe* v. *Egremont (Earl)*, 2 M. & Rob. 386.

Under a subpœna duces tecum, the party may, in court, object to produce the documents; but if the objection is overruled, production will be compelled. *Field* v. *Beaumont*, 1 Swanst. 209.

A person having a deed in his possession, that in effect amounted to an act of bankruptcy, one of the parties was ordered to attend commissioners with it, without prejudice to any objection being taken before them, as to disclosure of confidential communications. *Treacher, Ex parte*, Buck, 17. S. P., *Law, Ex parte*, *id.* 110.

—— Of State—Secondary Evidence.]—Where a state official is subpœnaed in an action to produce a document, and acting by the direction of the authority to which he is responsible refuses to do so, on the ground that its production would be injurious to the public service, the court will not compel him to produce it, and will not inquire whether the objection is well founded, except where the excuse is palpably futile and frivolous. Where production in such a case has been refused, secondary evidence of its contents cannot be given. *Hughes* v. *Vargas*, 9 R. 661—C. A.

Lien.]—A right of lien upon an instrument in possession of a witness (not a solicitor) is not a good objection to its production under a subpœna duces tecum. *Hunter* v. *Leake*, 7 L. J. (o.s.) K. B. 221.

Documents held in Trust—Subject to Litigation—Inaccessible.]—A witness may well excuse himself for not bringing with him and producing documents which he has under trust, and the right to which is or may become the subject of litigation. He is not bound to search for them, if he shews that they are in a place to which access on his part is both legally and physically impossible. *Campbell* v. *Dalhousie (Earl)*, L. R. 1 H. L. (Sc.), 462; 22 L. T. 879.

An appellant on a bill to perpetuate testimony under 5 & 6 Vict. c. 69, obtained from the Court of Chancery a subpœna duces tecum directed to the respondents. The appellant being unable to enforce this writ against the respondents, who were resident in Scotland, applied to the Court of Session, under 22 Vict. c. 20, to compel them to search for an exhibit to the documents mentioned in the subpœna. The respondents stated as a reason for non-search and non-production, that they were locked up in the muniment room at a certain castle, and that though they were, as trustees of the late owner, in possession of the key of that room, yet they could not search that room, because there was a dispute between them and the present owner of the castle as to the right of possession of the documents:—Held, that the respondents could not be compelled to produce the documents. *Ib.*

What Persons.]—In ejectment by a tenant in tail against a lessee holding under a lease with warranty, granted by a prior tenant for life under a power to make leases, to recover possession, on the ground that the lease was not a due exercise of the power, the executors of the deceased grantor are not privileged from producing in evidence, under a subpœna duces tecum from the plaintiff, to prove seisin in the tenant for life, books containing notices by the steward of the deceased grantor, charging himself with receipt of rent for the premises. *Doe* d. *Wyndham* v. *Date*, 3 Q. B. 609; 6 Jur. 990.

An overseer of a parish is bound by a subpœna duces tecum, at the instance of another parish, to attend as a witness, and bring the rate-books of the parish with him, before justices, on an inquiry touching the settlement of a pauper. *Reg.* v. *Greenaway*, 7 Q. B. 126; 14 L. J., M. C. 190; 9 Jur. 1009.

So, also, is the attorney for the parish. *Ib.*

An attorney and steward of a lord of a borough is bound to produce under a subpœna duces tecum public documents relating to the borough, but he is not bound to produce documents relating to the lord's interest in the borough. *Rex* v. *Woodley*, 1 M. & Rob. 390.

A subpœna duces tecum to a party defendant, discouraged; the proper course is to move for an order on the defendant to bring in the documents, which he admits by his answer to be in his possession. *Aldborough* v. *Stratford*, 1 Hog, 123.

What Deeds.]—In an ejectment by devisees, it appeared that the defendant had mortgaged the premises to B., and had given him the will. At the trial B. was subpœnaed to produce it, and he declined doing so, as it was part of his title:—Held, that B. was not bound to produce the will, and that secondary evidence of the contents was not admissible. *Doe* d. *Bowdler* v. *Owen*, 8 Car. & P. 110.

A witness is not bound to produce, in obedience to a subpœna, a will, which he holds as attorney for a devisee claiming under it. *Doe* d. *Carter* v. *James*, 2 M. & Rob. 47.

A judge will not compel a witness to produce a document under a subpœna duces tecum, if, as against the party asking its production, the witness has a lien on the document which is called for. *Kemp* v. *King*, Car. & M. 396; 2 M. & Rob. 437. *But see* infra, *Fowler* v. *Fowler*, 50 L. J., Ch. 686.

A person's having a lien upon a document is no objection to his producing it on a trial; but if he fears that it may be abstracted the judge will allow him to stand by the witness while the witness is examined respecting it. *Thompson* v. *Mosley*, 5 Car. & P. 501.

A witness is bound to produce a document in order that it may be given in evidence, notwithstanding he may have a lien on it. *Cameron Coalbrook Ry., In re*, 25 Beav. 1.

Distinction between the production of documents at the instance of the party who created the lien, and of a stranger, and between production and parting with the possession. *Ib.*

Delivery of Document to Party in Action after Service of Subpœna.]—Where a letter has been written by the plaintiff to a witness, and the witness has had a subpœna duces tecum, but has delivered the letter to the plaintiff after action brought, and he refuses to produce it, parol evidence of its contents is admissible. *Leeds* v. *Cook*, 4 Esp. 256; 6 R. R. 855.

Secondary Evidence—Person not Party to Suit not Producing.]—A person not a party to a cause, served in due time with a subpœna duces tecum, to produce a document at the trial, without any legal excuse disobeyed it, and did not produce the document:—Held, that secondary evidence of its contents was not admissible. *Reg.* v. *Llanfaethly*, 2 El. & Bl. 940; 2 C. L. R. 230; 23 L. J., M. C. 33; 17 Jur. (N.S.) 1123; 2 W. R. 61.

Swearing Witness.]—A witness who appears to produce a document under a subpœna duces tecum, may be compelled to produce it without being sworn. *Perry* v. *Gibson*, 3 N. & M. 462; 1 A. & E. 48; 3 L. J., K. B. 158. S. P., *Davies* v. *Dale*, M. & M. 514; *Summers* v. *Moseley*, 2 C. & M. 477; 4 Tyr. 158; 3 L. J., Ex. 128.

Where a person called only to produce a document is sworn as a witness by mistake, and a question is put to him which he does not answer, the opposite party is not entitled to cross-examine him. *Rush* v. *Smith*, 1 C. M. & R. 94; 2 D. P. C. 687; 4 Tyr. 675; 3 L. J., Ex. 355.

Where a witness swears that he had attended with all the documents required by the subpœna, the defendants are entitled to ask him what documents he had in his possession, without his being sworn, and so making him their witness. *Lee* v. *Angas*, 35 L. J., Ch. 370; 14 L. T. 324; 14 W. R. 667.

A person served with subpœna duces tecum, under the 24th general order of May, 1845, to produce a document at the hearing, may, without having been sworn as a witness for the party serving him, be called at the hearing, upon his subpœna, and asked whether he produces the document; and if not, why not; or any other question confined to the purpose of production. *Griffith* v. *Ricketts*, 7 Hare, 301; 19 L. J., Ch. 399; 14 Jur. 325.

Delivery to Usher.]—Duces tecum for deeds, but ordered to be delivered to usher of court, but not to plaintiff, without special order. *Wilford* v. *Denny*, Cary, 53.

Practice.]—Issuing a writ of duces tecum is not now the practice of this court; instead of it, the plaintiff moves for deeds which the answer admits defendant has in his possession or power. *Anon.*, 2 Moll. 367.

Upon a motion for a decree a subpœna duces tecum to produce a document at the hearing does not issue as of course. *Chard* v. *Cox*, 35 Beav. 196.

Where a case comes on upon motion for decree, it is not necessary to apply to the court for a writ of subpœna duces tecum, but such writ may be obtained at the record and writ clerk's office, as if the cause came on regularly at the hearing. *Wilhem* v. *Reynolds*, 8 W. R. 625.

Service by Person not a Party.]—Upon an inquiry in chambers to ascertain the next of kin of a person dead, partially intestate, one of the claimants, not a party to the suit, served upon the defendant, the administrator, and also one of the claimants of kinship, a summons to attend for examination, and a subpœna duces tecum to compel him to produce all letters from persons named in the subpœna, to the intestate, and other documents. The defendant admitted possession of some such letters and documents, but declined to produce them:—Held, upon motion, that without deciding whether the description was too general, this was an improper mode of attempting to obtain evidence to support the claim. *Newland* v. *Steer*, 11 Jur. (N.S.) 596; 13 L. T. 111; 13 W. R. 1014.

b. In Case of Solicitors.

Lien.]—In an action by a married woman against her husband and the trustees of her marriage settlement, the solicitor who prepared the settlement was called as a witness for the plaintiff, and required to produce the settlement under a subpœna duces tecum. The solicitor objected to produce it on the ground that it had not been paid for, and asserted a general lien on it. The settlement was prepared on the instructions of the wife in contemplation of her marriage in 1873; i.e. between the dates of the Married Women's Property Act, 1870, and the Amendment Act, 1874:—Held, that the solicitor was bound to produce it. *Fowler* v. *Fowler*, 50 L. J., Ch. 686; 44 L. T. 799; 29 W. R. 800.

A deed containing a recital alleged to be material to a defendant in a suit, was in the custody of the solicitor of some of the parties to the deed, and he claimed a lien on it in respect of the costs of its preparation. On his being called as a witness by the defendant, who was not his client or party to the deed, to produce it:—Held, that he could not refuse to do so by

reason of his lien. *Hope* v. *Liddell*, 7 De G. M. & G. 331.

Where a deed is in the hands of an attorney, who holds it not merely as attorney, but as a security for money owing to him from his client, and the attorney, being called on a subpœna duces tecum, refuses to produce the deed on the ground of his own lien, the party calling for the production of the deed is entitled to give secondary evidence of its contents. *Doe* d. *Gilbert* v. *Ross*, 7 M. & W. 102; 8 D. P. C. 389; 10 L. J., Ex. 201; 4 Jur. 321.

A solicitor is not, on the ground of his lien on documents of a bankrupt in respect of professional services before the bankruptcy, entitled to refuse to produce such documents for examination by the trustee. *Toleman and England, In re, Bramble, Ex parte*, 13 Ch. D. 885; 42 L. T. 413; 28 W. R. 676.

Solicitor who had refused to allow a deed in his possession to be proved on behalf of plaintiff, because he had a lien on it for costs due from defendant, was ordered to produce it at his own expense, and to pay all the costs consequent on his refusal. *Brassington* v. *Brassington*, 1 Sim. & S. 455.

Solicitor claiming lien on deeds, cannot be compelled to produce them at hearing of cause, without subpœna duces tecum. *Busk* v. *Lewis*, 6 Madd. 29.

Privilege.]—An attorney, who has in that character received papers from a client, cannot be called to produce them in a cause, although he does not act therein as the attorney of the party. *Parker* v. *Yates*, 12 Moore, 520.

A vendor had a draft of conveyance made by his own attorney, from which the deeds were afterwards prepared. The attorney was paid for this business by the vendor and purchaser in moieties, by agreement, but the latter employed an attorney on his own part to look over the draft. It remained afterwards with the vendor's attorney:—Held, that such draft was confidentially deposited with the latter, by the purchaser as well as the vendor, and could not be produced on a trial against the interest of the purchaser's devisees, though with the consent of the vendor and his attorney. *Doe* d. *Strode* v. *Seaton*, 2 A. & E. 171; 4 N. & M. 81; 4 L. J., K. B. 13.

By an order of the Court of Chancery made in a suit depending between a lessee and lessor, the lease was deposited in the hands of the lessor's attorney, the lessee being at liberty to inspect the same. Upon ejectment brought by the lessee against the tenant in possession:—Held, that the attorney of the lessor was bound to produce the lease, it not being part of the lessor's title. *Doe* d. *Courtail* v. *Thomas*, 9 B. & C. 288; 4 M. & Ry. 218.

A party who is protected from producing a deed at nisi prius, on the ground that he holds it as a trustee for one of the parties, is not compellable to disclose the contents of it. *Davies* v. *Waters*, 9 M. & W. 608; 1 D. (N.S.) 651; 11 L. J., Ex. 214.

An attorney for a party in a cause is not bound to state the contents of a deed, of which he first obtained a knowledge by having obtained and read it, at the suggestion of his counsel, at the consultation in the cause. *Ib.*

An attorney subpœnaed to produce a document at a trial may, in his discretion, refuse to produce it, on the ground that it has been intrusted to him by a client. He is neither bound to produce it nor to answer a question with respect to its nature; and the judge ought not to examine it to see whether it is a document which ought to be withheld. *Volant* v. *Soyer*, 13 C. B. 231; 22 L. J., C. P. 83.

But an attorney, although he has received a document from his client, is not privileged from answering a question put for the purpose of letting in secondary evidence, whether the document is in his possession. *Coates* v. *Birch*, 1 G. & D. 647; 2 Q. B. 252; 1 D. (N.S.) 540; 11 L. J., Q. B. 1; 5 Jur. 540.

In an action against an attorney for negligence respecting a reference of an action for breach of promise of marriage, brought by Miss S. against the present plaintiff, in which he was attorney for the present plaintiff, it appeared that there were two parts of the agreement to refer, one signed by Miss S.'s attorney (unstamped), which was in possession of the present defendant, the other signed by the present defendant as attorney for the present plaintiff, and in the hands of Miss S.'s attorney. The latter had been stamped within twenty-one days after execution, and the expense of stamping and part of the expense of making it had been paid by the present plaintiff. The part in the hands of the present defendant being produced under a notice to produce, being unstamped could not be read in evidence, but:—Held, that the present plaintiff was entitled to have the stamped part of the agreement produced by Miss S.'s attorney, although she had desired him not to produce it. Held, also, that her attorney was not bound to produce letters written to him by the present defendant, as attorney for the present plaintiff, he stating that he was desired by his client not to produce them; but that if letters from her attorney to the present defendant as attorney for the present plaintiff were not produced under a notice to produce, her attorney was bound to give secondary evidence of their contents, although she desired him not to do so. *Higgs* v. *Taylor*, 1 Car. & K. 85.

See further, post, VI., 8.

To Identify.]—Action on a covenant in a lease by assignee of the reversion. The plaintiff put in a conveyance to him of the reversion, subject to mortgage debts. The defendant, in order to prove that the legal estate was out of the plaintiff, by reason of the conveyance of the reversion having been made subject to a mortgage, called the attorney of a person to whom the mortgage had been transferred, to produce the mortgage deed, under a subpœna duces tecum. The attorney objected, and stated that he had been instructed by his client not to produce it. The attorney for the original mortgagee was then called to give secondary evidence of its contents. He had a draft of a mortgage, but did not know whether it was a copy of the deed in question, unless he knew what that deed was. The judge ordered the first witness to produce the deed, and to allow the second witness to look at the indorsement, upon which he identified it as the deed of which the draft was a copy, and gave secondary evidence of its contents:—Held, that the privilege of the client was not violated by requiring the attorney to shew the indorsement on the deed, for the purpose of enabling the witness to identify it. *Phelps* v. *Prew*, 3 El. & Bl. 430; 2 C. L. R. 1422; 23 L. J., Q. B. 140; 18 Jur 249; 2 W. R. 258.

To let in Secondary Evidence.]—In an action against a mortgagor, the attorney of the mortgagee, who has the mortgage deed, cannot be compelled to produce it, if he objects to do so, nor can he be compelled to give evidence of its contents; but he may be asked for what purpose the money was raised; and secondary evidence may be given of the contents of the mortgage deed. *Marston* v. *Downes*, 4 N. & M. 861; 1 A. & E. 31; 6 Car. & P. 381; 3 L. J., K. B. 158. And see *Newton* v. *Chaplin*, 10 C. B. 356; 19 L. J., C. P. 374; 14 Jur. 1121.

Waiver.]—An attorney cannot be compelled by the court to disclose the contents of a client's deed in his possession; but if he does so willingly, the evidence may be received. *Hibberd* v. *Knight*, 2 Ex. 11; 17 L. J., Ex. 119; 12 Jur. 162.

In ejectment by a rector to recover land as parcel of the glebe, a book describing the lands subject to tithes, and a map of the glebe, were produced by an attorney and solicitor, who had been employed by J., the preceding rector, who was also owner of the advowson, to collect the tithes, and afterwards to sell the advowson. The book was given to him for the former purpose, the map with a view to the sale. The heir and the executors of J. authorised him to produce them. The advowson was sold to A., who had presented the lessor of the plaintiff:—Held, that the map was not a privileged communication; and that if it was, the privilege had been waived. *Doe* d. *Marriott* v. *Hertford* (*Marquis*), 19 L. J., Q. B. 526; 13 Jur. 632.

Interest.]—Where an attorney holds a document for a client, he cannot be compelled to produce it by a person who has an equal interest in it with his client. *Newton* v. *Chaplin*, 10 C. B. 356.

After a Notice to Produce.]—If, upon notice given to the attorney of a party to produce a document in his possession, he neglects so to do, he cannot be called as a witness to prove its contents. *Bothomley* v. *Usborne*, Peake, Ad. C. 101.

But he may be asked whether he has that document, in order to let in secondary evidence of it, if it is not produced. *Bevan* v. *Waters*, M. & M. 235; 3 Car. & P. 520.

If an attorney for a person not a party to an action, having refused at the trial to produce a deed belonging to his client, is directed by the judge to give parol evidence of the contents, the parties to the action have no right to object to such evidence going to the jury, even upon the supposition that the judge acted erroneously. *Marston* v. *Downes*, 1 A. & E. 31; 4 N. & M. 861; 6 Car. & P. 381; 3 L. J., K. B. 158.

Where a notice has been given to produce a deed, but which notice cannot be proved, the attorney for the other party cannot be called upon to produce it, he having admitted a receipt of the notice. *Reed* v. *Passer*, 1 Esp. 216; 1 Peake, 303; 3 R. R. 696.

The attorney for the opposite party cannot be asked whether he has with him a rule of court relating to the cause, with a view to give secondary evidence of the rule, no notice to produce or subpœna duces tecum having been served. *Cook* v. *Hearn*, 1 M. & Rob. 20.

4. Order for Attendance of Witnesses.

Under Ord. XXXVII. r. 13.]—Where a person duly subpœnaed fails to attend, the proper course is to move for an order that he do attend as a witness at his own expense. *Stuart* v. *Balkis Co.*, 32 W. R. 676.

Under 15 & 16 Vict. c. 86, s. 39.]—Under the 15 & 16 Vict. c. 86, s. 39, an order for the production of a witness at the hearing of a cause may be obtained without the order of the court. *Holden* v. *Holden*, 7 De G. M. & G. 397; 5 W. R. 217.

Semble, the 15 & 16 Vict. c. 86, s. 39, enabling the court to require the production and oral examination before itself of any witness or party in the cause, only authorises the examination in court of witnesses who have already given evidence in the cause. In such a case the court will point out the communication to be made to the witness required to be recalled. The matter in issue as stated in the bill, with the passage marked, should be placed before such witness, with his affidavit relating to it, and he is to be told that his further examination is required thereon. *East Anglian Ry.* v. *Goodwin*, 6 W. R. 564.

Upon a motion for leave to issue a subpœna ad testificandum, for the hearing of the cause, under the 39th section of 15 & 16 Vict. c. 86:—Held, that the court has no authority under that section to issue a subpœna, but that the mode of proceeding under that section is by an order to be made at the hearing of the cause. *May* v. *Biggendon*, 1 Sm. & G. 133; 10 Hare (App.), xlv.; 22 L. J., Ch. 429; 17 Jur. 252; 1 W. R. 111.

A subpœna ad testificandum issues ex debito justitiæ without the order of the court, and it is not necessary to obtain such an order beforehand where there is a probability that the vivâ voce evidence of a party may be required at the hearing in the case contemplated by the 39th section of the act 15 & 16 Vict. c. 86. *Ib.*

Semble, that if the court wishes to have the vivâ voce evidence of a party under that section, the course would be, if he were not present, to adjourn the hearing. *Ib.*

Semble, the court has jurisdiction under the 15 & 16 Vict. c. 86, to issue a subpœna ad testificandum, or a subpœna duces tecum, requiring the attendance of witnesses on a motion for a decree. *Wigan* v. *Rowland*, 10 Hare (App.), xviii.

Notice of Motion for, when necessary.]—It is not necessary to serve the other parties in the cause with a notice of motion that a witness be ordered to attend and be examined, though the reason assigned by the witness for his refusal to be examined was, that he was professionally concerned as solicitor for such other parties. *Wisden* v. *Wisden*, 6 Hare, 549.

At what stage.]—If plaintiff replies, defendant may rejoin gratis, and after next term may give rule to produce witnesses. *Flower* v. *Herbert*, Dick. 349.

Under 3 & 4 Will. 4, c. 42.]—Courts of equity have no jurisdiction, under 3 & 4 Will. 4, c. 42, to order witnesses to attend arbitrators. *Hall* v. *Ellis*, 9 Sim. 530; 8 L. J., Ch. 158; 3 Jur. 167.

Order on Party keeping back Witness.]—Where a witness is kept back by a party to

a suit, the court will make an order that the party keeping back the witness shall produce him. *Catholic Publishing Co.* v. *Wyman*, 1 N. R. 512.

5. Order for Attendance to Produce during Proceedings.

Order XXXVII. r. 7.]—*By Ord. XXXVII. r. 7, of the rules of court*, 1883, *the court or a judge may in any cause or matter at any stage of the proceedings order the attendance of any person, for the purpose of producing such writings or other documents as he could be compelled to produce at the hearing or trial.*

Order for Ex parte.]—The plaintiff in the action, one of the residuary legatees under the will of H. S. (who, at his death in December, 1887, was a partner in a firm of brewers), obtained ex parte, under Ord. XXXVII. r. 7, an order that the four present partners in the firm (two of whom were not parties to the action) should attend before an examiner, and produce the partnership books for the years 1887 to 1889. On a motion by the two partners, who were not parties to the action, to discharge the order:—Held, that the order was rightly made ex parte; and motion dismissed, with costs. *Smith, In re, Williams* v. *Frere*, 60 L. J., Ch. 328; [1891] 1 Ch. 323; 64 L. T. 253.

Effect of Order for.]—An order to produce under rule 7 of Ord. XXXVII. is equivalent to a subpœna duces tecum, and has the same effect. *Ib.*

When Order made or refused.]—In an action brought by the plaintiffs against the defendants for an improper use and publication of certain telegrams transmitted by them to the plaintiffs, the defendants applied, under Ord. XXXVII. r. 7, for the production of certain documents belonging to and in the possession of the Electric News Telegraph Company, who were not parties to the action, with a view of shewing that the news contained in the telegrams had been communicated by the plaintiffs to such company, and by them made public prior to the time at which such news was published by the defendants. The defendants contended that the production of the documents in question would simplify the proceedings at the trial and save expense:—Held, that the power conferred on the court was one which, if it existed, should be exercised with extreme caution, and that no sufficient ground had been shown for the production of the documents asked for. *Central News Co.* v. *Eastern News Telegraph Co.*, 53 L. J., Q. B. 236; 50 L. T. 235; 32 W. R. 493.

The plaintiff's solicitor, in a probate action, had also acted as solicitor to the testatrix whose will was in dispute:—Held, that no order could be made against the solicitor under Ord. XXXVII. r. 7, to produce documents in his possession as solicitor to the testatrix. *O'Shea* v. *Wood*, 60 L. J., P. 83; [1891] P. 286; 65 L. T. 30—C. A.

In an action against a married woman, the solicitor to the trustees of her settlement was held bound to produce it, as the defendant could not object to such production. *Bursill* v. *Tanner*, 55 L. J., Q. B. 53; 53 L. T. 445.

A conditional order to make discovery of a lease may be made against a tenant of lands ordered to be sold in an action. *Webb* v. *Webb*, 27 L. R., Ir. 42.

Power to Order Inspection.]—The power given by Ord. XXXVII. r. 7 to the court or a judge to order the attendance of any person for the purpose of producing documents at any stage of the proceedings, does not carry with it the power to order the inspection of the documents as distinct from their production. *Straker* v. *Reynolds*, 58 L. J., Q. B. 180; 22 Q. B. D. 262; 60 L. T. 107; 37 W. R. 379.

Jurisdiction where no Trial pending or Order made.]—There is no jurisdiction to make an order for production of documents under Ord. XXXVII. r. 7, against a third person not a party to the litigation, when there is no trial or application to the court pending, and the production of them is not necessary to carry out an order which has already been obtained. *Elder* v. *Carter*, 59 L. J., Q. B. 281; 25 Q. B. D. 194; 62 L. T. 516; 38 W. R. 612; 54 J. P. 692—C. A.

Against co-Defendant.]—Order of court on the application of a defendant for compelling production of documents by his co-defendant on the hearing of a motion. *Bennett* v. *Bayes*, 1 L. T. 69.

6. Expenses and Conduct-money.

a. Tender and Payment.

Necessity of.]—A subpœna without a tender of expenses will not bring a witness into contempt, though he comes to the assizes and refuses to be sworn. *Bowles* v. *Johnson*, 1 W. Bl. 36.

The court will not grant an attachment against a witness for not obeying a subpœna to attend at a trial unless the whole expenses of the journey, and of the necessary stay at the place of trial, are tendered at the time of serving the subpœna. *Fuller* v. *Prentice*, 1 H. Bl. 49; 2 R. R. 715. S. P., *Ashton* v. *Haigh*, 2 Chit. 201.

No conduct-money need be tendered to a witness in town in a town cause. *Jacob* v. *Hungate*, 3 D. P. C. 457.

Costs shall be paid to witness before he testifies. *Belgrave* v. *Hertford (Earl)*, Cary, 62.

Witnesses served to testify, entitled to costs. *Pearce* v. *Crawthorn*, Cary, 61.

A party attending commissioners for the purpose of being examined as to the property of the bankrupt, is not entitled to have his expenses paid or ascertained till his examination is concluded. *Roscoe, Ex parte* 2 Rose, 345.

A vice-chancellor having made an order, ex parte, that a person ordered to attend as a witness should pay the costs, the order was discharged as irregular. *Cast* v. *Poyser*, 26 L. J., Ch. 353.

A witness is not bound to appear upon his subpœna and give evidence before the examiner, unless his reasonable expenses to and from the place of examination, and of his stay there, are tendered with subpœna. *Brocas* v. *Lloyd*, 23 Beav. 129; 26 L. J., Ch. 758; 2 Jur. (N.S.) 555; 4 W. R. 540.

An insufficient tender to a witness on account of his travelling and other expenses will excuse his attendance before an examiner in chancery, and an attachment having been issued against him was discharged with costs.

When Required for Cross-Examination.]—The party on whose behalf a witness gives evidence, if required by the other side to produce him for cross-examination, is bound in the first instance to pay such witness his reasonable expenses, even though he may be out of the jurisdiction of the court. *Richards* v. *Goddard*, 43 L. J., Ch. 144; 17 L. R., Eq. 238; 29 L. T. 884; 22 W. R. 204.

What Expenses.]—A witness was taken to the assizes, and there kept at the plaintiff's expense until the day of trial, when she refused to go into court without first being paid a certain sum:—Held, that, to entitle the plaintiffs to move for an attachment against the witness for not attending pursuant to her subpœna, they were bound to shew that a reasonable sum had been tendered to the witness for her conveyance home. *Newton* v. *Harland*, 1 Scott (N.R.) 502; 1 Man. & G. 956; 9 D. P. C. 16; 1 W. P. C. 53; 10 L. J., C. P. 11; 4 Jur. 992.

An auctioneer must be tendered his reasonable expenses as a professional witness, and although sworn he may refuse to answer till they have been tendered him. *Working Men's Mutual Society, In re*, 51 L. J., Ch. 850; 21 Ch. D. 831; 47 L. T. 645; 30 W. R. 938.

A witness is entitled to her reasonable expenses for travelling in the mode suited to her station in life, and the particular circumstances in which she may be placed. *Dixon* v. *Lee*, 1 C. M. & R. 645; 5 Tyr. 180; 3 D. P. C. 259.

The measure of necessary expenses is somewhat fully stated in *Chapman* v. *Paynton*, 13 East, 13, n.; 12 R. R. 297, n.

A witness who had attended before the examiner, but had refused to be examined unless he were paid the expenses of some former attendances, ordered, upon motion, to attend and be examined and to pay the costs of the motion. *Gaunt* v. *Johnson*, 6 Hare, 551.

A witness residing within three and a half miles from the examiner's office, and who was not in any profession or business, was offered one guinea, but refused to be examined unless he was first paid two guineas for his loss of time and expenses; he was, on an ex parte motion, ordered to attend the examiner at his own expense, in four days, or be committed. *Wilson* v. *Broughton*, 6 L. J., Ch. 205.

Professional witnesses have a right to demand compensation for loss of time, at the rate of a guinea a day, before they submit to be examined, although they reside in the town in which the examination is conducted. Scale of allowances to different witnesses. *Clark* v. *Gill*, 1 Kay & J. 19; 23 L. J., Ch. 711; 2 W. R. 652.

The scale of allowances for the expenses of a witness does not depend upon any valuation of the particular witness's time, but the same scale of compensation is to be allowed to a witness examined in a court of equity as to a witness examined in a court of common law. *Nokes* v. *Gibbon*, 26 L. J., Ch. 208; 3 Jur. (N.S.) 282; 5 W. R. 216.

An order was obtained, ex parte, for the attendance of a witness in a cause in equity to give his evidence at his own expense, and the order also contained a direction for him to pay the costs of obtaining it:—Held, that such direction was wrong. *Ib.*

A person summoned under the 63rd section of the 11 & 12 Vict. c. 45, as a contributory, to attend before the Master, is entitled to have his travelling expenses tendered to him at the time of being served with the summons. *Northern and Southern Connecting Ry., In re, Mercer's Case*, 2 Sm. & Gif. 87; 23 L. J., Ch. 246; 2 Eq. R. 481; 18 Jur. 161; 2 W. R. 251—L.JJ.

Quære, whether the Master has any jurisdiction to suspend payment of such costs. *Ib.*

Recovery Back.]—An action is maintainable for money had and received to recover conduct-money paid to a party, under 7 Eliz. c. 9, s. 12, upon a subpœna to attend a trial as witness, where, in consequence of the cause being settled, no trial takes place and the party incurs no expense, and does no act in consequence of the subpœna. *Martin* v. *Andrews*, 7 El. & Bl. 1; 26 L. J., Q. B. 39; 2 Jur. (N.S.) 1121; 5 W. R. 67.

It makes no difference that the party paying the money has had the sum allowed on taxation of costs if, in fact, he has not obtained it. At any rate, such a defence cannot be raised under a plea of nunquam indebitatus. *Ib.*

If the opposite party requires a witness to attend, and he receives payment from both of them, although the payment made by the successful party is afterwards repaid him by the loser in the taxed costs, the loser cannot recover back the amount from the witness. *Crompton* v. *Hutton*, 3 Taunt. 230.

Waiver.]—A witness, being served with a subpœna, did not object to the amount of the conduct-money, but offered to bear his own expenses. Not having attended the trial, a rule nisi for an attachment against him having been granted:—Held, that, as he made no objection to the amount of the conduct-money when the subpœna was served on him, it was not competent to him to avail himself of the insufficiency of the amount tendered as an answer to a rule nisi for an attachment. *Gough* or *Goff* v. *Miller* or *Mills*, 2 D. & L. 23; 13 L. J., Q. B. 227; 8 Jur. 758.

Parties.]—A party to a cause about to attend it on his own account, has no right to conduct-money or expenses when subpœnaed by the other side. *Reed* v. *Fairless*, 3 F. & F. 958; 8 L. T. 853.

Defendant examined as witness, where he is the only evidence for plaintiff; and if no cause for plaintiff, plaintiff pays costs. *Fyfield* v. *Vinore*, Cary, 45.

Plaintiff examining defendant as a witness, pays his costs. *Harvey* v. *Tebbutt*, 1 Jac. & Walk. 197; 21 R. R. 145.

A plaintiff examined a defendant as a witness in the cause:—Held, that such defendant was on that account entitled to his costs of suit. *Young* v. *English*, 7 Beav. 10; 13 L. J., Ch. 76.

If a plaintiff examines a defendant as a witness, he must pay the defendant's costs of the suit. *Leeds* (*Duke*) v. *Amherst* (*Lord*), 14 Sim. 357.

A party to a suit, whether an accounting party or not, is entitled, under the 15 & 16 Vict. c. 86, s. 38, to be paid his costs of attending to be cross-examined, in the same way as an ordinary witness. *Darey* v. *Durrant*, 24 Beav. 493; 27 L. J., Ch. 503; 4 Jur. (N.S.) 230; 6 W. R. 405.

b. Remedy of Witness.

By Action—Compensation for Loss of Time.]—A witness attending a trial under a subpœna is not entitled to a compensation for his loss of time, although the party requiring his attendance

expressly promises to pay him for such loss. *Willis* v. *Peckam*, 4 Moore, 300; 1 Br. & B. 515; 21 R. R. 706.

A witness attending at the trial of a cause on subpœna cannot maintain an action for compensation for his loss of time in attendance, even though he is an attorney. *Collins* v. *Godefroy*, 1 D. P. C. 326; 1 B. & Ad. 950; 9 L. J. (O.S.) K. B. 158.

A promise by an attorney, after a trial, to pay a witness a compensation for his loss of time, cannot, it seems, be enforced, either by action or attachment. *Bates* v. *Sturges*, 2 M. & Scott, 172; 7 Bing. 585.

A witness who is called in an action to depose to a matter of opinion, depending on his skill in a particular trade, has, before he is examined, a right to demand from the party calling him, a compensation for his loss of time; and there is a distinction between a witness so called and a witness who is called to depose to facts which he saw. *Webb* v. *Page*, 1 Car. & K. 23.

A solicitor summoned by the official receiver, under s. 27 of Bankruptcy Act, 1883, to attend County Court to give evidence, is entitled to his costs as a professional witness under r. 71 of bankruptcy rules, 1886, and the county court rules, 1889, and may maintain action for them against the receiver. *Collins* v. *Godefroy*, supra, distinguished. *Chamberlain* v. *Stoneham*, 59 L. J., Q. B. 95; 24 Q. B. D. 113; 61 L. T. 560; 38 W. R. 107.

—— **Attendance.**]—One who is subpœnaed as a witness and attends at the trial, but there refuses to give evidence unless his expenses are paid, and is thereupon not examined, may yet maintain an action for his necessary expenses of attendance against the party who subpœnaed him. *Hallet* v. *Meares*, 13 East, 15; 12 R. R. 296.

A witness who, in obedience to a subpœna, attends a trial in a civil action, may, without any express contract, maintain an action for his expenses against the party who subpœnaed him, the fact of his attendance being evidence from which the jury may infer a contract. *Pell* v. *Daubney*, 5 Ex. 955; 20 L. J., Ex. 44.

Called by both Sides.]—A witness who is subpœnaed by both parties in a cause is entitled to have all his expenses paid by the party who calls him at the trial, although the other party may have been the first who subpœnaed him. *Allen* v. *Foxall*, 1 Car. & K. 315.

In an action by B. against S., to be tried in London, the plaintiff was subpœnaed as a witness by both parties. On the service of the subpœna by B., the plaintiff inquired whether he might return to Bath until the following week, but was told he must use his own discretion. S. gave his permission to the plaintiff to return to Bath. The verdict on that trial was found for S. The plaintiff was paid by the attorney of S. for his expenses and loss of time during the eleven days which he remained in London, with an understanding that if any part should be disallowed on taxation, the part so disallowed should be refunded by the plaintiff to the attorney of S. On the taxation of S.'s costs, the Master allowed for six days only of the plaintiff's attendance. Thereupon the plaintiff refunded the sum disallowed by the Master, and brought an action against B. for his expenses and loss of time during the other five days:—Held, that the refunding of the sum disallowed to the attorney of S. did not take away the plaintiff's right of action against B. *Hale* v. *Bates*, El. Bl. & El. 575; 28 L. J., Q. B. 14; 4 Jur. (N.S.) 1106.

7. Allowance on Taxation of Costs.

a. Parties.

Generally.]—It is not a general rule that parties, if witnesses, are to have an allowance for their attendance. *Dowdell* v. *Australian Royal Mail Steam Navigation Co.*, infra.

The simple fact of a successful party to an action being examined as a witness is not sufficient to entitle him to recover his expenses as a witness against the opposite party; and if it appears that his attendance was unnecessary, or for the purpose of superintending the conduct of the cause, such costs will not be allowed. *Howes* v. *Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254; 16 Jur. 614.

Loss of Time.]—A plaintiff obtained a verdict. The defendant obtained a rule nisi for a new trial, which was discharged. The plaintiff was a witness in his own cause, and he remained in this country till after the rule nisi was discharged. On taxation the Master allowed the plaintiff subsistence-money from the time the rule was granted till it was discharged:—Held, that as the Master must be taken to have found that the plaintiff was a necessary witness, that he could not have attended a second trial if one was ordered, unless he remained, and that his remaining incapacitated him from earning his subsistence, the detention might, under those special circumstances, be considered as part of the costs of the rule; and the allowance was right. *Dowdell* v. *Australian Royal Mail Steam Navigation Co.*, 3 El. & Bl. 902; 2 C. L. R. 1656; 23 L. J., Q. B. 369; 18 Jur. 579; 2 W. R. 554.

Plaintiff took a passage to Australia in defendant's ship, but, being turned out and the ship sailing without him, sued defendants for not carrying him according to contract. Plaintiff could have had another passage in a few days, but he remained until the trial, several months, and gave evidence in his own favour. A verdict was found for him:—Held, on motion to review the Master's taxation of costs, that if plaintiff was detained bonâ fide for the purpose of giving evidence, and it was proper to call him as a witness at the trial, he ought to be allowed the expense of his maintenance while so remaining in this country, as costs against the defendant, although he was not a seafaring man. *Ansett* v. *Marshall*, 22 L. J., Q. B. 118; 17 Jur. 114; 1 W. R. 166.

—— **Refusal to give Evidence.**]—A party to a suit who describes himself as an engineer and surveyor, makes an affidavit and is subpœnaed as a witness before the examiner by the defendants, to give evidence on such affidavit. A mistake is made in the day named. The witness nevertheless attends, and on the two following days, but refuses to give evidence because three guineas only are offered him, and he claims five. An order is then obtained ex parte, that he shall attend within four days and give evidence at his own expense or stand committed. He attends and is examined, and subsequently moves to discharge or vary such order:—Held, that he is entitled to one guinea per day for the first three

days, but nothing for the last day, and no costs given. *Nokes* v. *Gibbon*, 26 L. J., Ch. 208; 3 Jur. (N.S.) 282; 5 W. R. 216.

Travelling Expenses.]—The travelling expenses of a party suing in person, incurred for the purpose of conducting in person interlocutory proceedings, are not taxable items in party and party costs awarded against the opposite party in the action. *Anthony* v. *Walshe*, 22 L. R., Ir. 619—C. A.

Two Causes.]—A plaintiff having been brought up by habeas corpus to give evidence in one cause, when at the assizes gave evidence in another cause against the same defendant. Having succeeded in the first and failed in the second cause:—Held, that, on taxation of the costs of the first cause, he was entitled only to one moiety of the costs of the habeas corpus. *Griffin* v. *Hoskyns*, 1 H. & N. 95; 2 Jur. (N.S.) 475.

Materiality.]—In an action for goods sold, the delivery having been proved by the plaintiff's carman, the defendant's wife and servants were called to prove that the goods had been paid for on delivery, the latter swearing that they had on each occasion paid the carman, having received the money for that purpose, sometimes from the defendant's wife and sometimes from the defendant himself, and the former, that, as to proof, she had given the money to the servants only for the purpose of making the payments; on the trial, the defendant was in court, but was not called as a witness until observations had been made by the plaintiff's attorney, on account of his not being put into the box. A verdict having been found for the defendant, and the Master having declined to allow him the costs of his attendance, the court directed a review; holding that the defendant's attendance as a witness was under the circumstances advisable and proper, and it did not lie in the plaintiff's mouth to say that it was not necessary. *Flower* v. *Gardner*, 3 C. B. (N.S.) 185; 27 L. J., C. P. 56.

If a party to a cause is examined on his own behalf the Master may allow for his maintenance during the time of his detention for the purpose of giving evidence, as in the case of any witness, if his testimony, in the Master's opinion, was material and necessary, and if he attended for the purpose of being examined as a witness, and not merely to superintend the cause. *Howes* v. *Barber*, 18 Q. B. 588; 21 L. J., Q. B. 254; 16 Jur. 614.

To an action for work and labour, the defendant pleaded, first, except as to 59*l.* 12*s.*, never indebted; secondly, a set-off; thirdly, payment; and fourthly, payment into court of 59*l.* 12*s.*, which was taken out. The cause was referred, and the arbitrator found the first issue for the plaintiff and the rest for the defendant:—Held, that the plaintiff was not entitled to the expense of his own attendance as a witness if his evidence was applicable to the second and third issues, the defendant being entitled to the general costs of the cause. *Clothier* v. *Gann*, 13 C. B. 220.

From India.]—A plaintiff, who was an engineer in the defendant's employ in India, brought an action against them for wrongful dismissal, and a verdict was taken by consent for 200*l.*, a quarter's salary, and 150*l.* for his expenses in coming to England. The Master allowed the plaintiff 450*l.* for subsistence in England while waiting for the trial, which the defendants had repeatedly delayed, and 150*l.* for expenses to enable the plaintiff to return to India:—Held, that the sum of 600*l.* was properly allowed, but that the decision was not to be taken as a precedent to allow such a sum for expenses in demands of small amount without good grounds for doing so. *Culvert* v. *Seinde Ry.*, 18 C. B. (N.S.) 306; 11 Jur. (N.S.) 245; 13 W. R. 430.

b. Professional Witnesses.

Accountant.]—An accountant employed as a skilled witness to give evidence in support of the claim, though entitled to a reasonable allowance for his time and expenses in preparing his evidence by an examination of the books, is not entitled, upon party and party taxation, to his charges for balancing and putting the books into shape for the purpose of supporting the claim. *Laffitte & Co., In re, Laffitte's Claim*, 44 L. J., Ch. 633; L. R. 20 Eq. 650; 33 L. T. 91; 24 W. R. 7.

When, in an action involving questions of account, it becomes necessary for one party to employ an accountant to examine the books of his opponent for the purposes of his case, although he is afterwards successful in the action, yet he will not be allowed the costs in respect of the accountant's charges for such examination. Such costs fall within the general rule by which the expenses of qualifying a witness to give evidence are costs of the party whose witness he is. And it makes no difference that the accountant is to be appointed by an indifferent person, instead of by the party on whose behalf he is employed. *Nolan* v. *Copeman*, 42 L. J., Q. B. 44; L. R. 8 Q. B. 84; 27 L. T. 789; 21 W. R. 263.

The expense of an accountant, employed with reference to and pending the suit, does not come under the general denomination of costs, and will not be allowed on taxation. *Small* v. *Attwood*, 1 Y. & Coll. 53; 4 L. J., Ex. Eq. 1.

In the absence of any special arrangement, the rule for accountant's charges, fixed by the general order in bankruptcy of the 19th May, 1855, will be adopted by the Court of Chancery. *Meymott* v. *Meymott*, 33 Beav. 590; 33 L. J., Ch. 686; 10 Jur. (N.S.) 715; 10 L. T. 681; 12 W. R. 993.

Engineer or Architect.]—The daily fee allowed to a professional witness on taxation between party and party is not necessarily to be limited to 3*l.* 3*s.* In this case a fee of 5*l.* 5*s.* a day was allowed to an engineer and architect of eminence employed under the direction of the court. *Robb* v. *Connor*, Ir. R. 9 Eq. 373.

Auctioneer.]—An auctioneer summoned to give evidence before a special examiner appointed under proceedings in the chancery division is, as a professional witness, entitled to be paid a guinea a day by way of compensation for his loss of time, together with the amount of his travelling expenses, if any, including therein his railway fare, first-class, from his residence to the place of his examination and back again. And, although sworn, he may refuse to answer any questions until a sum sufficient to cover these amounts has been paid to him. *Working Men's Mutual Society, In re*, 51 L. J., Ch. 850; 21 Ch. D. 831; 47 L. T. 645; 30 W. R. 938.

Barrister.]—A barrister is primâ facie entitled to the expenses of a professional man, without proof of his being in practice. *Turner* v. *Turner*, 5 Jur. (N.S.) 839 ; 7 W. R. 573.

Solicitor.]—Where there is an order to tax a bill, as between attorney and client, or attorney and agent, and no reservation of the question of retainer or liability, the Master has, nevertheless, jurisdiction to consider whether any item is a proper item of charge, and is not confined merely to the question of amount. And if the agent, having attended as a witness, has charged for his attendance something beyond the ordinary charge of a witness, the Master will be justified in disallowing such extra charge, unless there is some special contract to pay a reasonable remuneration, in which case it will be for the Master to say what is reasonable. *Sollery* v. *Flewcker*, 27 L. J., Ex. 11.

Solicitor's Clerk.]—Charges for the attendance of a solicitor's clerk, in addition to the solicitor, on cross-examination, will not in any case be allowed. *Smith* v. *Buller*, 45 L. J., Ch. 69 ; L. R. 19 Eq. 473 ; 31 L. T. 873 ; 23 W. R. 332.

The Master having allowed the expenses of the plaintiff's attorney's attendance at the trial, as a witness for the plaintiff, to support an issue, upon which he was successful, the attorney not attending as such, but the cause being conducted by a competent clerk, the court refused to interfere. *Butler* v. *Hobson*, 5 Scott, 824 ; 7 D. P. C. 157 ; 5 Bing. (N.C.) 128 ; 1 Arn. 424 ; 8 L. J., C. P. 81.

The ordinary rule, not to allow on taxation the expenses both of the attorney and the London agent of the attorney of the party as witnesses in the cause (where it is tried at a town where neither of them resides), is relaxed, where it clearly appears that both of them were material and necessary witnesses for the party, as where one had written a letter and received an answer, and the other had communicated the answer to the plaintiff. *Chapman* v. *Rodway*, 27 L. J., Ex. 7.

Scientific Witnesses.]—There is no positive rule in equity as to the sum to be allowed to a scientific witness attending before an examiner ; but the Master decides on the sum to be allowed in each case according to the circumstances. *Smith* v. *Buller*, supra.

In fixing the remuneration of counsel and solicitor and the number of counsel employed, the amount of the money-issue involved and the commercial importance of the case are properly taken into consideration. The amount of evidence used in court is not the limit of the evidence the costs of which will be allowed between party and party. *L. C. & D. Ry.* v. *S. E. Ry.*, 60 L. T. 753.

Interpreter.]—A party examining, by means of an interpreter, a witness ignorant of the English language, must bear the expense of the interpreter's services on the cross, as well as the direct, examination. *Plunkett* v. *Williams*, Ir. Eq. 6 R. 80.

On taxation of costs as between party and party, the Master has a discretion to allow the expense of employing an interpreter to assist a foreigner in preparing instructions for his answer ; but such allowance ought not to include the tavern or travelling expenses of an interpreter brought to this country for the special purpose. *Shrewsbury (Earl)* v. *Trappes*, 31 L. J., Ch. 680 ; 8 Jur. (N.S.) 587 ; 6 L. T. 516 ; 10 W. R. 663.

Several Witnesses.]—In an action for breach of warranty of a horse sold to the plaintiff, who resided in England, the plaintiff produced, as witnesses at the trial, three English veterinary surgeons, who had examined the horse shortly after the purchase, and deposed to its unsoundness. The plaintiff recovered a verdict, and the taxing-master having, on taxation, disallowed the expenses of two of these witnesses ; the judge at the trial having considered them necessary witnesses :—Held, that their expenses should be allowed. *Weston* v. *Steeds*, 24 L. R., Ir. 283.

Though not Called.]—A professional witness is entitled to his expenses on the scale allowed to persons of his profession, although not called to give professional evidence. *Parkinson* v. *Atkinson*, 31 L. J., C. P. 199.

Costs of Experiments.]—Where the prothonotary allowed for various sums expended in experiments, and a compensation for loss of time to scientific and professional men employed in making them, with a view to ascertain the increased risk or advantage in a new process of boiling sugar by means of heated oil, and who were called as witnesses at the trial ; the court directed him to review his taxation, on the ground that no such allowance or compensation ought to be made. *Severn* v. *Olive*, 6 Moore, 235 ; 3 Br. & B. 72 ; 23 R. R. 365.

A plaintiff will not be allowed his expenses in the construction of a model, nor a compensation for loss of time by scientific persons who had been sent to a distant part of the country to inspect a building there, although he could not safely have proceeded to trial without their testimony. *Bayley* v. *Beaumont*, 11 Moore, 497.

In a patent suit in which the plaintiffs after the briefs were delivered, but before the hearing, took the common order dismissing their bill, with costs :—Held, that they were entitled to an allowance in respect of the charges of scientific witnesses, and that such allowance was not limited by the rules of taxation at common law, and also that they were entitled to an allowance in respect of the cost of a model : but the court followed the Master's decision as to amount. *Batley* v. *Kynock*, 44 L. J., Ch. 565 ; L. R. 20 Eq. 632 ; 33 L. T. 45.

Qualifying to give Evidence.]—Ord. VI. r. 8, 1875, directs that such just and reasonable charges and expenses as appear to have been properly incurred in "procuring evidence" are to be allowed on taxation of costs. The expenses of procuring surveyors and a builder to inspect a house before trial, with a view to qualifying themselves to give evidence as to its state of repair, &c., having been disallowed by a Master, the divisional court held that, instead of disallowing them altogether, the Master should allow such a sum as in his discretion he should think reasonable, according to the old rule of the Court of Chancery. *Mackley* v. *Chillingworth*, 46 L. J., C. P. 484 ; 2 C. P. D. 273 ; 36 L. T. 514 ; 25 W. R. 650.

Where witnesses were engaged several days in searching for a defendant, in order to identify him upon a trial, although notice was given requiring him to be present at a place and time appointed, as this was only a mode of qualifying

witnesses to give evidence, the plaintiff was not entitled to the costs of his witnesses in respect of the time they had been so engaged. *Small* v. *Batho*, 1 B. C. C. 43; 21 L. J., Q. B. 254; 16 Jur. 529.

The expenses of surveying and taking levels, in order to ascertain whether a weir had been improperly raised, to the prejudice of the plaintiff's water-mill, will not be allowed. *Ormerod* v. *Thompson*, 16 M. & W. 869.

In an action for negligence on a valuation between an outgoing and an incoming tenant, the Master disallowed the expenses of witnesses going to the premises for the purpose of qualifying themselves to give evidence:—Held, that such expenses were properly disallowed. *May* v. *Selby*, 4 Scott (N.R.) 727; 4 Man. & G. 142; 1 D. (N.S.) 702; 6 Jur. 52; 11 L. J., C. P. 223.

The Master was held to have properly disallowed the defendant such part of the expenses of witnesses as were incurred in qualifying them to give evidence; such as journeys and surveys being taken to enable them to speak to the insufficiency of work done. *Gravatt* v. *Attwood*, 1 B. C. C. 27; 21 L. J., Q. B. 215.

Fees to scientific witnesses for qualifying themselves to give evidence may in proper cases be allowed as between party and party, when sufficient information as to how the amount of such fees has been made up is laid before and considered by the taxing-master. *Thompson* v. *Moore*, 25 L. R., Ir. 98.

Inspecting Lands.]—Upon taxation of costs between party and party, the sums paid to witnesses for inspecting, measuring and valuing improvements upon lands will not be allowed in addition to the charges for the affidavits made by those witnesses. *Murphy* v. *Nolan*, Ir. R. 7 Eq. 498.

Rule 8 of the "special allowances" in the scale of 1875 so far qualifies the rule of 1853 as to allowance to witnesses, as to enable the Master in his discretion to allow so much for the attendance of scientific witnesses at the trial as shall appear to him to be just and reasonable. *Turnbull* v. *Janson*, 47 L. J., C. P. 384; 3 C. P. D. 264; 26 W. R. 815.

The same rule authorises the Master to allow in the charge for "instructions for brief" the reasonable expenses of such witnesses qualifying themselves to give evidence. *Ib.*

Special Fees to Scientific Witnesses.]—The rule as to special fees paid to counsel is applicable to the case of scientific witnesses, and special fees paid to experts of peculiar eminence, even when taxable between solicitor and client, will not be allowed as between party and party. *Thompson* v. *Moore*, 25 L. R., Ir. 98.

c. Foreign Witnesses.

Expenses.]—Where foreign witnesses appear to be domiciled in this country, they are not entitled to the expenses of their return home. *Lopes* v. *De Tastet*, 7 Moore, 120; 3 Br. & B. 292.

Loss of Time.]—Reasonable allowances in costs may be made for the loss of time of a necessary foreign witness, who is not accessible to a subpœna, and who will not attend without compensation. *Lonergan* v. *Royal Exchange Assurance Co.*, 1 D. P. C. 233; 5 M. & P. 805; 7 Bing. 729.

What Time.]—A plaintiff, who brings over a foreign witness hither, in order to judge by his testimony whether there is ground to bring an action, and afterwards sues, and examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, and a reasonable sum for his sustenance here during the same time, but not the cost of his passage hither, or of his return. *Schimmel* v. *Lousada*, 4 Taunt. 695.

If a witness is bonâ fide sent for from a foreign country to support an intended action, though the writ is not sued out until after his arrival, the plaintiff is entitled in that cause to the costs of bringing him over, his subsistence, and compensation for his loss of time spent here pending the suit, for the purposes thereof, and to the costs of his return. *Tremain* v. *Barrett*, 1 Marsh. 463, 563; 6 Taunt. 88; 16 R. R. 584.

But if the witness is sent for to give evidence in one action which is discontinued, and the plaintiff calls him as a witness in another action against a different defendant, but arising out of the same transaction, he is entitled in the second action to the costs only of the witness's subsistence and detention for the purpose of the second action, but not of his voyage hither, or of his return. *Ib.*

A witness for plaintiff in an important action which was standing for trial after Trinity term, was brought over from Norway on 3rd June, and it was then found that he was unable to give the evidence for which he was particularly required; and in the absence of this evidence, it was necessary for plaintiff to send a commission abroad, and the proceedings in the action were therefore stayed. He was, however, a material witness in other respects, and was examined before the Master on 29th June, and was sent back to Norway. Ultimately the action was settled in favour of plaintiff:—Held, that, in the circumstances, plaintiff was entitled to the costs of bringing the witness over, keeping him till his examination, and sending him back, in addition to the costs of the examination itself, which alone the Master had allowed him. *Seymour* v. *Saunders*, 20 W. R. 832.

d. Material or Otherwise.

Unnecessary.]—All costs caused by unnecessary evidence must be paid by the party offering it. *Littlewood* v. *Collins*, 1 N. R. 457.

It is improper to examine in chief as to particular items of the account, the defendant being an accounting party; or to examine in chief as to the particular acts of wilful default in not receiving rents, the defendant being bound to account for the wilful default simply by reason of the nature of his relation to the plaintiff. Such evidence may, however, be entered as read, but the plaintiff must pay the defendant the costs of it. *Hamilton* v. *M'Cormick*, 3 Jo. & Lat. 183.

Where plaintiff not only failed to establish his case by evidence, but also incumbered the suit with an unnecessary multitude of witnesses, and with a body of very irrelevant depositions, he must pay the costs of the depositions, although the bill, not being vexatious, was dismissed without costs, as to the rest of the cause. *Moore* v. *M'Kay*, Beat. 282.

Where much unnecessary evidence was adduced on the part of the plaintiffs, in whose favour a

decree was given, costs were only given against the defendants up to the date of the replication. *Harvey* v. *Mount*, 8 Beav. 439; 14 L. J., Ch. 233; 9 Jur. 741.

Question of Admissibility.]—Where there is a reasonable ground to believe that the testimony of a witness will be admissible, his expenses may be allowed on taxation of costs against the adverse party. *Rushworth* v. *Wilson*, 1 B. & C. 267; 1 L. J. (O.S.) K. B. 113.

The master is in general the sole judge of what witnesses shall be allowed on taxation, and, therefore, when he had, in an action of libel, disallowed all witnesses to prove innuendoes, the court refused to interfere to make him review his taxation. *Skelton* v. *Seward*, 1 D. P. C. 411.

Where defendant in tithe cause examines many witnesses, whose testimony is inadmissible to any extent, the court will give the plaintiff his costs of the rejected depositions, independently of the result of the cause. *Petch* v. *Dalton*, 6 Price, 232.

Witnesses Rejected by Judge or Arbitrator.]—On taxation of costs it is a general rule to disallow the expenses of a witness rejected by the judge at the trial, as between party and party. *Galloway* v. *Keyworth*, 15 C. B. 228; 2 C. L. R. 860; 23 L. J., C. P. 218.

The same rule applies to a witness rejected by an arbitrator. *Ib.*

Witnesses not Called.]—The circumstance of witnesses not being called at the trial is no ground for disallowing their expenses; provided the master is satisfied that the attendance was reasonably necessary. *Morison* v. *Harmer*, 5 Scott, 410.

After public notice that common jury causes in London would be taken on the 18th of February; on the 12th a fresh notice was issued that they would be taken on the 16th. A cause in which the plaintiff, his attorney, and witnesses resided in the country at a great distance from London, having been put in the list for the 15th was called on in its turn, and the witnesses not being in attendance was referred. The witnesses arrived in the evening after the court had risen. The arbitrator having awarded in favour of the plaintiff:—Held, that the master was at liberty to allow the plaintiff the costs of his witnesses as costs in the cause. *Standeven* v. *Murgatroyd*, 3 H. & N. 570; 6 W. R. 625.

A cause was referred at the assizes, at about three o'clock in the afternoon, the costs of the cause to abide the event, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitration commenced at six o'clock the same evening, and all the witnesses were examined before twelve o'clock that night. The award was ultimately made in favour of the defendant, to whom the costs of the action were ordered to be paid, each party paying his own costs of the reference, and a moiety of the expenses of the award:—Held, that a witness who did not arrive at the assize town until half-past ten o'clock in the evening of the day of the trial, was not properly chargeable as a witness in the cause. *Fryer* v. *Sturt*, 16 C. B. 218; 24 L. J., C. P. 154.

The fact of a witness not being examined at the trial, is not in itself a sufficient ground for disallowing the cost of such witness's proof. *O'Meara* v. *Barry*, [1895] 2 Ir. R. 454.

The expenses of attendance at the trial of a necessary witness (who, owing to the course of the trial, has not been examined) should be allowed where his attendance has been directed by counsel verbally or in writing. *Gregg* v. *Gardner*, [1897] 2 Ir. R. 122.

—— **Where Double Payment—Fraud.**]—If a plaintiff subpœnaes witnesses, and remunerates them accordingly, and they have been previously subpœnaed by and received their expenses from the defendant, which circumstances they conceal from the plaintiff, the court will allow the latter the expenses he has paid those witnesses for their attendance, although they were not called for him at the trial, on the ground that such payment was obtained by fraud. *Benson* v. *Schneider*, 1 Moore, 76; 7 Taunt. 337; Holt, 416.

Called for Trivial Purpose.]—Semble, no costs should be allowed for a witness summoned merely to prove a photograph, unless the other side have refused to admit his evidence, after a copy of his proof has been shown to them. *East Stonehouse Local Board* v. *Victoria Brewery Co.*, 64 L. J., Ch. 793; [1895] 2 Ch. 514; 13 R. 657; 73 L. T. 54; 43 W. R. 585.

Alteration in Pleadings—Admission by Party.]—If, by an alteration in the state of the pleadings, after notice of trial, certain witnesses are unnecessary, the party who subpœnaed them must make reasonable efforts to prevent their attendance, or their expenses will not be allowed. *Allport* v. *Baldwin*, 2 D. P. C. 599.

The costs of witnesses, whose attendance becomes useless, owing to an admission being made by the opposite party of the matter which they were summoned to prove, are in the discretion of the master. *Davis* v. *Thomas*, 5 Jur. (N.S.) 709.

A plaintiff who enters into evidence to prove facts clearly admitted by the answer, must pay the costs, though he succeed in the suit. *Booth* v. *Booth*, 1 Beav. 130; 8 L. J., Ch. 39; 2 Jur. 938.

Subordinate Issues not Tried.] — An issue under 6 & 7 Will. 4, c. 71, s. 46, raised a question as to the mode of taking the tithe of calves, and the plaintiff having, in his notice of the points to be raised, intimated an intention to raise a point on the question of value, which he was, at the trial, precluded by the defendant from going into, when the defendant succeeded:—Held, that he was not entitled to the costs of the witnesses brought by him to the assizes to rebut the plaintiff's evidence on the point as to value. *Fisher* v. *Berrell*, 1 D. (N.S.) 565; 6 Jur. 282.

In an action for entering a close, breaking the soil, and digging and carrying away minerals, the defendant pleaded that the plaintiff was not possessed of the minerals; a justification of the entry, under an immemorial custom; and a justification of the entry, subject to his making compensation to the plaintiff for surface damage; replication, taking the issue upon the plea of not possessed; traversing the unqualified right of entry; and alleging a demand of compensation and refusal; the plaintiff obtained a verdict upon the issue on the unqualified right, but the jury found that the defendant had tendered a reasonable compensation for the damage done, and a verdict was entered for him on the issue on the qualified right:—Held, that, under the issue on the plea of not possessed, the defendant

was entitled to the costs of the witnesses subpœnaed, but not examined to prove his right of entry, but that the costs must be estimated separately, and as contradistinguished from those which arose upon the issue on the right to dig and carry away the minerals. *Paddock* v. *Forrester*, 2 D. (N.S.) 125; 4 Man. & G. 775.

In an action on a promissory note, the defendant having pleaded fraud, the plaintiff brought up a witness to disprove the fraud, but the defendant failing to make out a primâ facie case of fraud, the witness was not called:—Held, that the plaintiff was entitled to the expenses of such witness. *Miller* v. *Thomson*, 4 Man. & G. 260; 11 L. J., C. P. 224.

The master having allowed a plaintiff the expenses of a witness who was brought from France for the purpose of proving that the tenant in tail (upon whose will the question arose) died unmarried and without issue, the briefs shewing that he would have proved these facts, had not the course the cause took rendered such proof unnecessary:—The court refused to send the matter back to him. *Street* v. *Platel*, 8 Scott, 397.

To an action for refusing to deliver goods into the plaintiff's lighter, the defendant pleaded that, though in the notice for delivery he was required to deliver them upon tender of the bills of lading and freight, no bills of lading or freight were tendered; on which issue was joined:—Held, that the plaintiff, who had a verdict, was not entitled to the costs of witnesses in attendance to prove that it was not customary to tender the bills of lading on applying for goods, nor to pay the freight till some days after delivery. *Jones* v. *Tobin*, 4 Bing. (N.C.) 123; 5 Scott, 440; 6 D. P. C. 251.

Where there is a plea in bar to a declaration which is found for the defendant, he is not entitled to the expenses of witnesses, who have been subpœnaed for the purpose of giving evidence in reduction of damages. *Hodgkinson* v. *Wyatt*, 1 D. & L. 668; 13 L. J., Q. B. 73; 8 Jur. 216.

Discretion of Master.] — The charges for "instructions for brief," for "scientific witnesses qualifying themselves to give evidence," for "copies of documents furnished to counsel," and for "refreshers to counsel," are purely in the discretion of the master. *Turnbull* v. *Janson*, 47 L. J., C. P. 384; 3 C. P. D. 264; 26 W. R. 815.

If doubt exists as to whether a witness was material and necessary, and the master allows the charge upon the certificate of counsel in the cause, the court will not review the taxation. *Marshall* v. *Parsons*, 9 D. P. C. 251; 4 Jur. 1017.

The master is the sole judge of the proper number of witnesses to be allowed in support of the same matters. *Pilgrim* v. *Southampton and Dorchester Ry.*, 8 C. B. 25.

Upon the taxation of the defendant's costs of issues upon which he has succeeded, an affidavit that the witnesses, whose expenses he claims, were called *exclusively* to support those issues, is not indispensable, provided the master is satisfied of the fact by other means. *Ib.*

The materiality of a witness is primâ facie a question for the master, but the court may review his decision on that point. *Galloway* v. *Keyworth*, 15 C. B. 228; 2 C. L. R. 860; 23 L. J., C. P. 218.

In taxing the costs of witnesses on several issues, where some issues are found for the plaintiff, and some for the defendant, it is for the master to judge whether the evidence of such witnesses is exclusively applicable to such issues. *Elderton* v. *Emmens*, 5 D. & L. 680; 17 L. J., C. P. 277; 12 Jur. 728.

The question whether the costs of witnesses subpœnaed but not actually called should be allowed, is a question of detail in reference to which the taxing-master may exercise his discretion. In allowing for witnesses' fees and expenses the taxing-master is not bound by the scale settled by the common law courts in 1853, but may exercise his discretion in accordance with Ord. LXV. r. 27 (9), (20), (29), (37), (38). *Turnbull* v. *Janson* (3 C. P. D. 264) followed. *East Stonehouse Local Board* v. *Victoria Brewery Co.*, 64 L. J., Ch. 793; [1895] 2 Ch. 514; 13 R. 657; 73 L. T. 54; 43 W. R. 585.

In taxing the costs of witnesses the officer should act upon no fixed general rule, but should determine the case of each witness on its own merits. *Railways Commissioner* v. *O'Rourke*, 65 L. J., P. C. 84; [1896] A. C. 594; 75 L. T. 84 P. C.

The taxing-officer is the proper authority, subject to appeal to the court, to decide upon the allowance or non-allowance of shorthand notes. *Ib.*

—— **Jurisdiction of Judge.**] — Where the taxing-master has, in the proper exercise of his discretion, allowed the costs of a witness as between party and party, the judge has no jurisdiction under R. S. C. 1883, Ord. LXV. r. 27, sub-r. 29, to review the taxation. *Oliver* v. *Robbins*, 64 L. J., Ch. 203; 13 R. 63; 71 L. T. 636; 43 W. R. 137.

What Issues.] — A party succeeding on an issue is entitled to the costs of any witnesses called to give evidence on a fact involved in that issue, though the jury or an arbitrator may find that fact against him. *Radcliffe* v. *Hall*, 2 C. M. & R. 258; 1 Gale, 140; 3 D. P. C. 802; 5 Tyr. 770; 4 L. J., Ex. 191.

A party is not necessarily disentitled to the costs of witnesses called in support of an issue on which he succeeds, because their testimony may in a slight degree be applicable also to an issue upon which he has failed. The true question is, for what purpose were they called. *Jewell* v. *Parr*, 17 C. B. 636; 25 L. J., C. P. 179.

A declaration for a malicious prosecution for perjury, in one count, set out ten assignments of perjury, which were alleged to have been prosecuted maliciously and without probable cause; at the trial the plaintiff failed in proving want of probable cause as to nine of the assignments. He obtained a verdict with damages on the tenth assignment:—Held, that he was not entitled to the costs of witnesses called to give evidence of want of probable cause as to those nine; and that the defendant was not entitled to the costs of witnesses subpœnaed by him to shew probable cause as to those assignments. *Delisser* v. *Towne*, 4 P. & D. 644; 1 Q. B. 333.

On an inquiry before a sheriff to assess damages in an action wherein the defendant had suffered judgment by default, the jury gave damages on one breach only, and none on two others. The master allowed the expenses of two witnesses called to prove the second and third breaches:—Held, that the omission to give

nominal damages could be rectified, and that the materiality of the witnesses was for the discretion of the master. *Dods* v. *Evans*, 15 C. B. (N.S.) 621; 33 L. J., C. P. 146; 10 Jur. (N.S.) 154; 9 L. T. 723; 12 W. R. 432.

Action for a libel contained in a memorial to the Secretary of State for the Home Department, charging misconduct of the plaintiff as a magistrate during the election of a member of parliament for a borough. Pleas, not guilty, and a justification. The plaintiff called some witnesses who proved the publication, and others who proved the falsehood of the charges in the memorial. The defendant called witnesses to prove the truth of the charges in the memorial. The jury found bona fides, but negatived the justification, and the court decided that the memorial was a privileged communication; therefore a verdict was entered for the defendant on the plea of not guilty, and for the plaintiff on the plea of justification:—Held, that the defendant was entitled to the costs of his witnesses, not excepting those whose evidence came to his knowledge after the publication of the memorial; and that the plaintiff was not entitled to the costs of his witnesses called to prove the truth of the charges. *Harrison* v. *Bush*, 5 El. & Bl. 344; 25 L. J., Q. B. 99; 2 Jur. (N.S.) 90; 4 W. R. 199.

When required for Cross-examination.]—A plaintiff having been called upon to produce and having produced, a witness for cross-examination, is entitled, ex debito justitiæ, to have the expenses thereof forthwith taxed and paid. *Richards* v. *Goddard*, L. R. 10 Ch. 288; 32 L. T. 213; 23 W. R. 329.

In a suit for specific performance the plaintiff, after expiration of the time prescribed, obtained liberty to cross-examine the defendants at the hearing, and they accordingly attended at the hearing for the purpose, but the plaintiff declined to cross-examine them:—Held, that, although the plaintiff was entitled to the general costs of the suit, he should be disallowed all costs in reference to the cross-examination, and pay the expenses of the witnesses so attending. *Guilfoyle* v. *Hutchisonn*, Ir. R. 8 Eq. 298.

The costs of bringing up witnesses for cross-examination in court allowed, in a taxation between party and party, although they had not been actually cross-examined. *Clark* v. *Malpas*, 31 Beav. 554; 1 N. R. 221; 32 L. J., Ch. 313; 9 Jur. (N.S.) 612; 7 L. T. 659; 11 W. R. 251.

One form of proceeding for the examination of a witness cannot be abandoned for another without payment of the costs incurred by the first proceeding. *Darey* v. *Durrant*, 24 Beav. 41; 27 L. J., Ch. 504; 4 Jur. (N.S.) 398.

Therefore, where the plaintiff had required the attendance of a defendant, to be cross-examined on his affidavit, and attended, it being decided that he was entitled to his expenses as a witness, the plaintiff then abandoned this course of proceeding, and filed interrogatories, for the defendant's examination:—Held, that this could not be done until the costs of the former proceeding had been paid. *Ib.*

Necessary through Negligence.]—In an action on a bill of exchange it became necessary to call two clerks of the plaintiff's attorney to account for the loss of the bill, which occurred through their negligence, in order to let in secondary evidence of its contents. The master having disallowed the costs of these witnesses, on the ground that their attendance was solely occasioned by their own negligence:—Held, per Pollock, C. B., and Martin, B., that he was correct in so doing; but per Alderson, B., and Platt, B., that he was incorrect, the true criterion of taxation being, whether the evidence was necessary for the plaintiff at the time of the trial. *Matthews* v. *Livesley*, 11 Ex. 221; 3 C. L. R. 898; 24 L. J., Ex. 252; 1 Jur. (N.S.) 601; 3 W. R. 517.

Where an examination is adjourned by the fault of a witness, the master taxes the costs of both days, and has no jurisdiction to decide that the second examination was unnecessary. *Turner* v. *Turner*, 5 Jur. (N.S.) 839; 7 W. R. 573.

The 14th order of June, 1854, does not empower the court to adjudicate on the amounts of the items allowed. *Ib.*

Subpœna duces tecum.] — When subpœnas duces tecum have been directed by counsel, and are necessary to enforce the production of documents, they should be allowed. *Jessop* v. *Cusack*, 25 L. R., Ir. 244.

e. Expenses.

Going to Assizes.]—In an action on a bill of exchange drawn in London, where the witnesses and parties resided, the plaintiff laid the venue in Surrey:—Held, that unless a case of oppression were made out, he was entitled to the costs of going to the assizes, notwithstanding the cause might have been tried at less expense in London. *Vere* v. *Moore*, 3 Bing. (N.C.) 261; 3 Scott, 646; 5 D. P. C. 367; 2 Hodges, 200; 6 L. J., C. P. 7.

Except under special circumstances, the expenses of the attendance of witnesses on the commission-day at the assizes cannot be allowed. *Harvey* v. *Divers*, 16 C. B. 497.

The court will not allow the expenses of the plaintiff's witnesses, brought too early to the assizes, to attend on a trial there. *Anon.*, 2 Chit. 200.

But a plaintiff is bound to have his witnesses in attendance from the commencement of the assizes, and may therefore have the costs of their attendance previously to the trial. *Cosgrave* v. *Evans*, 2 D. P. C. 443.

It is a question for the discretion of the master, whether a witness ought to be allowed for the whole time of his attendance at the assizes, or only a portion of it; but, where the master has decided upon it, the court will not review his decision. *Platt* v. *Greene*, 2 D. P. C. 216.

Where a cause at the assizes is over at three o'clock in the afternoon, the witnesses may reasonably be allowed the following day for their return home, though their place of residence is distant only about fifty miles, and accessible by trains on the same evening. *Fryer* v. *Sturt*, 16 C. B. 218; 24 L. J., C. P. 154.

Travelling Expenses.]—The master ought not to allow for the travelling expenses of witnesses a greater amount than is reasonable, though it does not exceed 1*s.* a mile, and though it has been actually paid by the party bringing them. *Hunter* v. *Liddell*, 16 Q. B. 402; 20 L. J., Q. B. 200; 15 Jur. 426.

The master, in taxing the expenses of witnesses according to a certain scale, cannot allow more than is actually paid for their travelling

expenses. *Radcliffe* v. *Hall*, 3 D. P. C. 802 ; 5 Tyr. 770 ; 2 C. M. & R. 258 ; 1 Gale, 140 ; 4 L. J., Ex. 191.

Where a country witness remained in London, the sum which his journey would have cost, being less than his expenses in town, will be allowed. *Turner* v. *Turner*, 5 Jur. (N.S.) 839.

Attendance for what Time.]—In the absence of special reasons, witnesses should be in attendance on the day fixed for trial, and from day to day while the case appears in the list for trial until the case is heard, and the costs of such attendance should be allowed. *O'Meara* v. *Barry*, [1895] 2 Ir. R. 454.

Maintenance during Detention.]—Where the captain of a merchant ship, domiciled in this country, was detained by the plaintiff for a considerable time to give evidence in a cause, but before issue was joined or notice of trial given :—Held, that the master was at liberty to allow the expenses of maintaining the witness during such detention. *Berry* v. *Pratt*, 1 B. & C. 276 ; 2 D. & R. 424 ; 1 L. J. (O.S.) K. B. 116 ; 25 R. R. 396.

Where the master has allowed the expenses of the witnesses of the successful party at the assize town for several days, during which their attendance was not in fact necessary, the court will not interfere with the master's decision, unless mala fides is shewn in such successful party, as an intention unnecessarily to increase the costs. *Thomas* v. *Saunders*, 3 N. & M. 572.

In an action upon a policy of insurance, the master allowed subsistence-money for the captain (whose conduct was impugned by the defendant, and whose personal attendance at the trial was therefore admitted to be necessary) from the issuing of the writ until the trial, a period of eighteen months, at the rate of ten shillings a day ; the trial having been delayed by the necessity for each party sending out a commission to examine witnesses at the place where the disaster occurred :—Held, that in the absence of anything to shew that the master had exercised an improper discretion either as to the amount or the period of the allowance, the court could not interfere. *Potter* v. *Rankin*, L. R. 5 C. P. 518 ; 18 W. R. 868.

Subsistence allowed in costs in a policy cause, to the master of a ship insured, a material witness from the time of subpœna to the time of trial, although the witness resided in England, was not examined, was a master in the royal navy, and did not shew the permission of the admiralty for him to engage in the merchant service. *Mount* v. *Larkins*, 8 Bing. 195 ; 1 M. & Scott, 357 ; 1 D. P. C. 262 ; 1 L. J., C. P. 89.

But refused for his further detention pending a rule for a new trial, upon a point to which his evidence was not applicable. *Ib.*

So, in another cause, the court approved the allowance of subsistence money for a witness, the captain of a ship, from the service of the subpœna till the time of trial. *Temperley* v. *Scott*, 1 M. & Scott, 601 ; 8 Bing. 392 ; 1 L. J., C. P. 111.

A witness who is bonâ fide detained in this country for the purposes of a trial is entitled to expenses of his maintenance during the time he is so detained, and that although he may not be a seafaring man. *Ansett* v. *Marshall*, 1 B. C. C. 147 ; 22 L. J., Q. B. 118 ; 17 Jur. 114 ; 1 W. R. 166.

The master allowed 40*l.* for expenses to a gentleman from the office of the accountant-general of the Court of Chancery in Ireland, who was called to produce an order of the court, and a power of attorney enabling the defendant's attorney to obtain a transfer of stock, standing in the name of the accountant-general, and also to prove the course of business in the accountant-general's office upon the subject :—Held, that the allowance was properly made. *Storey* v. *Houlditch*, 1 Scott (N.R.) 206.

Detaining Witnesses on Shore.]—Semble, the cost of detaining witnesses on shore may be allowed, although such witnesses are not called. This is a matter in the discretion of the registrar. *The City of Lucknow*, 51 L. T. 907 ; 5 Asp., M. C. 340.

Return from Continent.]—A witness who is subpœnaed in London in August, to attend a trial at the adjourned sittings in October, and who is at the time of service on the eve of departure for the continent, is entitled to the expenses of coming from the continent to attend the trial. *Vice* v. *Anson* (*Viscountess*), 3 Car. & P. 19 ; M. & M. 96.

Postponement of Trial.]—Where a trial has been postponed at the instance of a defendant, a plaintiff who succeeds in the action is entitled to the costs of detaining a material witness, a captain of a vessel, for 300 days, and is not bound to examine him on interrogatories. *Evans* v. *Watson*, 3 C. B. 327 ; 4 D. & L. 193 ; 15 L. J., C. P. 256 ; 10 Jur. 818.

Unnecessary.]—The expenses of detaining a witness are not allowed when it cannot be shewn that such detention was necessary to insure his attendance to give evidence, nor where his detention was for some other purpose, such as to watch the proceedings in the suit. *The Bahia*, L. R. 1 Adm. 15 ; 11 Jur. (N.S.) 1008 ; 14 W. R. 411.

Included in Verdict.]—In an action for unliquidated damages for breach of an agreement, the jury included in the verdict an amount for subsistence-money to the plaintiff whilst awaiting the trial :—Held, that he was not entitled to an allowance for subsistence-money pending the action. *Barker* v. *Clough*, 7 Jur. (N.S.) 545 ; 4 L. T. 306 ; 9 W. R. 618.

Where the jury, in returning a verdict, say that they find for the plaintiff as to part of the declaration, he will not be allowed the expenses of witnesses called to support a different part, although the verdict is entered for him generally. *Cocks* v. *Peachey*, 2 M. & R. 420.

Second Trial.]—In an action upon a policy of insurance, the question being, whether or not the ship was seaworthy, the captain was detained (for the purpose of giving evidence for the plaintiff at the trial) from May to December, 1836, and again from October, 1840, to March, 1841. A rule having been obtained by the defendant for a new trial, on payment of the costs of, and occasioned by, the former trial, the Master allowed for the second period of detention of the captain only, at the rate of one guinea per day. The court declined to interfere. *Stewart* v. *Steele*, 5 Scott (N.R.) 517 ; 4 Man. & G. 669.

Before Lord Mayor.]—Costs for witness served to testify before Lord Mayor, awarded. *Rowe* v. *Guybone*, Cary, 35.

8. Remedy for Non-Attendance.

a. Attachment.

Not Committal.]—Proceedings to compel a party to an action to attend and be examined are by way of attachment and not by way of committal. *Evans, In re, Evans* v. *Noton* 62 L. J., Ch. 413; [1893] 1 Ch. 252; 2 R. 216; 68 L. T. 271; 41 W. R. 230—C. A.

When Granted.]—Subpœna to testify in Guildhall, London, attachment for non-appearance. *Batt* v. *Rookes*, Cary 61.

Attachment against witness served to testify. *Middleton* v. *Speright*, Cary, 80.

On the return of a subpœna, if a witness will not appear, and be examined, the party may take attachment against him; and if he appears, and deposes on the other side, his depositions may be suppressed on motion. *Dolman* v. *Pritman*, 3 Ch. Rep. 64; *Anon.*, 2 Freem. 134.

The satisfaction formerly for the non-appearance of a witness was by action only, but now the courts of law grant attachment against him. *Vailiant* v. *Dodomede*, 2 Atk. 592. *S. C.*, nom. *Valiant* v. *Dodemead*, Dick. 92.

Under a decree in a cause certain inquiries were directed. A witness having been served with a subpœna to attend before the master, declined to attend. An order was made ex parte, with costs, that he should appear within four days, or be committed to the queen's prison. *Brook* v. *Biddall*, 2 Eq. R. 637; 23 L. J., Ch. 696; 2 W. R. 443.

Contempt must be Clear.]—The court will not grant an attachment against a witness for not appearing to give evidence, unless a clear case of contempt is made out against him. *Holme* v. *Smith*, 1 Marsh. 410; 16 R. R. 558. *S. C.*, nom. *Horne* v. *Smith*, 6 Taunt. 10; 16 R. R. 558.

The court will not grant an attachment against a witness for disobedience to a subpœna duces tecum, unless it appears clearly that the party absented himself, or withheld the documents in defiance and contempt of the court. *Reg.* v. *Russell (Lord)*, 7 D. P. C. 693; 3 Jur. 604.

To warrant an attachment against a party for not attending pursuant to a subpœna, it must be made out to the satisfaction of the court that his non-attendance was the result of a contemptuous disregard of the process of the court, and that he was a material and necessary witness. *Chapman* v. *Davis*, 4 Scott (N.R.) 319; 1 D. (N.S.) 239; 3 Man. & G. 609; 11 L. J., C. P. 51.

The court refused to grant an attachment against a witness for disobedience of an order of the district prothonotary of the Court of Pleas at Lancaster, and of an arbitrator, which required the witness to produce before the latter in London a large number of books and documents belonging to a railway company in Lincolnshire, of which he was the secretary and solicitor, and which the directors (who were no parties to the reference) refused to allow him to bring. *Crowther* v. *Appleby*, 43 L. J., C. P. 7; L. R. 9 C. P. 23; 29 L. T. 580; 22 W. R. 265.

A master maltster, resident at a distance from his malthouse, placed his servant in charge of malt in process of manufacture, strictly enjoining him not to leave it at any time whatever. The servant having been subpœnaed as a witness:—Held, that the injunctions of the master afforded no sufficient excuse for disobeying the subpœna, although it was served upon him so short a time before the trial as to preclude the possibility of his communicating with his master. *Gough* or *Goff* v. *Miller* or *Mills*, 2 D. & L. 23; 13 L. J., Q. B. 227; 8 Jur. 758.

Due Calling.]—No attachment will be granted unless the affidavit states that the witness was duly called at the trial. *Malcolm* v. *Ray*, 3 Moore, 222. S. P., *Jacobs, In re*, 1 H. & W. 123; *Rex* v. *Stretch*, 3 D. P. C. 368; 3 A. & E. 503.

It is not indispensably necessary that, when a witness is called on his subpœna, the officer of the court should hold the writ in his hand; it is sufficient that the writ should be exhibited in court, and the officer call him three times. *Rex* v. *Fenn*, 3 D. P. C. 546; 1 H. & W. 200.

An affidavit that the witness was called three times in open court is sufficient, without alleging that he was called upon the subpœna. *Dixon* v. *Lee*, 3 D. P. C. 259; 1 C. M. & R. 645; 5 Tyr. 180.

—— **Non-Attendance.**] — Though a witness may not have been called in court on his subpœna, yet, if it clearly appears from the affidavits in support of the application for an attachment against him that he did not attend the trial, the court will make the rule for the attachment absolute. *Gough* or *Goff* v. *Miller* or *Mills*, 2 D. & L. 23; 13 L. J., Q. B. 227; 8 Jur. 758.

Excuses—Illness.]—It is a sufficient excuse that he was too ill to attend. *Jacobs, In re*, 1 H. & W. 123.

Illness is an excuse. *Scholes* v. *Hilton*, 10 M. & W. 15; 2 D. (N.S.) 229; 11 L. J., Ex. 332.

Witness, unable to travel, discharged of contempt. *More* v. *Worcham*, Cary, 99.

—— **Impressment.**]—Witness, served to testify, pressed for soldier, attachment is stayed. *Humble* v. *Malbe*, Cary, 41.

—— **Failing to hear Call.**] — Defendant attended at Guildhall in obedience to a subpœna duces tecum with which he was served on plaintiff's behalf, but owing to ill health it was deemed advisable for him to remain outside the court until he was called. He accordingly remained in waiting at Guildhall until told by his attorney that the record had been withdrawn. It appeared that during the absence from the court for a few minutes of defendant's attorney to fetch his counsel from an adjoining court, the cause was called on, and defendant called on his subpœna both within and without the court, but not hearing himself called he failed to answer, whereupon plaintiff's attorney withdrew the record on the alleged ground that defendant was a material witness, in whose absence it was not safe for plaintiff to go to trial, and a motion (on affidavits) for an attachment against defendant for contempt in not obeying the subpœna was now made:—Held, that there was no ground for the application, the defendant having failed to answer only because he did not hear himself called. Per Pollock, C.B. If plaintiff had suffered any damage through defendant's negligence he has a remedy by action. The court, in discharging the rule, refused to mould it so as to make defendant pay the costs of the day. *Glendinning* v. *Thomas*, 6 L. T. 251.

—— **Irregular Service.**]—Upon discharging a rule nisi for an attachment against a witness for disobedience to a subpœna, a copy of which had been tendered to him enclosed in an envelope, the court refused to allow the costs of shewing cause, though the witness swore that the original writ of subpœna was not shewn, or the nature of the document explained to him at the time of the alleged service, there appearing to have been some "approximation" to the offence imputed to the witness. *Marshall* v. *York, Newcastle and Berwick Ry.*, 11 C. B. 398.

A rule for an attachment against a witness will be discharged with costs, if it is denied that the original was shewn at the time of service. *Jacobs* v. *Hungate*, 3 D. P. C. 456.

An affidavit, to ground a rule nisi for an attachment for not obeying a subpœna, must state that at the time of the service the original subpœna was shewn; and it is a sufficient answer to such rule that the affidavit does not so allege. *Garden* v. *Cresswell*, 2 M. & W. 319; 5 D. P. C. 461; M. & H. 44; 6 L. J., Ex. 84.

Upon a motion for an attachment against a witness for not attending pursuant to a subpœna, it appearing from the affidavits in answer that the witness's wife had neglected to deliver to her husband a notice which had been left with her, requiring his attendance in court on the following morning, and the witness swearing that he did not receive the notice, and did not wilfully disobey the process of the court, the rule was discharged, but without costs. *Netherwood* v. *Wilkinson*, 17 C. B. 226.

—— **Leaving Court.**]—A witness is liable to attachment, if, after a subpœna served on him, he attends in court, and, during the opening of the plaintiff's case, thinking he is not able to prove a particular fact, he leaves the court, and the plaintiff is nonsuited for want of his evidence. *Malcolm* v. *Day*, 3 Moore, 579; 21 R. R. 730.

The court refused an attachment against a witness, who being subpœnaed without particular notice when the cause would come on, in the course of his third's day's attendance left the court to attend to urgent business of his trade, although the cause was tried in his absence, and the plaintiff nonsuited, which his evidence would have prevented. *Blandford* v. *De Tastet*, 5 Taunt. 260; 1 Marsh. 42.

So, though the witness was induced to leave the court by the representation of the adverse attorney. *Ib.*

An attachment will not be granted against a witness, if he has a reasonable ground for believing that he will not be wanted. *Rex* v. *Soloman*, 1 D. P. C. 618.

—— **Cause going off.**]—But it is no excuse that he would have been in time, if a previous cause on the list had not unexpectedly gone off. *Fenn, In re*, 3 D. P. C. 546; 1 H. & W. 200.

Nor that another person had answered for him, and would have fetched him in a few minutes. *Ib.*

—— **Leave.**]—If an attorney of the party who has subpœnaed a witness gives him leave to be absent until a particular time, and, in the interim, the cause is called on in the absence of the witness, the latter is not liable to an attachment for a contempt. *Farrah* v. *Keat*, 6 D. P. C. 470; 1 W. W. & H. 43; 2 Jur. 136.

—— **Materiality.**]—Where it appears from the notes and information of the judge who tried a cause, that the attendance of a witness who has been subpœnaed would be wholly immaterial to the event, no attachment for contempt in not attending will be granted. *Dicas* v. *Lawson*, 1 C. M. & R. 934; 3 D. P. C. 427; 5 Tyr. 235; 4 L. J., Ex. 80.

In order to ground a motion for an attachment for disobedience to a subpœna, the affidavit must state that the party was a material witness. *Tinley* v. *Porter*, 2 M. & W. 822; 5 D. P. C. 744; 6 L. J., Ex. 233. S. P., *Taylor* v. *Willans*, 4 M. & P. 59; and *Chapman* v. *Davis*, 1 D. (N.S.) 239: 4 Scott (N.R.) 319; 3 Man. & G. 609; 11 L. J., C. P. 51.

—— **Postponement.**]—A subpœna duces tecum required a defendant's attorney to appear on a particular day, but did not command him to appear from day to day, after that day. The cause was postponed at the instance of the defendant, and the attorney did not appear on the day when the cause was called up. The court refused an attachment for disobedience to the subpœna. *Vaughton* v. *Brine*, 9 D. P. C. 179; 1 W. P. C. 41; 4 Jur. 1061.

Time for Motion.]—A motion for an attachment against a person subpœnaed as a witness, for not attending at a trial, must be made within the term succeeding the trial. *Thorpe* v. *Gisbourne*, 11 Moore, 55.

A motion for an attachment for not obeying a subpœna should be made at the earliest possible opportunity after the contempt has occurred. *Rex* v. *Stretch*, 4 D. P. C. 30; 5 N. & M. 178; 1 H. & W. 322; 3 A. & E. 503.

b. Action.

When it Lies.]—No action lies against a witness for non-attendance, unless the cause was called on and the jury sworn. *Bland* v. *Swafford*, Peake, 60.

In a declaration an averment that the appearance of the defendant was material and necessary at the trial is equivalent to an averment that the plaintiff had a good cause of action. *Davis* v. *Lovell*, 4 M. & W. 679; 1 H. & H. 451; 7 D. P. C. 178; 8 L. J., Ex. 152; 3 Jur. 225.

An action will lie for disobedience to a subpœna served after the first day of the assizes, and commanding the witness to attend on that day, and so from day to day until the cause is tried, provided the trial takes place within a reasonable time after service of the subpœna. *Ib.*

It is not necessary to aver that the absence of the defendant as a witness was the sole cause of the plaintiff failing in his action. That fact is important only with regard to the amount of damages to be recovered in an action against such witness. *Ib.*

In an action for not obeying a subpœna, it is primâ facie sufficient to allege that the defendant was a material witness, and that his absence caused the plaintiff to be nonsuited, without averring that the plaintiff had originally a good cause of action. *Masterman* v. *Judson*, 8 Bing. 224; 1 M. & Scott, 367; 1 L. J., C. P. 86.

In an action for not appearing as a witness, the declaration need not aver, in express terms, that the subpœna was served within a reasonable time; the usual averment that the defendant could and might have appeared, and had

no reasonable cause for omitting to do so is sufficient. *Maunsell* v. *Ainsworth*, 8 D. P. C. 869; 1 H. & W. 5.

The action will lie if the witness's evidence was material upon any one of the issues, even though the plaintiff had not a good cause of action. *Cowling* v. *Coxe*, 6 D. & L. 399; 6 C. B. 703; 18 L. J., C. P. 100; 13 Jur. 101.

—— **Cause of Withdrawal of Record.**]—An action will lie against a witness for non-attendance in pursuance of a subpœna, although the plaintiff was not nonsuited but withdrew his record in consequence of the absence of the witness. *Mullett* v. *Hunt*, 1 C. & M. 752; 3 Tyr. 875; 2 L. J., Ex. 287.

A declaration alleged, that the subpœna was made known and shewn to the defendant. The evidence was, that the subpœna was made known, and conduct-money was taken by the witness, but the original subpœna was not shewn:—Held, that it was not necessary for the purposes of such action that the original subpœna should have been shewn (unless, perhaps, where the party demanded to see it), and that the part of the allegation as to shewing the subpœna might be rejected. *Ib.*

In an action against a party for not appearing to give evidence in obedience to a subpœna ad testificandum, it is not necessary to shew that the defendant was called on his subpœna by the officer of the court, if it is shewn by other satisfactory evidence that he was not present at the proper time and place when he was required to give evidence; or even that he was absent when the cause was called on for trial, under such circumstances that he could not have been forthcoming when required to give evidence, and in such case it is not necessary that the jury should have been sworn and the plaintiff nonsuited; it is sufficient if he withdrew the record, being unable safely to go to trial in the absence of the witness. *Lamont* v. *Crook*, 6 M. & W. 615; 8 D. P. C. 737; 9 L. J., Ex. 253; 4 Jur. 489.

A declaration stating that the plaintiff was about to institute a suit in the Divorce Court for a dissolution of his marriage on the ground of his wife's insanity at the time of the marriage, and that the defendant was a surgeon and apothecary, alleged a contract on his part to attend as a witness and give testimony at the trial. Breach, that he did not appear, by reason whereof the plaintiff was bound to withdraw the record, there being no allegation that the plaintiff had a good cause of action. Verdict for the plaintiff, damages 50*l*. On a rule to enter a nonsuit, or to reduce the damages to 1*s*.:—Held, that on the facts there was evidence of the contract alleged; that the action was well brought; and that the plaintiff was entitled to substantial damages. *Yeatman* v. *Dempsey*, 7 C. B. (N.S.) 628; 29 L. J., C. P. 177; 6 Jur. (N.S.) 778; 1 L. T. 402; 8 W. R. 219. Affirmed 9 C. B. (N.S.) 881; 7 Jur. (N.S.) 1245; 9 W. R. 743—Ex. Ch.

What Payment.]—If a witness has received an adequate sum from one party for his expenses, on being subpœnaed, and he consents to accept a shilling for his expenses with the subpœna, when served by the opposite party, he will still be liable to an action by the latter, if he does not attend pursuant to the writ. *Bittley* v. *M'Leod*, 3 Bing. (N.C.) 405; 4 Scott, 131; 5 D. P. C. 481; 3 Hodges, 44; 1 Jur. 22.

Contesting Ground of Action.]—A declaration in an action against a witness for disobedience of a subpœna ad testificandum stated that the plaintiff had a good cause of action in the suit in which the subpœna was issued, and that although the testimony of the defendant was material evidence for the plaintiff, he did not attend the trial, whereby the plaintiff was compelled to withdraw the record, and became liable to pay the defendant in that suit the costs of the day, and also to pay his own costs. The defendant having pleaded not guilty, leave and licence, and that the plaintiff could have proceeded to the trial without the testimony of the defendant:—Held, that, the plaintiff having put in the record in the previous action, the defendant could not, on these pleadings, refer to it, and contend that it contained no ground of action, a good cause of action being conclusively admitted by the pleadings, and that the defendant was liable to pay the whole of the costs. *Needham* v. *Fraser*, 3 D. & L. 190; 1 C. B. 815; 14 L. J., C. P. 256; 9 Jur. 734.

Damages.]—In an action against a witness for not obeying a subpœna, proof of actual damage having been sustained by the plaintiff, through the witness's breach of duty, is essential, as the law will not imply a loss from mere disobedience to a subpœna. *Cowling* v. *Coxe*, 6 D. & L. 399; 6 C. B. 703; 18 L. J., C. P. 100; 13 Jur. 101.

c. Assessment of Recompense by Court.

The further recompense given by 5 Eliz. c. 9, s. 12, against a witness for non-attendance, must be assessed by the court out of which the process issues, and not by the jury or judge at nisi prius. *Pearson* v. *Iles*, 2 Dougl. 556.

9. Protection from Arrest.

Statute.]—55 & 56 Vict. c. 64 *protects Witnesses giving Evidence before any Royal Commission, or any Committee of either House of Parliament, or on other Public Inquiries.*

Before Magistrate.]—A witness attending before a police magistrate in a pending case is privileged from arrest. *Montague* v. *Harrison*, 3 C. B. (N.S.) 292; 27 L. J., C. P. 24; 4 Jur. (N.S.) 29; 6 W. R. 43.

A. had charged persons with felony, and the magistrate, on their being brought before him, remanded them to a future day. A. was attending as prosecutor and witness, but without any summons or crown-office subpœna to compel his attendance. On leaving the court he was arrested under a ca. sa.:—Held, that he was entitled to his discharge. *Ib.*

Jurisdiction of Court to give Protection.]—The court out of which the nisi prius record is sent has jurisdiction to punish a contempt committed by the arrest of a witness in the cause during the continuance of his privilege eundo, morando, et redeundo. *Kimpton* v. *L. & N. W. Ry.*, 9 Ex. 766; 2 C. L. R. 1026; 23 L. J., Ex. 232; 2 W. R. 430.

A person subpœnaed to attend as a witness on the trial of an action is privileged from arrest under a decree for debt, and will be discharged from custody on motion to the court in which the action is pending, and the attorney causing her to be arrested may be compelled to pay the

costs of the motion. *Hayes* v. *Bagwell*, 18 W. R. 470.

Commitment for Non-Payment of Rates.]—Commitment for non-payment of rates where no distress is recoverable is a civil and not a punitive process, and, therefore, a witness in an action against whom an order for such a commitment has been made is privileged from arrest whilst returning from the court in which he has given evidence. *Hobern* v. *Fowler*, 62 L. J., Q. B. 49; 5 R. 33.

VI. EXAMINATION OF WITNESSES.

1. Competency.

a. Want of Reason or Religion.

Religion.]—A person who has no notion of eternity, or of a future state of rewards and punishments, cannot be examined as a witness. *Rex* v. *White*, 1 Leach, C. C. 430.

The proper question to be asked a witness, in order to ground an objection to his competency, is not whether he believes in Jesus Christ or the Holy Gospels, but whether he believes in God and a future state. *Rex* v. *Taylor*, Peake, 11.

A plaintiff in a cause was about to be sworn, when she was objected to as incompetent, on the ground of want of religious belief. The judge then swore her on the voir dire, and, in answer to questions by the defendant's counsel, she said that she did not believe in a God, and that she did not believe in the obligation of an oath any more than in that of her word, nor did she believe in a future state of rewards and punishments, but that she was morally bound by the solemn declaration she had taken, to speak the truth:—Held, that the witness was properly examined on the voir dire, and rejected as incompetent. *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118; 7 Jur. (N.S.) 1107; 5 L. T. 288; 10 W. R. 112.

A Chinese, sworn according to a form which is obligatory upon his conscience, is a good witness in a court of law. *Reg.* v. *Entrehman*, Car. & M. 248.

So a negro, who was called as a witness, stated, before he was sworn, that he was a Christian and had been baptised:—Held, that he ought to be sworn, and that no further question could be asked him before he was so. *Reg.* v. *Serva*, 2 Car. & K. 53.

As to the admission of evidence of heathens, &c. *Omychund* v. *Barker*, 1 Atk. 21; 2 Eq. Abr. 397; Willis's Rep. 538.

Infants.]—Before a child is examined as a witness, the judge must be satisfied that the child feels the binding obligation of an oath from a general course of religious education; and the effect of the oath on the conscience of the child should arise from religious feelings of a permanent nature, and not from instruction recently communicated for the purposes of a trial. *Rex* v. *Williams*, 7 Car. & P. 320.

Though a witness be an infant, his tender years will not invalidate his evidence. *Smith* v. *French*, 2 Atk. 245.

Lunatics.]—If a lunatic is tendered as a witness, it is for the judge to examine whether the lunatic is of competent understanding to give rational evidence, and is aware of the nature and obligation of an oath. If the judge is satisfied on these points, he should admit the lunatic as a witness. *Reg.* v. *Hill*, 2 Den. C. C. 254; T. & M. 512; 20 L. J., M. C. 222; 15 Jur. 470; 5 Cox, C. C. 259.

Before being sworn the lunatic may be examined, and witnesses may be called as to his competency. *Ib.*

If he is admitted it is for the jury to judge whether his evidence is tainted by his insanity, and to decide upon the degree of credit to be attached to it. *Ib.*

Before the evidence of a lunatic, subject to insane hallucinations, can be received, there must be an inquiry as to his mental condition. *Spittle* v. *Walton*, 40 L. J., Ch. 368; L. R. 11 Eq. 420; 24 L. T. 18: 19 W. R. 405.

b. Parties.

Under 14 & 15 Vict. c. 99, a party to a suit may be called as a witness by his adversary. *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

Conducting their own Cases.]—There is no rule of law against a party addressing the jury and being examined as a witness in his own behalf, since 14 & 15 Vict. c. 99; though the court strongly disapproves of such a practice. *Cobbett* v. *Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 488; 1 W. R. 54.

Defendant in Criminal and Fiscal Proceedings.]—An information before justices under 1 & 2 Will. 4, c. 32, s. 23, for using an engine for the purpose of taking game without the authority of a certificate, is a criminal proceeding in which the party is charged with the commission of an offence punishable on summary conviction, within 14 & 15 Vict. c. 99, s. 3, and therefore the party charged is not competent or compellable to give evidence for or against himself. *Cattell* v. *Ireson*, El. Bl. & El. 91; 27 L. J., M. C. 167; 4 Jur. (N.S.) 560; 6 W. R. 469.

Upon a proceeding under 9 Geo. 4, c. 61, s. 21, against an ale-house keeper for unlawfully and knowingly permitting divers persons of bad character to assemble and meet together in his house and premises against the tenure of his license, such ale-house keeper is not a competent witness, and cannot give evidence in his own behalf. *Parker* v. *Green*, 2 B. & S. 299; 31 L. J., M. C. 133; 6 L. T. 46; 9 Cox, C. C. 169.

On the trial of an information for penalties incurred under 5 & 6 Vict. c. 35 and 16 & 17 Vict. c. 34, against an annuitant for refusing to allow the tenants of the premises on which the annuity was charged, the property-tax, to be deducted out of the rents, he could not be called as a witness, before 28 & 29 Vict. c. 104. *Reg.* v. *Sheil*, 1 F. & F. 204.

See further Criminal Law.

c. Husband and Wife.

Since 16 & 17 Vict. c. 83, s. 1, a wife is competent and compellable to give evidence against the husband in an action in which he is a party. *Selfe* v. *Isaacson*, 1 F. & F. 194.

In all cases where husband and wife are admissible witnesses against each other, they are also admissible for each other. *Rex* v. *Sergeant*, R. & M. 352.

Husband neglecting to Maintain Wife.]—But a wife is not a competent witness against her husband, charged under the Vagrant Act, 5 Geo. 4, c. 83, s. 3, with neglecting to maintain her, whereby she became chargeable to the parish. *Reeve* v. *Wood*, 5 B. & S. 364; 34 L. J., M. C. 15; 11 Jur. (N.S.) 201; 11 L. T. 449; 13 W. R. 154.

After Termination of Marriage.]—Where a man and wife are divorced by act of parliament, the wife is not competent to prove a contract made by her husband previously to the divorce. *Monroe* v. *Twistleton*, Peake Ad. C. 219. *But see* 16 & 17 Vict. c. 83, s. 3.

The widow of a deceased person is a competent witness for the plaintiff, in an action against the executors of such person, on a promise made by him in his lifetime. *Beveridge* v. *Minter*, 1 Car. & P. 364.

But a widow cannot be asked to disclose conversations between herself and her husband. *Doker* v. *Hasler*, R. & M. 198.

Void Marriage and Cohabitation.]—Persons who cohabit as man and wife, after a marriage de facto, supposed by both to be a good marriage in law, may, after the marriage is found to be a nullity, give in evidence, in a court of justice, statements made by each other during the cohabitation. *Wells* v. *Fletcher*, 5 Car. & P. 12; *S. C.*, nom. *Wells* v. *Fisher*, 1 M. & Rob. 99.

A kept mistress is not incompetent to give evidence for her protector, although she has, with his consent, passed by his name, and appeared in the world as his wife, as the objection only goes to her credit. *Batthews* v. *Galindo*, 4 Bing. 610; 1 M. & P. 565; 3 Car. & P. 238; 6 L. J. (O.S.), C. P. 138.

A man who has been married may be a witness to prove such marriage illegal. *Standen* v. *Standen*, Peake, 33.

See further HUSBAND AND WIFE.

d. Other Cases.

Convicts.]—A convict under sentence of death cannot be called as a witness. *Reg.* v. *Webb*, 11 Cox, C. C. 133.

Parish Matters.]—Under 3 & 4 Vict. c. 26, s. 1, any owner of lands within a parish is competent to give evidence on a prosecution against the parish for non-repair of a highway, though he is not a rated inhabitant, the lands being occupied by tenants who are rated for them. *Reg.* v. *Doddington*, 1 Q. B. 341; 10 L. J., Q B. 166.

An overseer, since 3 & 4 Vict. c. 26, is a competent witness for or against his parish. *Reg.* v. *Vickery*, 12 Q. B. 478; 17 L. J., M. C. 129; 15 Jur. 581.

To prove Adultery.]—The adultery of a wife living apart from her husband destroys her implied agency to bind him for necessaries, and the wife is an admissible witness to prove the adultery. *Cooper* v. *Lloyd*, 6 C. B. (N.S.) 519.

The 32 & 33 Vict. c. 68, s. 3, did not render inadmissible the evidence of a witness that he or she has committed adultery. *Hebblethwaite* v. *Hebblethwaite*, 39 L. J., Mat. 15; L. R. 2 P. 29; 21 L. T. 732.

A witness may claim the protection of the statute or give the evidence, but a party to the suit cannot object to its admission. *Ib.*

Withdrawing Evidence.]—The evidence of an incompetent witness may be withdrawn from the jury upon the incompetency appearing during his examination in chief, although he has been examined previously on the voir dire, and pronounced to be competent. *Reg.* v. *Whitehead*, 35 L. J., M. C. 186; L. R. 1 C. C. 33; 14 L. T. 489; 14 W. R. 677.

Examination on Voir Dire.]—A party cannot examine his own witness upon a voir dire. *Plummer* v. *May*, 1 Ves. 426.

2. SUFFICIENCY.

Against Deceased Persons.]—The court is not prone to act on evidence of conversation with a deceased person, and will never give a person anything on his own uncorroborated statement against another after that other's death. *Rogers* v. *Powell*, 38 L. J., Ch. 648; 18 W. R. 282. *Hartford* v. *Power*, Ir. R. 3 Eq. 602. *McGonnell* v. *Murray*, Ir. R. 3 Eq. 460.

When a claim is made against the estate of a deceased person, the court will never act upon the uncorroborated evidence of the claimant. *Morley* v. *Finney*, 18 W. R. 490.

The evidence of a party to the suit in his own favour, although uncorroborated, is admissible, and may influence the court as a juryman. *Browne* v. *Collins*, 21 W. R. 222.

Evidence of a plaintiff on his own behalf as to a bargain with a man since dead, ought, in the absence of corroboration, to be disregarded. *Hill* v. *Wilson*, 42 L. J., Ch. 817; L. R. 8 Ch. 888; 29 L. T. 238; 21 W. R. 757.

The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of the claimant, applies to cases of alleged debt as well as to cases of alleged gift. *Finch, In re, Finch* v. *Finch*, or *Wynne-Finch, In re, Wynne-Finch* v. *Wynne-Finch*, 23 Ch. D. 267; 48 L. T. 129; 31 W. R. 526—C. A. S. P., *Whittaker, In re, Whittaker* v. *Whittaker*, 51 L. J., Ch. 737; 21 Ch. D. 657; 46 L. T. 802; 30 W. R. 787.

The evidence of a plaintiff on his own behalf as to an agreement with a man since dead ought, in the absence of corroboration, to be disregarded. *Hope* v. *Cloncurry (Lord)*, Ir. R. 8 Eq. 554.

There is no rule of law that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion. *Garnett, In re, Gandy* v. *Macaulay*, 31 Ch. D. 1—C. A.

There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; although the court will in general require such corroboration. *Hodgson, In re, Beckett* v. *Ramsdale*, 55 L. J., Ch. 241; 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127—C. A.

A claim against the assets of a deceased person cannot be allowed upon the uncorroborated evidence of the claimant. This rule is of universal application, and does not depend on the character or position of the claimant. *Harnett, In re, Leahy* v. *O'Grady*, 17 L. R., Ir. 543.

The court will not act upon the unsupported testimony of a claimant upon the estate of a deceased person. *Grant* v. *Grant*, 34 Beav. 623.

The court will not act on the unsupported testimony of a person in his own favour. *Down* v. *Ellis*, 35 Beav. 578.

The court will not in any case allow, out of the

assets of a deceased person, the amount of a claim which is sustained only by the uncorroborated testimony of the claimant. *Hartford* v. *Power*, Ir. R. 3 Eq. 602.

Impeaching Deed.]—The evidence of a witness, impeaching the instrument he has attested, as a witness to a will, denying the sanity of the devisor, &c., is admissible, but to be received with the most anxious jealousy. *Howard* v. *Braithwaite*, 1 Ves. & B. 202.

Ex Post Facto Evidence.]—The danger of receiving the evidence of parties themselves, ex post facto, as to their original intentions. *Jackson, Ex parte, Warwick, In re*, Mont. & C. 271; 3 Deac. 651; 8 L. J., Bk. 36.

Perjury.]—Evidence of persons coming to swear that they, in former instance, perjured themselves, is not to be received. *Lord, Ex parte*, 2 Ves. 26. *See further*, CRIMINAL LAW.

Accomplices.]—A person employed by government to mix with conspirators and pretend to aid their designs for the purpose of betraying them, does not require corroboration as an accomplice. *Reg.* v. *Mullens*, 3 Cox. C. C. 526.

If there is strong evidence against one who at law is put into the simul cum, that he is particeps criminis, the court will exclude him from being a witness. *Cotton* v. *Lottrell*, 1 Atk. 452. *See further*, CRIMINAL LAW.

Against Wrong-doer.]—In odium spoliatoris, the oath of the injured party sufficient to charge the wrongdoer. *Childrens* v. *Saxby*, 1 Vern. 207.

Oath of Single Witness — To prove Contempt.]—One witness sufficient to prove a contempt. *Sands* v. *Knighton*, Toth. 41.

Upon an ordinary contempt, a commission was had by the plaintiff, who proved the contempt positively by one witness. The defendant alleged the process was by mistake served on a wrong person, and prayed a commission to examine into it, and it was granted. *Hammond* v. *Shelley*, 2 Ch. Ca. 100.

Though contemptuous words were spoken of a subpœna, and the person serving is severely beaten, yet, as these facts were proved by the oath of a single person only, the court would not, in the first instance, order the person to stand committed, but made a rule upon him to shew cause why he should not stand committed. *Anon.*, 3 Atk. 219.

—— **To prove Admission.**]—Little reliance is to be placed on the unsupported testimony of one witness of an oral admission by the defendant of the plaintiff's case. *Greenslade* v. *Dare*, 20 Beav. 284.

—— **To prove Gift.**]—Unsupported evidence of donee of a parol gift, together with delivery of a part, not sufficient evidence of a gift of the whole. Semble, on a question of a gift, subsequent statement of donor admissible. *Forrest* v. *Forrest*, 5 N. R. 299.

—— **To prove Indemnity.**]—On an application for the settlement of a fund belonging to a married woman, her evidence as to the indemnity of the parties is not by itself sufficient. *Anon.*, 1 Jur. (N.S.) 1084.

—— **Of Wife as to Settlement.**]—Where a husband is residing permanently abroad, semble, the court will act upon an affidavit of no settlement by the wife alone. *Wilkinson* v. *Schneider*, 39 L. J., Ch. 410; L. R. 9 Eq. 423.

—— **Inconsistent Conduct.**]—Where any question of fact depends upon the testimony of a single witness, and any inconsistency is apparent between such testimony and his previous conduct, the court will look rather to the acts done by him than to the statements when called as a witness. *Barr, In re*, 4 Kay & J. 219; 6 W. R. 424.

When a witness comes forward after a considerable lapse of time to impeach the character of a transaction by the allegation of fresh circumstances, which are either unsupported or contradicted by other evidence, the conduct of the witness in the interval will be regarded as affecting the value of his testimony. *Rowley* v. *Rowley*, 1 Kay, 242; 2 Eq. R. 241; 23 L. J., Ch. 275; 18 Jur. 306.

—— **Against Receipt.**]—A man who has given a written receipt for money paid to him cannot avoid the effect of the written instrument by his own unsupported affidavit that the money was not actually paid him; but must produce independent evidence to that effect. *Farrow's Estate, In re*, 22 Beav. 400.

A., in January, 1853, gave to B. his I. O. U. for 65*l*. After A.'s death, B. having claimed the amount, his receipt for the amount was produced. B. swore positively that the amount had never been produced. The court held, that it could not act on his unsupported testimony against the written evidence. *Ib.*

—— **Against Oath.**]—The court will not act upon the uncorroborated testimony of one witness against a party as to a fact expressly denied by him upon his oath. *Gray* v. *Haig*, 20 Beav. 219.

No decree for a plaintiff in equity on the evidence only of one witness in contradiction to defendant's positive answer. *Glynn* v. *Bank of England*, 2 Ves. 38.

Single witness against defendant's answer on oath not sufficient for decree. *Speed* v. *Martin*, 2 Com. 587.

Where there is a single witness against the defendant's oath, this is not sufficient evidence for a decree, nor will the court direct a trial at law. *Christ's College, Cambridge* v. *Widdrington*, 2 Vern. 283.

One witness against the defendant's answer not sufficient to ground a decree. *Kingdome* v. *Boakes*, Pre. Ch. 19.

There being but one witness against what was sworn in the defendant's answer, the plaintiff can have no decree. *Alam* v. *Jourdan*, 1 Vern. 161.

Plaintiff cannot have a decree on the testimony of one witness contradicted by the answer of one defendant. *Mortimer* v. *Orchard*, 2 Ves. J. 243.

A single witness cannot prevail against a positive denial by the answer. *Cranstown (Lord)* v. *Johnston*, 3 Ves. 171; 3 R. R. 80.

Evidence of single witness not sufficient against answer of defendant. *Evans* v. *Bicknell*, 6 Ves. 174; 5 R. R. 245.

Single witness not corroborated, not sufficient against positive denial by the answer. *Cooke* v. *Clayworth*, 18 Ves. 12; 11 R. R. 137.

Parol evidence of one witness, unsupported by other evidence, not sufficient to found a decree. *Dawson* v. *Massey*, 1 Ball & B. 234.

Where the bill is supported by only one witness, and the facts affirmed in the answer are not less probable than those affirmed by the witness, no decree will be made. *Warren* v. *Taylor*, C. P. Cooper, 174.

A decree, whereby the defendant was concluded by the plaintiff's own oath, reversed. *Plampin* v. *Betts*, 1 Vern. 272.

Lease not decreed upon expenditure in repairs and improvements under an alleged agreement proved by one witness; the answer containing a positive denial of the agreement was also confirmed by circumstances. *Pilling* v. *Armitage*, 12 Ves. 78; 8 R. R. 295.

Specific execution of a parol agreement for a lease for three lives proved by one witness, refused, the answer admitting an agreement for one life only, supported by the testimony of one witness, and not inconsistent with the evidence of part performance by plaintiff. *Lindsay* v. *Lynch*, 2 Sch. & Lef. 1; 9 R. R. 54.

Though one witness not sufficient against a distinct denial by answer, the latter must be precise and positive. *Arnot* v. *Biscoe*, 1 Ves. 95.

The rule that a decree cannot be made, where there is but one witness, applies only where the answer of the defendant is equally strong in opposition to such evidence. *Walton* v. *Hobbs*, 2 Atk. 19.

—— **When held sufficient.**]—Effect given to the testimony of a single witness in support of a positive statement contained in the bill and against the answer. *Watts* v. *Hyde*, 17 L. J., Ch. 409; 12 Jur. 661.

There being but one witness against answer, court directed an issue. *Pemby* v. *Mathew*, Dick. 550; 1 Bro. C. C. 52.

The evidence of one witness, corroborated by a letter of the defendant, is sufficient to contradict the defendant's answer. *Keys* v. *Williams*, 3 Y. & Coll. 55; 7 L. J., Ex. Eq. 59.

The testimony of one witness, though uncorroborated by circumstances, is a sufficient ground for a decree, if the answer deny the fact upon belief only, although the answer be positive, and there are no other means of contradicting the fact. *Hughes* v. *Garner*, 2 Y. & Coll. 328.

Decree varied in the House of Lords by directing an issue. *Id.* 731.

Corroborating Circumstances.]—The evidence of a single witness cannot be received against the answer of a defendant, unless there are circumstances which go to corroborate the witness as against the answer. *Jordan* v. *Money*, 5 H. L. Cas. 185. Reversing *S. C.*, nom. *Money* v. *Jordan*, 21 L. J., Ch. 893.

If a particular allegation is supported by only one witness, and is positively denied by the answer, and there is nothing to shew that the one is to be credited more than the other, the claim founded upon that allegation cannot be enforced against the defendant. For this purpose the answer must be looked at with all the concomitant circumstances which may tend to depreciate it, and the value of the particular denial may be legitimately tested by a comparison of the answer with the evidence on other points. *Ib.*

Specific performance of a parol agreement to grant a lease, decreed on the testimony of one witness, confirmed by circumstances, against the denial in the answer, after part performance by delivery of possession. *Morphett* v. *Jones*, 1 Swanst. 172; 1 Wils. 100; 18 R. R. 48.

Where the evidence of a single witness against a negative in defendant's answer is corroborated by a great number of circumstances, it is sufficient to support an equity. *Janson* v. *Rany*, 2 Atk. 140.

One witness with corroborating circumstances admitted against an answer. *Biddulph* v. *St. John*, 2 Sch. & Lef. 532.

Decree made upon evidence of single witness against positive contradiction of the answer, containing circumstances giving greater credit to the depositions, the defendant declining an issue, otherwise it would not be made thereon. *East India Co.* v. *Donald*, 9 Ves. 275; 1 Smith, 213.

A single witness is not sufficient against the answer of defendant, except under special circumstances. *Cuth* v. *Jackson*, 6 Ves. 40.

A single witness cannot prevail against the answer unless confirmed by circumstances. *Savage* v. *Brocksopp*, 18 Ves. 336.

Answer read as evidence contrasted with the other evidence not for the purpose of discrediting it. *Ib.*

3. Swearing.

Statute.]—The Oaths Act, 1888, *amends and consolidates the enactments relating to the administration of oaths.*

Form of Oath.]—A witness may be sworn in the form which he expressly or impliedly declares to be binding on his conscience. *Omichund* v. *Barker*, Willes, 538; 1 Atk. 21.

Upon the principles of the common law, no particular form of oath is essential to be taken by a witness, so that it binds his conscience. *Atcheson* v. *Everitt*, Cowp. 389.

A witness who declines swearing on the New Testament, although he professes Christianity, but states himself to be a methodist, may be allowed to swear on the Old Testament, if he considers that mode of swearing as binding on his conscience. *Edmonds* v. *Rowe*, R. & M. 77.

If a witness, without making any objection, takes the oath in the usual form, he may be afterwards asked whether he thinks such oath binding on his conscience; but it is improper to ask him if he considers any other form of oath more binding, and such a question cannot be asked. *Queen's Case*, 2 Br. & B. 284; 22 R. R. 662.

Where witnesses were sworn upon a book that did not contain the gospels, the court suppressed the depositions, as being a nullity. *Doherty* v. *Doherty*, 8 Ir. Eq. R. 379.

—— **Jewish.**]—A Jew ordered to be sworn to his answer on the Pentateuch, and the plaintiff's clerk to be present. *Anon.*, 1 Vern. 263.

Where a witness was sworn on the gospels at the trial, and it was afterwards discovered that he was a Jew, and had been sworn in a false name:—Held, that any objection as to his testimony was too late after verdict, and that the oath, as taken by the witness, was binding on him, as it would subject him to the penalties of perjury if he had sworn falsely. *Sells* v. *Hoare*, 7 Moore, 36; 3 Br. & B. 232.

Where a witness is sworn on the New Testament, who admits that he was born a Jew, but the tenets of which religion he has never formally abjured, and was never baptised or admitted

into the Christian church, he is an admissible witness, though the oath has been so taken by him, on his asserting that he then considered himself as a member of the established religion, and bound by its precepts. *Rex* v. *Gillham*, 1 Esp. 285; 6 Term Rep. 265.

—— **Mahometan.**]—See *Rex* v. *Morgan*, 1 Leach, C. C. 54.

—— **Chinese.**]—*Reg.* v. *Entrehman*, Car. & M. 248.

—— **Statutory.**]—The concluding paragraph in the form of oath of abjuration imposed by 6 Geo. 3, c. 53, "And I do make this recognition, acknowledgment, abjuration, renunciation, and promise heartily, willingly, and truly upon the true faith of a Christian," was an essential portion of the substance of the oath, and no part of it could be omitted or altered. *Salomons* v. *Miller* 8 Ex. 778; 22 L. J., Ex. 169; 17 Jur. 463; 1 W. R. 360—Ex. Ch.

By a private act, no person appointed to act as tithe valuer shall be capable of acting until he shall have taken and subscribed an oath in the words following: "I, A. B., do swear that I will faithfully execute, &c. So help me God." The oath had been subscribed with the omission of the words "So help me God":—Held, that the oath had nevertheless been properly administered according to the statute, for the words omitted were no part of the oath, but only an indication of the manner of administering it. *Lancaster and Carlisle Ry.* v. *Heaton*, 8 El. & Bl. 952; 27 L. J., Q. B. 195; 4 Jur. (N.S.) 707.

An affirmation taken under 3 & 4 Will. 4, c. 82, stated that the affirmant was a member of a religious sect called Separatists. It did not follow in terms the form of affirmation required by the statute, but it purported to be supplemental to another affirmation which did, and to have been made before an officer authorised to administer it:—Held, that it must be assumed to have been properly made. *Wolsely* v. *Worthington*, 13 Ir. Ch. R. 341.

Obligation of Oath.]—A witness who does not believe in the sanctions of religion will not be bound by an oath, and his evidence if given on oath may be rejected. *Maden* v. *Catanach*, 7 H. & N. 360; 31 L. J., Ex. 118; 5 L. T. 288; 10 W. R. 112.

Affirmation.]—Where a witness is desirous of making an affirmation instead of taking an oath, it is the duty of the judge presiding at the trial to himself examine the witness, and ascertain that he objects to being sworn on the ground either that he has no religious belief, or that the taking of an oath is contrary to his religious belief. A witness who states that he has a religious belief cannot be allowed to affirm. *Reg.* v. *Moore*, 61 L. J., M. C. 80; 66 L. T. 125; 40 W. R. 304; 17 Cox, C. C. 458; 56 J. P. 345—C. C. R.

And see *Nash* v. *Ali Khan*, 8 Times Rep. 444.

—— **Under earlier Statutes.**]—A person, formerly a Quaker, who had seceded from that sect on some points of doctrine, retaining their opinions on the unlawfulness of swearing, but refusing to affirm under the forms given in 3 & 4 Will. 4, c. 49, and 3 & 4 Will. 4, c. 82, was not admissible as a witness in criminal cases upon making the affirmation according to 9 Geo. 4, c. 32. *Reg.* v. *Doran*, 2 M. C. C. 37; 2 Lewin, C. C. 27.

Time for Objection.]—Upon a criminal trial an objection to the admissibility of the evidence of a witness permitted to affirm without having been so questioned, is not taken too late although taken after verdict. *Reg.* v. *Moore*, supra. And see *Sells* v. *Hoare*, supra.

Swearing Juror.]—On the trial of an action on a bill of exchange, where the cause was undefended, one of the jury said that the stamp was forged, and called the attention of the judge to the fact:—Held, that the juryman must be sworn as a witness to give evidence to his brother jurors, before they can act upon his opinion, and on his declining to be sworn as a witness, the judge told the jury that they must find for the plaintiff. *Manley* v. *Shaw*, Car. & M. 361.

Refusing to be Sworn.]—An accounting party subpœnaed for examination cannot refuse to be sworn because he has not received sufficient notice of the points on which he is to be examined, but after being sworn he may object to answer for this reason. *Meyrick* v. *James*, 46 L. J., Ch. 38.

A person having attended under a subpœna as a witness, but refusing to be sworn, ordered to attend to be examined or stand committed. *Hennegal* v. *Evance*, 12 Ves. 201.

After decree an affidavit was made by A. B., one of the defendants to the suit. A summons was taken out for A. B. to attend at chambers, where the accounts were being taken for cross-examination. A. B. attended, but was not cross-examined. Notice was given for his attendance before the examiner, but he was not served with a writ of subpœna, nor were any directions or order given by the judge or his chief clerk for the attendance of the witness before the examiner. A. B. having refused to be sworn:—Held, that after decree he was entitled to a writ of subpœna before appearing before the examiner for cross-examination, but that no special directions by the judge or chief clerk were necessary for transferring the examination from chambers to before the examiner. *Stebbing* v. *Atlee*, 26 L. J., Ch. 265; 2 Jur. (N.S.) 1161; 5 W. R. 109.

A party interested, being summoned to appear as a witness, is not justified in refusing to be sworn before the chief clerk, on the ground that he will not be able to have the assistance of counsel before the chief clerk, and ought therefore to be examined before the judge or the examiner. The proper course would be, after he has been sworn, to apply to the chief clerk for such purpose, and afterwards by way of appeal to the court. *Electric Telegraph Co. of Ireland, In re, Bunn, Ex parte*, 24 Beav. 127; 26 L. J., Ch. 614.

A plaintiff cannot, before he has given notice to the defendant of his intention to proceed, either by filing replication or moving for a decree, summon a witness before an examiner of the court to obtain evidence for the hearing. *Rendle* v. *Metropolitan Provincial Bank*, 36 L. J., Ch. 789; 16 L. T. 764; 15 W. R. 1068.

A plaintiff summoned a witness to appear before an examiner, but the witness, at the request of the defendants, objected to be sworn. The plaintiff afterwards obtained an order of course to set down that objection for argument as the demurrer of the witness, and on the same day filed a replication:—Held, that he had been guilty of an irregularity, and must pay the costs of the demurrer. *Ib.*

Evidence of Counsel.]—See *Kempshall* v. *Holland*, 14 R. 336—C. A.; and *Hickman* v. *Berens*, 64 L. J., Ch. 785; [1895] 2 Ch. 638; 12 R. 602; 73 L. T. 323—C. A.

4. EXAMINATION.

Objecting to Competency.]—It is not too late to object to the competency of a witness after he has been sworn in chief, but before he has been asked any questions on oath. *Yardley* v. *Arnold*, 10 M. & W. 141; 2 D. (N.S.) 311; Car. & M. 434; 6 Jur. 718; 11 L. J., Ex. 413.

An objection to the competency of a witness may be taken at any period of his examination, even though founded on facts elicited on cross-examination, and which were known from the beginning to the party taking the objection. *Jacobs* v. *Layhourn*, 11 M. & W. 685; 1 D. & L. 352; 12 L. J., Ex. 427; 7 Jur. 562.

The judge at nisi prius is a judge of fact as well as of law on a question of the competency of a witness arising on the voir dire; but his opinion on the facts is subject to review by the court, which will uphold his opinion where the evidence of disqualification is ambiguous, and the judge has admitted the witness. *Doe* d. *Norton* v. *Webster*, 12 A. & E. 442; 4 P. & D. 270; 9 L. J., Q. B. 373.

Two Defendants.] — Where an action was brought against two for negligence, who appeared by different attorneys, and were defended by different counsel:—Held, that one counsel only could be allowed to examine their joint witnesses in chief. *King* v. *Williamson*, 3 Stark. 162.

Application by Plaintiff to call Defendant after close of Defendant's Case.] — After a defendant's case was closed, the plaintiff's counsel asked leave to call as a witness one of the defendants who had not (as plaintiff's counsel assumed that he would) been called to support his own case. Counsel admitted that he had not been misled by anything falling from the other side:—Leave refused, as counsel had, in the exercise of his judgment, relied on the defendant being called in his own behalf; the court thinking that to grant the application would be making a precedent which might lead to laxity in the conduct of a plaintiff's case. *Barker* v. *Furlong*, [1891] 2 Ch. 172; 64 L. T. 411; 39 W. R. 621.

After Decree.]—Motion for leave to examine a witness after decree—refused with costs; such a special application not being justified by the 15 & 16 Vict. c. 86. *Howard* v. *Sewell*, 1 W. R. 124.

After Notice of Motion for Decree.] — After notice of motion for a decree, witnesses in chief cannot be examined. *Rheden* v. *Wesley*, 28 L. J., Ch. 797.

After Nonsuit.]—After a plaintiff has submitted to be nonsuited, the defendant's counsel cannot put further questions to any witness. *Jones* v. *Hall*, 2 Stark. 505.

Where Judge prepared to decide Issue.]—If a judge of first instance is prepared to decide in favour of a defendant or respondent without hearing his evidence, his counsel is entitled to insist that the evidence shall be heard before the decision is given. *Jacobson, Ex parte, Pincoffs, In re*, 21 Ch. D. 312; 48 L. T. 197; 31 W. R. 554.

If, however, the counsel does not exercise that right, but accepts the decision in his favour on his opponent's evidence, the Court of Appeal has still power to allow the evidence to be taken before reversing the decision. *Ib.*

Recalling.]—A judge has a discretion whether or not a witness shall be recalled after the party who called him has closed his case. *Adams* v. *Bankart*, 1 C. M. & R. 681; 5 Tyr. 425; 1 Gale, 48.

Permission to recall a witness is entirely within the discretion of the judge, and that discretion should be exercised with great caution. *Shedden* v. *Att.-Gen.*, L. R. 1 H. L., Sc. 470; 22 L. T. 631.

A witness who had answered some of the interrogatories, but refused to answer the others, was ordered to answer those interrogatories within four days, or stand committed. *Austin* v. *Prince*, 1 Sim. 348.

Witness previously examined allowed to be recalled for further examination. *Wood* v. *Scarth*, 3 Eq. R. 485; 24 L. J., Ch. 392; 3 W. R. 305.

Refusal to Answer — When Allowable.]—In an inquiry before the chief clerk directed by an administration decree, any person able to give information relating to the assets may be summoned, and is bound to attend before a special examiner, and to answer all questions properly put to him by the receiver having the conduct of the decree; but the witness so summoned may decline to answer any questions tending to shew his liability in a pending action commenced by the receiver against him. *Venables* v. *Schweitzer*, 42 L. J., Ch. 389; L. R. 16 Eq. 76; 28 L. T. 462; 21 W. R. 505.

A party to a suit who is subpœnaed as a witness cannot object to be sworn and examined on the ground that the only relevant questions which could be put to him are such as would tend to incriminate himself; but the opposite party has a right to insist on his being sworn and examined, and he must, if he thinks fit, claim his privilege not to answer such questions. *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

—— **Practice.**]—If a person under examination in chambers refuse to give a sufficient answer, the proper course is to apply to the judge to examine him personally, which the judge can do; and then, if he refuse to answer, he may be at once committed. The practice of waiting until the examinant has put in four insufficient answers, and then applying for an order that he may stand committed, if feasible at all, would involve very considerable delay, as the insufficiency of the several examinations must be certified by the chief clerk, and his certificates do not become final until twelve days after he has signed them, under the orders 47 to 52 of the 16th October, 1850. An order for committal will not be made after a third insufficient examination. *Hayward* v. *Hayward*, or *Price*, 1 Kay (App.), xxxi.; 23 L. J., Ch. 549; 3 Eq. R. 436; 2 W. R. 332.

Answer tending to Criminate — Duty of Judge.]—Where a witness refuses to answer a question put to him on the ground that his answer might tend to criminate himself, his mere statement of his belief that his answer will

have that effect is not enough to excuse him from answering, but the court must be satisfied from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But, if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. *Reg.* v. *Boyes* (1 B. & S. 311) approved and followed. *Reynolds, Ex parte, Reynolds In re*, 51 L. J., Ch. 756; 20 Ch. D. 294; 46 L. T. 508; 30 W. R. 651; 46 J. P. 533—C. A.

The 11 & 12 Vict. c. 42, s. 18, requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them. *Reg.* v. *Coote*, infra.

—— **Witness presumed to know Rules of Law.**]—The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed on the maxim, ignorantia juris non excusat. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553; 21 Cox, C.C. 557.

—— **Only Witness can take Advantage of.**]—The privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness alone, and neither party to the suit can take any advantage therefrom. *Reg.* v. *Kinglake*, 22 L. T. 335; 18 W. R. 805.

Where, therefore, a witness was called on the part of the Crown to prove bribery against the defendant, and he refused to give evidence on the ground that his evidence would tend to criminate himself, which objection was overruled by the judge, whereupon he gave his evidence:—Held, that the defendant could not afterwards object that such evidence was improperly received. *Ib.* See also *Thomas* v. *Newton*, M. & M. 48, n.; and *Rex* v. *Adey*, 1 M. & Rob. 94.

Refusal to Produce Documents.]—A witness being sworn, and having in court a document in his possession, is bound to produce it, if required, though he has not received any notice to produce, nor been served with a subpœna duces tecum. *Suelgrove* v. *Stevens*, Car. & M. 508. S. P., *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J., Ex. 225; 16 Jur. 569.

After Time.]—Notwithstanding the time for taking the evidence in a cause has expired, the court will allow the examination in chief of witnesses as to facts to which newly discovered documents relate, on being satisfied that such documents are of importance in the cause, that they are newly discovered, and that there has been no delay or laches in respect of them. *Ernest* v. *Vivian*, 2 N. R. 545.

Disclosing Evidence.]—Witnesses ought not to disclose their evidence to parties. *Cooth* v. *Jackson*, 6 Ves. 33.

Interpreter.]—Interpreter appointed on oath to witness. *Smith* v. *Kirkpatrick*, Dick. 103.

Under a commission for the examination of French witnesses who could not speak English, the depositions are not to be taken in French, but must be turned by the interpreter into English, and be so taken down and returned. *Belmore* v. *Anderson*, 2 Cox, 288; 4 Bro. C. C. 90.

Consent of a Welsh married woman, unable to speak English, taken by the judge in his private room through an interpreter sworn in the usual manner. *Lloyd, In re*, 2 W. R. 388.

5. Ordering out of Court.

In what Cases.]—A witness will not be ordered out of court during the reading of evidence on affidavit. *Penniman* v. *Hill*, 24 W. R. 245.

It is almost a matter of right for a party to have a witness go out of court while a legal argument is going on as to his evidence. *Reg.* v. *Murphy*, 8 Car. & P. 297.

Either party, at any period of a cause, has a right to require that the unexamined witnesses should be out of court. *Southey* v. *Nash*, 7 Car. & P. 632.

But parties to an action cannot be ordered out of the court as long as they behave with propriety. *Charnock* v. *Dewings*, 3 Car. & K. 378.

The application to have the witnesses ordered out of court is made to the discretion of the court, and the court may accede or not to the application, and direct in what manner it may be carried out. *Selfe* v. *Isaacson*, 1 F. & F. 194.

The plaintiff has a right to be in court to instruct counsel. *Ib.*

So, the attorney in the cause may remain, and afterwards be called as a witness. *Pomeroy* v. *Baddeley*, R. & M. 430. S. P., *Everett* v. *Lowdham*, 5 Car. & P. 91.

If on the trial of an information for a libel, where the defendant has pleaded a justification under 6 & 7 Vict. c. 96, s. 6, the witnesses are ordered out of court, the prosecutor must be out of court if he is intended to be called as a witness. *Reg.* v. *Newman*, 3 Car. & K. 252.

Semble, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during vivâ voce examination. *Dugard, Ex parte, Aughtie, In re*, 4 Deac. & C. 524.

Witness Disobeying Order.]—Though a judge has power to order witnesses out of court, and may fine a witness for disobeying this order:—Semble, he cannot lawfully refuse to permit the examination of the witness. *Cobbett* v. *Hudson*, 1 El. & Bl. 11; 22 L. J., Q. B. 11; 17 Jur. 481; 1 W. R. 54.

A judge has no right to exclude the parties to a cause from being present at the trial, although they are to be examined as witnesses; but if they remain in court after having been ordered to leave it, the judge may direct the jury to weigh the credit due to their testimony. *Constance* v. *Brain*, 2 Jur. (N.S.) 1145. S. P., *Chandler* v. *Horne*, 2 M. & Rob. 423.

If, however, a party leaves the court in obedience to the order of the judge, the court will not grant a new trial, for he ought to have stood upon his right to remain. *Ib.*

It is no ground for rejecting a witness's evidence that he remained in court after an order for all the witnesses to leave the court; it is merely matter of observation on his evidence.

Cook v. *Nethercote*, 6 Car. & P. 741; *Rex* v. *Colley*, M. & M. 329.

If a witness comes into court, and hears some of the evidence after the witnesses have been ordered out of court, it is entirely in the discretion of the judge whether he shall be examined or not: and this is so in the Exchequer as well as in other courts, the only difference in that court being confined to revenue cases, in which the rule is istrict, that such witness cannot be examined. *Thomas* v. *David*, 7 Car. & P. 350; *Parker* v. *M'Williams*, 6 Bing. 683; 4 M. & P. 480; 8 L. J. (o.s.) C. P. 276.

The witnesses had been all ordered out of court, but one of them came into court again, and heard the evidence of another witness. The witness who had so come back into court was allowed to be examined as to such facts only as had not been spoken to by any other witness. *Beaman* v. *Ellice*, 4 Car. & P. 585.

6. Refreshing Memory.

Nature of Assistance.]—A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection, any farther than as finding it entered in a book or a paper, the original book or paper must be produced. *Doe* d. *Church* v. *Perkins*, 3 Term Rep. 749.

Where a licence to trade had been lost, a witness was allowed to speak to the contents of the licence from memory, though he had made an entry of it in his memorandum-book for the private information of himself and the governor by whom it was issued. It was held the book itself was not evidence per se, but could be used by the witness to refresh his memory. *Kensington* v. *Inglis*, 8 East, 273; 9 R. R. 438.

In an action by acceptor against drawer of an accommodation bill, on his implied contract of indemnity, the plaintiff, in order to prove that a former bill, in renewal of which the bill in respect of which the action was brought was given, had been made payable at a particular place, called a banker's clerk, who, without producing the bank book, stated that he had ascertained the fact from an entry therein, in his own handwriting, but that, independently of that entry, he had no recollection whatever of the fact:—Held, that this was not evidence of such fact. *Beech* v. *Jones*, 5 C. B. 696.

At law a witness may refresh his memory from notes, as to dates and names, but he must not give the whole evidence from writing. *Anon.*, Ambl. 252.

The cashier of a banking house, upon his examination as a witness, stated, that he had ascertained, from the clearing-book kept by him, and in his own handwriting, that a certain sum of money was paid in notes of a particular description. The statement was founded solely on the witness's knowledge of the book and of his own handwriting, and not from any recollection of the fact deposed to, and the book was not produced:—Held, that, under these circumstances, the statement could not be received as evidence of the fact deposed to, though it might serve as a ground for further inquiry. *Dupuy* v. *Truman*, 2 Y. & Coll. C. C. 341.

A witness stated, that he believed from a reference to his books of account, and from inspection of a cheque and other documents which were produced to him at the time of his examination, that A., on a certain day, paid 500*l.* to B.:—Held that this was not sufficient evidence of payment. *Cator* v. *Croydon Canal Co.*, 4 Y. & Coll. 405. Affirmed 13 L. J., Ch. 89.

Notes—When made.]—A witness, for the purpose of refreshing his memory, may refer to entries in a book, which he did not write with his own hand, but which he regularly examined from time to time soon after they were written, and while the facts stated in them were fresh in his memory. *Burrough* v. *Martin*, 2 Camp. 112; 11 R. R. 679.

A witness has no right to refresh his memory with a copy of a paper made by himself six months after he made the original, although the original is proved to be so covered with figures that it is unintelligible, the original paper having been written at the time of the transaction. *Jones* v. *Stroud*, 2 Car. & P. 196; 31 R. R. 660.

A witness cannot refresh his memory by depositions which he did not make immediately after the occurrence of the facts he deposed to. *Whitfield* v. *Aland*, 2 Car. & K. 1015.

It is essential that a witness producing a memorandum, by which to refresh his memory as to a fact, should be enabled to swear positively to the truth of such fact, although he has no present independent recollection of it; but it is not essential that the memorandum should have been contemporary with the fact. *Hill* v. *Barry*, 7 Jur. 10.

By whom made.]—Entries made in a time-book of a colliery by the timekeeper may be referred to by the pay clerk to refresh his memory if the pay clerk has seen the entries at the time of the timekeeper calling them out at pay time, in order to prove that the pay clerk paid certain sums at the pay time. *Reg.* v. *Langton*, 46 L. J., M. C. 136; 2 Q. B. D. 296; 35 L. T. 527; 13 Cox, C. C. 345.

A clerk may refresh his memory as to the deliveries of goods, by looking at entries made in his presence by his master in a ledger, from entries made by the clerk in a waste-book, such entries in the ledger having been checked by the clerk while the facts were fresh in his memory, and the waste-book need not be produced. *Burton* v. *Plummer*, 4 N. & M. 315; 2 A. & E. 341; 4 L. J., K. B. 53.

So a witness may refresh his memory by reference to entries in a book, which entries were made by another person, under the witness's directions, from documents written by the witness at the time of the transactions, and which entries were regularly compared by the witness with the original memoranda. *Talbot de Malahide (Lord)* v. *Cusack*, 17 Ir. C. L. R. 213; 12 L. T. 678.

A ship's log, written by the mate who is abroad, may be used to refresh the memory of the captain, who read it about a week after it was written. *Anderson* v. *Whalley*, 3 Car. & K. 54.

A person was in the habit from time to time, and within two hours of their occurrence, of reporting to a police inspector proceedings that had taken place at certain meetings where a treasonable conspiracy was carried on. The inspector took down the purport of the report from his dictation, but not in the very words he used. When finished, some of the reports were read over by the witness, and some were read to him, and all were signed by him. Held, that on examination he might use these reports for the purpose of refreshing his memory. *Reg.* v. *Mullens*, 3 Cox, C. C. 526.

Newspaper Report.]—A witness may refresh his memory as to the day on which certain proceedings at which he was present took place, by referring to a newspaper containing a report of those proceedings, and which he read at the time the facts were fresh in his recollection, and then knew that they were correctly reported. *Dyer* v. *Best*, 4 H. & C. 189.

An editor of a newspaper swore that A. was the writer of an article which had appeared in that paper many years before, and that the MS. had been lost. A. stated that he had been in the habit of writing such articles for the newspaper, but that he had no recollection of having sent the particular article referred to. He swore, however, that all the statements made in the articles he did send were true:—Held, that the newspaper might be put into A.'s hand, in order to refresh his memory; and that he might be asked whether, looking at the article, he had any doubt that the fact was as therein stated. *Topham* v. *M'Gregor*, 1 Car. & K. 320.

Surveyor's Report.]—A surveyor made a survey of a report which he furnished to his employers; being afterwards called as a witness, he produced a printed copy of this report, on the margin of which he had two days before, to assist him in giving his explanations as a witness, made a few dottings. The report had been made up from his original notes, of which it was, in substance, though not in words, a transcript:—Held, that he might look at this printed copy of the report to refresh his memory. *Horne* v. *M'Kenzie*, 6 Cl. & F. 628; Macl. & R. 977.

Other Proceedings.]—A witness cannot have the proceedings in another court put into his hands for the purpose of refreshing his memory as to the matters on which he is giving evidence. *Halliday* v. *Holgate*, 17 L. T. 18.

A witness may refresh his memory from the notes of counsel, taken at a former trial. *Lawes* v. *Reed*, 2 Lewin, C. C. 152.

Receipt not Stamped.]—In an action against assignees to recover money wrongfully paid to them, the debt having been previously paid to the bankrupt, it appeared that an entry was made in the plaintiff's book by the bankrupt, i.e. "R. L." the bankrupt's initials, "26*l.* Maugham," the plaintiff's name:—Held, that the bankrupt might speak from his recollection of the entry in the book, as having refreshed his memory, though the book could not be used as evidence for want of a receipt stamp. *Maugham* v. *Hubbard*, 2 M. & Ry. 5; 8 B. & C. 14; 6 L. J. (o.s.) K. B. 229.

Where an agent who had given a receipt for money afterwards became blind, such receipt, although unstamped, was allowed to be read over to him in court, for the purpose of refreshing his memory. *Catt* v. *Howard*, 3 Stark, 3; 23 R. R. 751. S. P., *Rambert* v. *Cohen*, 4 Esp. 213; 6 R. R. 854.

Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such acknowledgment in writing cannot be given in evidence per se, in respect of the cash items, amounting to above 40*s.* in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that, upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the account. *Jacob* v. *Lindsay*, 1 East. 460.

Attention Directed to Items of Account.]—The rule that in cross-examination upon an account, notice of the items to which the cross-examination will be directed must be given to the party bringing in the account, applies to the cross-examination of a party seeking to charge by his account as well as to the case of a merely accounting party. *Bates* v. *Eley*, 45 L. J., Ch. 270; 1 Ch. D. 473; 34 L. T. 50; 24 W. R. 424.

Right of Counsel to Inspect.]—On cross-examination of a witness, the cross-examining counsel is not entitled to inspect the whole of a diary used by the witness to assist his memory, but only such parts as refer to the subject-matter of the suit. *Burgess* v. *Bennett*, 20 W. R. 720.

When on cross-examination of a witness for the plaintiff, the defendant's counsel puts documents into his hands, and proves out of his mouth that they are in the plaintiff's handwriting, the plaintiff's counsel has a right to see them at once, for the purposes of cross-examining on them and identifying them. *Peck* v. *Peck*, 21 L. T. 670; 18 W. R. 295.

If a witness refreshes his memory from entries in a book, the opposite counsel may cross-examine on those entries, without making them his evidence, and the jury may see the entries if they wish to do so; but if the opposite counsel cross-examines as to other entries in the same book, he makes them his evidence. *Gregory* v. *Tavernor*, 6 Car. & P. 281. S. P., *Lloyd* v. *Freshfield*, 2 Car. & P. 325.

Where a witness refreshes his memory with respect to a particular fact, by a memorandum, it must be produced. *Howard* v. *Canfield*, 5 D. P. C. 417; W. W. & D. 78; 1 Jur. 71.

If a paper is put into the hands of a witness to refresh his memory, the counsel on the opposite side has a right to see it; but if it is merely given to him to prove a handwriting on it, he has not. *Sinclair* v. *Stevenson*, 1 Car. & P. 582; 2 Bing. 514; 10 Moore, 46.

If the counsel for the defendant in cross-examination puts a paper into the witness's hand to refresh his memory, the opposite counsel has a right to look at it, without being bound to read it in evidence; and the opposite counsel may also ask the witness when it was written without being bound to put it in. *Rex* v. *Ramsden*, 2 Car. & P. 603; 31 R. R. 703.

Where a witness has documents handed to him to depose to the handwriting or merely to refresh his memory, the other side are not entitled to inspection of such documents, but only of those documents upon which the witness is examined extra those points. In the absence of anything to shew what is the practice at common law in the case of a witness going abroad, referred to in the 31st section of 15 & 16 Vict. c. 86, the ordinary rule of evidence at a trial is adhered to, and which is expressed in the above propositions. *Lord* v. *Colvin*, 5 De G. M. & G. 47; 2 Drew. 205; 23 L. J., Ch. 469; 18 Jur. 253; 2 W. R. 298.

7. Opinion.

a. In General.

Effect of Opinion.]—When a skilled witness says that in the course of his duty he formed a

particular opinion on certain facts, he may further be asked in examination in chief how he went on to act upon that opinion. *Stephenson* v. *Tyne River Improvement Commissioners*, 17 W. R. 590.

Lunacy.]—Where an accused person is supposed to be insane, a medical man, who has been in court and heard the evidence, may be asked as a matter of science, whether the facts stated by the witnesses, supposing them to be true, shew a state of mind incapable of distinguishing between right and wrong. *Reg.* v. *M'Naghten*, 10 Cl. & F. 200; 8 Scott (N.R.) 595; 1 Car. & K. 130.

See also CRIMINAL LAW.

So, too, the opinion of a testator's friends as to his sanity, contained in letters written to him in his lifetime, are admissible. *Wright* v. *Tatham*, 7 A. & E. 313; 2 Nev. & P. 305.

Nuisance.]—In an action for a nuisance, an architect acquainted with the locality may be asked, if the nuisance depreciated the value of the houses in the neighbourhood. *Gauntlett* v. *Whitworth*, 2 Car. & K. 720.

Course of Business.]—A London stockbroker is a competent witness as to the course of business of London bankers. *Adams* v. *Peters*, 2 Car. & K. 723.

Where a deficit appeared on the accounts of a grocer's assistant, another grocer having had eleven years' experience in a shop in a similar district is admissible as an expert to shew how the deficit might have arisen from losses incidental to the trade of a retail grocer, notwithstanding that his course of dealing was in some respects dissimilar from that pursued in the shop in question. *M'Fadden* v. *Murdock*, 15 W. R. 1079.

Course of Nature.]—Where the question is, whether a bank, which had been erected for the purpose of preventing the overflowing of the sea, had caused the choking up of a harbour, the opinions of scientific men, as to the effect of such an embankment upon the harbour, are admissible. *Folkes* v. *Chadd*, 3 Dougl. 157.

Art.]—Seal engravers may be called to prove the difference between a genuine impression and one supposed to be false. *Ib.*

The opinion of an artist in painting is evidence as to the genuineness of a picture. *Ib.*

State of Will.]—On an indictment for uttering a forged will, which, together with writings in support of it, it was suggested had been written over pencil marks which had been rubbed out, the evidence of an engraver who had examined the paper with a mirror and traced the pencil marks, is admissible on the part of the prosecution. *Reg.* v. *Williams*, 8 Car. & P. 434.

Insurance.]—The opinion of one conversant in the business of insurance, whether the communication of particular facts would have enhanced the premium, is admissible; but he cannot be asked what his conduct would have been in the particular case. *Berthon* v. *Loughman*, 2 Stark. 258.

A merchant at Sydney shipped goods for England on board the ship C., and, by another that sailed after her, wrote to an agent in England, and desired him if he received the letter before the C. arrived, to wait thirty days in order to give every chance for her arrival, and then effect an insurance on the goods. The letter was received, and the agent having waited more than thirty days effected an insurance through the intervention of a broker, who told the underwriters when the C. sailed, and when the letter ordering the insurance was written, but did not state when it was received nor the order to wait thirty days after the receipt of it, both affecting the insurance. The C. never arrived. The assured brought an action on the policy against the insurers, but failed on account of the suppression of facts by the broker. In an action by the assured against the broker, for negligence in effecting the policy:—Held, that the evidence of underwriters was not admissible to shew that in their opinion the matters not communicated were material. *Campbell* v. *Rickards*, 5 B. & Ad. 840; 2 N. & M. 542; 2 L. J., K. B. 204.

A broker, having effected policies of insurance on goods of R., R. putting into his hands a letter from the supercargo of the ship containing the goods, told the broker the policies were to be altered, and he must do the needful. In an action against him for negligence in this matter:—Held, that brokers might be called to say, looking at the policies, the invoices of the goods, and the letter, what alterations in the policies a skilful broker ought to have made. *Chapman* v. *Walton*, 10 Bing. 57; 3 M. & Scott, 389; 2 L. J., C. P. 213.

Drawing of Patent.]—On a scire facias to repeal a patent for a machine, on the ground that it is not new, to prove that fact, it is allowable to put in the hands of a witness, who has constructed a machine for the same purpose, a drawing not made by himself, and ask him whether he has such a recollection of the machine he made as to be able to say that such is a correct drawing of it. *Rex* v. *Hadden*, 2 Car. & P. 184; 31 R. R. 658.

Professional Character.]—In an action for a libel, imputing to the plaintiff, a physician, improper treatment of a patient, and that another physician had said that the plaintiff's conduct had been such that no medical man of respectability would consult with him, and that, by so doing, he had honourably discharged his duty to his medical brethren:—Held, that a medical man, having been called as a witness, could not be asked whether he would meet the plaintiff in consultation, or whether the physician who had refused to consult with him had honourably discharged his duty to the medical profession. *Ramadge* v. *Ryan*, 2 M. & Scott, 421; 9 Bing. 333; 2 L. J., C. P. 7.

In an action upon a policy of insurance as for a total loss, the captain having abandoned the vessel, the defence was, that there had not been a total loss. The captain was called for the plaintiff, and was cross-examined as to alleged habits of intoxication, and as to his state at the time of the abandonment. A witness for the defendant was asked "whether from what he saw of the captain's habits, in A., before the voyage, he could form any judgment as to his general habits of sobriety or intoxication":—Held, that the question was admissible, the inquiry whether the captain formed a correct judgment under the circumstances being relevant to the issue. *Alcock* v. *Royal Exchange Assurance Corporation*, 13 Q. B. 292; 18 L. J., Q. B. 121; 13 Jur. 445.

A witness for the plaintiff stated on cross-examination, that, by the rules of the Jockey Club, the owner of the horse might bet against his own horse, and then withdraw him:—Held, that the witness might be asked, on re-examination, whether he did not consider such conduct dishonourable. *Greville* v. *Chapman*, 5 Q. B. 731; D. & M. 553; 13 L. J., Q. B. 172.

Meaning of Words.]—In an action for words spoken or written, the ordinary sense of those words is to be taken as the meaning of the speaker or writer, unless something is shewn to have taken place which may give a peculiar character to the expressions used. In the absence of any such evidence, a witness cannot be asked the question, "What did you understand by the words?" The proper course to be adopted is, first, to lay the foundation by giving such evidence, and then the question becomes admissible. *Daines* v. *Hartley*, 3 Ex. 200; 12 Jur. 1093.

Signature.]—A person accustomed to ancient manuscripts, saying that, by a careful examination of certain signatures, he had, in his mind, such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shewn to him was or was not written by the same person, is a competent witness. *Crawford and Lindsay Peerages*, 2 H. L. Cas. 557.

Evidence of witnesses who have seen letters written by the person whose handwriting is in dispute, is admissible, though they may not have seen him actually write. *Doe* v. *Suckermore*, 5 A. & E. 705.

Foreign Documents.]—It is not competent to a witness, who is called to interpret a foreign document, to give an opinion as to its construction; that is for the court. *Stearine and Kaarsen Fabrick Gonda Co.* v. *Hentzmann*, 17 C. B. (N.S.) 56.

Foreign Law.]—The evidence of a person whose only knowledge of the laws of a foreign country is derived from having studied them, cannot be received in proof of the operation and effect of such laws. *Bonelli, In goods of*, 45 L. J., P. 42; 1 P. D. 69; 34 L. T. 32; 24 W. R. 255.

A witness, who describes himself as a "certified special pleader," and familiar with Italian law, is incompetent to prove a point of Italian law. *Ib.*

An English barrister practising in Canadian appeals before the privy council, is not competent to give evidence as an expert as to the validity, according to the law of Canada, of a marriage solemnised in that country. *Cartwright* v. *Cartwright*, 26 W. R. 684.

A professional or an official witness, giving evidence as to a foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence. *Sussex Peerage*, 11 Cl. & F. 85; 8 Jur. 793.

A Roman Catholic bishop, holding the office of coadjutor to a vicar-apostolic in this country, is, in virtue of that office, to be considered as a person skilled in the matrimonial law of Rome, and, therefore, admissible as a witness to prove that law. *Ib.*

Witnesses, in giving their testimony on a foreign law, may, if they think fit, refer to laws or to treaties, for the purpose of aiding their memory upon the subject of their examination; but, in general, it is the testimony of the witness, and not the authority of the law or of the text writer, detached from the testimony of the witness, which is to influence the judge. *Nelson (Earl)* v. *Bridport (Lord)*, 8 Beav. 527; 10 Jur. 871.

A party is not bound to produce a written law or decree which his witness, in proving a foreign law, refers to. *Ib.*

Witnesses, in proving a foreign law, referred to certain passages in law books:—Held, that this did not give the opposite party a right, without further proof, of reading any other passages from the same works. *Ib.*

And see ante, cols. 610–613.

Ecclesiastical Law.]—Where a question is to be decided upon the principles of an ecclesiastical court, a court of equity will have a case stated for the opinion of civilians. *Hurst* v. *Beach* (5 Madd. 356; 21 R. R. 304) followed in that respect. *Sayre* v. *Cramp*, 2 W. R. 438.

Surveyor.]—Evidence, as to value, of witnesses stating opinions formed upon a loose recollection of circumstances, at a distant period, not to be put in competition with that of surveyors actually employed at the time to ascertain the value, and where no bad motive can be ascribed, so as to affect a lease sought to be set aside for undervalue. *Att.-Gen.* v. *Cross*, 3 Mer. 542; 17 R. R. 121.

Accountant.]—The court refused to receive at the hearing of a cause the deposition of an accountant containing a statement of the result of his examination of partnership account-books, where the books on which he made his statement were not in evidence; but, semble, that if the books had been in evidence, the deposition of the accountant of the result of his examination of them would be receivable as the evidence of a person of skill. *Johnson* v. *Kershaw*, 1 De G. & Sm. 260; 11 Jur. 553.

Actuary.]—A person who, though not an actuary, is acquainted with the business of life insurance, is competent to give evidence as to the average and probable duration of lives and the present value of annuities, as stated by the tables and accepted by life insurance companies. *Rowley* v. *L. & N. W. Ry.*, 42 L. J., Ex. 153; L. R. 8 Ex. 221; 29 L. T. 180; 21 W. R. 869—Ex. Ch.

Not as to Merits.]—Where scientific men are called as witnesses, they are not entitled to give their opinions as to the merits of the case, but only as to the facts as proved at the trial. *Jameson* v. *Drinkald*, 12 Moore, 148.

b. As to Handwriting.

Document put into Hands of Witness.]—If a paper is put into the hands of a witness to refresh his memory, the counsel on the opposite side have a right to see it; but if it is merely given to him to prove a handwriting, they have not. *Sinclair* v. *Stevenson*, 1 Car. & P. 582; 2 Bing. 514; 10 Moore, 46.

Skilled Witness.]—Any person who is "skilled" in handwriting may give evidence as to the handwriting of a document, although

he may not be "skilled" in the way of his business or profession. *Reg.* v. *Silverlock*, 63 L. J., M. C. 233; [1894] 2 Q. B. 766; 10 R. 431; 72 L. T. 298; 43 W. R. 14; 18 Cox, C. C. 104; 58 J. P. 788.

Nature of Knowledge.]—Evidence of witnesses who have seen letters written by the person whose handwriting is in dispute, is admissible, though they may not have seen him actually write. *Doe* d. *Sackermore*, 5 A. & E. 705.

A witness formed his opinion of the handwriting of a party from having observed it signed to an affidavit used in the cause (on a motion to postpone) by the counsel for the party against whom it was proposed to be proved:—Held, sufficient. *Smith* v. *Sainsbury*, 5 Car. & P. 196.

If a person prove that he has never seen the defendant write, and has never corresponded with him, but has seen papers in the master's office which the attorney of the party admitted to be of his handwriting, and the person has acted on these papers: this is not such a knowledge of the party's handwriting as will enable the person to prove a written document alleged to be in his handwriting. *Greaves* v. *Hunter*, 2 Car. & P. 477.

Handwriting cannot be proved by a person who has seen letters franked by defendant, but has never corresponded with him or seen him write. Quære, how far opinion as to handwriting being genuine is evidence. *Carey* v. *Pitt*, Peake Ad. C. 130; 4 R. R. 895.

An issue having been directed to satisfy the court as to the forgery of a signature to a warrant of attorney, a verdict was found, establishing the genuineness of it, upon evidence satisfactory to the judge who tried the cause, and to the court upon his report of it. In the course of the trial, an inspector of franks, who had never seen the party write, was called to prove, from his knowledge of handwriting in general, that the signature in question was not genuine, but an imitation; this evidence having been rejected, the court refused to disturb the verdict, on the ground that such evidence, even if admissible, was entitled to very little weight; and that the issue being to satisfy the court, a new trial ought not to be granted, unless for the rejection of evidence which might possibly have altered the verdict. Quære, whether such evidence be admissible at all. *Gurney* v. *Langlands*, 5 B. & Ald. 330; 24 R. R. 396.

Rule as to proof of handwriting, the witness must have seen the party write, and swear to his belief that the writing produced is his. *Eagleton* v. *Kingston*, 8 Ves. 473.

If the witness will not swear to his belief of the handwriting, but says that he thinks it like, the Lord Chancellor of opinion this is not evidence. *Id.* 476.

A witness called to prove handwriting should form his judgment from the handwriting, not from extrinsic circumstances. *Mendes Da Costa* v. *Pym*, Peake Ad. C. 144.

In an action on a joint and several promissory note against A., B. and C., the only evidence as to the handwriting of C. was a retainer to the attorney to defend the action, bearing the signatures of all three, upon which the attorney had acted, without having ever seen C., or being acquainted with his handwriting:—Held, that there was no evidence of the handwriting of C. *Drew* v. *Prior*, 5 Man. & G. 264.

On a claim of peerage, a family pedigree from the proper custody being offered in evidence, and, in order to prove handwriting, the opinion of an inspector of franks and official correspondence, forming a judgment of the character of handwriting from inspection of other documents, without immediate comparison with the one in question:—Held, inadmissible; but that of the claimant's family solicitor, who had acquired a familiar knowledge of the ancestor's handwriting, from having, in a long course of his business for the claimant's family, examined deeds, &c., signed by the ancestor, and coming to the claimant as muniments of his title to estates descending to him, received. *Fitzwalter Peerage*, 10 Cl. & F. 193.

The clerk of a solicitor, who was the solicitor of the mortgagor and mortgagee in the creation of the security, and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of preparing the mortgage deed, which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document (which proof alone does not make it evidence), but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction, and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. *Chant* v. *Brown*, 9 Hare, 790; 16 Jur. 606.

As to the necessary proof of a party's handwriting. *Randolph* v. *Gordon*, 5 Price, 312; 19 R. R. 633.

Writing of Surname.]—The signature of a party to a bill of exchange may be proved by a person who has seen him write his surname only. *Lewis* v. *Sapio*, M. & M. 39.

From one Occasion.]—In an action on a foreign bill to prove the handwriting of the defendant, it is evidence to go to the jury, that a person, who saw him write once, thinks the handwriting like, though he has no belief on the subject; but, if he had never seen the party write, mere comparison of hands would not be admissible. *Garrells* v. *Alexander*, 4 Esp. 37.

If a witness, who is called to prove a person's handwriting, states that he has seen the person sign his name once, and believes the handwriting to be his, that is evidence of the handwriting, though slight, to go to the jury. *Willman* v. *Worrall*, 8 Car. & P. 380.

From Correspondence.]—If a party has received letters from another, and has acted on them, it is sufficient to justify him in swearing as to his belief of the handwriting of such person. *Thorpe* v. *Gisburne*, 2 Car. & P. 21.

A witness who had never seen the defendant, but had corresponded with a person by the same name, living at Plymouth Dock, where the defendant resided (and it appeared that there was no other person of that name there), stated that the handwriting of certain letters was that of the person with whom he had corresponded:—Held, sufficient evidence to admit the letters to be read against the defendant. *Harrington* v. *Fry*, R. & M. 90; 1 Car. & P. 289; 2 Bing. 179; 9 Moore, 344.

A clerk who has seen numerous letters addressed by a party to his employer, and has acted on those letters, may prove the handwriting of the party. *Rex* v. *Slaney*, 5 Car. & P. 213.

To prove the handwriting of a defendant, named F. W., to a letter, a clerk of a banker stated that a person of that name kept an account with the banker and had signed his name in a book, and drawn cheques which the witness had paid, and that he believed the letter to be of the handwriting of that person. The defendant's attorney proved that the defendant had desired him to address him at No. 12, Tower-street, and another witness proved that he had written two letters to "Mr. F. W., 12, Tower-street," and had received answers, and that he believed the letter offered in evidence to be of the same handwriting as the answers he had received to his letters :—Held, sufficient proof that the letter was in the defendant's handwriting. *Murieta* v. *Wolfhagen*, 2 Car. & K. 744.

—— **Answer to Letter.**]—Mr. S., the managing clerk of the plaintiff's attorney, wrote a letter to the defendant, addressed to him at his residence, which letter was proved to have been put into the post. Mr. S. proved that he received an answer to his letter :—Held, that the letter thus received in answer was admissible, without proof of the defendant's handwriting. *Orenston* v. *Wilson*, 2 Car. & K. 1.

Ancient Manuscripts.]—A person accustomed to ancient manuscripts, saying that, by a careful examination of certain signatures he had, in his mind, such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shewn to him was or was not written by the same person, is a competent witness. *Crawford and Lindsay Peerages*, 2 H. L. Cas. 557.

Where a person had been dead a great number of years, whose handwriting was to be proved, it was done by shewing the similarity of the handwriting in question to the handwriting of his will. *Morewood* v. *Wood*, 14 East, 328, n. ; 12 R. R. 537. S. P., *Roe* d. *Brune* v. *Rawlings*, 7 East, 282 ; 3 Smith, 254 ; 8 R. R. 632.

A witness may prove handwriting although he never saw the party write, if the antiquity of the writing renders that impossible, by swearing that it corresponded with other ancient documents acknowledged to be genuine. *Gould* v. *Jones*, 1 W. Bl. 384.

To prove that a paper was the handwriting of a deceased rector, whose name it bore, it is not sufficient to produce many of the returns to the spiritual court, made in the time of that rector, and signed with his name. *Brookbard* v. *Woodley*, Peake, 21, n.

The handwriting of an account paper may be proved by the opinion of a witness, who has compared it for the first time with other authentic old writings at the time of the trial. *Doe* d. *Tilman* v. *Turver*, R. & M. 141.

After thirty years, handwriting of letter need not necessarily be proved when letter affords intrinsic evidence of its authenticity. Where there is no direction to such letter, primâ facie it must be intended to have been written to the party among whose papers it was found. *Fenwick* v. *Reed*, 6 Madd. 7.

Comparison of Handwriting—Since the C. L. P. Act, 1854, s. 27.]—In an action on a bill, the acceptance being denied and alleged to be a forgery, documents, such as receipts, not relevant to the issue, but proved to be in the handwriting of the defendant, were allowed to be put in for the purpose of comparison. *Birch* v. *Ridgway*, 1 F. & F. 270.

On the cross-examination of an attesting witness to a codicil, he denying that it was in his handwriting, other documents admitted by him to be in his writing were allowed to be submitted to the jury for the purpose of comparison of handwriting. *Cresswell* v. *Jackson*, 2 F. & F. 24.

In an action on a bill against the acceptor, there was a plea traversing the acceptance. No evidence was offered by the plaintiff on this point, but the bill and a letter were produced at the trial in accordance with a notice by the defendant to produce, in which notice the bill was described as the bill accepted by the defendant, and the letter as being a letter of the defendant's :—Held, that as the jury had an opportunity of comparing the handwriting if they had thought it necessary, there was some evidence of the defendant's handwriting. *Beard* v. *Jackson*, 24 W. R. 159.

The question being whether a memorandum was in the handwriting of a defendant, and he, in the course of cross-examination, having been got to write something on a piece of paper, this was allowed to be shewn to the jury for the purpose of comparison of handwriting. *Cobbett* v. *Kilminster*, 4 F. & F. 490.

In a suit involving a question of disputed handwriting the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the C. L. P. Act, 1854, s. 27, disputed writings may be compared only with writings "proved to the satisfaction of the judge to be genuine," and this proof can only be furnished at the hearing. *Wilson* v. *Thornbury*, 43 L. J., Ch. 356 ; L. R. 17 Eq. 517.

—— **Before Act.**]—Evidence of handwriting by comparison is inadmissible, except either where the writing acknowledged to be genuine is already in evidence in the cause, or the disputed writing is an ancient document. These exceptions are of necessity. *Doe* d. *Perry* v. *Newton*, 1 N. & P. 1 ; 5 A. & E. 514 ; W. W. & D. 403 ; 6 L. J., K. B. 1.

A person accustomed to ancient manuscripts, saying that by a careful examination of certain signatures he had in his mind such a distinct knowledge of the handwriting as to be able to say, without immediate reference to them, whether any letter shewn to him was or was not written by the same person, is a competent witness. *Crawford and Lindsay Peerages*, 2 H. L. Cas. 557.

A document purported to be a certificate of a marriage at Bristol, in 1761, written and signed by W. D., curate of St. James's :—Held, that the handwriting of W. D. might be proved by the opinion of a witness, formed by comparing it with various signatures of W. D. in the original register of St. James's, by which he appeared to be the officiating curate in 1761, without any proof of his death, or of search for witnesses who might have seen him write. *Doe* d. *Jenkins* v. *Davies*, 10 Q. B. 314 ; 16 L. J., Q. B. 218 ; 11 Jur. 607.

In an action of libel for having charged the plaintiff with having written a libel on the

defendant, to which he pleaded a justification that the plaintiff had written the libel, it appeared that in the libel thus alleged to have been written by the plaintiff, the name of the defendant was spelt in a peculiar way:—Held, that, in order to prove that the plaintiff wrote that libel, other documents written by him in which the name was so spelt were receivable. *Brooks* v. *Tichborne*, 5 Ex. 929; 20 L. J., Ex. 69; 14 Jur. 1122.

If a witness who is called to disprove the signature of the defendant to an acceptance, states that he believes the signature is not that of the defendant, and gives as his reason for that belief, the absence or presence of certain peculiarities, which he says do or do not exist in the genuine signatures of the defendant, the opposite counsel may put into his hand a paper unconnected with the cause, and ask if, in his opinion, that contains a genuine signature of the defendant; and, if he answers in the affirmative, he may then be asked, "Does the signature in this paper, which you say is genuine, contain the same peculiarities, or want the same peculiarities (as the case may be), which you have before stated as your reasons that the signature in dispute is not genuine?" *Young* v. *Honner*, 1 Car. & K. 51; 2 M. & Rob. 536.

Evidence as to handwriting formed by the witness called on an immediate comparison at the trial, is inadmissible. *Doe* d. *Mudd* v. *Suckermore*, 2 N. & P. 16; 5 A. & E. 703; W. W. & D. 405; 7 L. J., Q. B. 33.

If the witness called for the plaintiff, in his cross-examination, admit that a letter was written by him with the authority of the plaintiff, but deny that a second letter is of his handwriting, the defendant's counsel will not be allowed to show both letters to another witness called for the plaintiff, and ask him whether he does not believe that the second letter was written by the same person who wrote the first. *Clermont* v. *Tullidge*, 4 Car. & P. 1.

A clerk of the post-office, accustomed to inspect franks for the detection of forgeries, may be examined as a witness to prove that the handwriting of an instrument is an imitated and not a natural hand, and also to prove that two writings, suspected to be imitated hands, were written by the same person. *Goodtitle* d. *Revett* v. *Braham*, 4 Term Rep. 497.

The rule that comparison of handwriting is not evidence, does not extend so far as to prevent the court or jury from instituting a comparison between two documents of which primâ facie evidence has been given. *Griffith* v. *Williams*, 1 C. & J. 47.

A jury may judge of a disputed handwriting, by comparing it with other documents in evidence for other purposes, and admitted to be the handwriting of the party. *Solita* v. *Yarrow*, 1 M. & Rob. 133. See also *Rex* v. *Morgan*, *Ib. n.*

If, in an action on a bill of exchange, the question be whether the acceptance be that of defendant, the jury will be allowed to look at letters written by defendant on the subject of the bill, and which are in evidence in the cause. *Eaton* v. *Gervis*, 8 Car. & P. 273.

Evidence of rector's handwriting of receipts by comparison of his signature in registrar's book (the entries in which it was his duty to sign):—Held, sufficient. *Taylor* v. *Cook*, 8 Price, 650.

Comparison of handwriting, though lately admitted as evidence, if confirmed by the contents of correspondence, refused in the instance of a single letter for the purpose of commitment. *Wade* v. *Broughton*, 3 Ves. & B. 172.

The evidence of "experts," as to the age of the document and the character of the handwriting, may in some cases be valuable. *Crouch* v. *Hooper*, 16 Beav. 182.

—— **With Document not in Evidence.**]—On the trial of an action on a promissory note, in which the question is whether defendant had endorsed it or not, plaintiff's counsel will not be allowed to give in evidence a number of other notes bearing defendant's undoubted signature, with a view of having the jury compare the handwriting of those signatures with the indorsement of the note in question, and the jury will not be allowed to compare anything with the endorsement except documents otherwise evidence in the case. *Bromage* v. *Rice*, 7 Car. & P. 548.

On a question as to the genuineness of handwriting, a witness who has been examined as to his opinion and belief respecting it, cannot on cross-examination be asked his opinion as to the genuineness of another document in the handwriting of the supposed writer, such document not being in evidence for other purposes. *Griffits* v. *Ivory*, 11 Ad. & E. 322; 3 P. & D. 179; 9 L. J., Q. B. 49.

A witness for defendants in an action on a bond, having sworn that the attestation to the bond was not in A.'s handwriting, plaintiff's counsel put into his hand a paper not in evidence in the cause, which he also stated was not written by A.:—Held, that plaintiff could not prove, for the purpose of contradicting the witness, that the paper was actually written by A. *Hughes* v. *Rogers*, 8 M. & W. 123; 10 L. J., Ex. 238.

Signature — Deed appointing Trustees.] — A married woman, under a power prescribing no particular form, appoints new trustees, and the fund vested in the old trustees having been paid into court under the Trustee Relief Act, petitions for payment out to the new trustees. Upon this petition the question arises, whether the proof of her signature by a stranger who has seen her write is sufficient under s. 26 of the Common Law Procedure Act, 1854:—Held, that the application being for payment out of the fund, and not to carry into effect the instrument, the act did not apply; and that, inasmuch as the power did not prescribe any special form, the proof was sufficient. *Hall's Trust, In re*, 9 W. R. 776.

Signature of Marksmen.] — An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments. *George* v. *Surrey*, M. & M. 516; 31 R. R. 755.

Where Witness becomes Blind.]—A witness, in his deposition taken in a suit in equity, swore to the handwriting of a particular document, and afterwards became blind: his deposition was read in his lifetime, on the trial of an issue to prove the handwriting. *Lynn* v. *Robson*, 1 L. J., (o.s.) Ch. 88.

Conflicting Evidence.]—Where the genuineness of handwriting to a deed is contested in chancery, if an affidavit is produced from the sole attesting witness alive that he knew the

persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits. *Newton* v. *Ricketts*, 9 H. L. Cas. 262; 31 L. J., Ch. 247; 7 Jur. (N.S.) 952; 5 L. T. 62; 10 W. R. 1.

What Documents.]—Letters and papers of any class may be proved as to the handwriting viva voce, and the witness cannot be cross-examined at the hearing; but, if there be any doubt, an opportunity may be given by the court to see if he has sworn truly. *Ellis* v. *Deane*, 3 Moll. 63.

Effect of Offer to Compromise.]—Assumpsit against the drawer and indorser of a bill of exchange. Plea denying the drawing and indorsement. At the trial a witness for plaintiff stated that he had received letters from defendant's place of business in the same handwriting as that in which the bill was drawn and indorsed. An offer to defendant to compromise after action brought was also proved. For the defence, three witnesses swore that the writing was not defendant's:—Held, that though the witnesses for the defence rebutted the inference that the writing was defendant's, yet the offer to compromise was evidence recognising the handwriting upon the bill, whether that of the defendant or of some other person, sufficient to go to a jury. *Harding* v. *Jones*, 1 Tyrw. & G. 135.

In Criminal Case.]—The same proof of a prisoner's handwriting is allowed in a criminal as in a civil case. *Rex* v. *Hensey*, 2 Ken. 368; 1 Burr. 643.

In Ecclesiastical Court.]—In the ecclesiastical courts comparison of handwriting is admissible evidence. *Lock* v. *Denner*, 1 Add. 360.

8. Privilege.

a. Legal Professional Confidence.

i. *Counsel.*

In what Cases.]—A barrister cannot be called as a witness to prove what was stated by him on a motion before the court. *Curry* v. *Walter*, 1 Esp. 456; 5 R. R. 743.

A party will not be allowed to go into evidence of the time when the counsel for the opposite party was retained, either by calling the counsel's clerk, or otherwise, as the retaining of counsel falls within the rules respecting confidential communications. *Foote* v. *Hayne*, 1 Car. & P. 545; R. & M. 165; 28 R. R. 788.

A statement made by counsel at judge's chambers in the presence of his client's attorney or the attorney's clerk acting for the attorney, in order to induce the judge to take a step in the cause, is, if relevant to the question at issue in the trial, admissible. *Huller* v. *Worman*, 3 L. T. 741; 9 W. R. 348.

Counsel not to be examined as to his knowledge as such. *Dennis* v. *Codrington*, Cary, 100.

ii. *Solicitors.*

Existence of Legal Proceedings.]—If any matter is disclosed to an attorney in the cause, he cannot be permitted to give it in evidence either in that or in any other action. *Wilson* v. *Rastall*, 4 Term Rep. 753; 2 R. R. 515. S. P. *Lloyd* v. *Lloyd*, 2 Curt. 262.

It is the privilege of the client and not of the attorney. *Parkhurst* v. *Lowten*, 2 Swanst. 216.

An attorney is not privileged from disclosing as a witness a statement made by his client relative to the subject-matter of a suit, if such statement was not necessary for the purpose of the proceedings on which the attorney was employed. *Gillard* v. *Bates*, 6 M. & W. 547; 8 D. P. C. 774; 9 L. J., Ex. 171.

Solicitor concerned in cause is not bound to testify, though served with process. *Berd* v. *Lovelace*, Cary, 62. S. P. *Austen* v. *Vesey*, *id.* 63; *Hartford* v. *Lee*, *id.* 63.

Communications made to an attorney respecting a matter in dispute and controversy are privileged, though no cause was then commenced. *Clark* v. *Clark*, 1 M. & Rob. 3.

So, communications made by a party to an attorney are confidential, although they do not relate to a cause existing or in progress at the time they were made. *Cromack* v. *Heathcote*, 4 Moore, 357; 2 Br. & B. 4; 22 R. R. 638. But see *Reg.* v. *Cox*, infra.

Communications made before suit, by a client to his solicitor, concerning the matter in dispute, are not generally privileged; but advice given confidentially to a client, on such statements, is within the rule. *Bluck* v. *Galsworthy*, 2 Giff. 453; 7 Jur. (N.S.) 91; 3 L. T. 399.

Communications between a solicitor and his client ante litem motam, and a bill of costs relating thereto, are privileged. *Turton* v. *Barber*, 22 W. R. 438.

Communications between solicitor and client, to which privilege once attaches, are always privileged, whether they have been made with reference to the existing action or to a previous one; à fortiori are they privileged when the question in dispute is the same in the second action. *Bullock* v. *Corrie*, 47 L. J., Q. B. 352; 3 Q. B. D. 356; 38 L. T. 102; 26 W. R. 330.

So, held, where A., having failed in an action against him by B., brought an action for indemnity against C., who was under the same obligation to him as he was to B., and the application was by C. to inspect documents to which privilege attached in the former action. *Ib.*

On the Queen's proctor's intervention alleging the adultery of the petitioner, counsel on behalf of the Queen's proctor proposed to ask the petitioner whether he had not confessed to his solicitor on a former trial that he had been guilty of a matrimonial offence:—Held, that the communication was privileged, and that therefore the question was inadmissible. *Branford* v. *Branford*, 48 L. J., P. 40; 4 P. D. 72; 40 L. T. 659; 27 W. R. 691.

An attorney is not at liberty to disclose in evidence what has been confidentially communicated to him by a client, although the latter is no party to the cause before the court. *Rex* v. *Withers*, 2 Camp. 578.

An interrogatory being put to a solicitor in the cause, as to whether the plaintiff had acted as adviser and agent for a certain defendant, the solicitor demurred, for that he had acted professionally for both parties, and in the suit; and all the information he possessed which would enable him to answer the interrogatory had been derived from communications confidentially made to him by the said defendant and the plaintiff, or one of them; and he considered his answering the

interrogatory would be a breach of professional confidence reposed in him by his clients. Demurrer allowed. *Gibbon* v. *Strathmore*, 11 L. J., Ch. 366.

As to Sale of Estates.]—Communications made to an attorney by his client respecting the sale of estates are privileged: the rule is not limited to suits existing or expected. *Mynn* v. *Joliffe*, 1 M. & Rob. 326.

The privilege of communication between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being of such matters a solicitor is not at liberty to disclose what passed in conversations which he had either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale. *Carpmael* v. *Powis*, 1 Ph. 687; 15 L. J., Ch. 275.

Where an act is done in pursuance of a bargain between two parties, and in presence of the attorneys for each of them, the communication by one party to his attorney relating to that act is not privileged so as to prevent the attorney from giving evidence of it. *Weeks* v. *Argent*, 16 M. & W. 817; 16 L. J., Ex. 209; 11 Jur. 525.

Where upon the sale of an estate the same attorney was employed by the vendor and by the purchaser, a communication from the purchaser to the attorney, asking for time to pay the purchase-money, is not privileged. *Perry* v. *Smith*, 9 M. & W. 681; Car. & M. 554; 11 L. J., Ex. 269.

Upon settling interrogatories for the examination of a vendor in the master's office, on a question of title between vendor and purchaser:—Held, that the vendor was not compellable, at the instance of the purchaser, to state his motive for making a certain appointment, or to disclose confidential communications made by him to his solicitor and counsel respecting the property, although such communications were made merely on behalf of the consulting person singly, and were not made during a suit, during a dispute, or after the threat of a suit. *Pearse* v. *Pearse*, 1 De G. & Sm. 12; 16 L. J., Ch. 153; 11 Jur. 52.

As to Mortgage.]—In a suit for redemption by a judgment creditor of A., a mortgagor, and B., a solicitor, who had a mortgage on A.'s property in his own name, but in trust for other parties, his clients, and had been employed by other clients also in advancing money upon it by way of mortgage, it was held that B. was not bound to disclose either the names of the parties for whom he held the mortgage (he swearing by his answer that he was authorised to give discharges for the money when repaid) or the names of the other clients for whom he had effected mortgages. *Jones* v. *Pugh*, 1 Ph. 96; 11 L. J., Ch. 323; 6 Jur. 616. Reversing 12 Sim. 470.

Knowledge Obtained during Trial.]—The rule as to privileged communications between counsel or attorney and client does not extend to facts of which the counsel or attorney of themselves obtain knowledge in the course of a trial. *Brown* v. *Foster*, 1 H. & N. 736; 26 L. J., Ex. 249; 3 Jur. (N.S.) 245; 5 W. R. 292.

The privilege of a solicitor applies only to communications received from his client; it does not extend to those derived from third parties, whether strangers to or the opponents of the client, although made to the solicitor while acting in that capacity. *Ford* v. *Tennant*, 32 Beav. 162; 32 L. J., Ch. 465; 9 Jur. (N.S.) 292; 7 L. T. 732; 11 W. R. 324.

Question for Judge.]—A judge is bound to decide the preliminary question of fact whether a communication is privileged or not, and his decision, if erroneous, may be reviewed. *Cleave* v. *Jones*, 7 Ex. 421; 21 L. J., Ex. 105.

Motion to restrain a solicitor from giving evidence of confidential matters, refused; the propriety of his being examined being left to the consideration of the court before which he might appear as a witness. *Beer* v. *Ward*, Jac. 77.

Professional Advice.]—The protection of communications, made by a client to his attorney, applies to all cases in which the relation of attorney and client subsists, and to all cases where the client applies to the attorney in his professional capacity. *Doe* d. *Shellard* v. *Harris*, 5 Car. & P. 592.

An attorney cannot be asked whether A. applied to him to draw a certain deed; nor whether A. asked his advice for a lawful or an unlawful purpose. *Ib.*

In an action of trover for a lease brought by the assignees of a bankrupt, the plea set out that before the bankruptcy, the bankrupt deposited the lease with the defendant as a collateral security for money which the bankrupt owed him. At the trial, the plaintiffs attempted to shew that the lease was deposited after the act of bankruptcy, and for that purpose called a witness, who had been the attorney for the bankrupt after the act of bankruptcy, and had been applied to by him to raise the money. It was then proposed to ask him whether the bankrupt had not the lease in his possession at that time:—Held, that this was privileged from disclosure, as being a confidential communication made to him in his character as an attorney. *Turquand* v. *Knight*, 2 M. & W. 98; 2 Gale, 192; 6 L. J., Ex. 4.

Counsel or attorney cannot be called upon to reveal the advice given to the client; demurrer, therefore, overruled as to the case, and allowed as to the opinion. *Richards* v. *Jackson*, 18 Ves. 474. See *Wayte* v. *Surman*, 2 L. J. (O.S.) Ch. 28.

A., the defendant, wrote to his solicitor, who was also the solicitor of E., the plaintiff: "You may make Mr. E. an offer of the T. Hotel on certain terms." This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. A subsequent letter from the defendant to the solicitor, expressing satisfaction that E. had accepted the offer, was tendered in evidence:—Held, that the letter was privileged. *Eadie* v. *Addison*, 52 L. J., Ch. 80; 47 L. T. 543; 31 W. R. 320.

Where an attorney is employed by a client professionally to transact professional business, all the communications which pass between them in the cause and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications. *Herring* v. *Clobery*, 1 Ph. 91; 11 L. J., Ch. 149.

A. applied to B., an attorney, to raise money upon certain property, and enabled him to obtain an abstract of the title and compare it with the original, but the money was never raised. In an

ejectment, B. was called upon to produce the abstract as secondary evidence of an original deed stated therein :—Held, that A.'s communication was confidential, and that B.'s evidence was therefore inadmissible. *Doe* d. *Peter* v. *Watkins*, 4 Scott, 155 ; 3 Bing. (N.C.) 421 ; 3 Hodges, 25 ; 6 L. J., C. P. 107 ; 1 Jur. 42.

An attorney is not bound to speak as to the particulars of a bill of exchange, when the knowledge of those particulars is only derived from the bill having been intrusted to him by his client. *Beard* v. *Ackerman*, 5 Esp. 120.

An attorney, employed by consent of two parties in preparing a deed from one to the other, cannot be examined as to what he became informed of in preparing the deed, when the action is brought by the assignees of one against the other, suggesting fraud in the deed. *Robson* v. *Kemp*, 4 Esp. 235 ; 5 Esp. 52 ; 8 R. R. 831.

When an attorney has come to the knowledge of a deed or an instrument having been destroyed, from the circumstance of his being employed as an attorney, he cannot be asked as to the fact the knowledge of which was so obtained. *Ib.*

In an action by payee against maker of a promissory note for money lent, the plaintiff, for the purpose of taking the case out of the Statute of Limitations, tendered an account-book, containing an admission by the defendant of payment of interest to him. The defendant's counsel then raised a collateral issue as to the admissibility of the book, and proved that the plaintiff, being the attorney of the defendant, wrote to her for a statement of the debts and payments of her late husband, adding, "This from you will assist me in preparing the case for counsel." Whereupon the book in question was sent to the plaintiff :—Held, that the communication was privileged. *Cleave* v. *Jones*, 7 Ex. 421 ; 21 L. J., Ex. 105.

A witness may demur to answer an interrogatory which seeks for information come to his knowledge in professional confidence. *Parry* v. *Watkins*, 9 L. J. (O.S.) Ch. 63.

Attorney, &c., may object to answer as a witness, as to a confidential communication. *Maddox* v. *Maddox*, 1 Ves. 61.

A solicitor may, by his answer to a bill against him and his clients, refuse to discover any deeds or facts confidentially communicated to him. *Stratford* v. *Hogan*, 2 Ball & B. 164.

Crime.]—All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure. *Reg.* v. *Cox*, 54 L. J., M. C. 41 ; 14 Q. B. D. 153 ; 52 L. T. 25 ; 33 W. R. 396 ; 15 Cox, C. C. 611 ; 49 J. P. 374—C. C. R.

Fraud.]—C. and R. were partners under a deed of partnership. M. brought an action against R. & Co., and obtained judgment therein, and issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the partnership deed was produced on C.'s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by M. Subsequently C. and R. were tried and convicted upon a charge of conspiring to defraud M., and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. and C. was in truth subsisting when it was given, and that the memorandum of dissolution indorsed on the deed was put there after M. had obtained judgment, and fraudulently ante-dated, the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after M. had obtained the judgment C. and R. together consulted him as to how they could defeat M.'s judgment, and as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solicitor and client, and privileged : the evidence was received, but the question of whether it was properly received was reserved for this court :—Held, that the evidence was properly received. *Cromack* v. *Heathcote* (2 Br. & B. 4 ; 22 R. R. 638) ; *Rex* v. *Smith* (1 Phil. & Arn. on Evidence, 118) ; and *Doe* v. *Harris* (5 Car. & P. 592), overruled. *Follett* v. *Jefferyes* (1 Sim. (N.S.) 1) ; *Russell* v. *Jackson* (9 Hare, 387) ; and *Gartside* v. *Outram* (26 L. J., Ch. 113), approved. *Ib.*

A solicitor ordered to be examined against his client in a case of fraud. *Cutts* v. *Pickering*, 3 Ch. Rep. 66.

Where relief is sought in respect of a fraud, there must, in order to take the case out of the rule of privilege, be at least a specific, allegation in the bill, connecting with the fraud the solicitor of the person who was a party thereto, although such person be deceased. *Charlton* v. *Coombes*, 32 L. J., Ch. 284 ; 9 Jur. (N.S.) 534 ; 8 L. T. 81 ; 11 W. R. 504 : 1 N. R. 547.

Where, therefore, a bill alleged that a person deceased had been party to a fraud and prayed relief in respect thereof, and the solicitor of such person, being called as a witness, demurred to questions put to him before the examiner upon the ground of privilege, the court allowed the demurrer, there being no specific allegation in the bill connecting the solicitor with the fraud complained of. *Ib.*

Forgery.]—A. took a forged will to B., a solicitor, and asked him to advance money on a mortgage of the property mentioned in the will. B. made no charge for the interview, and did not advance the money :—Held, not a privileged communication. *Reg.* v. *Farley*, 1 Den. C. C. 197 ; 2 Car. & K. 313.

A prisoner was indicted for forging a will. The forged instrument had been given by him to his attorney, ostensibly for professional purposes, but in the opinion of the judge with some very different object. An objection that it was a privileged communication, and therefore could not be read :—Held invalid. *Reg.* v. *Jones*, 1 Den. C. C. 166 ; 2 Car. & K. 234.

An attorney is not obliged to give evidence on a charge of forgery against his client. *Rex* v. *Dixon*, 3 Burr. 1687.

A., an attorney was employed by B., as his solicitor, to put out money upon mortgage. C. applied to A. as his solicitor to procure him an advance on mortgage. C. stated to A. that he was owner of certain freehold lands, and produced a forged will in proof of his title, which he placed in the hands of A. B. advanced the money, A. acting as his solicitor, by preparing the mortgage deeds, &c.:—Held, that on the trial of C. for uttering the forged will, A. was bound to produce the will, and also to give evidence of what C. said to him as to the advance of the money. *Reg.* v. *Avery*, 8 Car. & P. 596.

And see *Rex* v. *Hayward*, 2 Car. & K. 234; 2 Cox C. C. 23.

False Pretences.]—A letter written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. But in order to make a client criminally responsible for a letter written by his solicitor it must be shewn that the letter was written in pursuance of the instructions of the client. A letter by a solicitor written "in consequence" of an interview with his client is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. *Reg.* v. *Downer*, 43 L. T. 445.

Same Solicitor Employed by Two Clients.]—Where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, and may be used by the other. *Baugh* v. *Cradocke*, 1 M. & Rob. 182. S. P., *Cleave* v. *Powell*, 1 M. & Rob. 228.

A solicitor acting for two clients in a matter is privileged, upon examination before the court, from disclosing to one client professional instructions given to him by the other. *Ubsdell, In re*, 27 L. T. 460; 21 W. R. 70.

A. having a claim against B., they went together to the office of A.'s attorney, who had never acted as attorney for B. A statement was made by B. relating to A.'s claim, and it was arranged that the attorney should, on behalf of B., write to a third party in respect of the subject-matter of the claim. An action having been afterwards brought by A. against B.:—Held, that the statement by B. was not a privileged communication. *Shore* v. *Bedford*, 5 Man. & G. 271; 12 L. J., C. P. 138. And see *Eadie* v. *Addison*, ante, col. 926.

Held, also that the letter, being an act done, might be proved by the attorney. *Ib.*

Joint Adventure by Two Persons—Statements by One to Solicitor of the Other.]—Where two persons, each employing his own solicitor, are engaged in a joint adventure, and one of them, who is desirous of retiring from the adventure, suggests that his solicitor should be consulted by his co-adventurer in regard to the matter, the statements made at an interview with his solicitor by or to the co-adventurer are privileged, and cannot be admitted as evidence against him in an action by a third person brought in connection with the joint adventure. Semble, statements made at joint consultations between parties and their counsel or their solicitors would be similarly privileged. *Rochefoucauld* v. *Boustead*, 65 L. J., Ch. 794; 74 L. T. 783.

Trust Business.]—In an action by a cestui que trust against his trustee, a communication made by him to an attorney, who had been employed by him in the matters of the trust, and only relating to such matters, is not privileged. *Shean* v. *Philips*, 1 F. & F. 449.

Proposition of Compromise.] — The plaintiff may call the former attorney of the defendant to prove an offer by him, on the part of his client, to settle the account, and to pay a sum of money as due to the plaintiff. *Turner* v. *Railton*, 2 Esp. 474.

A witness may be called upon by the plaintiff to state a conversation, in which the defendant proposed a compromise to the plaintiff, although the witness attended on that occasion as attorney for the defendant. *Griffith* v. *Davies*, 5 B. & Ad. 502.

An offer made by the attorney of the defendant's father, is no evidence against the defendant, and the fact of the defendant afterwards employing the same attorney makes no difference. *Burghart* v. *Angerstein*, 6 Car. & P. 690.

Where the clerk of the plaintiff's attorney went to the defendant's attorney for the object of effecting a compromise, and what he said was said with the wish of effecting it:—Held, that all that passed was privileged as being a negotiation to bring about a compromise. *Jardine* v. *Sheridan*, 2 Car. & P. 24.

In a discussion between the attorneys of the plaintiff and defendant touching the dispensing with certain witnesses at the trial, the plaintiff's attorney stated to the defendant's attorney that the debt was owing from the late husband of the defendant:—Held, that such statement could not be given in evidence against the plaintiff. *Petch* v. *Lyon*, 9 Q. B. 147; 15 L. J., Q. B. 393.

A. having a demand upon B., B., before A. commenced his action, employed C., his attorney, to make certain propositions to A. upon the matters in difference between them; C. cannot be examined as to what B. said upon the occasion, for this is to be considered as a privileged communication between attorney and client; but what C. said when he made the propositions to A. is good evidence against B., without further proof of C. being authorised by him than the fact of C. being his attorney. *Gainsford* v. *Grammar*, 2 Camp. 9; 11 R. R. 648.

A letter from one of the parties, proposing a compromise, is not a privileged communication, if tendered as evidence that a compromise had actually been effected. *Collier* v. *Nokes*, 2 Car. & K. 1012.

An offer to accept a given sum in payment of a claim, on condition that the amount of the claim is not to be questioned, is not a negotiation for a compromise, and therefore admissible. *Burchall* v. *Spottiswoode*, 3 Car. & K. 302.

A debtor being in prison wrote to the town agents of his creditors' attorneys requesting them to send a confidential clerk to him, with whom he might communicate as to his creditor's claim:—Held, in an action by the creditors to recover the claim, that what the debtor said to the person who went to him in consequence of his letter was receivable in evidence, even though the subject-matter of the communications was an offer of 10*s.* in the £. *Hill* v. *Elliott*, 5 Car. & P. 436.

To what Persons the Doctrine applies.]—The privilege is confined to counsel, solicitors, and

attorneys when acting in their respective characters. *Wilson* v. *Rastall*, 4 Term Rep. 753 ; 2 R. R. 515.

The agent of the defendant's attorney cannot be examined as to communications with the defendant on the subject of the action, in order to prove his identity. *Parkins* v. *Hawkshaw*, 2 Stark. 239 ; 19 R. R. 711.

If a party goes to C., who is neither an attorney nor pretended to be one, to ask him to make a conveyance of some property, and C. writes to a relation of his who was an attorney, and on receiving his relation's answer, informs the party that she cannot convey, this is not a privileged communication. *Doe* d. *Pritchard* v. *Roe*, 8 Car. & P. 99.

An interpreter, who is present at conversations between a foreigner and his attorney, is bound to the same secrecy as the attorney himself, and ought not to divulge the facts confided to him, after the cause for the purpose of which the confidence was placed is at an end. *Du Barre* v. *Livette*, 1 Peake, 108 ; 3 R. R. 655.

The rule respecting privileged communications extends to an attorney's clerk acting on behalf of his master, as well as to the attorney himself. *Taylor* v. *Foster*, 2 Car. & P. 195 ; 31 R. R. 659.

But an attorney's clerk is not privileged from answering whether he has received a particular paper from the client. *Eicke* v. *Nokes*, M. & M. 303.

A conversation between a client, who afterwards becomes bankrupt, and his attorney's clerk, on the subject of his affairs, is a privileged communication, and cannot be given in evidence in an action by his assignees, for the purpose of shewing his motives. *Bowman* v. *Norton*, 5 Car. & P. 177.

An articled clerk to an attorney, who is bound by his articles to keep all his master's secrets, is at liberty to give in evidence statements of his master not made under a charge of secrecy, nor affecting the interests of his master's clients, though the disclosure may go to support a civil action against the master. *Webb* v. *Smith*, 1 Car. & P. 337 ; R. & M. 106.

A person to whom a party, supposing him to be an attorney, makes confidential communications respecting his cause, is bound to give evidence of them, if called as a witness ; attorneys only being privileged as to not being bound to disclose the secrets of their clients. *Fountain* v. *Young*, 6 Esp. 113.

An attorney will be prevented from communicating his client's secrets even after he is struck off the roll. *Cholmondeley (Earl)* v. *Clinton (Lord)*, 19 Ves. 268 ; 13 R. R. 183.

The privilege of not disclosing communications between solicitor and client belongs to the client alone and his representatives as against third parties, not inter se. *Gresley* v. *Mousley*, 2 Kay & J. 288 ; 2 Jur. (N.S.) 156.

Defendant having examined B., his clerk in court, plaintiff exhibited interrogatories to cross-examine him, to which he demurred, for that he knew nothing but as defendant's clerk in court, or agent. Demurrer overruled, as covering too much, for it ought to conclude, that he knew nothing but by the information of his client. *Vaillant* v. *Dodemead*, 2 Atk. 524. *S. C.* nom. *Valiant* v. *Dodemead*, Dick. 92.

Where at law the party calls upon his attorney as a witness, the other side may cross-examine him to the point in the cause. *Ib.*

Counsel, solicitor, or attorney may be privileged from being examined in such cases, but not an agent. *Ib.*

Demurrer to examination, as being counsel for the opposite party, was overruled, for that what he knew was as a conveyancer only. *Ib.*

The communications by an agent sent abroad by a solicitor to collect evidence in aid of an action, will be protected as confidential, equally with the communications of a solicitor or solicitor's clerk. *Steel* v. *Stewart*, 13 Sim. 533 ; 12 L. J., Ch. 473.

Address of Client.]—A solicitor is not protected from disclosing the residence of his client by the circumstance that it became known to him only in his character of solicitor. To be entitled to claim such a protection, the client's residence must have been made known to him in professional confidence for the purpose of obtaining professional advice. *Campbell, Ex parte, Cathcart, In re*, L. R. 5 Ch. 703 ; 23 L. T. 289 ; 18 W. R. 1056.

The court will not make an order upon a solicitor compelling him to disclose the address of his client, a defendant who has absconded, and whom the plaintiff seeks to serve with a subpœna duces tecum to compel his appearance at the hearing with documents material to the plaintiff's case. *Heath* v. *Crealock*, 42 L. J., Ch. 455 ; L. R. 15 Eq. 257 ; 28 L. T. 101 ; 21 W. R. 380.

A female who had been employed by the defendant to take care of his house, but who had subsequently left it, brought an action against him for breach of promise of marriage. The defendant had threatened to proceed criminally against her on a charge of taking away some of his property from the house. The court refused to compel the plaintiff's attorney to disclose her place of residence, as the defendant knew who she was, and had avowed he sought the information with the view of effecting her arrest on the criminal charge. *Harris* v. *Holler*, 7 D. & L. 319 ; 19 L. J., Q. B. 62.

But the court or a judge will compel a plaintiff's attorney to disclose the place of abode of his client, notwithstanding that one object of the defendant in requiring the information is, that he may be enabled to arrest the plaintiff under a writ of attachment. *Cox* v. *Bockett*, 18 C. B. (N.S.) 239 ; 34 L. J., C. P. 125 ; 11 Jur. (N.S.) 88 ; 11 L. T. 629 ; 13 W. R. 292.

A bill was filed against A., B. and C. All the defendants appeared by the same solicitor, and put in a joint answer. The bill amended. The solicitor accepted service for A. and B., who answered the interrogatories to the amended bill, but declined to accept service for C., or to disclose his address, on the ground that the plaintiff's object was to ascertain C.'s address in order to serve process upon him in an action at law in an independent matter :—The court ordered the time for filing replication, or giving notice of motion for decree, to be enlarged till C. should put in his answer ; but made no order for the solicitor to disclose C.'s address. *Clark* v. *Compton*, 4 N. R. 15.

A client's address, communicated to his solicitor when applying to him for advice, is privileged from disclosure unless the solicitor and his client were jointly engaged in the commission of some wrongful act, and the address was communicated to the solicitor while so engaged. On the 31st July the debtor departed from his dwelling-house, and took with him all his furniture. On the 1st August he had an interview with his solicitor,

who was at that time unaware that an act of bankruptcy had been committed. On the 4th October the debtor communicated by letter with his solicitor. In the proceedings that ensued the solicitor's clerk was examined as a witness, and declined to disclose the debtor's address, on the ground that it had been communicated confidentially to him, as the debtor's solicitor, for the purpose of advising his client in reference to these proceedings, and that such address had not been, so far as he believed, communicated by the debtor to the rest of the world. On application being made to compel the witness to disclose the address:—Held, that the address was under the circumstances a privileged communication, and as such need not be disclosed. *Official Receiver, Ex parte, Arnott, In re*, 60 L. T. 109; 37 W. R. 223; 5 Morrell, 286.

As Attesting Witness.]—A solicitor employed to obtain the execution of a deed, and who is one of the witnesses, is not precluded, on the ground of a breach of professional confidence, from giving evidence as to what passed at the time of execution, by which the deed may be proved invalid. *Crawcour* v. *Salter*, 18 Ch. D. 30; 45 L. T. 62.

A person devised real property to his widow for life, and after her death to his children equally, with a power to the widow to mortgage or sell, in case the fund arising from the real and personal estate of the testator was not sufficient for her maintenance. The widow executed a mortgage of the property for 30*l.* to her son T., and it was proved that four years before the mortgage, T. advanced his mother a sum less than 1*l.* to pay a poor-rate that she was unable to pay. The subscribing witness to the mortgage deed had acted as attorney both of the widow and T. respecting it:—Held, that, on the trial of an ejectment by the administratrix of T., to recover the property under the deed, the subscribing witness might be cross-examined to shew that the sum of 30*l.* mentioned in the deed, and in the receipt at the back of it, was never in fact advanced. *Doe* d. *Salt* v. *Carr*, Car. & M. 123.

Collateral Matters.]—An attorney is not privileged from giving evidence of collateral facts; therefore, he may be obliged to prove that his client swore to and signed an answer, upon which the latter is indicted for perjury. *Doe* d. *Jupp*, v. *Andrews*, Cowp. 845.

The right of an attorney to refuse to disclose matters with which he had become acquainted in the course of his employment as such, does not extend to matters of fact which he knows by any other means than confidential communication with his client, though, if he had not been employed as attorney, he probably would not have known them; therefore an attorney of a party to a suit is bound to answer, on a trial, whether a particular document belonging to his client is in his possession, and is then in court. *Dwyer* v. *Collins*, 7 Ex. 639; 21 L. J., Ex. 225; 16 Jur. 569.

An attorney is not justified in refusing to answer questions on the ground of privilege, unless the questions relate to matters communicated to him in his capacity of legal adviser. *Hawley, In re*, 1 W. R. 128.

Knowledge which an attorney obtains in the course of his retainer as such, of the state of a deed, e.g. whether when shewn to him by his client it was stamped or not, is privileged. *Wheatley* v. *Williams*, 2 Gale, 140; 1 M. & W. 533; 5 L. J., Ex. 237.

A knowledge of a client's handwriting, obtained by his attorney from having witnessed his execution of the bail-bond in the action, is not a confidential knowledge, so as to privilege the attorney from answering when called on the part of the plaintiff, to prove the defendant's handwriting on the trial. *Hurd* v. *Moring*, 1 Car. & P. 372.

No breach of confidence in a solicitor to prove client's handwriting: he is bound to do so if called upon. *Bowles* v. *Stewart*, 1 Sch. & Lef. 226.

An attorney is not restrained from any rule of law from giving evidence of a conversation between him and his client, touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon: for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause. *Cobden* v. *Kendrick*, 4 Term Rep. 431; 2 R. R. 424.

A communication made by a client to his attorney to obtain information as to a matter of fact, and not for the purpose of asking him his legal advice, is not privileged. *Bramwell* v. *Lucas*, 4 D. & R. 367; 2 B. & C. 745; 2 L. J. (o.s.) K. B. 161.

An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he has received to produce a paper in the hands of his client. *Spenceley* v. *Schulenberg*, 7 East, 357; 3 Smith, 325.

What a mortgagor, in treaty to raise money, says to the attorney of the mortgagee, is not a privileged communication. *Marston* v. *Downes*, 4 N. & M. 861; 6 Car. & P. 381; 1 A. & E. 31; 3 L. J., K. B. 158.

An attorney is bound to give evidence of a statement made by himself to the adverse party by the direction of his client. *Ripon* v. *Davies*, 2 N. & M. 310.

A bill was filed to set aside a deed, on the ground of alterations having been improperly made in it after execution. A defendant examined the solicitor of a plaintiff as a witness to prove communications between them, showing that the solicitor was aware of the alteration in the deed. To the interrogatory on this point the witness demurred, because he alleged that it inquired about matters only known to him as a solicitor for the plaintiff:—Held, that this could not protect him from the necessity of disclosing his communications with the defendant. *Gore* v. *Harris*, 15 Jur. 1168.

A solicitor cannot object to prove a distinct fact, as, for instance, the execution of a deed for the benefit of third parties, though, by so doing, he may injure the interests of his client. *Tristram* v. *Roberts*, 10 Jur. 125.

But, where a solicitor was asked whether his client had waived objections to title:—Held, that as such a waiver might be the result of a course of conduct, or series of transactions, he was not bound to answer the question. *Ib.*

An attorney held bound to discover when and to whom he parted with documents of title of his client, and in whose possession the same were. *Banner* v. *Jackson*, 1 De G. & Sm. 472.

An attorney cannot, on the grounds of professional confidence, refuse to answer an interrogatory, as to his having seen a certain instrument; and if so, when and in whose hands

O'Gorman v. *M'Namara*, Hayes, 174; and see *id.* note (*a*).

Demurrer by a witness examined by the plaintiff, on the ground that he had been the solicitor of some of the defendants, and that the interrogatory required the disclosure of confidential communication, overruled, the witness being bound to produce letters communicated to him from collateral quarters to which the interrogatory pointed, and to answer questions seeking information as to matters of fact, as distinguished from confidential communications. *Sawyer* v. *Birchmore*, 3 Myl. & K. 572.

The solicitor of a purchaser of an estate from the bankrupt, ordered to attend the commissioners for the purpose of being examined; without prejudice to any question of privilege. *Hodgson, Ex parte*, 2 Glyn & J. 21.

The attorney of the party benefited by the will, and who prepared it:—Held, not privileged, on the ground of professional confidence, from answering as to contemporaneous acts of the testatrix, upon which he founded his opinion as to her testamentary capacity. *Jones* v. *Goodrich*, 5 Moore, P. C. 16.

Attorney examined as a witness must disclose acts done in his presence by his client, as execution of a deed, &c. not private confidential conversation with him, as the reasons for making it, etc., on motion to suppress the depositions referred to see what part came to his knowledge as confidential attorney, in order to have that suppressed. *Sandford* v. *Remington*, 2 Ves. J. 189; 2 R. R. 195.

Solicitor of plaintiff to be examined, except as to things in his knowledge as solicitor. *Kelway* v. *Kelway*, Cary, 89.

A direction given by a client to his attorney, or his clerk, to send a particular person, not a sheriff's officer, with the sheriff, to point out the person to be arrested under a capias ad satisfaciendum, is not a privileged communication. *Caldbeck* v. *Boon*, Ir. R. 7 C. L. 32.

Judgment having been signed against a married woman in an action, an inquiry was directed before a master whether she was possessed of any separate estate. The solicitor to the trustees of her marriage settlement, being subpœnaed by the judgment creditor upon the inquiry as a witness, and to produce documents, stated that the deed of settlement was in his possession as solicitor to the trustees, but refused to state the names of the trustees or produce the deed on the ground of professional privilege:—Held, that he must state the names of the trustees and produce the deed. *Bursill* v. *Tanner*, 55 L. J., Q. B. 53; 16 Q. B. D. 1; 53 L. T. 445; 34 W. R. 35—C. A.

The answer to an interrogatory confined to the point on which the party's solicitor was produced is admissible, though he gained his information as solicitor. *King's Proctor* v. *Daines*, 3 Hag. Ec. 235.

As to Retainer.]—The fact of the retainer of counsel or attorney is not a privileged communication. *Forshaw* v. *Lewis*, 1 Jur. (N.S.) 263.

The attorney conducting a cause in court may be called as a witness by the opposite side, and asked who employs him, in order to shew the real party, and to let in his declarations. *Levy* v. *Pope*, M. & M. 410; 31 R. R. 743.

At a private examination of the solicitor to a debtor the solicitor was in effect asked when he was first employed by the debtor:—Held, that he could not decline to answer on the ground that he would disclose communications made to him for the purpose of obtaining his professional advice. *Trustee, Ex parte, Wells, In re*, 9 Morrell, 116.

Consent of Client.]—Confidential communications to an attorney being the privilege of the client may be disclosed if he consents. *Merle* v. *More*, 1 R. & M. 390.

Lien.]—Where a witness in a cause, who had been the solicitor of the plaintiff, declines to answer an interrogatory concerning documents in his possession, on the ground that he has a lien on them for costs, the court (there being no danger of perjury in the case) will permit a new interrogatory to the same intent as the former to be exhibited to him, though publication had passed. *Bloss* v. *O'More*, Hay. & J. 337.

Interrogatories.]—*See* DISCOVERY.

Privileged Documents — Subpœna Duces Tecum.]—*See* ante, cols. 861, 862, and 865, 866.

—— **Discovery.**]—*See* DISCOVERY.

b. Tendency to Criminate.

Power of Judge.]—Where a witness refuses to answer a question put to him on the ground that his answer might tend to criminate himself, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the court must be satisfied, from the circumstances of the case and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound to insist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. *Reynolds, Ex parte, Reynolds, In re*, 51 L. J., Ch. 756; 20 Ch. D. 294; 46 L. T. 508; 30 W. R. 651; 46 J. P. 533—C. A.

Witness presumed to know Rules of Law.]—The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed, on the maxim, ignorantia juris non excusat. *Reg.* v. *Coote*, 9 Moore, P. C. (N.S.) 463; 42 L. J., P. C. 45; L. R. 4 P. C. 599; 29 L. T. 111; 21 W. R. 553.

The 11 & 12 Vict. c. 42, s. 18, requiring magistrates to caution the accused with respect to statements he may make in answer to the charge is not applicable to witnesses asked questions tending to criminate them. *Ib.*

Only Witness can take advantage of.]—The privilege of refusing to answer questions on the ground that they tend to criminate, is that of the witness alone, and neither party to the suit can take any advantage therefrom. *Reg.* v. *Kinglake*, 22 L. T. 335; 18 W. R. 805.

A party to an action may be put in the box and sworn, although the counsel for such party objects that the questions intended to be put to him will criminate him, and that he will object

to answer them. It is for the party himself to make such objection. *Boyle* v. *Wiseman*, 10 Ex. 647; 3 C. L. R. 482; 24 L. J., Ex. 160; 1 Jur. (N.S.) 115; 3 W. R. 206.

Counsel have no right to make the objection, but it must be made by the witness himself. *Thomas* v. *Newton*, M. & M. 48, n.

Nor can counsel argue in support of the witness's objection. *Rex* v. *Adey*, 1 M. & Rob. 94.

The court will not refuse leave to deliver interrogatories on the ground that the attorney of the party proposed to be interrogated swears that the questions, if answered, may tend to criminate his client. If they have that tendency the objection must be taken by the client on oath. *Osborn* v. *London Dock Co.*, 10 Ex. 698; 3 C. L. R. 313; 24 L. J., Ex. 140; 1 Jur. (N.S.) 93.

Answer "might tend to Criminate."]—In an act on for false and malicious libel the plaintiff delivered interrogatories to prove the publication. The defendant in his answer objected to answer, on the ground that to do so "might tend to criminate" him:—Held, a sufficient answer. *Lamb* v. *Munster*, 52 L. J., Q. B. 46; 47 L. T. 442; 31 W. R. 117. See *Sidebottom* v. *Adkins*, post, col. 939.

Criminate—"Would tend."]—A witness is not only not bound to answer a question the answer to which would criminate him, but he is not bound to answer any question the answer to which would tend to criminate him. *Cates* v. *Hardacre*, 3 Taunt. 424; 12 R. R. 678. S. P., *Macbride* v. *Macbride*, 4 Esp. 243; *Rex* v. *Lewis*, 4 Esp. 225.

If a witness claims the protection of the court on the ground that the answer would tend to criminate himself, and there appears reasonable ground to believe that it would do so, he cannot be compelled to answer. *Reg.* v. *Garbett*, 1 Den. C. C. 236; 2 Car. & K. 474; 2 Cox, C. C. 448.

If compelled notwithstanding, what he says after such claim must be considered to have been obtained by compulsion and cannot be given in evidence against him. *Ib.*

He is entitled to protection at whatever stage of the inquiry he chooses to claim it; he is equally entitled to protection, whether he has already answered the question in part or not at all; and no answer forced from him by the presiding judge (after such a claim) can be afterwards given in evidence against him. *Ib.*

Whether the mere declaration of a witness on oath that he believes that his answer would tend to criminate him would or would not be sufficient to protect him from answering, where sufficient other circumstances did not appear in the case to induce the judge to believe that the answer would tend to criminate the witness, quære. *Ib.*

The privilege of a witness in not answering questions which may tend to criminate him is not limited to cases where he has been guilty of an offence; it is sufficient if the answer would disclose circumstances connected with the commission of a crime which he might not be able to explain, and would induce those who heard him to fix him as the guilty party. *Adams* v. *Lloyd*, 3 H. & N. 351; 27 L. J., Ex. 499; 4 Jur. (N.S.) 590; 6 W. R. 752.

In order to protect himself from answering upon the ground that a discovery of the matters inquired after would expose, or tend to expose, him to penalties, a defendant must state upon oath his belief that such would be the case. *Scott* v. *Miller*, Johnson, 328; 28 L. J., Ch. 584; 5 Jur. (N.S.) 858; 7 W. R. 561.

Exceptions therefore allowed to an answer in the following form: I submit that I am not bound to discover "certain matters specified," because the discovery of such matters would or might shew or tend to shew, that, under the provisions of the 6 & 7 Vict. c. 73, I am liable to "certain specified penalties"; the defendant not stating his own belief upon the subject. *Ib.*

Where a question is in form an innocent one, it is not a sufficient ground of refusal for a witness to say that he believes his answer to such a question will or may criminate him; but he must satisfy the court that there is a reasonable probability that it would or might do so. *Gilbert, Ex parte, Genese, In re*, 3 Morrell, 223.

Whatever the rule may be as to the right of a witness to decline answering a question, on the ground that it may tend to criminate him, without giving any reason why it should tend to do so, he will be compelled to answer where he gives his reason and such reason is insufficient. *Aston's Case*, 4 De G. & J. 320; 28 L. J., Ch. 631; 5 Jur. (N.S.) 779; 7 W. R. 539.

Where Judge may compel Answer.]—But the rule is subject to exception, where the state of things disclosed renders the judge perfectly certain that in claiming protection the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground for the excuse he is making in not answering the question. *Adams* v. *Lloyd*, 3 H. & N. 351; 27 L. J., Ex. 499; 4 Jur. (N.S.) 590; 6 W. R. 752.

Semble, per Jervis, C.J., and Maule, J., that it is for the witness to say, on oath, whether he believes the answer may tend to criminate him, and that his decision is conclusive. *Fisher* v. *Ronalds*, infra.

No man can be compelled to criminate himself. *Parkhurst* v. *Lowten*, 2 Swanst. 214; 19 R. R. 63.

Nature of Liability.]—In an action for a libel in the shape of an extra-judicial affidavit sworn before a magistrate, a person acting as the magistrate's clerk is not bound to answer whether, by the defendant's orders, he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself. *Maloney* v. *Bartley*, 3 Camp. 210.

A witness is, therefore, not bound to answer whether he wrote an advertisement referring to libellous letters which the prosecutor has received; and though he is bound to answer whether he knows in whose handwriting it is, he is not bound to name the person, as it may be himself. *Rex* v. *Slaney*, 5 Car. & P. 213.

A witness (called to prove that a bill of exchange was given for money lost at play) having said that he was present in a room in his own house when the transaction was alleged to have taken place, but that he saw no gaming, being asked, "was there a roulette table in the room?" and on being cautioned by the judge, declined to answer, on the ground that his answer might tend to criminate him in a prosecution for keeping a gaming-house, is privileged from answering. *Fisher* v. *Ronalds*, 12 C. B. 762; 22 L. J., C. P. 62; 17 Jur. 393; 1 W. R. 54.

A witness asked whether he has not been imprisoned on a conviction for forging coal-meters' certificates is not bound to answer. *Millman* v. *Tucker*, Peake, Ad. C. 222.

A defendant is not, as a general rule, at liberty to decline to answer interrogatories, upon his mere statement upon oath that such answer might subject him to prosecution. The court will decide whether, under the circumstances, such a statement ought to be considered conclusive. Judgment in *Fisher* v. *Ronalds* (17 Jur. 393) observed upon. *Sidebottom* v. *Adkins*, 3 Jur. (N.S.) 631; 5 W. R. 743.

Witness not compelled to answer interrogatories having a direct tendency to subject him to penalties, &c., or having such a connection with them as to form a step towards it. *Paxton* v. *Douglas*, 16 Ves. 239.

Witness obliged to give testimony, though it affects his civil rights. *Chamberlain, Ex parte*, 19 Ves. 482.

The admission of a witness that he is a member of a religious sect who hold a certain principle as a body, which, if acknowledged individually, would subject him to excommunication ipso facto by the 12th Canon of 1603:—Held, insufficient to disable him from giving evidence in the suit; and quære, if excommunication ipso facto (if not absolutely abolished by statute 53 Geo. 3, c. 127), disables a party from being a witness until absolved. *Escott* v. *Martin*, 4 Moore, P. C. 104; 6 Jur. 765.

Demurrer by a witness to answering interrogatories, on the ground that he might subject himself to penalties, allowed. Such a demurrer may be allowed partially. A demurrer by a witness to two interrogatories was allowed as to one, and overruled as to the other. The court gave the witness half the costs of the demurrer. *Daris* v. *Reid*, 5 Sim. 443.

Demurrer to interrogatory by witness on account of its tendency to render him liable to penalty should state particularly the objectionable parts of the interrogatories. *Jackson* v. *Benson*, 1 Y. & J. 32.

Bankruptcy—Bankrupt must Answer.]—A bankrupt was examined before a commissioner, and asked various questions respecting the writing of a false letter in his father's name for the purpose of getting additional credit from persons with whom he traded. He made no objection to answering the questions on the ground that they tendered to criminate him, or on any other ground:—Held, that the examination was not compulsory, as touching the estate or dealings of the bankrupt; and that, as he might have objected to it and did not, it was a voluntary statement, and admissible against him upon his trial subsequently on the criminal charge of uttering a forged letter. *Reg.* v. *Sloggett*, Dears. C. C. 656; 25 L. J., M. C. 93; 2 Jur. (N.S.) 764; 4 W. R. 487; 7 Cox, C. C. 139.

The examination of a bankrupt as to his trade dealings and effects, lawfully taken under 12 & 13 Vict. c. 106, s. 117, is admissible against him on a criminal charge arising out of the very matters as to which he was so examined. *Reg.* v. *Cross*, Dears. & B. 68; 7 Cox, C. C. 226.

A bankrupt is bound to answer all questions touching matters relating to his trade dealing or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself, and such answers may afterwards be given in evidence against him upon a criminal charge. *Reg.* v. *Scott*, Dears & B. 47; 25 L. J., M. C. 128; 2 Jur. (N.S.) 1096; 4 W. R. 777; 7 Cox, C. C. 164. S. P., *Reg.* v. *Robinson*, 36 L. J., M. C. 78; L. R. 2 C. C. 80; 16 L. T. 605; 15 W. R. 966; 10 Cox, C. C. 467.

The bankrupt being under a personal obligation to make a full disclosure of his property to his creditors, must answer all questions put to him about his property, whatever the consequences to himself may be. *Scholefield, Ex parte, Firth, In re*, 46 L. J., Bk. 112; 6 Ch. D. 230; 37 L. T. 281; 26 W. R. 9—C. A.

A bankrupt is bound to disclose his property, although his answer may tend to convict him of concealing his effects. *Feaks, In re*, 2 Deac. & C. 226; Mont. & B. 215.

A bankrupt is bound to answer touching his estate, although his answer may tend to convict him of perjury on a former occasion, and of concealing his effects. Cross, J., dissent. on the ground of the assignee's motive in putting the question. *Smith, In re*, 2 Deac. & C. 230; Mont. & B. 203; 2 L. J., Bk. 33.

Semble, a plaintiff is bound to disclose his property although an indictment is pending against him for concealing it, &c., and although his answer may tend to criminate him. *Heath, In re*, 2 Deac. & C. 214; Mont. & B. 184; 2 L. J., Bk. 27.

Where a bankrupt has sold goods to a party for a price considerably lower than what he gave for them, the purchaser, when summoned before the commissioner for examination, is bound to answer the question, "To whom did you subsequently sell these goods?" for it materially concerns the estate of the bankrupt to ascertain whether the sale by him was bonâ fide. *Falk, In re*, 2 Deac. & C. 415.

—— **But Witness may Refuse.**]—A witness summoned for examination, under s. 96 of the Bankruptcy Act, 1869, as to the property of a bankrupt, is entitled to refuse to answer a question on the ground that his answer would tend to criminate himself. *Scholefield, Ex parte, Firth, In re*, supra.

Time for Refusal to Answer.]—A defendant or witness, if interrogated as to matters tending to criminate him, may decline to answer at any time, notwithstanding what he has disclosed may be sufficient to convict him. The decision in *Ewin* v. *Oshaldiston* (6 Sim. 608) disapproved of. *Two Sicilies (King of)* v. *Willcox*, 1 Sim. (N.S.) 301; 20 L. J., Ch. 417; 15 Jur. 214.

Inference.]—If a witness declines to answer a question, no inference of the truth of the fact inquired into may be drawn from that circumstance. *Rose* v. *Blakemore*, R. & M. 383.

Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself, no admission to the truth of the fact. *Lloyd* v. *Passingham*, 16 Ves. 59.

Tending to Degrade.]—Questions tending to degrade a witness, without exposing him to punishment, may be put on cross-examination. *Cundell* v. *Pratt*, M. & M. 108.

The question whether the witness was not living in a state of incest cannot be put because it may subject her to punishment. *Ib.*

Waiver of Privilege.]—If a witness answers any question on a matter rendering himself liable to forfeiture or punishment, he cannot afterwards claim his privilege, but must answer throughout. *East* v. *Chapman*, M. & M. 47; 2 Car. & P. 570.

A witness who has given evidence on his examination in chief as to the truth of a libel may be asked on his cross-examination whether the MS. of the libel was not written by him, and he is bound to answer the question. *Ib.*

If a witness, being cautioned that he is not obliged to answer a question that may criminate him, still chooses to answer it, he is bound to answer all questions relative to that transaction, and cannot afterwards take an objection to any further question that has a tendency to criminate him. *Dixon* v. *Vale*, 1 Car. & P. 278.

If a witness answers questions to which he might have demurred as subjecting him to penalties, his answers may be used against him for all legal purposes. *Smith* v. *Beadnell*, 1 Camp. 30.

Pardon—Unfounded fears of Incrimination.]—A pardon, under the Great Seal, takes away the privilege of a witness in not answering, so far as regards any risk of prosecution at the suit, or in the name of the Crown. *Reg.* v. *Boyes*, 1 B. & S. 311; 2 F. & F. 157; 30 L. J., Q. B. 301; 7 Jur. (N.S.) 1158; 5 L. T. 147; 9 W. R. 690; 9 Cox, C. C. 32.

A merely remote and naked possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering; to entitle him to the privilege of silence the court must see, from the circumstances of the case and the nature of the evidence which he is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. Moreover, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; not a danger of an imaginary and an unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. *Ib.*

On the trial of an information for bribery, filed by the attorney-general by the direction of the House of Commons, one of the persons charged in the information to have been bribed was called as a witness; and, on his declining to answer any questions with respect to the bribery, the counsel for the Crown handed him a pardon under the Great Seal; which the witness accepted, but still declined to answer:—Held, that the possible risk of impeachment by the House of Commons, notwithstanding the pardon under the Great Seal, according to 12 & 13 Will. 3, c. 2, s. 3, was not a sufficient ground to entitle him to the privilege of not answering. *Ib.*

A witness is not excused from answering a question on the ground that the conduct inquired into on his part would subject him to a penalty, if the time limited for proceeding for such penalty is past. *Roberts* v. *Allatt*, M. & M. 192. See *Rex* v. *Reading*, 7 Howell's St. Tr. 296.

Punishment for not Answering.]—A witness, who, on a trial, refuses to answer a question duly put to him, on the ground that the answer would tend to criminate himself, and persists in his refusal after being told by the judge that he sees no ground for the witness to apprehend danger from answering the question, is liable to fine and commitment for contempt of court. *Fernandez, Ex parte*, 10 C. B. (N.S.) 3; 30 L. J., C. P. 321; 7 Jur. (N.S.) 571; 4 L. T. 324; 9 W. R. 832.

Examination by Commissioner.] — Commissioners have no right to ask questions, the answers to which may subject the witness to fine or other criminal punishment. *Smith* v. *Beadnell*, 1 Camp. 30.

c. Public Policy.

As to Affairs of State.]—Communications in official correspondence relating to matters of state cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in the exercise of the power given to him as such officer; not only because such communications are confidential, but because their disclosure might betray secrets of state policy which might be injurious to the interests of the country; nor can an extract be admitted relating to the particular matter, because the whole must be read or none. *Anderson* v. *Hamilton*, 8 Price, 244, n.; 4 Moore, 593; 2 Br. & B. 156, n.; 22 R. R. 751, n.

Communications which take place between the governor of a distant province and his attorney-general are confidential, and if a witness is interrogated as to their substance in a court of justice, he is not bound to answer any questions respecting them. *Wyatt* v. *Gore*, Holt, N. P. 299.

In an action against the secretary of the Board of Trade for acts done by the board's servants, an order having been obtained for discovery of documents, he made an affidavit stating that he had, as secretary to the board, certain official documents in his official custody and control, and that he objected to state anything further with respect to them on the ground of public policy:—Held, that this was insufficient to establish the privilege claimed. *Kain* v. *Farrer*, 37 L. T. 469.

Semble, it is not enough to state, in a mere formal affidavit, that discovery is objected to on the ground of public policy; but it should appear that the mind of a responsible person has been brought to bear on the question of the expediency for the public interest of giving or refusing the information asked for. *Ib.*

In such an action, the defendant not having denied his responsibility for the acts of the servants of the board, possession of documents by the board which are under his official control is possession by himself. *Ib.*

When a collision occurs between one of the Queen's ships and a ship belonging to a private owner, and the captain of the Queen's ship makes (in accordance with the usual practice) a report to the Lords of the Admiralty, the Court of Admiralty will not, in a cause against the captain, in which an appearance has been entered by the Queen's proctor by order of the Lords of the Admiralty, order it to be produced for inspection by the opposite parties if the secretary to the Lords of the Admiralty makes an affidavit to the effect that such production would be prejudicial to the public service. *H.M.S. Bellerophon*, 44 L. J., Adm. 5; 31 L. T. 756; 23 W. R. 248.

A judge at nisi prius has no power to compel a witness to produce documents connected with affairs of state if their production would be injurious to the public service, and that question must be determined not by the judge but by the head of the department having the custody of the documents. *Beatson* v. *Skene*, 5 H. & N. 838; 29 L. J., Ex. 430; 6 Jur. (N.S.) 780; 2 L. T. 378; 8 W. R. 544.

An officer of the Tower will not be permitted to prove that a particular plan of the Tower produced is a correct one. *Rex* v. *Watson*, 2 Stark. 148.

Parliament.]—A member of parliament, or the Speaker, may be called upon to give evidence of the fact of a member of parliament having taken part or spoken in a particular debate. *Plunkett* v. *Cobbett*, 5 Esp. 137.

But he cannot be asked as to what the member delivered in the course of a debate. *Ib.*

On a trial, a member of parliament may be asked whether Mr. L. was Speaker of the House of Commons on a particular day; but if he be asked how a member voted, he will not be compelled to answer, if he declines doing so, and has not leave of the House to give evidence. *Chubb* v. *Salomons*, 3 Car. & K. 75.

To an action of slander the defendant pleaded that the statements complained of were part of the evidence given by him in a character of a witness before a select committee of the House of Commons:—Held, that the statements so made were privileged, and that the action would not lie. *Goffin* v. *Donnelly*, 50 L. J., Q. B. 303; 6 Q. B. D. 307; 44 L. T. 141; 29 W. R. 440; 45 J. P. 439.

Military Court.]—Where the commander-in-chief directed a military inquiry to be held to investigate the conduct of a commissioned officer in the army, who afterwards sued the president of such inquiry for a libel stated to be contained in his report:—Held, that such report was a privileged communication, and properly rejected as evidence at the trial. *Home* v. *Bentinck* (*Lord*), 2 Br. & B. 130; 4 Moore, 563; 22 R. R. 748.

No action will lie against a witness for what he says or writes when giving evidence before a court of justice. The rule is founded on principles of public policy. The same principle applies when a military man is bound to appear and give evidence before a military court of inquiry. *Dawkins* v. *Rokeby* (*Lord*), 45 L. J., Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931.

A military court of inquiry may not be strictly a judicial tribunal; but where such court has been assembled under the orders of the general commanding in chief, in conformity with the Queen's regulations for the government of the army, a witness who gives evidence thereat stands in the same position as a witness giving evidence before a judicial tribunal. *Ib.*

And see *Dawkins* v. *Paulet* (*Lord*), 9 B. & S. 768; 39 L. J., Q. B. 53; L. R. 5 Q. B. 94; 21 L. T. 584; 18 W. R. 336.

Letter to Insolvency Court.]—A letter written by an opposing creditor to the chief commissioner of the Insolvent Debtors' Court, previous to the hearing of an insolvent's case, is not a privileged communication. *Gould* v. *Hulme*, 3 Car. & P. 625.

Surveyor appointed by Court to report.]—A surveyor appointed by the parties, at the instance of the judge, to make a report, acts in a quasi-judicial capacity and ought not to be examined in the action. *Broder* v. *Saillard*, 24 W. R. 456.

Arbitrator.]—An arbitrator cannot be compelled to give evidence in a cause as to matters that occurred before him during the arbitration. *Johnson* v. *Darwin*, 4 Car. & P. 327; 2 B. & Ad. 925.

Where a cause has been referred, and the arbitrator, upon the inspection of the plaintiff's books and examination of the parties, finds that the plaintiff had no cause of action in an action for malicious prosecution, the arbitrator cannot be called as a witness to prove those facts. *Habershon* v. *Troby*, 3 Esp. 38; Peake, Ad. C. 181.

An arbitrator may be called to prove what matters were claimed before him on a reference. *Martin* v. *Thornton*, 4 Esp. 181.

An arbitrator may be called as a witness in an action to enforce his award. *Buccleuch* (*Duke*) v. *Metropolitan Board of Works*, 41 L. J., Ex. 137; L. R. 5 H. L. 418; 27 L. T. 1.

He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration. *Ib.*

But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to him. *Ib.*

The former law and practice with regard to references to arbitration are not abolished by the Judicature Act, and consequently, where a cause is referred to an arbitrator for decision according to the old practice, the arbitrator cannot be called on to report to the court with regard to the matter referred to him, but his decision is final. *Craikshank* v. *Floating Swimming Baths Co.*, 45 L. J., C. P. 684; 1 C. P. D. 260; 34 L. T. 733; 24 W. R. 644.

An order was made that a cause should be referred to the master, and that the subsequent proceedings should be continued and concluded according to the new practice:—Held, that the reference was not merely for report by the master under the new powers given by the Judicature Act, but for decision, and that the master could not be made to report to the court, but his decision was final. *Ib.*

The court will admit evidence of an arbitrator in explanation of his award; and when it appears from such evidence that there has been a mistake on his part, either as to the subject-matter referred to him, or in point of legal principle affecting the basis on which the award is made, the award will be set aside or referred back to the arbitrator. *Dare Valley Ry., In re*, 37 L. J., Ch. 719; L. R. 6 Eq. 429.

Protection of Informer.]—In an information by the attorney-general for a breach of the revenue laws, a witness for the Crown cannot be asked in cross-examination, "Did you give the information?" *Att.-Gen.* v. *Bryant*, 15 M. & W. 169; 15 L. J., Ex. 265.

For the rule of public policy which protects a witness from being asked such questions as would disclose the informer, if he is a third person, equally applies to questions which would disclose whether the witness is himself the informer. *Ib.*

Protection of Witness.]—A witness in a court of justice is absolutely privileged as to anything

he may say as a witness having reference to the inquiry on which he is called as a witness. *Seaman* v. *Netherclift*, 46 L. J., C. P. 128; 2 C. P. D. 53; 35 L. T. 784; 25 W. R. 159—C. A.

An action will not lie against a witness for what he says when giving evidence before a court of justice. The same principle applies where a military man is bound to appear and give evidence before a military court of inquiry. *Dawkins* v. *Rokeby (Lord)*, 45 L. J., Q. B. 8; L. R. 7 H. L. 744; 33 L. T. 196; 23 W. R. 931. *See further* DEFAMATION.

Grand Jurymen.]—A grand juryman may be examined, in an action for malicious prosecution, as to the fact whether the defendant was the prosecutor of the indictment. *Sykes* v. *Dunbar*, 2 Selw. N. P. 1059; 1 Camp. 202, n. S. P., *Freeman* v. *Arkell*, 1 Car. & P. 137; 3 D. & R. 669; 2 B. & C. 494.

Tax Collector.]—A collector of the property-tax is bound, when subpœnaed as a witness, to give evidence of all facts within his knowledge touching the matter in question, notwithstanding the oath against disclosure administered to him by the commissioners. *Lee* v. *Birrell*, 3 Camp. 337.

Acts of Agent.]—When the directions which have been given by a defendant to his agent cannot be read on the ground of public policy, the agent may be asked whether he did not act under the direction of the defendant. *Cooke* v. *Maxwell*, 2 Stark. 183; 19 R. R. 700.

Indecency.] — Indecency of evidence is no objection to its being received, when it is necessary to the decision of a civil or a criminal right. *Da Costa* v. *Jones*, Cowp. 729.

Legitimacy — Non-Access.] — *See* HUSBAND AND WIFE.

d. Other Grounds.

Non-Legal Confidence—Clergymen.]—Clergymen are bound to answer questions relating to matters confided to them in confession. *Butler* v. *Moore*, MacNally, 253.

Otherwise, by Best, C.J., in *Broad* v. *Pitt*, 3 Car. & P. 518; and by Alderson, B., in *Reg.* v. *Griffin*, 6 Cox, C. C. 219.

In a suit by the husband it appeared that, subsequently to the discovery by the petitioner of an alleged act of adultery between the respondent and co-respondent, the respondent had an interview with a clergyman, who, at the trial, was called as a witness on behalf of the petitioner, but objected, on the ground of privilege, to disclose the conversation or anything that took place at the interview. The court, however, overruled the objection, and held that the clergyman had no right to withhold the information. *Normanshaw* v. *Normanshaw*, 69 L. T. 468.

—— **Romish Priest.**] — A Roman Catholic priest called as a witness, on a trial for felony, is bound to answer the question from whom he received the property alleged to be stolen, although delivered to him by a party in connection with the confessional. *Reg.* v. *Hay*, 2 F. & F. 2.

—— **Medical Men.**]—Medical men are bound to reveal confidential communications made to them in their professional character as such. *Rex* v. *Gibbons*, 1 Car. & P. 97.

—— **Bankers.**]—The bankers of one of the parties in a cause is bound to answer what such party's balance was on a given day, as it is not a privileged communication. *Lloyd* v. *Freshfield*, 2 Car. & P. 325.

A letter by a mercantile agent to his principal, giving information respecting what the agent has actually done for, and on account of, the principal, is not privileged, although it is sent in compliance with the request of the principal, made after the principal has been threatened with litigation respecting the matter on which he requires information. *Anderson* v. *Bank of British Columbia*, 45 L. J., Ch. 449; 2 Ch. D. 644; 35 L. T. 76; 24 W. R. 624—C. A. Affirming decision of M.R., reported subsequently, 24 W. R. 724.

—— **Steward.**]—Communications to a steward by his employer respecting his affairs are not privileged from disclosure, like those to legal advisers. *Falmouth* v. *Moss*, 11 Price, 455; 25 R. R. 753.

—— **Pursuivant of Heralds' College.**]—A pursuivant of the Heralds' College is not in the position of a legal adviser, and communications passing between him and the person employing him in reference to pedigrees in the Heralds' College are not privileged, and he is entitled to be examined in reference thereto. *Slade* v. *Tucker*, 49 L. J., Ch. 644; 14 Ch. D. 824; 43 L. T. 49; 28 W. R. 807.

Irrelevancy.]—A witness cannot demur because the questions asked him are not pertinent to the matter in issue. *Ashton* v. *Ashton*, 1 Vern. 165.

Immateriality.]—A witness cannot object to answer a question because it relates to private matters, or because it is immaterial, unless the answer may be withheld on some ground of privilege. *Tipping* v. *Coates*, 6 Hare, 16; 17 L. J., Ch. 17; 11 Jur. 1075.

Defamatory to Third Party.]—Demurrer of a witness to interrogatories inquiring after matter defamatory to a third person, and not material in the cause, allowed. *Mulgrave* v. *Dunbar (Lord)*, 2 Swanst. 198.

Prejudicial in other Action.]—An order had been made to wind up a company, and a special examiner appointed to take the evidence in the proceedings. B. was subpœnaed as a witness, but not by the company. He was asked whether he was a director of the company, and what was the nature of certain specified transactions in which he was engaged with particular persons. He refused to answer those questions on the grounds that they ought to have been put to him only in the presence of a jury, and that to answer them then might prejudice his success in two actions which he had commenced against the company. He then moved for an order to stay his further examination before the special examiner, and for leave to prosecute his actions, notwithstanding the pendency of the winding-

up:—Held, that his examination could not be stopped, but that he might go on with his actions. *Contract Corporation Co., In re, Bateman, Ex parte*, 15 L. T. 263.

Solicitor — Retainer by other Side.]—The solicitor of the plaintiffs in the cause was served with a subpœna to attend and be examined before commissioners as a witness for the defendants, and he thereupon attended and delivered to the commissioners a written refusal to be examined, on the ground of his being professionally employed by the plaintiffs:—Held, that such document was not properly returned by the commissioners, and ought not to have been set down as a demurrer. *Wisden* v. *Wisden*, 6 Hare, 549.

9. Leading Questions.

What are.]—A witness, called to prove that A. and B. are partners, is asked whether A. has interfered in the business of B.: this is not a leading question. *Nicholls* v. *Dowding*, 1 Stark. 81; 18 R. R. 746.

In order to identify a person in court with one whom the witness has described, the attention of the witness may be directed to that person, and he may be asked if that is the person of whom he has spoken. *Rex* v. *Watson*, 2 Stark. 128. S. P., *Rex* v. *De Berenger*, 3 M. & S. 67.

A leading question may be put when it is necessary to contradict a witness on the other side, as to the contents of a paper which has been destroyed. *Courteen* v. *Touse*, 1 Camp. 43; 10 R. R. 627.

Where a witness on cross-examination denies having used particular expressions in the presence of the parties, the opposite counsel examining a person to contradict the witness is not at liberty to lead, by reading from his brief the words denied; the conversation spoken to by the first witness being evidence of itself. *Hallett* v. *Cousins*, 2 M. & Rob. 238.

The rules of evidence are exactly the same in civil and criminal cases; and in both it is in the discretion of the judge how far he will allow the examination in chief of a witness to be by leading questions, or to assume the form of a cross-examination. *Reg.* v. *Murphy*, 8 Car. & P. 297.

Cross-examination.]—Leading questions may always be put in cross-examination, whether the witness is a willing or an adverse one for the party calling him. *Parkin* v. *Moon*, 7 Car. & P. 408.

Alternative Question.]—An interrogatory put in the alternative, not pointing to one side of the question more than to the other:—Held, not to be leading, as it would be sometimes impossible otherwise to get an answer to the interrogatory. *Aylward* v. *Kearney*, 2 Ball & B. 463.

10. As to Contents of Written Documents.

Admissions.]—What a party says is evidence against himself as an admission, notwithstanding it may relate to the contents of a written paper. *Earle* v. *Pickin*, 5 Car. & P. 542.

In an action for goods sold and delivered, and on an account stated, a parol admission of the debt by the defendant is evidence under the account stated, though it appears that there was a written agreement relating to the goods. *Newhall* v. *Holt*, 6 M. & W. 662; 9 L. J., Ex. 293; 4 Jur. 610

When issue is joined on the contents of a deed, the plaintiff may give in evidence an admission by the defendant of the contents of that deed, without producing the deed itself, or accounting for its non-production. *Slatterie* v. *Pooley*, 6 M. & W. 664; 1 H. & W. 18; 10 L. J., Ex. 8; 4 Jur. 1038. S. P., *Howard* v. *Smith*, 3 Scott (N.R.) 574; 3 Man. & G. 254; 10 L. J., C. P. 245.

In an action against assignees to recover money wrongfully paid to them, the debt having been previously paid to the bankrupt, the latter stated, that, from looking at an entry of his own in the plaintiff's book, he had no doubt whatever he had received the money:—Held, sufficient proof of the payment without producing the book. *Maughim* v. *Hubbard*, 2 M. & Ry. 5; 8 B. & C. 84; 6 L. J. (O.S.) K. B. 229.

Nature of Rule.]—A party who has executed a deed under a power of attorney will not be permitted to speak to its contents: the power of attorney ought to be produced. *Johnson* v. *Mason*, 1 Esp. 89.

A reporter to a newspaper, who is called as a witness, cannot be asked in cross-examination, whether, in articles which he has written in that newspaper, he has not called the opposite party by nicknames, as that is a part of the contents of the articles. *Reg.* v. *Murphy*, 8 Car. & P. 297.

A witness cannot be asked what the opposite party has said as to the contents of a deed executed by him, without such party has had notice to produce such deed. *Bloxam* v. *Elsee*, 1 Car. & P. 558; R. & M. 187; 30 R. R. 275.

A witness may be interrogated as to his examination of old records, and may state that they correspond in substance with a particular record, which has been read, without going through the whole in detail, subject, however, to a full cross-examination. *Rowe* v. *Brenton*, 3 M. & Ry. 212; 8 B. & C. 765.

In the absence of any evidence of the contents of a rate-book, the collector cannot be asked to say whether a particular person's name was on the rate, though he might be asked whether he had applied to him for it. *Justice* v. *Elstob*, 1 F. & F. 256.

A witness, who states that he had at one time received a number of letters from one of the parties in a cause, containing statements with reference to a particular fact, but which letters he had since destroyed, cannot be examined as to the general contents of such letters, for the purpose of ascertaining the impression thereby produced in his mind with reference to the fact in question. *Topham* v. *M'Gregor*, 1 Car. & K. 320.

On the trial of an action for piracy of musical copyright, a piece of music having been shewn to a witness skilled in music, he was asked, for the purpose of proving that it was not first published in England, whether he had not seen printed copies of it for sale in a shop at Milan, at a given date, sixteen years before the trial:—Held, that the question was irregular as referring to the contents of a document not produced or accounted for. *Boosey* v. *Davidson*, 13 Q. B. 257; 18 L. J., Q. B. 174.

Where parts only of a book containing pro-

ceedings in bankruptcy are put in by one party, the opposite counsel has no right to refer to other parts of it. *Whitfield* v. *Alan*, 2 Car. & K. 1015.

Though a witness cannot give evidence of the particular contents of written accounts, yet he may speak to the general balance, without producing them. *Roberts* v. *Doxon*, 1 Peake, 116; 3 R. R. 660.

A witness may be asked whether he has agreed to sell goods on commission, although the terms of such agreement have been reduced to writing. *Whitfield* v. *Brand*, 16 M. & W. 282; 16 L. J., Ex. 103.

Denial of Writing.]—If, in examination in chief, the plaintiff is asked as to the contract, and denies that there was a contract in writing, the defendant may interpose and give evidence upon a collateral issue as to whether there was a contract in writing or not, before the plaintiff is allowed to give evidence of its terms. *Cox* v. *Coureless*, 2 F. & F. 139.

On Cross-examination.] — When on cross-examination of a witness for the plaintiff the defendant's counsel puts documents into his hands and proves out of his mouth that they are in the plaintiff's handwriting, the plaintiff's counsel has a right to see them at once for the purposes of cross-examining on them and identifying them. *Peck* v. *Peck*, 21 L. T. 670; 18 W. R. 295.

The mere fact of counsel whilst cross-examining a witness, putting a document into the witness's hand, and asking him whether it is in his handwriting, does not entitle the opposite counsel to see such document. *Cope* v. *Thames Dock Co.*, 2 Car. & K. 757.

But the opposite counsel have a right to see the document before the cross-examining counsel proceeds to found any question on the document itself. *Ib.*

On cross-examination of a witness, the cross-examining counsel is not entitled to inspect the whole of a diary used by the witness to assist his memory, but only such parts as refer to the subject-matter of the suit. *Burgess* v. *Bennett*, 20 W. R. 720.

Parties are not entitled to put in as part of their case documents handed to a witness on cross-examination by the opposite party, to depose to their nature. *Collier* v. *Nokes*, 2 Car. & K. 1012.

Where a witness on cross-examination proves the handwriting of the opposite party to a paper, the counsel for such party has no right to see the paper, to enable him to found an examination as to whether it was really the writing of his client or not. *Russell* v. *Rider*, 6 Car. & P. 416.

The defendant's counsel, on cross-examination of the plaintiff, read a letter from him, which, in effect, answered his case, and then submitted that there was no evidence for the jury:—Held, that the court in banc, in considering whether there was evidence, could not look at the letter as part of the plaintiff's case. *Rawlings* v. *Chandler*, 9 Ex. 687.

In an action for a libel in imputing to the plaintiff that by reason of his belonging to an association he was a rebel, the plea justifying the libel:—Held, that the defendant could not ask him on cross-examination (he not having been asked anything on the point of examination in chief) whether his name was inscribed in a book containing the names of members. *Darby* v. *Ousley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463.

And see further under next head.

11. Cross-examination.

Examination in Chief, Necessity for.]—What is opened by the counsel of one party, as presumptive evidence in favour of his client against the other, cannot be examined into on cross-examination of his witnesses, if they have not been examined in chief as to the facts so stated in his favour. *Lucas* v. *Novosilieski*, 1 Esp. 297.

Where a witness has been called by one party, the other may cross-examine him, though no question has been asked him in chief. *Phillips* v. *Middlesex (Sheriff)*, 1 Esp. 357.

If a witness is called, and has only answered an immaterial question when his examination is stopped by the judge, the opposite party has no right to cross-examine him. *Creery* v. *Carr*, 7 Car. & P. 64.

The cross-examination of a witness is an incident to his examination in chief. *Phelps* v. *Prothero*, 2 De G. & Sm. 274. *And see* 17 L. J., Ch. 404; 12 Jur. 783.

Quære, whether a party can read the cross-examination of the witness of his adversary where the latter does not read the examination in chief. *Barker* v. *Birch*, 1 De G. & Sm. 376.

Witness called by Mistake.]—If the plaintiff's counsel calls a witness by mistake, he cannot be cross-examined. *Clifford* v. *Hunter*, 3 Car. & P. 16; M. & M. 113.

A witness called under a mistake of counsel, as to his being able to speak to a transaction, is not liable to cross-examination though sworn, if the mistake is discovered before any question is put. *Wood* v. *Mackinson*, 2 M. & Rob. 273.

Witness to prove Document.]—A party will not, as a matter of indulgence, obtain leave to cross-examine a witness, who has been produced by the other side, merely for the purpose of proving a will of lands. *Moore* v. *Moore*, 2 Jones, 445.

The plaintiff in a creditors' suit called a witness to prove the execution of a bond upon which his debt was founded; the defendant, the executor, cross-examined the witness as to the consideration. On the proving of the debts before the master, the defendant insisted that the bond was usurious, and obtained leave to examine the witness again upon interrogatories to be settled by the master, on a motion by the plaintiff:—Held, that the plaintiff was entitled to cross-examine the witness; that the application by the plaintiff for leave to cross-examine the witness was proper. *Whitaker* v. *Wright*, 3 Hare, 412; 13 L. J., Ch. 367; 8 Jur. 439.

Witness to Produce Document.]—A witness having been called into the box and sworn in the course of a prosecution for a misdemeanour, produces a document, but is not examined: the defendant is entitled to cross-examine. *Rex* v. *Brooke*, 2 Stark. 472; 20 R. R. 723.

A person who merely attends under a subpœna duces tecum for the purpose of producing a document cannot be cross-examined. *Summers* v. *Mosely*, 1 C. M. & R. 96, n.

Even if by mistake he has been sworn and

asked a question which he does not answer. *Rush* v. *Smith*, 2 D. P. C. 687; 1 C. M. & R. 94; 4 Tyr. 674; 3 L. J., Ex. 355.

Testing by Documents.]—The power of the Court of Chancery to make an order for the production of documents for the purpose of their being put into the hands of a witness who is being cross-examined in order to test his evidence, is the same as that of a common law court at a trial at nisi prius. *Emma Silver Mining Co., In re*, 44 L. J., Ch. 456; L. R. 10 Ch. 194; 31 L. T. 816; 23 W. R. 300.

Attention directed to Items of Account.]—The rule that in cross-examination upon an account, notice of the items to which the cross-examination will be directed must be given to the party bringing in the account, applies to the cross-examination of a party seeking to charge by his account as well as to the case of a merely accounting party. *Bates* v. *Eley*, 45 L. J., Ch. 270; 1 Ch. D. 473; 34 L. T. 50; 24 W. R. 424.

Of Plaintiff on Counter-claim.]—The defendant in an action for a legacy sought a set-off by counter-claim, and raised issues not involved in the claim and defence. He was not allowed in cross-examination of the plaintiff to ask questions relevant only to the issues raised upon the counter-claim, but was allowed to recall that plaintiff as his own witness. *Woodfine, In re, Thompson* v. *Woodfine*, 47 L. J., Ch. 832; 38 L. T. 753; 26 W. R. 678.

Right of Party to Cross-examine own Witness.]—Where a party to an action has called a witness, he is not entitled as of right to cross-examine that witness, even if the witness is a hostile litigant. The presiding judge has a discretion whether he will allow the witness to be cross-examined by the party calling him. *Clarke* v. *Saffery* (R. & M. 126; 27 R. R. 736), and *Barton* v. *Carew* (R. & M. 127), commented on. *Price* v. *Manning*, 58 L. J., Ch. 649; 42 Ch. D. 372; 61 L. T. 537; 37 W. R. 785—C. A.

The situation in which a witness stands towards either party, does not give the party calling the witness a right to cross-examine him unless the witness's evidence be of such a nature as to make it appear that the witness is an unwilling one. *Reg.* v. *Ball*, 8 Car. & P. 745.

—— **When called by Other Side.**]—A plaintiff having examined a witness, if a defendant afterwards calls him as his witness in chief, the plaintiff may cross-examine him at large. *Lord* v. *Colvin*, 3 Drew. 222; 3 Eq. R. 514; 24 L. J., Ch. 517; 1 Jur. (N.S.) 298; 3 W. R. 342.

Right of Party to Discredit his own Witness.]—*See* post, col. 966.

Witness of Co-Defendant.]—A defendant may cross-examine another defendant's witness. *Lord* v. *Colvin*, supra.

All evidence taken, whether on examination in chief or on cross-examination, is open to all parties. *Ib.*

Time for.]—The cross-examination of a witness should always commence as soon as the direct examination is finished. *Beatagh* v. *Beatagh*, 1 Hog, 98.

Relevancy.]—The judge will allow the defendant's counsel to cross-examine as to facts which appear to be irrelevant, as relating to a third person, if the defendant's counsel undertakes that it shall be shewn by other evidence that these facts are relevant to the issue. *Haigh* v. *Belcher*, 7 Car. & P. 389.

Adverse party may cross-examine witness to same point to which he is produced, but not to new matter. *Ely (Dean)* v. *Stewart*, 2 Atk. 44; Barnard. 170.

On the trial of an issue, "whether (during a certain period) there arose from the works of the defendants noisome, offensive, noxious, or unwholesome smoke, and other vapours, to the nuisance of the plaintiff, whereby the produce of his garden was deteriorated," evidence was adduced for the plaintiff to shew that the smoke and other vapours from the defendants' works had injured the produce of other grounds in the neighbourhood; and also, for the defendants to shew that their works did not injure the produce of any other grounds; and one of the defendants' witnesses having, on his examination in chief, described several gardens in the neighbourhood of the works as in utmost health, was asked in cross-examination by the plaintiff's counsel, if he knew Glasgow Field (grounds in the neighbourhood), and having answered that he "knew Glasgow Field, and never knew of any damage done there," he was then asked, "whether he had known of any sum having been paid by the defendants to the proprietors of Glasgow Field, for alleged damage there, occasioned by their works":—Held, that the question was inadmissible as leading to a new collateral inquiry, which, answered either way, could not affect the issue, or test the credit of the witness. *Tennant* v. *Hamilton*, 7 Cl. & F. 152; 1 Rob. 821.

On a motion ex parte, the court ordered the witnesses to be produced, plaintiffs to give a note of what witnesses they had examined, and defendants to give a note of which of them they would have produced to be cross-examined. *Spalding* v. *Bragham*, 2 Fowl. Ex. Pr. 158. S. P., *Johnston* v. *Carruthers*, *id.* 159.

A defendant in a foreclosure suit produced evidence to shew that the mortgagor was insane at the time of the execution of the deed, which had been proved in the usual way by the attesting witness. The court made the usual foreclosure decree. Semble, it would have been competent to the defendant to have prevented the plaintiff from succeeding in his claim, by cross-examining the attesting witness, and thereby shewing that the deed was void. *Jacobs* v. *Richards*, 23 L. J., Ch. 557; 18 Jur. 257; 2 W. R. 174.

As to Character of Plaintiff.]—In an action for false imprisonment on a criminal charge, the defendant cannot cross-examine as to the bad character of the plaintiff, nor as to previous charges made against him. *Downing* v. *Butcher*, 2 M. & Rob. 374.

Where the character of the plaintiff or the defendant is attempted to be impeached in the cross-examination of the adversaries' witnesses, if those witnesses deny the imputation intended to be conveyed, the party will not be admitted to go into evidence of his character. *King* v. *Francis*, 3 Esp. 116.

In an action for slander, imputing to the plaintiff unnatural practices, to which there was only a plea of not guilty, the counsel for the

defendant, on cross-examination, asked a witness, "Have you heard from other persons that the plaintiff is addicted to practices of this kind?"—Held, that the question was improper, as it was not confined to rumours existing before the words were spoken by the defendant. *Thompson* v. *Nye*, 16 Q. B. 175; 20 L. J., Q. B. 85; 15 Jur. 285.

A libel alleged that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress; defence, that the allegation was true in substance and in fact:—Held, that evidence of rumours, before the publication of the libel, that the plaintiff had committed the offences charged in it, and evidence of particular facts and circumstances tending to shew the misconduct of the plaintiff as a theatrical critic, could not be admitted in reduction of damages. *Scott* v. *Sampson*, 51 L. J., Q. B. 380; 8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

Character of Third Party.]—In an action for fraudulently representing that a trader was trustworthy, the defendant proposed to ask a witness what was the reputation of the trader on a certain day, as to his trustworthiness:—Held, that the question was admissible. *Sheen* v. *Bumpstead*, 1 H. & C. 358; 32 L. J., Ex. 124. Affirmed, 2 H. & C. 193; 32 L. J., Ex. 271; 10 Jur. (N.S.) 242; 8 L. T. 832; 11 W. R. 734—Ex. Ch.

Collateral Matters.]—A defendant charged with an indecent assault, having been cross-examined as to alleged indecencies as to other persons, and denied them; evidence in disproof of these imputations on one side, or in support of them on the other, was rejected, as relating to issues quite collateral; the plaintiff being bound by the defendants' answers as to these collateral matters. *Tolman* v. *Johnstone*, 2 F. & F. 66.

In an action upon a joint and several promissory note, professed to be made by A. and B., the defendant being the administrator of A., the defence set up was, that the plaintiff had forged the note, and another note also; and the defendant was asked, on cross-examination, whether he had not heard B. say, after the case had been before the magistrates, when a charge of forgery with reference to the note was preferred against the plaintiff, that "he, B., was sorry he had forgotten he had signed two notes." The defendant answered in the negative:—Held, that another could not be called to shew that he was present at the time, and that B. had made the statement. *Palmer* v. *Trower*, 8 Ex. 247; 22 L. J., Ex. 32.

Refusal.]—Where, upon the hearing of a cause by a vice-chancellor, a tender by the defendant of himself to be examined orally as a witness for himself in the cause, with a view to his cross-examination by the plaintiff, had been refused by the plaintiff, this was held by the Court of Appeal to be a sufficient ground for refusing to accede to an application by the plaintiff to have that course adopted upon the hearing of an appeal from the vice-chancellor's decree. *Hindson* v. *Weatherill*, 23 L. J., Ch. 820; 18 Jur. 499; 2 W. R. 507—L.JJ.

As to Contents of Written Documents.]—A witness cannot upon cross-examination, even for the purpose of discrediting him, be asked as to the contents of a written paper which is neither produced, nor its absence accounted for. *Macdonnell* v. *Evans*, 11 C. B. 930; 21 L. J., C. P. 141; 16 Jur. 103.

The defendant cannot, in the course of the plaintiff's evidence, cross-examine the plaintiff's witnesses, as to the contents of written documents, although notice has been given to the plaintiff to produce them, and he refuses to produce them in that stage of the cause. *Sidways* v. *Dyson*, 2 Stark. 49. S. P., *Graham* v. *Dyster*, 2 Stark. 21.

It was not allowable on cross-examination, in the statement of a question to a witness, to represent the contents of a letter, and to ask him whether he wrote a letter to any person, with such or similar contents, without having first shewn the witness the letter, and asked him whether he wrote it or not. *Queen's Case*, 2 Br. & B. 286; 22 R. R. 662.

Two or three lines of a letter might be exhibited to a witness, without shewing him the whole, and he might be asked whether he wrote the part shewn him or not; but if he denied that he wrote such part he could not be examined as to the general contents of the letter. *Ib.*

A. brought an action against the publisher of a newspaper for libelling him in his character of tidewaiter, by imputing to him that he was a traitor and idolater, and sworn to obey a foreign potentate, and solemnly pledged to devote himself to the work of the conversion of England to the Roman Catholic faith, and overturning the national faith; that he was member of an association for that purpose, and as such unfit to be intrusted with the property of the Crown. At the trial the publication of the libel having been proved, the plaintiff was examined as a witness, and deposed that he was a Roman Catholic, and had paid ½*d.* towards an association for the conversion of England to the Roman Catholic faith:—Held, that he could not, either at common law or under the 17 & 18 Vict. c. 125, s. 24, be asked on cross-examination if his name was written in a book of that association. *Darby* v. *Ouseley*, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463.

The plaintiff having admitted that he was bound by the canons and decrees of the Church of Rome, and believed the Pope in council infallible:—Held, that he could not be asked on cross-examination whether he felt himself bound by the notes and comments of the Rheimish Testament. *Ib.*

A party may be cross-examined as to whether he has read a letter of a certain date, and in certain terms. *Ireland* v. *Stiff*, 1 F. & F. 340.

A party to the action being called as a witness on his own behalf, may be asked in cross-examination the contents of a letter which he has written, without producing the letter. *Farrow* v. *Blomfield*, 1 F. & F. 653.

The defendant's counsel, in an action for collision, proposed, in his cross-examination of the captain of the plaintiff's ship, to put in evidence the statement made by the captain before a receiver of wreck, under 17 & 18 Vict. c. 104, s. 448:—Held, inadmissible. *Northard* v. *Pepper*, 17 C. B. (N.S.) 39; 10 Jur. (N.S.) 1077; 10 L. T. 782.

The rules of a society to which the defendant belonged, proved by cross-examination of one of the witnesses, are evidence against him. *Minns* v. *Smith*, 1 F. & F. 318.

A plaintiff, in an affidavit in support of a motion for an injunction, referred to portions of an examination taken in the Court of Bankruptcy:—Held, that for the purpose of cross-examining him upon his affidavit, the defendant was entitled to have the examination, which had been partially referred to, produced. *Bell* v. *Johnson*, 4 L. T. 636; 9 W. R. 549.

To explain or contradict a statement made by a party as to an alteration in a will under which he was claiming, the probate of the will is not sufficient evidence, but the original document itself should be put into the hands of the witness. *Brown* v. *Hughes*, 1 F. & F. 299.

A witness on cross-examination may admit not having mentioned a fact on a former examination, though that examination is in writing, and not produced. *Ridley* v. *Gyde*, 1 M. & Rob. 197.

—— **Evidence for whom.**]—When a book is put into the hands of a witness to refresh his recollection, and questions are asked upon it in cross-examination, the book is not thereby made evidence for the party producing it, though it may be so for the opposite party. *Payne* v. *Ibbotson*, 27 L. J., Ex. 341.

—— **Cross-examining on Affidavit.**] — *See cases*, post, IX. EVIDENCE ON AFFIDAVIT.

Right of Counsel to Inspect Documents.]—*See cases*, ante, col. 949.

Whether by Court or Examiner.]—The court, under the 15 & 16 Vict. cc. 80 and 86, directed that a party to a suit, a witness by affidavit on his own behalf in support of his own state of facts before the master, should be cross-examined before the examiner instead of the master; and that all the parties should be examined on interrogatories before the examiner, as the master should direct. *Heartall* v. *Cheatle*, 1 Sm. & G. 78; 9 Hare (App.) xx. n.; 17 Jur. 128; 1 W. R. 91.

A witness who has made an affidavit may be cross-examined either before one of the examiners of the court or a special examiner, and in the case of a witness abroad, the proper course is to apply for a special examiner. *Edwards* v. *Spaight*, 2 John. & H. 617.

Under 7, 19, and 21 of the Orders of the 5th February, 1861, a witness cannot be cross-examined in court upon an interlocutory application, but only at the hearing, issue having been joined, and replication filed. *Bodger* v. *Bodger*, 1 N. R. 119; 11 W. R. 80.

A party to the suit, who has made an affidavit at chambers after decree, may be cross-examined before the examiner at any time thereafter without a special order to that effect, but cannot be compelled to attend there, or to submit to such cross-examination without a subpœna. *Stebbing* v. *Atlee*, 26 L. J., Ch. 265; 2 Jur. (N.S.) 1161; 5 W. R. 109.

The examiner's office is primâ facie the proper place to take all evidence without any special order. Such special order is more proper to be made where the evidence is desired to be taken at chambers. *Ib.*

Where the party to the suit, who had made the affidavit in question at chambers, where the evidence was being taken, received a simple notice to attend at chambers to be cross-examined, and did attend, but was not then cross-examined:—Held, that she might afterwards be compelled to attend at the examiner's office to be cross-examined, but that for such purpose a subpœna was necessary, and that simple notice of the meeting would not do, and even that, being present on such notice, she might refuse to be sworn. *Ib.*

Semble, the costs occasioned by the subpœna under such circumstances would in general fall on the party insisting on the cross-examination, after having neglected his first opportunity. *Ib.*

Where a suit is brought on by motion for decree, and issue is joined in a cross-suit, and an order is obtained by the plaintiff in the original suit for him to use in the cross-suit affidavits filed in his own suit, it is at the option of the plaintiff in the cross-suit either to treat these affidavits as filed in the original suit, and so cross-examine the witnesses before an examiner, or to consider them as evidence to be used in his own suit, and give notice of cross-examination in open court at the hearing. *Nere* v. *Pennell*, 1 Hem. & M. 252.

A witness having disputed the correctness of an alleged translation of letters in a foreign language, on which translation he was being cross-examined before the examiner, but as to the correctness of which there was no evidence:—Held, that the proper course would be to cross-examine the witness at the hearing in open court upon the alleged translation, at which time, if any difficulties should arise, the court would, if necessary, consider how to dispose of them. *Foster* v. *Gladstone*, 12 W. R. 525.

Under Commission.] — *See* post, VII. EXAMINATION UNDER COMMISSION.

12. RECALLING.

In what Cases.] — A witness on cross-examination answered a question put to him by the defendant's counsel, and went on to make a further statement, which was not legal evidence. The plaintiff's counsel, in reply, remarked upon this further statement. He was stopped by the jury, who understood the witness to have said the direct contrary to that attributed to him by the plaintiff's counsel, who then wished to recall the witness, but the judge refused to allow this to be done:—Held, that the witness having volunteered a statement which was not evidence, it was the duty of the judge not to notice it, and that he was right in refusing to recall the witness to correct the mistake of the jury as to what the statement was. *Cattlin* v. *Barker*, 5 C. B. 201; 17 L. J., C. P. 62.

Discretion.]—Permission to recall a witness is entirely within the discretion of the judge, and that discretion should be exercised with great caution. *Shedden* v. *Att.-Gen.*, L. R. 1 H. L. Sc. 470; 22 L. T. 631.

A judge has a discretion whether or not a witness shall be recalled after the party who

called him has closed his case. *Adams* v. *Bankart*, 1 C. M. & R. 681; 5 Tyr. 425; 1 Gale, 48.

13. Re-examination and Reply.

Hostile Witness.]—Where an adverse witness, upon his cross-examination, voluntarily gives evidence which would have been inadmissible as evidence in chief, and the counsel cross-examining does not object to such evidence being admitted or retained upon the judge's notes, the opposite counsel has a right to re-examine as to that evidence. *Blewett* v. *Tregonning*, 5 N. & M. 308; 3 A. & E. 554; 1 H. & W. 432.

Where a witness gives evidence destructive of the case which he was called to prove, the party calling him may, in order to neutralise his evidence, shew that he had before the trial given to the attorney an account of the transaction entirely different to that sworn to by him at the trial. *Wright* v. *Beckett*, 1 M. & Rob. 414.

The counsel calling a witness, who gives adverse testimony, cannot on re-examination ask whether the witness has not given a different account to the attorney. *Winter* v. *Butt*, 2 M. & Rob. 357. S. P., *Allay* v. *Hutchings*, 2 M. & Rob. 358, n.

The counsel calling a witness who has given unfavourable evidence on cross-examination may, on re-examination, ask him questions to shew inducements to betray the party who has called him. *Dunn* v. *Aslett*, 2 M. & Rob. 122.

Conversations.]—If, on the trial of an action or an indictment, a witness examined on the part of the plaintiff or prosecutor, upon cross-examination by the defendant's counsel, states that, at a time specified, he told A. that he was one of the witnesses against the defendant, and, being re-examined by the plaintiff's or the prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it related to his being one of the witnesses. *Queen's Case*, 2 Br. & B. 294; 22 R. R. 662.

If a witness called for the plaintiff is asked, on the part of the defendant, whether the plaintiff had any conversation with him on a particular subject, and the witness states anything that the plaintiff said on that subject, the plaintiff's counsel may examine as to every part of the same conversation: but, if the witness states that the plaintiff had no such conversation with him, this does not let in the plaintiff's counsel to examine as to anything else that the plaintiff said. *Dicas* v. *Brougham* (*Lord*), 6 Car. & P. 249.

Previous Statement.]—A witness was asked, on the trial of a cause, if the plaintiff had not, in his cross-examination on a former trial, admitted his insolvency:—Held, that the witness, on his re-examination, was not at liberty to detail any statement made by the plaintiff in his examination in chief at the former trial, if that statement was unconnected with the question of insolvency. *Prince* v. *Samo*, 3 N. & P. 139; 7 A. & E. 627; 1 W. W. & H. 132; 7 L. J., Q. B. 123; 2 Jur. 323.

Upon Documents.]—If the counsel who cross-examines puts a paper into the witness's hand, and puts questions on it, and anything comes of those questions, the counsel for the opposite party has a right to see the paper, and re-examine on it; but if the cross-examination, founded on the paper entirely fails, and nothing comes of it, the opposite counsel has no right to see the paper. *Reg.* v. *Duncombe*, 8 Car. & P. 369.

In Reply—When Plaintiff taken by Surprise.]—An action having been brought in a county court, ostensibly by two executors, the defendant shewed that it was brought without the consent of one of the executors, and put in and proved a release executed by that one only a day before the trial. The plaintiff's counsel, on his saying he was taken by surprise, applied to be allowed to call that executor for the purpose of shewing the release to be void. The judge refused this, and nonsuited the plaintiffs:—Held, that he was wrong in so refusing, and that such examination ought to have been allowed. *Robinson* v. *Vernon* (*Lord*), 7 C. B. (N.S.) 231: 29 L. J., C. P. 135; 6 Jur. (N.S.) 610; 1 L. T. 67; 8 W. R. 47.

Where a party is taken by surprise by a point made against him at the hearing, the judge may, if he thinks right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal. *Bigsby* v. *Dickinson*, 46 L. J., Ch. 280; 4 Ch. D. 24; 35 L. T. 679; 25 W. R. 89—C. A.

—— **Purpose of.**]—In an action by indorsee of a bill of exchange, on an issue denying the indorsement, he rested his case, in the first instance, on proof of the handwriting of the indorser. The defendant then gave evidence that the plaintiff was too poor to have discounted the bill, or to have had it indorsed to him, and that he had disclaimed having done so, or having anything to do with the bill:—Held, that the plaintiff ought not to be allowed to give evidence in reply, for the purpose of shewing his ability to discount the bill, and that, in fact, he had discounted it, as such evidence was merely confirmatory of his primâ facie case, and not in contradiction of the defendant's witnesses. *Jacobs* v. *Tarleton*, 11 Q. B. 421; 17 L. J., Q. B. 194; 12 Jur. 517.

Upon the trial of an interpleader issue in a county court, to try the title to goods taken in execution, the plaintiff, in support of his title, gave in evidence a deed (which was valid upon the face of it), by which the execution debtor had assigned to him the goods; but the witness called to prove the execution of the deed was cross-examined by the defendant, with a view to shew that the transaction was fraudulent, and the deed was therefore void:—Held, that the plaintiff was not bound to give evidence in the first instance to establish the validity of the deed, although called upon by the judge to do so, and although the nature of the defence appeared by the cross-examination of the attesting witness: and therefore that the judge was wrong in refusing to receive evidence in reply, to rebut a case of fraud set up by the defendant to invalidate the deed. *Shaw* v. *Beck*, 8 Ex. 392.

—— **Jurisdiction of Judge to allow Further**

Evidence.]—A judge may at any period in a case allow further evidence to be called by either party for his own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right. *Budd* v. *Davison*, 29 W. R. 192.

The plaintiff rested his case partly on an alleged conversation between himself and the defendant at the plaintiff's house on a certain evening in the presence of plaintiff's wife. Plaintiff's wife was cross-examined as to the substance of the alleged conversation, but not as to the fact of the defendant having been in the house on that occasion. The defendant having in his examination in chief denied that he was in the house at all on the evening in question: leave was given to the plaintiff, after the evidence on both sides was closed, to call further evidence to rebut the defendant's denial. *Rogers* v. *Manley*, 42 L. T. 585.

In an action to restrain the defendants from erecting a urinal in Old Burlington Mews, the statement of claim alleged that the soil of the mews was vested in and was the absolute property of three of the plaintiffs. The statement of defence did not admit this allegation, but alleged that the mews had long been a highway dedicated to the public, and belonged to the parish as one of the public streets thereof. At the trial of the action several witnesses were examined on both sides; and at the close of the defendant's evidence the plaintiffs applied for leave to call evidence in reply, to shew that the soil of the mews had not been dedicated to the public:—Held, that as the plaintiffs were distinctly apprised by the pleadings before the trial of the action what the nature of the defence would be, the application must be refused. *Vernon* v. *St. James' Vestry*, 49 L. J., Ch. 130; 42 L. T. 82.

14. Impeachment of Credit.

a. Generally.

The only modes of impeaching the credit of a witness are by cross-examination, by producing the record of his conviction of some infamous crime, or by adducing general evidence that he is unworthy of belief upon his oath. *Rex* v. *Watson*, 2 Stark. 149. S. P., *Spencely* v. *De Willott*, 7 East, 108; 3 Smith, 289.

b. Evidence in Contradiction.

Preliminary Cross-examination.]—Where a witness has said nothing in examination in chief, he cannot be cross-examined to discredit him. *Bracegirdle* v. *Bailey*, 1 F. & F. 536.

A party to an action, giving evidence in support of his own case, may be asked, on cross-examination, for the purpose of testing his credit, whether an action has not been brought against him in an inferior court of record upon a similar claim, and a verdict against him has been returned by the jury, he having given evidence in the cause, and this may be done without the production and proof of the record of that court. Even if a judge wrongly allows such questions to be put and to be answered, the court will not on that ground, even if the witness had been a third person, grant a new trial, unless it can see that injustice has been done by such ruling. *Henman* v. *Lester*, 12 C. B. (N.S.) 776; 31 L. J., C. P. 366; 9 Jur. (N.S.) 601. See also *Reg.* v. *Little*, 15 Cox, C. C. 319.

—— **Necessity for.**]—If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination shewing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story, or (per Lord Morris) the story is of an incredible and romancing character. *Browne* v. *Dunn*, 6 R. 67—H. L. (E.)

The solicitor for a defendant stated in an affidavit that a witness for the plaintiff had stated to him facts which were put in writing signed by the witness, and he made the writing an exhibit. The statements in the writing were contradictory to the evidence of the witness as given in the suit:—Held, that the writing was not admissible in the way in which it was put in, the witness having had no opportunity of explaining it. *Hemming* v. *Maddick*, 41 L. J., Ch. 522; L. R. 7 Ch. 395; 26 L. T. 565; 20 W. R. 433.

The general rule is, that if a party to a cause wishes on the trial to impeach an adverse witness, by proof of his having used certain expressions, the witness himself must first be asked whether he used them. *Carpenter* v. *Wuhl* or *Wall*, 3 P. & D. 457; 11 A. & E. 803; 9 L. J., Q. B. 217.

Not Admissible as to Collateral Matters.]—Where a question is put to a witness in cross-examination, the answer to which may have a tendency to discredit him, if such question is collateral to the matter in issue the answer which the witness gives must be taken as conclusive, and other witnesses cannot be called to contradict him. *Harris* v. *Tippett*, 2 Camp. 637; 11 R. R. 767. S. P., *Rex* v. *Rudge*, 2 Peake, 232; 4 R. R. 906.

Evidence of a particular collateral fact cannot be adduced in any case, whether civil or criminal, in order to discredit a witness. *Rex* v. *Watson*, 2 Stark. 149.

A witness cannot be cross-examined as to any collateral independent fact, irrelevant to the matter in issue, for the purpose of contradicting him, if his answer be one way, by another witness, in order to discredit the whole of his testimony. *Spencely* v. *De Willott*, 7 East, 108; 3 Smith, 289. S. P., *Henman* v. *Lester*, 12 C. B. (N.S.) 776; 31 L. J., C. P. 366; 9 Jur. (N.S.) 601.

A witness cannot be cross-examined for the purpose of contradicting him, except on points relevant to the issue. *Palmer, Ex parte and In re*, 1 Deac. & C. 373.

If, on cross-examining a witness, an irrelevant question be put, you cannot produce evidence to disprove his answer, but must take it for better and worse. *Arnsby, Ex parte*, 2 Deac. & C. 213.

A witness who was examined for the plaintiff, to prove a contract, was cross-examined for the defendant upon a subject irrelevant to the matter in dispute between the parties. The defendant then examined witnesses to contradict the statement made by the plaintiff's witness with regard to such irrelevant matter:—Held, that it was not

competent for a party to call witnesses to contradict evidence which was immaterial to the question at issue. *Goddard* v. *Parr*, 24 L. J., Ch. 783; 3 W. R. 633.

It is an acknowledged rule of evidence, that a collateral irrelevant inquiry cannot be gone into, to discredit a witness on the other side. *Tennant* v. *Hamilton*, 7 Cl. & F. 152; 1 Rob. 821.

A witness, being examined to prove a contract, is asked if he is not a fortune-teller, and, on his answering no, two affidavits are made to prove that he had told fortunes for money, for the purpose of throwing discredit on his evidence; and a motion is made to take those two affidavits off the file, as totally irrelevant to the question at issue:—Held, that they must be taken off the file, and that the party filing them must pay the costs. *Goddard* v. *Parr*, 24 L. J., Ch. 783; 3 W. R. 633.

Proof of Previous Inconsistent Statement—Statutes.]—*The Criminal Procedure Act*, 1865 (*which by s.* 1 *is made applicable to all courts as well criminal as all others*), *s.* 4, *provides that "if a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement." A similar provision in the Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *was repealed by the S. L. R. Act*, 1883.

—— **By Witness previously Examined.**]—Where a defendant, who claimed to be the owner of a mill, denied on cross-examination that he had ever stated that he was tenant only, the plaintiff was allowed under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 23, to call a witness to prove that on a certain occasion the defendant had described himself as such, though the same witness had previously been called and examined. *Sykes* v. *Haig*, 44 L. T. 57.

—— **Before the Act.**]—If, on cross-examination, it is proposed to ascertain of a witness, whether he has made representations of any particular nature, immediately after being asked whether he made any representation, he must be asked whether he made the representation by parol, or in writing. *Queen's Case*, 2 Br. & B. 292; 22 R. R. 662.

If a witness, examined in chief on the part of the plaintiff, being asked whether he remembered a quarrel taking place between A. and B., answers that he has heard of a quarrel between them, but does not know the cause of it, and such witness is not asked upon his cross-examination whether he has or has not made a declaration touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel. *Queen's Case*, 2 Br. & B. 299; 22 R. R. 662.

So, where he answers that he does not remember it, and such witness is not asked, on his cross-examination, whether he has or has not made a declaration stated in the question respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration. *Ib.*

Where a witness in support of a prosecution has been examined in chief, and has not been asked, on cross-examination, as to any declarations made by him, or acts done by him, to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the accused to examine witnesses in his defence to prove such declarations or acts, without first calling back such witness examined in chief, to be examined as to the fact whether he ever made such declarations or did such acts. *Queen's Case*, 2 Br. & B. 311; 22 R. R. 662.

If a witness is called on the part of the plaintiff or a prosecutor, and gives evidence against the defendant or accused, and if, after the cross-examination of such witness, the defendant's or accused's counsel discovers that the witness so examined has corrupted, or endeavoured to corrupt, another person to give false testimony in such cause, the counsel for the defendant or accused is not permitted to give evidence of such corrupt act of such witness, without calling back such witness. *Ib.*

It is not admissible to impeach a witness by shewing that he has made a particular statement, unless the witness denies having made such statement; it is enough that he states he has no recollection of making such statement. *Pain* v. *Beeston*, 1 M. & Rob. 20.

In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally whether he has ever made such a statement, but particulars must be specified to him. *Angus* v. *Smith*, M. & M. 473.

A witness cannot be called to contradict another who denies having made a particular statement, if such statement was not of a fact, but only of a matter of opinion, as such statement of opinion does not come within the rule which confines contradictions to matters directly connected with the issue in the cause. *Elton* v. *Larkins*, 5 Car. & P. 385.

Evidence of statements by witnesses on other occasions relevant to the matter at issue, and inconsistent with the evidence given by them at the trial, is always admissible, in order to impeach the value of their testimony; but it is only such statements as are relevant that are admissible. And in order to lay a foundation for the admission of such contradictory statements, and to enable the witness to explain them, and for that purpose only, he must be asked whether he ever said what is suggested to him, with the name of the person to whom or in whose presence he is supposed to have said it, or some other circumstance sufficient to designate the particular occasion. If the witness, on the cross-examination, admits the conversation imputed to him, there is no necessity for giving other evidence of it; but if he says he does not recollect, that is not an admission, and evidence may be given on the other side, that the witness did say what is imputed, provided the statement is relevant to the matter in issue. *Crowley* v. *Page*, 7 Car. & P. 789.

A witness cannot be called to contradict another with respect to a statement suggested to

have been made, if there is not an express denial by the party who is supposed to have made it of his having done so. *Long* v. *Hitchcock*, 9 Car. & P. 619.

In an information against the defendant for using a cistern in the making of malt, without making an entry as required by act of parliament, a witness was asked by the defendant's counsel if he had not stated to C. that the excise officers had offered him 20*l.* to say that the cistern had been used; the witness having denied the alleged statement:—Held, that evidence could not be given to shew that he had in fact made the statement. *Att.-Gen.* v. *Hitchcock*, 1 Ex. 91; 16 L. J., Ex. 259; 11 Jur. 478.

Where a witness is asked if he has made a certain statement, which is material to the issue, and at variance with other parts of his evidence, and he denies that he has made such statement, evidence may be given to shew that he did in fact make the statement. *Ib.*

Where a witness is examined as to a fact with a view to shew that he is biassed as to the cause, and he denies the fact, evidence may be offered in contradiction to prove the fact. *Ib.*

In a suit against the personal representative of D., deceased, the principal question was, at what period the partnership of D. with E. terminated; and after publication passed, the plaintiff discovered two affidavits, one sworn by D. in another suit, the other sworn in the same suit by a witness examined for the defendant in the principal suit. On a motion by the plaintiff for liberty to examine witnesses to prove the existence of these affidavits on the ground that the affidavit of D. tended to prove the existence of the partnership at a particular period which was a fact in issue, and that the affidavit of the witness might contradict his evidence, if read for the defendant at the hearing, leave was given to exhibit an interrogatory to prove the affidavit of D., without prejudice as to the admissibility of the affidavit, with liberty for the defendant to cross-examine; but it was refused, as to the affidavit of the witness, on the ground that, if the object was to discredit his testimony, the plaintiff ought to proceed in the ordinary course for that purpose. *Gregory* v. *Davies*, or *Marychurch*, 12 Beav. 275; 19 L. J., Ch. 77; 13 Jur. 1019; 14 Jur. 102.

In a suit for renewal the defendant examined a witness, to prove the service of a notice upon the plaintiffs, requiring them to renew and pay up the renewal fines. Semble, that it was not competent for the plaintiffs to read the evidence of another witness examined by them in the same cause, for the purpose of proving an admission by the defendant's witness that he had never served the notice in question. And semble, that articles should have been previously exhibited, to the credit of the defendant's witness, by the plaintiffs, to enable them to impeach his testimony. *O'Keeffe* v. *Allen*, 1 Ir. Eq. R. 382.

Semble, that an examination of a party before the commissioner may be read to discredit an affidavit of the same witness made upon a petition. *Marjoribanks, Ex parte*, 1 De G. 466.

—— **Illiterate Witness.**]—The veracity, or even accuracy, of an ignorant and illiterate person, is not to be conclusively tested by comparing an affidavit made by him with his vivâ voce testimony; discrepancies between them are not conclusive against his testimony. *Johnston* v. *Todd*, 5 Beav. 597.

Subsequent Statement.]—Upon an appeal from the Rolls, it was objected to the evidence of a witness examined in the cause, and read at the former hearing, that he had since, by answer to a bill exhibited against him, confessed, that on the day he was examined, the plaintiff gave him a bond that, if he recovered the land in question, he would convey part of it to the witness. By the opinion of the Lord Keeper, assisted by two judges, this answer was ordered to be read. *Needham* v. *Smith*. 2 Vern. 463.

c. Evidence as to Character.

Proof that Witness is Unworthy of Belief.]—In order to impeach the character of a witness for veracity, witnesses may be called to prove that his general reputation is such that they would not believe him upon oath. *Reg.* v. *Brown*, 36 L. J., M. C. 59; L. R. 1 C. C. 70; 16 L. T. 364; 15 W. R. 795; 10 Cox, C. C. 453.

Evidence may be brought by the opposite side to shew that the general character of a witness is such that he is unworthy of being believed upon his oath. *Mawson* v. *Hartsink*, 4 Esp. 102; 6 R. R. 841.

—— **Scope of Inquiry.**]—Examination to credit limited to the general question, whether the witness is to be believed upon his oath. An affidavit in bankruptcy, with that view, going to particular facts, and scandalous, taken off the file, with costs. *Anon.*, 3 Ves. & B. 93.

In examination as to credit of a witness, the general question "whether he is to be believed on his oath" only, and not the circumstances leading to that belief, can be asked. *Carlos* v. *Brook*, 10 Ves. 50.

If a party wishes to discredit the testimony of a witness, he can only bring evidence to prove that the witness is a person not deserving of credit, but not that the evidence given is false. If it is desired to disprove his testimony, that should be by cross-examination. *Llewellin* v. *Pace*, 1 W. R. 28.

—— **Collateral Matters.**]—Collateral questions trying the truth of a material part of the witness's story, may be put. *Bardwell, Ex parte*, *Venables, In re*, 1 Mont. & Ayr. 206.

Interrogatories in support of articles for purpose of discrediting witnesses, may relate to particular facts not in use in the cause, as well as to the credit of the witnesses generally. *Piggott* v. *Croxhall*, 1 Sim. & S. 467.

Application for examination to credit regarded with great jealousy: confined to facts affecting credit and character only, and not material to what is in issue. *White* v. *Fussell*, 1 Ves. & B. 153.

A witness to credit deposed that he believed the principal witness to be unworthy of belief, on account of a particular transaction, which he detailed:—Held, that the assignment of a reason for the belief was insufficient ground for suppressing more of the deposition than related to the reason assigned. The same witness spoke to a conversation in which the principal witness had given an account of a fact material to the issue, at variance with his testimony; the court refused to suppress the deposition, although the principal witness had not been cross-examined as to this. *Penny* v. *Watts*, 2 De G. & Sm. 501; 12 Jur. 993.

Immorality — Relevancy.]—In an action against the maker of a promissory note, one of

the subscribing witnesses was asked if she did not constantly sleep with her master, the plaintiff. She said that she did not:—Held, that a witness might be called for the defendant to prove that she did so, and that this was not collateral to the issue; though, if the question had been, whether the witness had walked the streets as a prostitute, that would have been so, and had the witness denied it, other witnesses could not have been called to contradict her. *Thomas* v. *David*, 7 Car. & P. 350. See also *Rex* v. *Rudge*, 2 Peake, 232; 4 R. R. 906; and *Goddard* v. *Parr*, 24 L. J., Ch. 783; 3 W. R. 633.

Previous Conviction — Statutes.]—*By the Criminal Procedure Act*, 1865 (28 *Vict. c.* 18) (*which by s.* 1 *is applicable to all courts as well criminal as all others*), *s.* 5, "*A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction.*"

A similar provision in the Common Law Procedure Act, 1854, *s.* 25, *was repealed by S. L. R. Act*, 1883.

—— **Decisions.**]—A previous conviction may be proved against a party under s. 25 of 17 & 18 Vict. c. 125, if he denies such conviction on cross-examination, although the fact of such conviction may be altogether irrelevant. *Ward* v. *Sinfield*, 49 L. J., C. P. 696; 43 L. T. 252.

The credit of a witness may be impeached by producing the record of his conviction of some crime. *Rex* v. *Watson*, 2 Stark. 149.

Evidence in Support of Character.]—Where evidence is brought to impeach the character of a witness, and his character is in issue, evidence may be adduced on his behalf for the purpose of shewing that he bears a good character. *Rex* v. *Murphy*, 19 Howell's St. Tr. 724; *Rex* v. *Clarke*, 2 Starkie, 241.

Evidence to support the character of a witness is not admissible unless fraud is expressly imputed to him. *Durham* (*Bishop*) v. *Beaumont*, 1 Camp. 207.

—— **Solicitor preparing Will.**]—In a suit by the heir-at-law of a testator, imputations having been cast upon the character of a deceased attorney, by whom the will was prepared, and who was one of the attesting witnesses, charging him with fraud in the execution of the will:—Held, that the devisee might call witnesses to shew the general good character of such attorney. *Provis* v. *Reed*, 3 M. & P. 4; 1 L. J., C. P. 163; 30 R. R. 695.

In ejectment by heir against devisee, the solicitor who drew the will was called to prove its execution by the testator. On cross-examination it was sought to impeach his character:—Held, that the defendant could not be allowed to call witnesses to prove his good character, such evidence being only allowable where the attorney who prepared the will is dead. *Doe* d. *Reed* v. *Harris*, 7 Car. & P. 330.

At what Stage.] — In general witnesses to character cannot be examined after verdict and before sentence, where the defendant might have examined them upon the trial. *Reg.* v. *Mullens*, 3 Cox, C. C. 526.

There is no precise time beyond which witnesses cannot be discredited. *Piggott* v. *Croxhall*, 1 Sim. & S. 467.

Commission to examine to credit should be executed before decree: costs given on that ground. *White* v. *Fussell*, 1 Ves. & B. 151.

Party is too late to move to suppress a deposition for irregularity, after having exhibited articles to discredit the witness. *Malone* v. *Morris*, 2 Moll. 324.

After decree founded upon the testimony of a witness, it would be too late to apply to exhibit articles to impeach his credit; but liberty was given after decree to exhibit articles to discredit a witness who had been examined in chief only to one point (which it was not intended to controvert), he having been afterwards examined in aid of the account. *Ib.* 323.

Depositions Scandalous.] — Depositions of witnesses examined as to credit referred for scandal and impertinence. *Bray* v. *Bulkby*, Dick. 288.

d. Party's own Witness.

Statutes.]—*By the Criminal Procedure Act*, 1865 (28 *Vict. c.* 18) (*which by s.* 1 *is applicable to all courts as well criminal as all others*), *s.* 3, *it is provided that* "*A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.*"

The corresponding provision in the Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 22, *was repealed by S. L. R. Act*, 1883.

Adverse Witness—Who is.]—The 17 & 18 Vict. c. 125, s. 22, lays down the following rules as to a party discrediting and contradicting his own witness who proves adverse, two of them declaratory of the common law, the third enacting, viz. a party shall not impeach his own witness by general evidence of bad character; a party may contradict him by other evidence relevant to the issues; a party may prove that the witness has made other statements on other occasions at variance with his evidence at the trial, provided, in the judge's opinion, the witness is adverse, and provided the judge also gives leave to produce evidence of such statements. *Greenough* v. *Eccles*, 5 C. B. (N.S.) 786; 28 L. J., C. P. 160; 5 Jur. (N.S.) 766.

A witness, whose testimony turns out to be unfavourable to the party calling him, is not therefore an adverse witness within 17 & 18 Vict. c. 125, s. 22. *Ib.*

To make him an adverse witness, so as to entitle the party calling him to contradict him by other evidence, shewing that he has made at other times a statement inconsistent with his present testimony, he must, in the opinion of the judge, be adverse in the sense of shewing a hostile mind. *Ib.*

See also *Amstell* v. *Alexander*, infra.

—— **Previous Inconsistent Statements.**]—The defendant's counsel stating, after calling and examining a witness, that he had given another and materially different account of the transactions to the defendant's attorney, the judge allowed the witness to be asked if they were so, and to be dealt with as adverse, but only with a view to discredit him generally; and this it will not do if it is not utterly inconsistent with his sworn evidence. *Faulkner* v. *Brine*, 1 F. & F. 254.

In an action on a policy of insurance against bodily injury by accident or violence, a surgeon, who was called as a witness for the plaintiff, to whom he had given a certificate of serious injury, contradicting it and alleging that it was collusively given, was allowed to be treated as an adverse witness. *Martin* v. *Travellers' Insurance Co.*, 1 F. & F. 505.

A statement to contradict the evidence of a witness may be contained in a series of documents, not one of which, taken by itself, would amount to a contradiction of his evidence. *Jackson* v. *Thomason*, 1 B. & S. 745; 31 L. J., Q. B. 11; 8 Jur. (N.S.) 134; 6 L. T. 104; 10 W. R. 42.

To enable a party, at the trial of an action, to impeach the credit of a witness called by him, by proving that he (the witness) has made at other times a statement inconsistent with his evidence in the witness-box, it is not necessary that the previous statement and the evidence at the trial should be absolutely and entirely at variance with each other. *Ib.*

By 17 & 18 Vict. c. 125 (C. L. P. Act), it is not made competent to a party to prove that his own witness has formerly made a statement inconsistent with his present testimony. *Ryberg* v. *Rybery*, 32 L. J., Mat. 112; 11 W. R. 502.

A witness called on behalf of a plaintiff gave evidence quite different from the proof in the brief of the plaintiff's counsel, and from the heads of evidence as taken down in writing by the plaintiff's attorney, and alleged to have been read over by him to the witness. The witness was considered sufficiently adverse to be examined as to his previous statements to the plaintiff's attorney; and the judge allowed the witness to be asked whether he did not say the several things stated in the paper containing the heads of his evidence as taken down by the plaintiff's attorney, but refused permission to examine the witness from the paper as a statement in writing made by him within 17 & 18 Vict. c. 125, s. 22. *Amstell* v. *Alexander*, 16 L. T. 830.

—— **Witness to Will.**]—An executor having produced one of the attesting witnesses to the will in dispute, who failed, from mental incapacity or some other cause, to give a rational account of the time and manner of execution, called the second witness. The second witness deposed that the testator did not sign his name or acknowledge his signature in the presence of two witnesses present at the time:—Held, that though the second witness could not be considered a hostile witness, yet he was produced to satisfy the requirements of the law; the party producing him might put questions to other witnesses tending to throw doubts upon his general credibility. *Coles* v. *Coles*, 35 L. J., P. 40; L. R. 1 P. 70; 13 L. T. 608; 14 W. R. 290.

—— **Discretion of Judge.**]—At the trial of an action the defendant's counsel, in order to shew that a witness called by him was hostile, and to obtain leave to treat him as such under s. 22 of the Common Law Procedure Act, 1854, asked the judge to look at an affidavit made by the witness in a former action. The judge, being of opinion that there had been nothing in the witness's demeanour, or in the way he had given his evidence, to shew that he was hostile, refused to look at the affidavit:—Held, on motion for a new trial, that the discretion given to the judge under s. 22 of the Common Law Procedure Act, 1854, was absolute, and the court had no jurisdiction to review his decision. *Rice* v. *Howard*, 55 L. J., Q. B. 311; 16 Q. B. D. 681; 34 W. R. 532.

—— **Before Examiner.**]—There is no rule that a witness on his examination in chief before the examiner may not be treated as a hostile witness. *Ohlsen* v. *Terrero*, 44 L. J., Ch. 155; L. R. 10 Ch. 127; 31 L. T. 811; 23 W. R. 195.

The 22nd section of the Common Law Procedure Act, 1854, authorising a party to a suit to discredit his own adverse witness, applies to the courts of chancery, and to an examination, not in court, but before an examiner; but the leave to produce counter-evidence must be given, not by the examiner, but by the judge upon a special motion. *Buckley* v. *Cooke*, 1 Kay & J. 29; 24 L. J., Ch. 24; 3 Eq. Rep. 138; 3 W. R. 33.

An examiner in chancery has no authority to determine questions as to the relevancy or adverse nature of the evidence of a witness; but when the question as to his being adverse is likely to be raised, the examiner should take down the questions as well as the answers upon which counter evidence may be required. *Ib.*

At the hearing this leave cannot be given because no new witness can then be called. *Ib.*

Before the Statutes—Contradicting Witness by other Evidence.]—If a witness for a prosecution disprove the prosecutor's case, the prosecutor may call other witnesses to prove the facts denied by the former witness, and thus incidentally contradict that witness, and shew him to be unworthy of credit; but the prosecutor cannot adduce any evidence not otherwise admissible for the sole purpose of discrediting his own witness. *Reg.* v. *Ball*, 8 Car. & P. 745.

If a witness unexpectedly gives evidence against the party calling him, although his evidence cannot be in part relied upon, and the rest of it disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him. *Alexander* v. *Gibson*, 2 Camp. 556; 11 R. R. 797.

Where a witness, called to prove a particular fact, states on cross-examination, or otherwise, another fact militating against the party calling him, other witnesses may be called on the same side to disprove such other fact, but the whole of his testimony is not necessarily to be rejected. *Bradley* v. *Ricardo*, 1 M. & Scott, 133; 8 Bing. 57; 1 L. J., C. P. 36.

Where the first witness called for a defendant disproved the fact relied on in defence:—Held, that the defendant was not thereby concluded, but might prove the fact by other witnesses. *Ewer* v. *Ambrose*, 5 D. & R. 629; 3 B. & C. 746.

The other witnesses called are not to discredit him generally, but to contradict him on the fact to which he has deposed, if it is material to the issue, not if it is merely collateral. *Friedlander* v. *London Assurance Co.*, 4 B. & Ad. 193; 1 N. & M. 30; 2 L. J., K. B. 16.

—— **Previous Statements.**]—Where a witness gives on cross-examination unfavourable testimony to the party calling him, and on re-examination denies having given a different account of the matter so spoken to, the party calling him has no right to discredit him, by shewing he has given such different account. *Holdsworth* v. *Dartmouth Corporation*, 2 M. & Rob. 153.

Although the general rule is, that on the trial of a cause a party shall not discredit his own witness, yet if the witness unexpectedly gives adverse evidence, the party may ask him if he has not on a particular occasion, made a contrary statement; and the question and answer may be stated by the judge to the jury with the rest of the evidence, the judge cautioning them not to infer, merely from the question, that the fact suggested by it is true. *Melhuish* v. *Collier*, 15 Q. B. 878; 19 L. J., Q. B. 493; 14 Jur. 621.

Right of Party to Cross-examine his own Witness.]—*See* col. 952.

15. Perjury.

Not Actionable.]—An action will not lie against a witness for perjury. *Amey* v. *Long*, 1 Camp. 16, 180; 9 East, 473; 6 Esp. 116; 9 R. R. 589.

Or for giving false or even perjured testimony. *Collins* v. *Cave*, 4 H. & N. 225; 28 L. J., Ex. 204; 5 Jur. (N.S.) 297; 7 W. R. 493. Affirmed, 8 W. R. 586—Ex. Ch.

Observations on the effect of a positive pledging of an oath to a circumstance which turns out to be a misconception. *Wood* v. *Scarth*, 1 Jur. (N.S.) 1107.

And see Criminal Law.

VII. Examination of Witnesses under Commission or Mandamus.

1. Jurisdiction Generally.

De bene esse.]—Whenever a necessary witness is going abroad, or is from illness, age or other infirmity likely to be unable to attend the trial, an order will be made under Ord. XXXVII. r. 4, for his examination before an officer of the court in the presence of both parties. A like order will be made whenever it shall appear to the court necessary for the purposes of justice. *Warner* v. *Mosses*, 50 L. J., Ch. 28; 16 Ch. D. 100; 29 W. R. 201—C. A.

Mayor's Court.]—The Mayor's Court of the city of London has no power to grant a commission to examine witnesses abroad. *Cox* v. *Leech*, 1 C. B. (N.S.) 617; 26 L. J., C. P. 125; 3 Jur. (N.S.) 442; 5 W. R. 199.

Court of Chancery.]—A motion for a commission to examine witnesses for the trial of an issue directed by the Court of Chancery, is properly made to the court in which such trial is to be had. *Bourdeau* v. *Rowe*, 1 Bing. (N.C.) 721; 1 Scott, 648; 1 Hodges, 93.

A commission having been granted by the Court of Chancery for the examination upon interrogatories of a witness for the defendants in an issue, the Common Pleas refused to vary the terms of that commission by empowering the plaintiff to cross-examine the witness under it vivâ voce, or to issue another commission for that purpose. *Hargrave* v. *Hargrave*, 4 C. B. 648; 5 D. & L. 151; 16 L. J., C. P. 271.

Scotch Court.]—When an application is made to a Scotch court under 1 Will. 4, c. 22, s. 1, to enforce the attendance of witnesses in an English suit for examination in Scotland before a special examiner appointed in the English suit, it is the duty of the Scotch court to determine what witnesses are to be summoned, and what documents they are to produce, as well as to decide all questions as to privilege on the evidence, which may arise on the examination. *Campbell* v. *Att.-Gen.*, 36 L. J., Ch. 600; L. R. 2 Ch. 571; 15 W. R. 915.

Revenue Proceedings.]—Before 22 & 23 Vict. c. 21, s. 16, in an information by the attorney-general on behalf of the customs, the court had no power, either by virtue of its general jurisdiction at common law or under 1 Will. 4, c. 22, at the defendant's instance, to direct a commission for the examination of witnesses. *Att.-Gen.* v. *Bovet*, 15 M. & W. 60; 3 D. & L. 492; 15 L. J., Ex. 155. S. P., *Reg.* v. *Wood*, 7 M. & W. 571; 9 D. P. C. 310; 10 L. J., Ex. 168.

Reference by Consent out of Court.]—In a reference to arbitration by consent out of court, the court has no jurisdiction under Ord. XXXVII. r. 5, to order a commission to issue for the examination of witnesses abroad. *Shaw and Ronaldson, In re*, 61 L. J., Q. B. 141; [1892] 1 Q. B. 91.

2. Writ of Mandamus.

a. In General.

Into what Countries.]—A mandamus cannot be issued into Scotland under 1 Will. 4, c. 22, s. 1, for the examination of witnesses there; but a commission may be issued for that purpose under s. 4. *Wainwright* v. *Bland*, 3 D. P. C. 653; 1 Gale, 103.

A mandamus will not in general be granted for the examination of witnesses in one of the British colonies, where the same end may be attained by the less expensive and less dilatory proceeding by commission. *Farnworth* v. *Hyde*, 14 C. B. (N.S.) 719; 11 W. R. 783.

By 1 Will. 4, c. 22, the court has power to issue a mandamus to examine a witness in India wheresoever the cause may have arisen. *Bain* v. *De Vetry*, 2 D. P. C. 516; 1 Gale, 52.

Distance, and the smallness of the amount of a plaintiff's claim form no ground for refusing a writ in the nature of a mandamus for the examination of witnesses abroad on behalf of a defendant. *Dye* v. *Bennett*, 9 C. B. 281; 1 L. M. & P. 92.

Court not Specified.]—A rule nisi for a mandamus to a colonial court to examine witnesses was granted, although the rule did not specify the court. *Batchelor* v. *Oliver*, 2 W. R. 517.

b. To India under 13 Geo. 3, c. 63, s. 40.

Who may Apply.]—A defendant may apply for a mandamus as well as a plaintiff. *Grillard* v. *Houge*, 4 Moore, 313; 1 Br. & B. 519; 21 R. R. 708.

Who can Grant.]—A judge has no power to grant a writ in the nature of a mandamus or commission to examine witnesses in India, under 13 Geo. 3, c. 63, s. 44. *Clarke* v. *East India Co.*, 6 D. & L. 278; 2 B. C. Rep. 319; 18 L. J., Q. B. 23.

The application for such writ should be made to the court in term time. *Ib.*

Cause of Action.]—A captain of an India country trader contracted in India with B. for a crew, according to the custom of the country. He arrived in England with the crew, and then made a voyage with them to the West Indies, and back again. In an action by part of the crew for wages due on the West India voyage:—Held, on motion for a mandamus to examine witnesses in India, that the cause of action did not arise in India, within the statute. *Francisco* v. *Gilmore*, 1 Bos. & P. 177.

How Application made.]—In an information at the suit of the crown, the court will grant a rule for a mandamus upon the statement of the attorney-general, that the writ is necessary, and will not require the production of any affidavit in support of that statement. *Reg.* v. *Douglas*, 2 D. (N.S.) 416; 7 Jur. 305.

It is not essential that the names should be given in the affidavit to ground a motion for the examination of witnesses in India; a certain description or designation is sufficient. *Rickards* v. *East India Co.*, 3 Jur. 822.

Issues Pending for Argument.] — It is no answer to a rule for a mandamus to examine witnesses, that it is moved whilst issues in law are pending for argument. *Kelsall* v. *Marshall*, 1 C. B. (N.S.) 266.

Indian Courts.]—The Supreme Court of Judicature of Madras is for every purpose substituted for the Mayor's Court formerly in existence there. It is bound, therefore, to receive and obey a mandamus from the Queen's Bench for the examination of witnesses under 13 Geo. 3, c. 63, s. 40. Such writ was directed to the chief justice and other judges of the court, and shewed that the court was held by them only:—Held, that the writ in this respect was properly executed. *Reg.* v. *Douglas*, 13 Q. B. 42; 16 L. J., Q. B. 417; 11 Jur. 841.

It appeared from the return that the witnesses were sworn, that the original examinations were taken by the sworn officers in open court and in writing, and subsequently transcribed upon parchment in the Crown office at Madras (by whom did not appear); that the parchment writings were carefully collated and compared by the sworn officers with the originals, and such parchment writings were annexed to the returns, which stated them to be the examinations:—Held, that this was a substantial compliance with the directions of the 13 Geo. 3, c. 63, s. 40, and that such examinations were receivable. *Ib.*

Copies of Depositions.]—Where a defendant, at his own expense, obtains a mandamus, the plaintiff is entitled to copies of the depositions returned, on paying the expense of making such copies, although he refuses to pay any part of the expenses attending the writ. *Davis* v. *Nicholson*, 7 Bing. 358; 1 D. P. C. 220; 5 M. & P. 185; 9 L. J. (O.S.) C. P. 114.

Rule nisi.]—A rule for a mandamus to examine witnesses in India under 13 Geo. 3, c. 63, s. 44, is nisi in the first instance. *Doe* d. *Grimes* v. *Pattison*, 3 D. P. C. 35.

Costs.]—The plaintiffs obtained a mandamus for the examination of witnesses in India, and the writ and depositions were returned to this country; but the defendant did not join in the application for the writ, nor examine nor cross-examine witnesses under it, and the plaintiffs obtained a verdict:—Held, that they were not entitled to the costs attending the writ, or of the office copies of the depositions. *Fairlie* v. *Parker*, 1 M. & P. 438.

Where a defendant obtained a mandamus to examine witnesses in India, the plaintiff having recovered a verdict, was entitled to his costs of cross-examining such witnesses. *Whytt* v. *Macintosh*, 2 M. & Ry. 133; 8 B. & C. 317; 6 L. J. (O.S.) K. B. 224.

A mandamus granted to examine a defendant in India, on his own behalf, he being an officer who had left England after action brought, to return to his regiment. The costs in such cases will be costs in the cause, except under special circumstances. *Brunton* v. *Hardy*, 10 W. R. 562.

3. When Witness Abroad.

a. When Granted.

In what Cases.]—The court will allow witnesses to be cross-examined vivâ voce, by a commission executed abroad, when the application seems reasonable. *Pole* v. *Rogers*, 5 D. P. C. 632; 4 Scott, 479; 3 Bing. (N.C.) 780; 3 Hodges, 83; 6 L. J., C. P. 216.

A commission may be granted to examine a party to a suit resident abroad on his own behalf. But the court may, in its discretion, refuse such commission, if sufficient ground is not shewn for requiring it. *Castelli* v. *Groome*, 18 Q. B. 490; 21 L. J., Q. B. 308; 16 Jur. 888.

The court refused a commission where the only specific ground assigned was, that the parties were resident, and were carrying on business in distant places abroad (Leghorn and Constantinople), and that they made the application bonâ fide. *Ib.*

It is no answer to an application for a commission to examine witnesses abroad (supported by the ordinary affidavit), that the opposite party deposes that there are persons in this country, and documents accessible to the applicant, which would supply him with any information he could obtain from the witnesses he proposes to examine. And after a judge has exercised his discretion on such an application, the court will not disturb his decision unless it is manifestly wrong. *Adams* v. *Corfield*, 28 L. J., Ex. 31.

In deciding, on an application by one of the parties to an action, for the issue of a commission to take his evidence abroad, the court must consider whether, having regard to all the circumstances of the case, it is necessary for the purposes of justice, and in the interest of all the parties to the action, and not of the party applying only, that the commission should issue. In so considering the matter, the possibility of the witness not being a credible witness must be assumed, and regard must be had to the importance of cross-examination before a court by which the case is to be tried, and if the court is satisfied that the non-appearance of the witness in court would place the other parties to the action at a disadvantage, the commission should

not issue, even though the result may be to prevent the evidence from being given at all. The decision of a court of first instance on such a question is not such an exercise of judicial discretion that the Court of Appeal is fettered in reviewing it. *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.; 46 L. T. 524, n.—C. A.

The plaintiff in an action to recover commission on sales of a foreign government on the ground that such sales had been effected through the exercise of his influence with that government, applied for his evidence to be taken by commission abroad, alleging that to cross the channel would be injurious to the health and dangerous to his life:—Held, that to grant the application would be injurious to the defendants, and that it not being shewn satisfactorily that the facts could not be proved by other evidence, or that to come to England would in fact be dangerous to the plaintiff, the commission should not issue. *Ib.*

L. granted to T. an exclusive licence to use in England a certain patented invention for making sugar. This invention was also patented in America, and M., an American sugar manufacturer, had a licence for its use in the United States. L. brought his action against T. to have the licence rectified, alleging that the real agreement between the parties was that the licence was not to interfere with the importation into England of sugar made abroad under the patent. The statement of claim alleged that M. had introduced L. to T., and that the negotiations between L. and T. had proceeded on the understanding that sugar made abroad under the patent might be imported; but there was no allegation, nor did it appear in evidence, that M. had taken part in the negotiations. L. applied to have a commission to examine M. in America:—Held, that if it appeared that the evidence of M. would be material, the commission ought to be granted, there being nothing to shew that M. was keeping out of the way to avoid cross-examination. *Berdan* v. *Greenwood* (20 Ch. D. 764, n.) distinguished. *Langen* v. *Tate*, 53 L. J., Ch. 361; 24 Ch. D. 522; 49 L. T. 758; 32 W. R. 189—C. A.

But held, that on the materials before the court, the commission should be refused, there being nothing to shew that M. had taken such part in the negotiations as to make his evidence material. The court, however, as an indulgence, gave the plaintiff an opportunity of adducing evidence to shew that M. could give material evidence. *Ib.*

Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must shew clearly that he cannot bring him to this country to be examined at the trial. *Lawson* v. *Vacuum Brake Co.*, 54 L. J., Ch. 16; 27 Ch. D. 137; 51 L. T. 275; 33 W. R. 186—C. A.

If it is shewn that there are material witnesses resident abroad whom a party wishes to examine, a commission to examine them abroad will be granted if there is any reasonable ground for their not coming here, unless a case is made shewing that it is necessary for the purposes of justice that they should be examined in England. *Armour* v. *Walker*, 53 L. J., Ch. 413; 25 Ch. D. 673; 50 L. T. 292; 32 W. R. 214—C. A.

A party is not entitled to a commission ex debito justitiæ upon shewing that a material witness is resident out of the jurisdiction. The granting of the commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case. In a case where it was shewn that witnesses were out of the jurisdiction and their examination on commission abroad would be much less expensive than bringing them to the trial in England, and there was nothing to shew that their presence in court was essential:—Held, that the commission should issue. *Cuch* v. *Allcock*, 57 L. J., Q. B. 489; 21 Q. B. D. 178; 36 W. R. 747—C. A.

Under the 15 & 16 Vict. c. 86, ss. 28, 31, and 32, this court will not issue a commission to examine witnesses orally or upon interrogatories, out of the jurisdiction; but will appoint a special examiner for that purpose. *Lawrence* v. *Maule*, 3 W. R. 534.

Motion to examine on affidavit defendant out of the jurisdiction refused. A commission to examine witnesses is not necessary even where the witness is out of the jurisdiction. *Crofts* v. *Middleton*, 9 Hare (App.) 18; 17 Jur. 112; 1 W. R. 74, 163.

On a motion for a commission to take the examination of a married woman—order made; but the accountant-general will not be directed to send out a power of attorney for her execution, to enable her to direct payment to her husband (although time would be saved by so doing), on account of the possibility of its influencing the lady's decision. *Allat* v. *Bailey*, 1 W. R. 383.

On a petition presented by a ward of court who had married a foreigner without leave of the court, for a settlement, the court directs the usual inquiries on affidavit of facts, and will not direct a commission to issue for the purpose of proving the facts. *Reynolds* v. *Lane*, 1 Jur. 330.

On a suggestion that exhibits given in before commissioners on an examination of witnesses, had been since altered and interlined, the court granted a commission to examine the point. *Richardson* v. *Lowther*, 1 Ch. Ca. 273.

Practice as to commissions to examine witnesses in a foreign country. *Anon.*, 2 Ir. Ch. R. 92.

Facts not admitted by Attorney-General.]—Plaintiff's claim to have a commission to inquire of facts denied, or not confessed, by the attorney-general. *Clayton* v. *Att.-Gen.*, 1 Coop. t. Cot. 140.

Petition of Right.]—It is of course that a commission should issue to inquire into the facts stated in a petition of right, unless the attorney-general will admit them. *Queen and Canterbury (Viscount), In re, Queen and Baron de Bode, In re*, 1 Coop. t. Cot. 143.

On Application of Plaintiff.]—The court has power to order a commission to issue for the examination abroad of a party to an action, though the circumstances which will induce the court to make such an order are different from those required to be shewn on an application for a commission to examine a mere witness. Where a plaintiff residing abroad claimed as an heir-at-law who had been missing for twenty-four years, Kay, J., ordered a commission to issue to take his evidence abroad, without prejudice to the right of the defendant to cross-examine him at the trial in England in the presence of witnesses who could speak to his

identity :—Held, on appeal, that the order must be varied by directing that the depositions of the plaintiff were not to be read at the trial without the consent of the defendant. *Nadin* v. *Bassett*, 53 L. J., Ch. 253 ; 25 Ch. D. 21 ; 49 L. T. 454 ; 32 W. R. 70—C. A.

A plaintiff who desires to be examined on commission must make out by affidavit a strong primâ facie case why he should not attend and be examined at the trial ; and the onus is not on the defendant in the first instance to shew why he should attend to be examined at the trial. A plaintiff is not entitled to be examined on commission in the absence of any affidavit by himself, shewing strong and positive reasons for his not attending to be examined at the trial. *Light* v. *Anticosti Co.*, 58 L. T. 25.

On Application of Defendant.]—The court is more favourable to an application by a defendant resident abroad to have his evidence in the action taken by commission or special examiner in the country where he resides, than it is to similar applications by plaintiffs resident abroad suing in the jurisdiction, the principles applicable in the two cases being clearly different. *Ross* v. *Woodford*, 63 L. J., Ch. 191 ; [1894] 1 Ch. 38 ; 8 R. 20 ; 70 L. T. 22 ; 42 W. R. 188.

In the absence of special circumstances a commission will be issued on the application of a foreign defendant, to take his evidence in the place where he resides. The fact that, after the service of the writ but before the action was set down, the defendant was in this country for the purpose of settling the action, is not such a special circumstance as to disentitle him to a commission. *Ross* v. *Woodford* ([1894] 1 Ch. 38) approved. *New* v. *Burns*, 64 L. J., Q. B. 104 ; 14 R. 339 ; 71 L. T. 681 ; 43 W. R. 182—C. A.

To Defendant, when obtained by Plaintiff.]—Where the plaintiff has obtained an order for a commission to examine witnesses, but has not served it, the defendant is entitled as of course to an order for a commission. *Markland* v. *Jones*, 6 L. J., Ch. 63.

Commission to examine abroad granted to defendant, who had cross-examined, but not examined in chief, under commission sued out by plaintiff. *Steward* v. *Steward*, 2 Ves. & B. 116.

To prove Question of Foreign Law.] — The defendant to an action pleaded the law of Spain, and moved for a commission to be directed to issue to Spain to examine witnesses as to the law. He did not shew that the law could not be proved at the hearing by the production of witnesses in this country ; and the plaintiff opposed the motion :—Held, that the commission would not be granted. *The M. Moxham*, 1 P. D. 107 ; 24 W. R. 597—C. A.

M., the daughter of C. by B., the ceremony of "nekir" in India having been performed between them, after being treated and having assumed herself in her bill to be the natural daughter, claims to be legitimate, and moves for a commission to examine witnesses in India, as to the legitimacy, in France, as to the domicile, and in Scotland as to the construction of C.'s will :—Held, that being always treated as illegitimate, admitted as such by her own bill, by the answer of B., and found so by the master : and it being evident that no information could be obtained :—Held, that a commission to India be refused ; but those to France and Scotland granted. *Lord* v. *Colvin*, 2 Eq. R., Eq. 296 ; 23 L. J., Ch. 469 ; 2 W. R. 134.

A foreign judgment is binding here, and therefore a commission to examine abroad will not be granted in a suit to question such judgment. *Martin* v. *Nicolls*, 3 Sim. 458.

To prove Jurisdiction of Foreign Court.]—A commission granted to examine at Paris, as to the extent of jurisdiction of a particular court erected there, but not as to the original constitution of it. *Gage* v. *Stafford* (*Lady*), 2 Ves. 556.

Whether Ship Foreign.]—Where a vessel has been seized by the officers of the customs, on charges of offences against other acts of parliament than that usually called the Navigation Act ; if, on the trial of the information filed thereon, the question be likely to turn on the fact of the ship belonging to a foreign subject, the court will, on motion (a bill having been filed against the attorney-general for that purpose), grant the defendant a commission to examine persons residing abroad, and make it part of the order, that their depositions shall be received in evidence on the trial. *Laragoity* v. *Att.-Gen.*, 2 Price, 172.

To determine Accuracy of Accounts.]—On an application for an order directing a commission to be issued to examine witnesses abroad with a view of testing the accuracy of accounts rendered by the liquidator of a company, in respect of a charge in which the applicants were largely interested :—Held, that the application ought to be granted. The applicants were in substance mortgage creditors of the company, and the commission was a mere incident to the prosecution of the accounts. *Imperial Land Co. of Marseilles, In re*, 37 L. T. 588—C. A.

On a reference by the decree to make certain inquiries, and a state of facts brought in by the plaintiff, and witnesses examined charging the defendants with receipt of moneys, as to which the depositions had passed publication ; the defendants then brought in a state of facts, admitting the receipts, but discharge by payment. The court, on motion, gave the latter liberty to issue a commission to examine witnesses in support of such discharge, but not to contradict the plaintiff's state of facts. *Parker* v. *Peet*, 1 De G. & Sm. 216.

To value Property of Company—Jurisdiction.]—A company, whose property consisted of gold mines in India, having passed resolutions for voluntary liquidation and reconstruction, a dissentient member of the liquidating company, in an arbitration under the Companies Act, 1862, ss. 161 and 162, claimed to have his interest valued at the price at which the shares in the new company were issued under the scheme of reconstruction ; but the liquidators claimed that such interest should be valued on the footing of a realisation of the assets, and took out a summons under the act for a commission to India to examine witnesses as to the value of the property :—Held (1), that apart from s. 138 of the act, the court had jurisdiction to entertain the application, inasmuch as the arbitration was compulsory ; (2) that the price of the dissentient's interest was not demonstrated by the terms of the scheme ; and (3) that, under the circumstances of the case, the court would make

the order as being necessary for the purposes of justice within Ord. XXXVII. r. 5. *Mysore West Gold Mining Co., In re*, 58 L. J., Ch. 731; 42 Ch. D. 535; 61 L. T. 453; 37 W. R. 794; 1 Meg. 347.

Costs Due.] — The court will not stop the issuing of a commission to examine witnesses abroad, on the ground of the plaintiff being indebted to the defendant for certain costs in equity. *Ougham* v. *Parish*, 4 D. P. C. 29.

Purpose of Delay.]—To induce the court to refuse to allow a commission to issue for the examination of the defendant's witnesses, a very strong case of misconduct, on the part of the defendant, must be made out; but where there is reason to suspect the object to be to delay the plaintiff, it will order him to bring the money into court. *Sparkes* v. *Barrett*, 5 Scott, 402; 7 L. J., C. P. 65. S. P., *Lloyd* v. *Key*, 3 D. P. C. 253.

Hostile Country.]—A commission will not be granted for the examination of witnesses in a hostile country. *Barrick* v. *Buba*, 16 C. B. 492; 3 C. L. R. 921; 1 Jur. (N.S.) 1020; 3 W. R. 524.

Discretion.]—Where a judge in a court below has made an order, the Court of Appeal will not interfere with his discretion unless it is clear that he has manifestly decided wrongly. *Berdan* v. *Greenwood*, 20 Ch. D. 764, n.; 46 L. T. 524, n. S. P., *Adams* v. *Corfield*, 28 L. J., Ex. 31.

Discretionary exercise of the jurisdiction of the court as to granting commissions to examine witnesses abroad. *Lousada* v. *Templer*, 2 Russ. 561.

Not Incidental to Discovery.]—Commission to examine abroad is not incidental to discovery; therefore, it does not follow that, where court refuses discovery, it will refuse commission. *Thorpe* v. *Macauley*, 5 Madd. 219.

By Equity in Aid of Proceedings at Law.]—Either party at law is entitled to assistance of court of equity to obtain commission to examine abroad. Defendant retiring from jurisdiction, service of subpœna to appear to bill for commission, on his attorney at law, ordered good service. *Devis* v. *Turnbull*, 6 Madd. 232.

Upon a petition to expunge the proofs upon certain bills of exchange, an action had been directed to be brought against the bankrupts to try the validity of the debts. A material witness being abroad, the court of common law put off the trial: it was ordered, upon petition, that the bankrupt should be at liberty to file a bill for a commission to take the examination of the witness abroad. *Coles, Ex parte*, Buck. 293.

On a bill for discovery, and a commission to examine witnesses abroad, in aid of the defence to an action, the plaintiff, having obtained the common injunction for want of an answer, was held entitled to a commission, and to extend the injunction to stay trial. *Bowden* v. *Hodge*, 2 Swanst. 258.

Plaintiff, on bill of discovery in aid of defence to action against him at law, may have, on motion at sittings after term, a commission to examine abroad, on payment of a considerable part at least of plaintiff at law's demand into court, where cause at law is at issue, and was entered for trial, the term before the term immediately preceding the sittings, and a case of defence has been stated by the bill, although the affidavit on which it has been moved is in the common form; the delay in staying the trial not being a sufficient ground of opposition to such an application. *Ebden* v. *Prince*, 8 Price, 290.

On a bill for discovery by plaintiff at law in aid of action, motion for commission abroad is not of course. *Anon.*, 1 Anstr. 201.

In aid of defence at law, court will not grant commission to examine abroad, unless on good ground shewn, although no injunction moved for. *Shedden* v. *Baring*, 3 Anstr. 880.

A bill was filed for discovery and relief, and for an injunction to stay proceedings at law; a motion, by the plaintiff, to continue an injunction granted before answer, and for a commission to examine witnesses in aid of the defence at law, was refused. *Chimelli* v. *Chauvet*, Younge, 302.

An action having been brought against the plaintiffs, whose witnesses were about to leave London for New York, they applied to the chief justice of the king's bench, under 1 Will. 4, c. 22, for a commission to examine their witnesses before the trial. But his lordship ordered them to be examined vivâ voce before a barrister with liberty to the defendants to attend and cross-examine. The plaintiffs took no proceedings under that order, but, their witnesses having shortly afterwards gone to New York, they filed a bill in this court, and afterwards moved for a commission to examine their witnesses there: motion granted. *Grinnell* v. *Cobbold*, 4 Sim. 546.

—— **Injunction.**]—Where the party applying for a commission to examine witnesses, appears, from the nature of his case, to be entitled to it, the granting an injunction in the meantime is no more than a necessary consequence of that right. *Nicol* v. *Verelst*, 4 Bro. P. C. 416.

Injunction obtained two years back, on granting commission to examine in India not yet returned, dissolved. *Penney* v. *Edgar*, 1 Anstr. 276.

Under what circumstances a commission to examine witnesses abroad, and an injunction to restrain proceedings at law in the meantime, ought not to be granted. *Cujamaul* v. *Verelst*, 4 Bro. P. C. 407.

—— **Bill.**]—A bill for a commission to examine witnesses abroad, in aid of a defence to an action at law, is not a bill for relief. *Mills* v. *Campbell*, 2 Y. & Coll. 389.

Bill for commission to examine abroad must allege that action has been brought. *Angell* v. *Angell*, 1 Sim. & S. 83; 24 R. R. 149.

Where, in case of libel, the party injured, instead of proceeding by indictment, brought an action for damages, and the defendant pleaded in justification the truth of the matters, and filed a bill for a commission to examine witnesses abroad for discovery, and for an injunction, &c.: —Held, on demurrer, that the fact of the libel being an indictable offence would not repel the right to the common defences in civil actions, and that the defendant was entitled to the ordinary means of proving the truth of his pleas; but such bill must shew the materiality of the evidence to support his case at law, and the bill ought therefore to shew what are the pleas, or refer to them so as to make them part of the

bill; and it is not necessary to allege that the witnesses were residing in England at the time of the publishing of the libel. *Macaulay* v. *Shackell*, 1 Bli. (N.S.) 96. And see *Shackell* v. *Macaulay*, 3 L. J. (O.S.) Ch. 30.

Where no Stay of Trial.]—Quære, whether the court will grant a commission to examine witnesses abroad in aid of the defence to an action at law, where it will not stay the trial of the action till the return of the commission. *Hart* v. *Strong*, 2 Russ. 559.

b. Time of Application.

After Issue Joined.]—An application for the examination of a witness resident out of the jurisdiction of the court must be made as early as possible after issue joined. *Brydges* v. *Fisher*, 4 M. & Scott, 458.

The rule of practice is, that a commission to examine witnesses in a cause will not be granted before issue joined; but a commission may be so granted in an extreme case, and where without it, justice would be defeated by the exclusion of material evidence. *Fynney* v. *Beesley*, 17 Q. B. 86; 20 L. J., Q. B. 395; 15 Jur. 898. S. P., *Clutterbuck* v. *Jones*, 6 D. & L. 251; 2 C. B. Rep. 332; 18 L. J., Q. B. 11; 13 Jur. 152.

Where Account Directed.]—The course of the court is, that where an account must necessarily be directed at the hearing, a commission before the hearing shall never be granted to examine witnesses beyond sea, when the granting such commission is after the account is directed. *Adams* v. *Bohun*, Barnard. 270.

Commission to examine in West Indies, on bill filed for discovery, in aid of an action at law brought by plaintiff, and for a commission (not praying relief), ordered, on motion, although defendant's will delay the directing the account; and the proper time to apply for such commission answering having expired. *Hibberson* v. *Cambridge*, 13 Price, 796.

After Order to Speed.]—It is of course that a plaintiff, even after the peremptory order to speed his cause, should have an order for a commission to examine witnesses, with liberty to execute the same in term time. *Field* v. *Sowle*, 1 Russ. 82.

Before Answer.]—A plaintiff is entitled to move for a commission to examine witnesses abroad as soon as the defendant has obtained an order for time, though he has neither filed his answer nor is in contempt. *Mendizabal* v. *Machado*, 2 Russ. 540; 4 L. J. (O.S.) Ch. 62.

Commission to examine abroad before time for answering expired, refused. *Cheminant* v. *De la Cour*, 1 Madd. 208.

Commission granted to examine witnesses abroad, before answer, the object of the suit being merely to obtain evidence for an action. *Noble* v. *Garland*, 19 Ves. 372; Coop. 322.

It is practice of the Court of Exchequer not to grant a commission to examine witnesses abroad, until after answer, as in the case of policies of insurance; the bill praying equitable relief, viz. to deliver up for fraud, &c., though not going beyond the motion to dissolve the injunction, as an action will try the question. *S. C.*, 19 Ves. 375.

On bill for discovery, you cannot move before answer, or unless defendant is in contempt, for commission abroad. *King* v. *Allen*, 4 Madd. 247.

Leave given to plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. *Lancaster* v. *Lancaster*, 6 Sim. 439.

A plaintiff is not entitled to a commission to examine witnesses abroad, if the defendant is not in contempt, although his time for answering has expired, and an order for time has been obtained by him. *Cook* v. *Stephens*, 3 L. J. (O.S.) Ch. 226.

A demurrer to a bill for a discovery and a commission in aid of the defence of an action for libel, being overruled, a commission to examine witnesses abroad will be granted, before answer, though the defendant in equity denies, by affidavit, the truth of the justification pleaded at law. *Shackell* v. *Macaulay*, 3 L. J. (O.S.) Ch. 40.

Defendant, under circumstances, allowed after examination, but before publication, to have commission to examine witnesses as to whether witness for plaintiff who was examined was not interested in suit. *Vaughan* v. *Worrall*, 2 Madd. 322.

Commission to examine witnesses abroad will be granted under circumstances, on coming in of answer, although not prayed by original bill, and the injunction granted will be in meantime continued. *Kensington* v. *White*, 3 Price, 164.

After Publication.]—After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses in order to falsify the defendant's examination, this tending to multiply causes, and make them endless. *Smith* v. *Turner*, 3 P. W. 413.

After publication in the original cause plaintiffs, in the cross-cause, moved for a commission to examine witnesses, which was granted, though it was urged that it would tend to cure the defects of that evidence which had been adduced in the original suit. *Scott* v. *Allgood*, Prac. Reg. Ex. 87.

Commission to examine witnesses abroad upon new matter, stated at the hearing, and not in issue before, granted upon terms of not delaying an action directed to be tried at law. *Newland* v. *Horsman*, 2 Ch. Ca. 74.

Order made after publication for liberty to take out a commission, and examine witnesses by general interrogatory, as to credit of witness who had been cross-examined, and as to such particular facts only as are not material to what is in issue in the cause. *Wood* v. *Hammerton*, 9 Ves. 145.

A plaintiff gave an undertaking to speed before the answers of all the defendants were put in, and at a future stage attempted to remedy this by getting a commission to examine witnesses after publication has passed:—Held, it could not be supported. *Howard* v. *Prince*, 3 Jur. 776.

Delay.]—A cause in the paper for hearing having been ordered to stand over on an application on behalf of the plaintiff, who was at Calcutta, sixteen days afterwards he took out a summons to have evidence taken abroad, but the court, on the ground of such delay and former delay on his part, refused the application with

costs. *Stewart* v. *Gladstone*, 47 L. J., Ch. 154; 7 Ch. D. 394; 37 L. T. 575; 26 W. R. 277.

The court refused to disallow a commission for examining the plaintiff's witnesses abroad, though there had been great delay on his part; but they referred it to the master to say whether or not the security the plaintiff had given for costs should not be increased. *De Rossi* v. *Polhill*, 7 Scott, 836.

A commission to examine witnesses abroad refused, on the ground of the delay of the party who made the application. *Hart* v. *Strong*, 2 Russ. 559.

The original bill being for an account, and an injunction to restrain an action, and the injunction being dissolved on the merits nearly ten years after the bill was filed, the plaintiff filed a supplemental bill for a discovery, and commission to examine witnesses in aid of his defence to an action substantially the same: motion for the commission refused, with costs, on the ground of delay. *Todd* v. *Aylwin*, 1 Sim. 271.

Notwithstanding the plaintiff in a bill of discovery had been guilty of delay in applying for a commission to examine witnesses abroad, prayed for by the bill, the court will grant it, but will impose severe terms. *Mill* v. *Campbell*, 2 Y. & Coll. 402; 7 L. J., Ex. Eq. 5; 1 Jur. 865.

c. Stay of Proceedings.

Effect.]—A rule of court for the examination of witnesses on interrogatories in a foreign country, is not an absolute stay of proceedings, but only a limited one. *Forbes* v. *Wells*, 3 D. P. C. 318.

The court discharged so much of an order for a commission to examine witnesses as stayed the proceedings, on the ground of an unreasonable delay in the application. *Butler* v. *Fox*, 9 C. B. 199.

Injunction.]—See *Armstrong* v. *Armstrong*, 61 L. J., P. 63; [1892] P. 98; 66 L. T. 384. And supra, head *a*.

d. Form of Application and Order.

Affidavit in Support — Deponent.] — The affidavit of the solicitor for the defendant will be received in support of a motion for commission to examine abroad, and it will be sufficient if he swear that he is informed of and believes the statement in the bill if he also add, that his belief is founded on documents in his possession, and that, from the nature of the defence, involving the question of what country the ship belongs to, he considers the commission necessary. *Laragoity* v. *Att.-Gen.*, 2 Price, 172.

Affidavit of insurance broker, the agent of underwriters, sued on a policy, will not be received in support of commission to examine abroad; it should be made by party himself, or his attorney. *Bonham* v. *Leigh*, 5 Price, 444.

—— **Sufficiency.**]—Upon what affidavits the master may certify as to the propriety of granting a commission for examining witnesses abroad. *Bauer* v. *Mitford*, 2 Coll. 188; 14 L. J., Ch. 374.

—— **Belief of Deponent.**]—On an application for a commission to examine evidence to shew that the legacies given in two codicils were both intended for the legatee, the legatee ought to swear she believes that to have been the intention. *Coote* v. *Coote*, 1 Bro. C. C. 448.

On a bill by underwriters, for a commission to examine abroad, to prove the circumstances under which a ship had been condemned and sold, as not worth repair, the court held an affidavit of the plaintiff's solicitor, stating his information and belief that there were several witnesses abroad whose testimony was necessary for the plaintiffs, to be sufficient, though it did not state any grounds for his belief. *Robinson* v. *Soames*, 1 Y. & J. 578.

Names of Proposed Witnesses.] — Upon an application for a commission to examine witnesses abroad, the names of at least some of them should be given; otherwise, the commission will not be allowed to go, unless under very special circumstances. *Cow* v. *Kinnersley*, 6 Man. & G. 981; 7 Scott (N.R.), 892; 1 D. & L. 906; 13 L. J., C. P. 114; 8 Jur. 364. S. P., *Dimond* v. *Vallance*, 7 D. P. C. 590; 2 W. W. & H. 67; 3 Jur. 385.

The affidavit must either specify the names of the witnesses proposed to be examined, or in some other way describe them. *Gunter* v. *M'Tear* or *M'Kear*, 1 M. & W. 201; 1 Gale, 440; 4 D. P. C. 722; 1 Tyr. & G. 245; 5 L. J., Ex. 115.

It need only state the name of the witness, that he is a material witness, and out of the jurisdiction of the court. *Norton* v. *Melbourne* (*Lord*), 3 Bing. (N.C.) 67; 3 Scott, 398; 2 Hodges, 114; 5 D. P. C. 181; 5 L. J., C. P. 343.

In order to obtain a commission to examine abroad, it is sufficient to state the name of the witness, that his evidence is material, and that he is abroad. *Oldham* v. *Carleton*, 4 Bro. C. C. 88.

To obtain a commission to examine abroad, it is not necessary to state the points to which it is intended to examine, or the names of the witnesses. *Rougemont* v. *Royal Exchange Co.*, 7 Ves. 304.

It is not necessary that the affidavit in support of a motion for a commission to examine witnesses abroad, should state either the names of the witnesses or the matters to which they are to be examined, in a case where it is evident that such examination is necessary. *Carbonell* v. *Bessell*, 5 Sim. 636.

Motion for commission to examine abroad in aid of action at law, must be supported by affidavit, stating name of witness and points of examination. *Mendizabal* v. *Machado*, 2 Sim. & S. 483; 4 L. J. (O.S.) Ch. 142. And see *S. C.*, 2 Russ. 540; 4 L. J. (O.S.) Ch. 62.

Upon an application to the court to examine witnesses out of the jurisdiction, it is not a general rule to require the names of the witnesses to be stated, or the affidavit to be made by the party or his solicitor. *M'Hardy* v. *Hitchcock*, 11 Beav. 93.

A motion for liberty to examine witnesses upon interrogatories, and that a commission should issue for that purpose, which motion was grounded upon the affidavit of the petitioner's solicitor, stating that A. B. and other persons (not named), when applied to, declined to volunteer evidence by making affidavits in the case, but that the deponent was persuaded that they would attend for examination upon interrogatories, and also stating that some of the witnesses (but not naming them) were resident in England, and that a commission would therefore be requisite, and that the respondent

was advised that their evidence was material and necessary to the petitioner's case, was refused with costs. *Kirwan* v. *Lindsay*, 2 Ir. Ch. R. 23.

—— **Of some.**]—On an application to examine witnesses in Ireland, by commission, where the names of seven witnesses are specifically stated, the court will allow the commission to go for the examination of "several others" not named in the rule. *Beresford* (*Lord*) v. *Easthope*, 8 D. P. C. 294; 4 Jur. 104.

If the names of some of the witnesses to be examined on a commission abroad are specified, the court may grant the commission for the examination of the witnesses named "and others." *Nadin* v. *Bassett*, supra.

A commission to examine witnesses abroad was granted before the action at law was at issue, on motion for that purpose (and for reviving an injunction dissolved as of course by reason of the order for enlarging time to shew cause against dissolution of injunction being discharged), for the examination of witnesses generally on part of plaintiff, necessary to his defence at law, witnesses residing at four different places in the West Indies, although his affidavit only mentioned two persons, both of whom resided at S., in the West Indies; if it appeared, by answer, that transactions took place in the West Indies generally. *Jackson* v. *Strong*, 13 Price, 309.

Materiality.]—An affidavit stating that the facts alleged in the pleadings took place in the presence of the witnesses, that they were resident abroad, and that their evidence was material and necessary, is sufficient; the affidavit need not state that the evidence was admissible, or that the application was bonâ fide and not for delay; no affidavit of merits is necessary. *Baddeley* v. *Gilmore*, 1 M. & W. 50; 1 Gale, 410; 1 Tyr. & G. 369; 5 L. J., Ex. 115.

Upon a motion on the part of the defendants for a commission to examine witnesses abroad, it was required that it should appear to the satisfaction of the court, upon an affidavit from their attorney, that the evidence of the witnesses proposed to be examined was material and necessary to the defence of the action. *Healy* v. *Young*, 2 C. B. 702.

In an action of slander, the defendant having obtained an order for the examination of two witnesses (whose names were given) in Australia, the court, upon a motion to rescind the order, imposed as a term that the defendant should state what it was that he expected the witnesses to prove. *Barry* v. *Barclay*, 15 C. B. (N.S.) 849.

On an application for a commission to examine a party abroad as a witness for the defendant, it must appear that there is a reasonable ground for believing that the evidence will be material on behalf of the defendant. *Lane* v. *Bagshawe*, 16 C. B. 576; 3 C. L. R. 919.

On a bill for injunction, the court will not grant a commission to examine a witness in India, without a full affidavit of materiality. *Moody* v. *Steele*, 2 Anstr. 386.

To obtain an order for commission in aid of an inquiry in relation to a receiver's securities, there must be an affidavit that the witnesses intended to be examined were expected to give material evidence; any party to an inquiry who unnecessarily sues out a commission, must pay the costs of it in any event. *Donovan* v. *Thompson*, 1 Hog. 150.

In affidavit, in support of commission to examine witnesses abroad, it is not necessary to state that applicant would have a good defence, if he could procure evidence under such commission, or that there are necessary facts within their knowledge required by plaintiff to be proved on his defence. *Woodhead* v. *Boyd*, 6 Price, 101.

Where Matter Arose.]—Affidavit in support of commission to examine abroad, need not state that matter arose there. *Akers* v. *Chancy*, 2 Bro. C. C. 273.

Affidavit in Opposition.]—Quære, whether, according to the strict practice of the court, affidavits can be read in opposition to the motion for a commission. *Shackell* v. *Macaulay*, 3 L. J. (O.S.) Ch. 40.

Affidavits on former Application.]—The master enlarged publication, and on that occasion evidence was produced that the defendant had not seen the depositions. Immediately afterwards, an application was made for an additional commission, which the master granted without any further evidence, that the defendant had not seen the depositions:—Held, that it was not necessary to bring forward further proof, the master having already in his office evidence of the fact, and the court refused with costs an application to set aside the proceedings. *Clark* v. *Chuck*, 9 Beav. 414.

Persons not parties to the suit claimed an interest in the subject-matter in dispute, and applied for and obtained the master's certificate for a commission for the examination of witnesses residing abroad in support of the claim. The claimants did not produce an affidavit, but, there being affidavits in the master's office sufficient to satisfy him that the certificate ought to be given, he granted the same:—Held, that the certificate so granted was regular. *Bauer* v. *Maule*, 9 Jur. 860.

Certificate of Master.]—If, in the prosecution of inquiries under a reference to the master, a commission to examine witnesses abroad be necessary, an application must be made to the master for his certificate, before applying to the court for the commission. *Bamford* v. *Bamford*, 2 Hare, 642; 13 L. J., Ch. 25; 8 Jur. 733.

Semble, the motion for the commission on the master's certificate is of course. *Ib.*

Production of Documents.]—On an application by a defendant for a commission to examine witnesses abroad, the court refused to make it a part of the rule to call upon the plaintiff to produce a bill of exchange in his possession at the time of executing the commission. *Cunliffe* v. *Whitehead*, 3 D. P. C. 634.

In trover for United States treasury notes, the defence set up was, that the notes had been forged by the plaintiff, who offered them for sale to the defendant, by whom they were detained, and that, to prove this, it was necessary to send out a commission to examine witnesses in America. On granting the commission, the court required the defendant to deposit the notes with the master. On the motion of the defendant, a rule was subsequently made for delivering out the notes to some person to be agreed on, or to be named by the master, for the purpose of producing them to the witnesses under the commission, the

defendant giving security, to the satisfaction of the master, for their safe return, and depositing facsimiles in lieu of them. The court considered that this rule was complied with by depositing facsimiles exhibiting in outline the figures and emblematical devices on the face of the notes, together with a tracing of the indorsements. *Clinton* v. *Peabody*, 7 Man. & G. 399; 8 Scott (N.R.) 117.

Payment into Court.]—Order for a commission to examine witnesses abroad, returnable without delay, pending an injunction against an action, without paying the money into court. *Coch* v. *Donovan*, 3 Ves. & B. 76.

Plaintiff, on bill of discovery in aid of defence to action against him at law, may have, on motion at sittings after term, a commission to examine abroad, on payment of considerable part at least of demand of plaintiff at law into court, where the cause at law is at issue, and was entered for trial the term before the term immediately preceding the sittings, and a case of sufficient defence has been made out by a bill, although the affidavit on which it has been moved is in the common form, the delay in staying trial not being sufficient ground of opposition to such an application. *Ebden* v. *Prince*, 8 Price, 290.

In insurance cases it is always a question of circumstances whether, on granting commission abroad, the party obtaining it shall be required to bring the whole or any part of the money alleged to be due into court. *Marryatt* v. *Nobre*, M'Clel. & Y. 101. S. P., *Jackson* v. *Strong*, 13 Price, 309.

Stay of Application.]—Commission to examine abroad is so far in nature of proceeding at law, that application for it is stayed by injunction to stay proceeding at law. *Novaes* v. *Darrien*, 4 Madd. 362.

Form of Order.]—An affidavit in support of a motion for a commission to examine witnesses at Paris and Boulogne for the defendant company, stated that certain Frenchmen residing in Paris (named), and others residing in Paris and Boulogne (unnamed), were necessary witnesses. The defendant company was registered in England; their business was in Paris. The court ordered the commission to issue, on the defendants, if the plaintiff pressed it, adding to their affidavit a statement that great inconvenience and expense would otherwise be occasioned. The costs of the commission were reserved; no security was required; and it was referred to chambers to settle the form in which the commission should issue. *Spiller* v. *Paris Skating Rink Co.*, 27 W. R. 225.

A testator gave the residue of his property to be held in deposit for the purpose of inquiring whether there were any relations of his blood living, and, if so, the said residue was to be divided equally among them. Upon a reference to the master to make inquiries in conformity with the above residuary bequest, the master reported that a commission ought to be sent to Venice to examine witnesses as to who were the next of kin. The court, upon the application of the executors, made an order for a foreign commission, and also directed what sum should be allowed out of the testator's property for the expenses of the commission. *Heath* v. *Chapman*, 21 L. J., Ch. 614.

It is not irregular to intitule an order for a commission to examine witnesses, or the commission, or the return thereof, in a short form as a suit in which "A. and others are plaintiffs," and "B. and others defendants." *Lincoln* v. *Wright*, 4 Beav. 166; 10 L. J., Ch. 331.

The order of course for the further examination of witnesses under a commission is not irregular on account of its not being restricted to the examination of witnesses not before examined on the same subject-matter. *Forbes* v. *Forbes*, 9 Hare (App.) lxxvii; 1 W. R. 124. *And see* post, 6. FORM OF COMMISSION.

4. WHEN WITNESS WITHIN JURISDICTION.

a. Examination De Bene Esse.

i. *General Principles.*

Distinction between examination to perpetuate and de bene esse. In a suit for the former purpose, after the examination there is an end to the issue. *Morrison* v. *Arnold*, 19 Ves. 671.

The reason why court allows taking of depositions de bene esse, is either from contempt of party in not answering, and thereby preventing joining of issue, or else where there may be ground to apprehend their not living to be examined in chief; but, if these witnesses do live, and are examined in chief, their depositions de bene esse fall to the ground. *Cann* v. *Cann*, 1 P. W. 567.

ii. *In What Cases.*

Facts known only to Witness.]—A witness ordered to be examined de bene esse, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. *Shirley* v. *Ferrers*, 3 P. W. 77; Mos. 389.

Two witnesses ordered to be examined de bene esse, being the only persons who knew material facts. *Cholmondeley* (*Earl*) v. *Orford* (*Earl*), 4 Bro. C. C. 157.

Motion that a witness be examined de bene esse, being the only witness to a material fact, granted. *Hankin* v. *Middleditch*, 2 Bro. C. C. 641.

Witness examined de bene esse, upon the sole ground of his being the only person in whose knowledge a material fact was. *Brydges* v. *Hatch*, 1 Cox, 423.

It is a ground for examining a witness de bene esse, that he is the only witness to some material fact in the court, although he be neither aged nor infirm. But the affidavits should state the particular points to which his evidence is meant to apply. *Pearson* v. *Ward*, 1 Cox, 177; Dick. 648.

Examination of other Witness.]—Witnesses having been examined de bene esse, with the view to a trial at law, the examination of another witness is not permitted without strong circumstances; as upon a second ejectment brought after verdict for the defendant, the examination of a witness, produced at the trial, who had not been examined under a bill to perpetuate testimony, was permitted; not as to other witnesses. *Palmer* v. *Ailesbury* (*Lord*), 15 Ves. 299.

Witness going Abroad.]—Whenever a necessary witness is going abroad, or is from illness,

age or other infirmity likely to be unable to attend the trial, an order will be made for his examination before an officer of the court in the presence of both parties. *Warner* v. *Mosses*, 50 L. J., Ch. 28; 16 Ch. D. 100; 29 W. R. 201—C. A.

The court granted a rule (absolute, unless cause shewn on the morrow), for the examination of witnesses upon an affidavit that they were about to sail immediately for India. *Pirie* v. *Iron*, 1 M. & Scott, 223; 8 Bing. 143; 1 D. P. C. 252.

The fact of a plaintiff not proceeding promptly in a cause, is no answer to a rule for examining a material witness on interrogatories, who is going abroad. *Weekes* v. *Paul*, 5 Scott, 713; 6 D. P. C. 462.

Witness going to the West Indies examined, but he being in Ireland must be examined in chief. *Birt* v. *White*, Dick. 473.

Scotland out of jurisdiction. Witness going there may be examined de bene esse. *Botts* v. *Verelst*, Dick. 454.

Motion on behalf of plaintiff, that two of their captains, sworn to be material witnesses, who were going to India, and not likely to return in less than eight months, might be examined de bene esse, refused, because the witnesses were plaintiff's servants, and they might keep them at home if they pleased, and because defendant would not, from the shortness of the time, be prepared to cross-examine. *East India Co.* v. *Naish*, Bunb. 320; 2 Fowl. Ex. Pr. 127.

If the principal witness of a plaintiff is about to leave the kingdom, and he has process to a sequestration against the defendant, he will be allowed to examine de bene esse, on undertaking not to hear his cause on sequestration without leave of the court. *Kirwan* v. *O'Boyle*, 2 Hog. 189.

Commission to examine de bene esse, witness going abroad. See *Lee Dicher* v. *Power*, Dick. 112.

Witness above Seventy Years of Age.]—The court has jurisdiction on a proper occasion, when it is "necessary for the purposes of justice," to make an order for an examination de bene esse of witnesses upon an ex parte application, the order being taken by the applicant at his peril, and subject to the risk of being discharged on sufficient grounds. An order was made in chambers on an ex parte application by the plaintiffs to examine de bene esse thirty witnesses upon an affidavit of the plaintiffs' solicitor merely stating that he was advised that they were material witnesses—that they were all above seventy years of age, and that he was advised and believed that by reason of their age it was desirable that their examination should be taken without delay. This order was discharged on motion in court, mainly on the ground that the affidavit was insufficient:—Held, that the affidavit did not satisfy the requirements of Ord. XXXVIII. r. 3, but leave was given to put in a further affidavit stating what information had been obtained, and what steps had been taken to obtain such information as to the age of the different witnesses, and also stating generally the facts which the particular witnesses were going to depose to. Although the fact that a witness is seventy years old is generally a good primâ facie ground for an order for his examination de bene esse, such a practice will not necessarily be applied to an extraordinary case, e.g. where an order has been made to examine thirty witnesses. On a subsequent application made on a further affidavit of the solicitor, in which he divided the witnesses into four parties who were to depose to four different heads of evidence:—The court declined to allow the examination de bene esse of ten of the proposed witnesses who were between seventy and seventy-five years old, without prejudice to a subsequent application for leave to examine them on grounds other than age, but allowed the other twenty witnesses above seventy-five to be examined de bene esse upon the undertaking of the plaintiffs' counsel to produce at the trial, if so requested by the defendant, any of such witnesses who might be then alive. *Bidder* v. *Bridges*, 26 Ch. D. 1; 50 L. T. 287; 32 W. R. 445—C. A. Affirming 53 L. J., Ch. 479.

Examination de bene esse, where the witness is above the age of seventy, or is the only witness to a particular fact; refused upon affidavit of the agent of his information from the witness that he can prove the fact, and belief that no other person can prove it. *Rowe* v. ——, 13 Ves. 251.

Illness.]—In order to obtain a rule to examine a party on interrogatories on the grounds that the party resided three hundred miles off, was eighty-one years old, and had lately met with an accident, an affidavit of a surgeon must be produced, stating his belief that the witness would not be able to attend the trial. *Davies* v. *Lowndes*, 6 Scott, 738; 1 Arn. 379; 7 D. P. C. 101; 8 L. J., C. P. 10; 2 Jur. 945.

But where it is sworn that a witness is in a precarious state of health, and cannot attend the trial with safety, he may be examined before the officer of the court. *Pond* v. *Dimes*, 2 D. P. C. 730; 3 M. & Scott, 161.

Before the court will permit a witness to be examined before the prothonotary, on the ground of anticipated illness, it must appear that there is strong reason to believe that the illness will exist at the time of the trial. *Abraham* v. *Newton*, 8 Bing. 274; 1 D. P. C. 266; 1 M. & Scott, 384; 1 L. J., C. P. 91.

A witness will not be allowed to be examined de bene esse, on an affidavit that she labours under a cancer, but not stating that she is in immediate danger. *Anon.*, 1 L. J., Ch. 76.

The court will not grant a rule absolute in the first instance for the examination of a witness although he be at the point of death. Semble, that s. 46 of the Common Law Procedure Act, 1854, does not give the court the power of doing so. *Thomas* v. *Von Stutterheim*, 5 W. R. 6.

Commission to examine witness on oath of impotency to travel. *Wade* v. *Gwye*, Cary, 40.

—— **Evidence rejected at Trial—Appeal.**]—Where the evidence of a witness had been rejected at the hearing of an action, and there was an appeal against that decision, the witness being dangerously ill, the Court of Appeal allowed his evidence to be taken de bene esse, before a special commissioner pending the appeal; the appellant undertaking to abide by any order which the court might hereafter make as to the costs of the application and the costs of the examination. *Treasury Solicitor* v. *White*, 55 L. J., P. 79—C. A.

—— **Form of Order.**]—In an action for replacement of railway stock alleged to have been transferred from the name of the plaintiff by means of a forged transfer, an attesting witness of the

execution of the transfer was dangerously ill. On motion ex parte on behalf of the plaintiff for leave to examine the witness de bene esse, and for the appointment of a special examiner:—Held, that it was a proper case to make the order, the judge directing the order to be drawn up in accordance with the form in Seton on Decrees (4th edit.), 1635, omitting the words, "And it is ordered that the plaintiff be at liberty to give such depositions in evidence at the trial of this action":—That, at the trial of the action, before leave to use the evidence was given, it would be necessary to prove that the witness was not capable of being examined. *Barton* v. *North Staffordshire Ry.*, 56 L. T. 601; 35 W. R. 536.

—— **Appointment of Special Examiner.**]—The court refused to appoint a special examiner, holding that the matter must go to the examiner in rotation. *Ib.*

Witness Deaf.]—There must be a special order for the examination of a witness who is deaf. *Hussey* v. *Bodkin*, 2 Hog. 214.

Welsh Witness.]—It is not now the practice of the court to appoint a special examiner to take a country examination, even, for instance, in a Welsh case, where it is alleged to be necessary that the examination should be taken by a person conversant with the Welsh language. In such a case the examination will be referred in the usual way to one of the examiners of the court, who is entitled, if necessary, to the assistance of an interpreter. *Bute* (*Marquis*) v. *James*, 55 L. J., Ch. 658; 33 Ch. D. 157; 55 L. T. 133; 34 W. R. 754.

Unwilling Witness.]—It is no ground of objection to a rule for examining a witness vivâ voce before the master, that it is suggested that he is unwilling to submit to cross-examination, or that he is the son of the party applying, if he appears to be independent of his father's influence. *Carruthers* v. *Graham*, 9 D. P. C. 947.

Person making Statements deposed to in Affidavit.]—Where, in an affidavit filed on behalf of the plaintiffs on a motion, which by consent stood over, statements were deposed to as having been made by a person to the deponent, and which were material for the purposes of the plaintiffs' case, leave was, on an ex parte application, given to the plaintiffs to examine such person before an examiner, the deposition to be given in evidence as if it were an affidavit. *Turner Pneumatic Tyre Co.* v. *Dunlop Pneumatic Tyre Co.*, 75 L. T. 651.

Inconvenience.]—Where country witnesses who had sworn affidavits in London were required to be cross-examined, the court, on affidavit of inconvenience, dispensed with their attendance at the examiner's office, and issued a commission. *Ogilby* v. *Gregory*, 25 L. J., Ch. 32; 4 W. R. 67.

To prove Modus.]—A cause went off for want of parties, with leave to amend, and the party, being added, put in his answer and plaintiff replied. On motion, defendant allowed to take out a commission to prove the modus as laid in his answer. *Phillips* v. *Gwynn*, 2 Fowl. Ex. Pr. 184.

Criminal Cases.]—But an order for the examination of a witness resident in England, but unable from illness to attend the trial, cannot be made in a criminal prosecution either by the common-law authority of the court, or under 1 Will. 4, c. 22. *Reg.* v. *Upton St. Leonard's*, 10 Q. B. 827; 17 L. J., M. C. 13; 12 Jur. 11.

Examination de bene esse not extended to the case of a prisoner charged with a capital felony. *Anon.*, 19 Ves. 321.

Other Cases.]—Upon a question of legitimacy depending upon a chain of distinct circumstances in the knowledge of different individuals, and the defendant, an infant, kept out of the way, an examination de bene esse would have been granted, though not within any of the three cases, viz. witnesses of the age of seventy, on quitting the kingdom, or a fact depending on a single witness. *Shelley* v. ——, 13 Ves. 56.

Plaintiff's guardian may be examined de bene esse. *Payne* v. *Bosgrave*, 2 Fowl. Ex. Pr. 125; *Hockley* v. *Butler*, *Ib.*; *Ashley* v. *Ashley*, *Ib.* So on behalf of defendant. *Gwynn* v. *Yale*, *Ib.*

The court will make an order for an examination de bene esse whenever the justice of the case may appear to require it. *Blackwood* v. *Burrowes*, Fl. & K. 630; 4 Ir. Eq. R. 609.

An order will be made under Judicature Act, Ord. XXXVII. r. 4, for examination before an officer of the court in the presence of both parties whenever it shall appear to the court necessary for the purposes of justice. *Warner* v. *Mosses*, 50 L. J., Ch. 28; 16 Ch. D. 100; 29 W. R. 201.

Of Party to Suit.]—It is an order of course that defendant may be examined de bene esse, saving just exceptions. *Glover* v. *Faulkner*, 1 Vern. 452.

The court cannot make an order to examine a plaintiff de bene esse, saving just exceptions, though they will make such order to examine a defendant; but the defendant ought to have demurred to such immaterial plaintiff; if a corporation would make use of one of their own members as a witness, they must disfranchise him. *Colchester Corporation* v. ——, 1 P. W. 595.

iii. *Order for.*

How Obtained.]—If the witness is proposed to be examined with a view to reading his testimony in a suit in chancery the order for his examination may be obtained on motion in that suit and affidavit; but if his testimony is wanted in an action at law, a bill must first be filed for his examination de bene esse, with the proper affidavits annexed; and an application is then made to the court by motion, for the order wanted; also the order may be obtained before appearance, after defendant has been served with a subpœna. *Wilson* v. *Wilson*, Newl. Pr. 286.

After commission to examine abroad was sent, witness, before commission had reached its destination, returned to England, and motion made to examine him de bene esse, but refused; and held that bill must be amended. *Atkins* v. *Palmer*, 5 Madd. 19.

After publication, decree, and an issue directed, a witness, whose testimony was wanted on the trial of the issue, being examined de bene esse by order obtained on petition in the cause:—Held, irregularly examined, and that a bill should have been filed for his examination de bene esse. *Stratford* v. *Aldborough* (*Lord*), 2 Moll. 326.

Rule for examination of witnesses de bene esse, dispensed with on account of parties living in Virginia. *Fitzhugh* v. *Lee*, Ambl. 65.

Order of Course.]—Motion of course to examine de bene esse a witness above seventy or in a dangerous state, or the only witness. *Tomkins* v. *Harrison*, 6 Madd. 315.

Where witness is above seventy years old it is motion of course to examine de bene esse, even before appearance, and it is no objection that reference of bill for impertinence is pending. *Prichard* v. *Gee*, 5 Madd. 364.

There are certain cases in which the order for an examination de bene esse is made of course, as on the ground of age. *Rowe* v. ——, 13 Ves. 261.

The fact of a person being in the seventieth year of his age, and in an infirm state of health, is not sufficient to sustain an ex parte order for his examination de bene esse. *M'Kenna* v. *Everitt*, 2 Beav. 188; 9 L. J., Ch. 98; 3 Jur. 1166.

But a motion to discharge such an order, which had been obtained ex parte, on the ground that the witness was about to quit the kingdom, with the expectation of being absent for seven years, was refused. *Ib.*

An order for liberty to examine a witness de bene esse will be made without notice, where the witness is of advanced age. *Scott* v. *Scott*, 9 Ir. Eq. R. 261.

An ex parte order for the examination de bene esse of a witness about to go abroad is regular. *M'Intosh* v. *G. W. Ry.*, 1 Hare, 328; 11 L. J., Ch. 283; 6 Jur. 454.

A motion to suppress depositions taken under an order for the examination of a witness de bene esse, not asking to discharge that order, is not supported by shewing circumstances from which it would merely appear that the order was irregular; for the court will assume, for purpose of the motion, that the order was regular. *Ib.*

When Notice necessary.]—Motion to examine witnesses de bene esse, except in certain cases, as upon the ground of age, requires notice. The affidavit must be, either that the witness is of the age of seventy, or the only witness to the particular fact, or if upon the ground of health in a dangerous state. *Bellamy* v. *Jones*, 8 Ves. 31; 6 R. R. 205. Or is going abroad. *Shelley* v. ——, 13 Ves. 56.

An application for an order to examine a witness de bene esse, on the ground that he is the only witness to a material fact, ought to be made upon notice and not ex parte. *Hope* v. *Hope*, 3 Beav. 317; 10 L. J., Ch. 70; 4 Jur. 1124.

Special Terms.]—Terms imposed on the plaintiff in an issue with regard to the examination de bene esse of an aged witness, where the plaintiff had failed in trying the issue at the time directed by the court. *Reeve* v. *Hodson*, 10 Hare (App.) xvii, xxiv; 17 Jur. 341.

Party as Witness.]—Where an order was sought for the examination of the plaintiff as a witness on his own behalf, on the ground that he was about to go abroad, the court, besides requiring him to give security for costs, and imposing other special terms, required a further affidavit, shewing that the application was made bonâ fide. *Fischer* v. *Hahn*, 13 C. B. (N.S.) 659; 32 L. J., C. P. 209; 11 W. R. 342.

Affidavit in Support.]—The affidavit in support of the application ought to shew the facts on which it is proposed to examine the witness. *Hope* v. *Hope*, 3 Beav. 317; 10 L. J., Ch. 70; 4 Jur. 1124.

An affidavit in support of such an application on belief only, that the witness is the sole witness to a particular fact, is not sufficient; it ought to state the reasons for such belief. *Ib.*

Place of residence and description of witness whom it is sought to have examined de bene esse, must be given in the affidavit. *O'Farrell* v. *O'Farrell*, 2 Moll. 364.

Where it appeared upon affidavit that a material witness was going abroad, an order was made upon motion that the defendant should be at liberty to examine him de bene esse; and it was held not to be necessary that the affidavits should disclose the points to which it was proposed to examine the witness, or that he was the only witness who could give evidence on the points. *Grove* v. *Young*, 3 De G. & Sm. 397; 13 Jur. 847.

Before whom.]—On an application to have a witness, within the jurisdiction of the court, examined on interrogatories, the name of the person before whom the examination is to take place must be mentioned, before the rule nisi will be granted. *Doe* d. *Thorn* v. *Phillips*, 1 D. P. C. 56.

On Certificate of Master.]—If on reference in bankruptcy to master, he finds examination of witnesses necessary, he must certify accordingly to court, who will make the order. *Anon.*, 4 Madd. 379.

After a decree, if the master sees cause for a commission to examine witnesses in the country, he certifies that it is necessary, and the depositions, when returned, are filed by the six clerks, but depositions taken before the masters are kept in their offices. *Parkinson* v. *Ingram*, 3 Ves. 607.

The decrees in the exchequer always express that the officer is to be armed with a commission to examine witnesses, and power to direct the same to the country: so formerly in chancery. *Ib.*

On a motion for a commission to take defendant's examination, the time is left to the master, not limited by the order. *Hairby* v. *Emmet*, 5 Ves. 683.

It is now the practice in chancery to insert direction in decree, that master is at liberty to examine witnesses, but master may certify that a commission is necessary, which then issues of course. *Sandford* v. *Biddulph*, 9 Ves. 36.

A commission for the examination of witnesses, to falsify an examination of a party before a master, cannot be had without the usual certificate from the master, of the necessity of such a commission. *Bearcroft* v. *Berkeley*, 2 Cox, 108.

Whether, upon an application to the master for his certificate of the necessity of a commission to examine witnesses, it is necessary to produce before him the interrogatories upon which it is intended to examine the witnesses, quære. The practice in the masters' offices in this respect differs. *Nelson* (*Earl*) v. *Bridport* (*Lord*), 7 Beav. 195.

The proper form for objecting to a master's certificate, approving of a commission for the examination of witnesses, and the order made thereon. *Jones* v. *Creswick*, 15 L. J., Ch. 342; 10 Jur. 404.

iv. *At What Stage.*

Before Issue Joined.]—An examination of witnesses vivâ voce before the master, cannot in general be had before issue joined. *Mondel* v. *Steele*, 8 M. & W. 301; 9 D. P. C. 812; 5 Jur. 511.

The court refused to rescind an order of a judge for the examination by the master of the plaintiff in a cause before issue joined or declaration delivered, which had been obtained on his application, supported by an affidavit that he was master of a ship, and about to sail to Stettin, and was not likely to be present at the trial. *Brown* v. *Mollett*, 16 C. B. 514; 3 C. L. R. 925; 24 L. J., C. P. 213.

Where defendant prevents plaintiff rejoining from standing out processes of contempt, plaintiff is entitled to examine de bene esse. *Coveny* v. *Athill*, Dick. 355.

After answer, defendants obtained order to examine de bene esse, but before commission could issue plaintiffs replied, and defendants rejoined; and wishing to save expense of commission de bene esse, defendants moved that plaintiffs might issue a commission in a week, and give six days' notice of executing it, which defendants would consent to accept, or that, in default, defendants might issue commission. But court thought time too limited, and gave plaintiffs three weeks to issue the commission. *Atwood* v. *Hurrill*, 2 Fowl. Ex. Pr. 126.

Before Answer.]—Plaintiff's witnesses being old, examined before defendant's answer. *Bagnold* v. *Greene*, Cary, 48; Dick. 2.

Depositions taken de bene esse before the defendant had put in his answer, or issue joined, admitted to be read. *Southwell* v. *Limerick* (*Lord*), 9 Mod. 133.

Motion, by a defendant before answer, to examine a witness de bene esse, granted. *Bown* v. *Child*, 3 Sim. 457.

Liberty to examine de bene esse a witness about to leave the country, may be granted upon application made before answer; but, when the answer is come in, except in a very special case, this cannot be done. *Byrne* v. *Byrne*, 2 Moll. 440.

On the application for a commission for the examination de bene esse of a witness above seventy years of age (such witness being the plaintiff in the cause, and a defendant in a cross cause, whose time for answering had expired and whose answer had not been put in, and being also the party who applied for the commission for the purpose of being examined in support of his own case, under the statute 14 & 15 Vict. c. 99), the court refused to impose it as a condition in making the order that the answer should be filed. *Forbes* v. *Forbes*, 9 Hare, 461.

Before Appearance.]—A commission to examine witnesses de bene esse, upon a bill to perpetuate testimony, granted though the defendant had not appeared, and was not in contempt. *Allen* v. *Annesley*, 2 Jones, 260.

Examination de bene esse granted to plaintiffs in a bill to perpetuate testimony after subpœna served, but before appearance of infant defendants, in contempt by the messenger's return that they had absconded and were not to be found, on affidavit of the materiality of the evidence and danger of its loss, and undertaking to proceed with all due diligence to issue, and examination in chief to be proved before publication of the depositions de bene esse. *Frere* v. *Green*, 19 Ves. 319.

Witnesses being old and infirm, and resident out of the jurisdiction, the court, in a suit to perpetuate testimony, before appearance of some of the parties, made an order for their examination de bene esse. *Campbell* v. *Att.-Gen.*, 11 Jur. (N.S.) 922; 13 L. T. 356; 14 W. R. 45.

After Verdict.]—Order after verdict upon an issue to examine de bene esse a witness above seventy, suggesting an intent to move for a new trial. *Anon.*, 6 Ves. 573.

After Adjournment.]—Leave given to examine witness after adjournment of cause. *Bank* v. *Farques*, Ambl. 145.

After Hearing.]—Examination had after hearing. *Throckmorton* v. *Cromwell*, Toth. 85; *Touch* v. *Thomas*, *Ib.*; *Lenox* v. *Clifton*, *Ib.* 192; *Anon.*, Cary, 37. But quære, as to the authority of these cases.

v. *Publication and User of Depositions.*

For Comparison with Evidence in Chief.]—Court refused to publish depositions de bene esse, in order to compare them with the depositions in the same cause taken on an examination in chief. *Cann* v. *Cann*, 1 P. W. 567.

Witness Dead, Absent or Incapacitated.]—Depositions de bene esse of witness dead, published to be read at law. *Price* v. *Bridgman*, Dick. 144.

Depositions of a witness examined de bene esse, he dying before he was examined in chief, ordered to be read at a trial at law. *Marsden* v. *Bound*, 1 Vern. 331.

An affidavit of the death or absence beyond sea of the witness is necessary, before examinations de bene esse can be published. *Ward* v. *Sykes*, Ridgw. 193.

In a suit which had been dismissed through the conduct of the plaintiff, the evidence of a witness who was about to proceed to the Cape of Good Hope was taken de bene esse, under an order obtained ex parte at the instance of the plaintiff. Subsequently another suit was virtually instituted between the same parties, and substantially for the same purposes as the former. The witness, as alleged, was still abroad, but he had not been heard of for a long period. The court, on motion by the plaintiff, ordered that the depositions be published, and that when published both parties should have an opportunity of seeing them, and then the defendants should have an opportunity of objecting to or rejecting them, with liberty to both parties to use them as they might be advised. *M'Intosh* v. *G. W. Ry.*, 1 Jur. (N.S.) 1132. Affirmed, 7 De G. M. & G. 737; 2 Jur. (N.S.) 129.

Depositions taken de bene esse upon incapacity of witness to attend at trial at law, not published but on affidavit of surgeon as to the probability of his attendance; an order was made for officer to attend at trial with the original deposition, to be tendered if the incapacity of the witness to attend should be proved. *Andrews* v. *Palmer*, 1 Ves. & B. 21.

Evidence given by a witness examined de bene esse by reason of ill-health is not admissible if

the witness be at the hearing of the cause incapable of being re-examined. *Wequelin* v. *Wequelin*, 2 Curt. 263.

Where Witness might have been Examined.]—The general rule is, that depositions taken de bene esse are not to be published in cases where the witness might have been, and was not, examined in the usual way; the proper period for such examination being between the time when the case is at issue and when publication passes. But the rule is liable to exception in a special case. Particular cases stated. *Forsyth* v. *Ellice*, 2 Mac. & G. 209; 2 Hall & Tw. 424; 19 L. J., Ch. 334. Reversing 7 Hare, 290.

Publication of depositions taken de bene esse, refused after one trial had, on which some of the persons who had been examined de bene esse, and who had since died, were examined, and the others might have been examined vivâ voce. *Fitzpatrick* v. *Webb*, 2 Moll. 313.

Application.] — An application to read the deposition of a witness on the trial of an issue at law, directed by the Court of Chancery, on the ground of the witness being so aged and infirm as to be unable to attend in person, must be made to the judge at the trial, and not to the court which directs the issue. *Jones* v. *Jones*, 1 Cox, 184.

Objection.]—It is too late, at the hearing of the cause, to object to depositions taken de bene esse, as irregular. The court should have been moved to discharge the order for publication. *Ely* (*Dean*) v. *Warren*, 2 Atk. 189.

A deposition de bene esse having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination, which might have been effectually taken at the hearing. Whether the court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in Scotland between the same parties on the same question, quære. *Gordon* v. *Gordon*, 1 Swanst. 166; 1 Wils. 155.

In Suit to Perpetuate.]—In a suit to perpetuate the testimony of witnesses, liberty given to the plaintiff under the 13 Geo. 3, c. 9, to pass publications of depositions of witnesses examined de bene esse in the cause. *Scallan* v. *M'Coy*, Fl. & K. 366.

In Other Court.]—Where a bill was filed in the Court of Chancery impeaching a will, and a suit to recall the probate had been instituted in the Prerogative Court, and a witness, who was examined de bene esse in the chancery suit, died after having been examined, the court will not permit his depositions to be published for the purpose of using them in a suit in the Ecclesiastical Court, issue not having been joined in the suit in chancery, and publication, therefore, not having passed in such suit. *Shewell* v. *Hilliard*, 9 Ir. Eq. R. 469.

Lost Commission.]—Commission de bene esse lost on return; witness being dead, paper draft sealed ordered to be sent up unopened, and ingrossed by six clerks, and used as original depositions. *Jones* v. *Donithorne*, Dick. 352.

Other Cases.] — Evidence of reputation of exemption of a district from tithe read de bene esse. *Donnison* v. *Elsley*, M'Clel. & Y. 24.

Witnesses examined de bene esse in Sweden: council of Sweden refused to let a commission be executed for examining them in chief; the depositions de bene esse may be read. *Gasson* v. *Wordsworth*, Ambl. 108; 2 Ves. 325, 336.

The evidence of a clerk to a commission to examine witnesses in a suit, and who has been examined de bene esse, will be admitted on behalf of the plaintiff, saving just exceptions. *Lord* v. *Colvin*, 4 W. R. 455.

Depositions of witnesses taken de bene esse in 1711, and not having passed till 1743, under the circumstances, the depositions were ordered to be published, but without prejudice. *Hamilton* (*Duke*) v. *Meynal*, Dick. 788; 2 Ves. 497.

b. Examination Pro Interesse Suo.

When Ordered.]—Orders made that a mortgagee and a person claiming property in goods sequestered might be examined pro interesse suo before the deputy remembrancer. *Mackenzie* v. *Powis*, 1 Fowl. Ex. Pr. 192, 193; *Martin* v. *Willis*, *Ib.*, 181.

Court will order person to be examined pro interesse suo against receiver, as well as against sequestrator. *Gomme* v. *West*, Dick. 472.

A party claiming to have a mortgage on an estate prior to plaintiff's right, was ordered to come in and be examined pro interesse suo; and on his neglecting to put in his examination, an order was made on him to do so, and to procure a report in a fortnight. On the report being made, his claim was allowed, and costs given him. *Cooper* v. *Thornton*, Dick. 72. S. P., *Bowles* v. *Parsons*, Dick. 142.

A prior mortgagee cannot obtain an examination pro interesse suo in the matter of a petition under which a puisne mortgagee has obtained a receiver. *Allen* v. *Colthurst*, 2 Hog. 249.

No examination pro interesse suo, before the sequestrators have made a return. *Pelham* (*Lord*) v. *Newcastle* (*Duke*), 3 Swanst. 290.

Where the goods of a third person are seized by sequestrators, an order to examine pro interesse suo will be made; and, if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland* v. *Mape*, 2 Ball & B. 66.

When Necessary.]—Tenants dispossessed by injunction of lands held by lease from defendant, executed prior to the institution of the suit, in which they were not parties, on application to be restored to the possession, are not to be examined pro interesse suo; such order set aside, and the plaintiff directed to proceed by ejectment to recover the lands. Order to examine pro interesse suo, only made to ascertain priority of incumbrances, or where an interest is claimed in estate in possession of receivers or sequestrators. *Dunne* v. *Farrell*, 1 Ball & B. 122.

Upon sequestration, mortgagee must come in to be examined pro interesse suo. *Anon.*, 6 Ves. 288. And see *Tatham* v. *Parker*, 1 Sm. & G. 506; 22 L. J., Ch. 903; 17 Jur. 929; 1 W. R. 491.

A tithe owner is entitled, under 4 Geo. 4, c. 99, to one year's arrear of tithe, out of a distress for rent, and is not compelled to apply to be examined pro interesse suo, when the amount is small. *Hawkes* v. *Smith*, Sau. & Sc. 326.

It is contempt to disturb sequestrators in possession. If sequestration is executed, a judgment creditor, though prior, can only claim to be examined pro interesse suo; if not executed, he

may take execution. *Angel* v. *Smith*, 9 Ves. 336; 7 R. R. 214.

Jurisdiction.] — No jurisdiction to compel party to be examined pro interesse suo. *Kaye* v. *Cunningham*, 5 Madd. 406.

A person having been examined pro interesse suo, was permitted to prosecute and make out her right in formâ pauperis. *James* v. *Dore*, Dick. 788.

Conclusiveness.]—Examination pro interesse suo is conclusive, if not replied to. *Att.-Gen.* v. *Coventry Corporation*, 3 Swanst. 311; 18 R. R. 238.

On examination of parties pro interesse suo, leave given to exhibit interrogatories to falsify an examination as of course. *Rowley* v. *Ridley*, 3 Swanst. 308; 2 Bro. C. C. 15; 19 R. R. 206.

Procedure.] — The mode of proceeding on examinations pro interesse suo. *Hunt* v. *Priest*, Dick. 540.

A party who is to be examined pro interesse suo, must file a charge before he can compel the plaintiff to lodge personal interrogatories for his examination. It is the practice, in the master's office, to require a charge and discharge to be filed in all cases in which there is a controversy between the parties. *Crone* v. *O'Dell*, 2 Hog. 144.

Form of Objection.]—Whether the proper form of objecting to the report of a master, or an examination pro interesse suo, is by exception, quære. *Empringham* v. *Short*, 3 Hare, 461; 13 L. J., Ch. 300; 8 Jur. 856.

5. The Commissioners.

a. Who may be.

Barrister.]—The evidence in the case being special, a barrister to be chosen by the parties must be special examiner. *Reed* v. *Prest*, 1 Kay (App.) xiv.

It is not imperative that commissioners appointed by the court to examine witnesses in a suit should be barristers-at-law. *Henderson* v. *Philipson*, 22 L. J., Ch. 1037; 17 Jur. 615.

Solicitor.]—Solicitor in the cause cannot be a commissioner, or the depositions will be suppressed. *Fricker* v. *Moore*, Bunb. 289.

Depositions suppressed, plaintiff's solicitor being one of the commissioners. *Selwyn* v. *Gill*, Dick. 563.

A deposition de bene esse having been read at the hearing of a cause, it is of course, if any issue is directed, to order it to be read on the trial, notwithstanding an irregularity in the examination which might have been effectually objected to at the hearing. Whether the court will suppress a deposition taken before commissioners, of whom one is attorney in a cause in Scotland between the same parties on the same question, quære. *Gordon* v. *Gordon*, 1 Swanst. 166; 1 Wils. 155.

A commissioner should not act as solicitor on behalf of a party. *Sayer* v. *Wagstaff*, 5 Beav. 462; 12 L. J., Ch. 35.

Where a party to a suit, who wished to put in accounts, resided at Lyons, and the nearest British consulate was 100 miles distant, the court appointed a solicitor resident at Lyons to be special examiner to take the evidence, on the ground that the consul, before whom an affidavit was to be sworn, resided at too great a distance for that purpose. *Drevon* v. *Drevon*, 9 L. T. 406; 12 W. R. 66.

Solicitor's Clerk.]—Under a commission issued to examine witnesses abroad, it is no objection that a clerk to the plaintiff's attorney is appointed one of the commissioners, and settles the draft of the depositions of one of the plaintiff's witnesses. *Lopes* v. *De Tastet*, 4 Moore, 424.

Foreign Court.]—A commission having been issued in a cause addressed to individual commissioners to examine witnesses at Pesth, was sent back unexecuted, through the Austrian embassy, on the ground that the Austrian government did not permit any but the tribunals of the country to examine witnesses in Hungary. The court made absolute a rule directing a commission to issue directed to the Imperial Royal Provincial Court at Pesth, to examine the witness. *Fischer* v. *Izataray*, or *Sztaray*, El. Bl. & El. 321; 27 L. J., Q. B. 239; 4 Jur. (N.S.) 632; 6 W. R. 549.

In a divorce suit the petitioner obtained a commission to examine witnesses in India, addressed to "The Judges of the Supreme Court at Calcutta." The Supreme Court was abolished by 24 & 25 Vict. c. 104, by which a "High Court of Judicature at Fort William, in Bengal," was established, with all the jurisdiction, power and authority of the abolished court. Witnesses were examined under the commission, and cross-examined on behalf of the respondent:—Held, that the evidence must be admitted at the trial, as the commission was in effect addressed to the judges of whatever was the highest court at Calcutta, and the judges of the High Court answered the description, and that the cross-examination of witnesses was no waiver of the right to object to the evidence. *Wilson* v. *Wilson*, 9 P. D. 8; 49 L. T. 430; 32 W. R. 282—C. A.

The court refused to issue a commission to a foreign court to examine witnesses abroad, because it appeared that under the procedure of the court he would not be examined in the ordinary way. *Boyse, In re, Crofton* v. *Crofton*, 51 L. J., Ch. 660; 20 Ch. D. 760; 46 L. T. 522; 30 W. R. 812.

A commission may issue to the judges of a foreign court (as individuals) to examine witnesses, although it appears that according to the foreign law the mode of examination will be conducted differently from the English practice, counsel not being allowed to put questions to the witnesses, except through the judge; and although hearsay evidence is there receivable. *Lumley* v. *Gye*, 3 El. & Bl. 114; 2 C. L. R. 936; 23 L. J., Q. B. 112; 18 Jur. 466.

If on the trial it should appear either on the face of the depositions, or by extrinsic proof, that illegal evidence has been admitted, or proper questions refused to be put to the witnesses, the judge would have a discretion as to rejecting the whole or the illegal portion. *Ib.*

Where a former commission issued to an English commissioner had been abortive by reason of the witnesses, in accordance with the foreign law, refusing to be examined except by a judge of the foreign court, the court granted a fresh commission to the judges of that court on payment of the costs of the former commission. *Ib.*

Commission to examine witnesses at Madras directed to the judges of the Supreme Court there. *Murray* v. *Lawford*, 6 Sim. 573.

—— **Letters of Request.**]—An order for letters of request to issue to a foreign court under Ord. XXXVII. r. 6A, can only be made where it is sought to examine witnesses under the order, and the court has no jurisdiction to make such an order when production of documents is alone asked for. *Cape Copper Co.* v. *Comptoir d'Escompte*, 38 W. R. 763—C. A.

An examination of witnesses abroad before a special examiner, ordered under Ord. XXXVII., r. 5, is not an ordinary commission so as to prevent the issuing of letters of request in addition thereto, under Ord. XXXVII. r. 6A. *Mason and Barry* v. *Comptoir d'Escompte*, 38 W. R. 685. But see preceding case.

The court ought not, in the exercise of its discretion, to order the issue of letters of request to a foreign tribunal to take evidence abroad for the purpose of a trial, unless the evidence sought to be obtained is directly material to the question to be tried. It is not sufficient that it may possibly be of use on some collateral matter to corroborate other evidence. *Ehrmann* v. *Ehrmann*, 65 L. J., Ch. 745; [1896] 2 Ch. 611; 75 L. T. 37; 45 W. R. 149—C. A.

—— **Hostile Judge.**]—Upon an application for a commission to issue directed to the judges of a foreign court, to examine witnesses on the part of a defendant; it appeared that the action was brought in formâ pauperis to recover the value of certain shares and coupons, and it was objected by the plaintiff's attorney, that she had already been interrogated by one of the judges (whose name appeared in the commission) in the course of proceedings taken against her abroad, respecting the shares and coupons; and it was stated that this judge had put questions to her suggesting that she had been guilty of fraud; that he had threatened her with imprisonment, and refused to hear evidence on her behalf; and it was requested, that even if the commission was allowed, she might be at liberty to exhibit cross interrogatories to the witnesses for the defence:—Held, that the commission might issue, the name of the judge complained of to be omitted from it, and the foreign court to be requested not to allow him to take part in the examination; the plaintiff to be at liberty to cross-examine on interrogatories, if the foreign court would allow such interrogatories to be used. *Valentin* v. *Hall*, 35 L. J., Q. B. 121; 14 W. R. 606.

—— **British Minister.**] — A plaintiff was desirous of cross-examining some of the defendant's witnesses who were attached to the British embassy at Teheran, in Persia, one of them being the minister's personal attendant. The court, notwithstanding the intimate relations between him and the witnesses, appointed the minister special examiner. *Ongley* v. *Hill*, 22 W. R. 817.

Interested Party.]—Depositions suppressed after publication, on the ground that one of the commissioners was the nephew and agent of the plaintiff. *Mostyn (Lord)* v. *Spencer*, 6 Beav. 135; 14 L. J., Ch. 1; 9 Jur. 97.

The fact of publication having passed, or the death of the witness, will not prevent the suppression of the depositions, when the commissioner is disqualified by interest, provided the application be made within a reasonable time after the discovery of the objection. *Ib.*

The selection of a commissioner to take evidence is vested in the discretion of the master, and the court will not vary his appointment upon a charge that the commissioner is interested in the success of the plaintiff in consequence of his friendship for the plaintiff's solicitor, the payment of whose costs depended upon his success in the suit. *Malone* v. *O'Connor*, Sau. & Sc. 429.

The 105th General Order, in limiting the discretion of the master, applies to cases where an examination of witnesses is to be held in one place only. *Ib.*

Special Examiner.] — Where a defendant, whose evidence it was desired to take, was resident in Australia, and it was not known whether in Melbourne or Adelaide, two examiners were appointed in each place, each with power to act in default of the first-named examiner being capable; and liberty was, in the same order, reserved to the principal defendant in the cause to appoint some person in the colony to attend the taking of the examination on his behalf. *Crofts* v. *Middleton*, 9 Hare (App.) lxx., lxxv.; 17 Jur. 112; 1 W. R. 163.

The practice of the court is to insert in the order for the examination of witnesses abroad, the names of the special examiners to examine such witnesses instead of issuing a commission. *London Bank of Mexico* v. *Hart*, L. R. 6 Eq. 467; 18 L. T. 553.

Under the 15 & 16 Vict. c. 86, ss. 28, 31, and 32, this court will not issue a commission to examine witnesses orally, or upon interrogatories, out of the jurisdiction; but will appoint a special examiner for that purpose. *Lawrence* v. *Maule*, 3 W. R. 534.

Appointment of an examiner to take orally the evidence of a witness residing out of the jurisdiction of the court. *Crofts* v. *Middleton*, 9 Hare (App.) xviii.

A special examiner ought only to be appointed after all persons interested in the appointment have been heard thereon. *Smith, Knight & Co., In re*, L. R. 8 Eq. 23; 17 W. R. 758.

Where, therefore, a special examiner was appointed to take the examination and cross-examination of witnesses in the winding-up of a company:—Held, that a person who had given evidence in opposition to a summons to place him on the list of contributories, and who had not consented to the appointment of the special examiner, could not be required to attend and be examined before him. *Ib.*

A witness who has made an affidavit may be cross-examined either before one of the examiners of the court or a special examiner, and in the case of a witness abroad, the proper course is to apply for a special examiner. *Edwards* v. *Spaight*, 2 John. & H. 617.

An affidavit was made by a plaintiff residing out of the jurisdiction, and he received notice to appear in London to be cross-examined thereon, but refused. An objection taken to its being received, was overruled, on the ground that it was the duty of the defendants' solicitor to have applied, either in chambers or in court, for the appointment of a special examiner, for the purpose of going over to Boulogne, to cross-examine the plaintiff. *Rawlings* v. *Wickham*, 4 Jur. (N.S.) 990.

b. Examination of.

A commissioner ordered to be examined to prove a deed, and an interrogatory to be added

for the purpose. *Maude* v. *Hartley*, 2 Fowl. Ex. Pr. 99.

A commissioner may be examined without an order, but he must be examined before any other witness. *Ib.* S. P., *Bright* v. *Woodward*, 1 Vern. 369.

Under special circumstances, the court will permit a commissioner to be examined, even after the commission has been opened, and the examination of witnesses proceeded with. *Grubb* v. *Grubb*, 1 Y. & J. 36.

c. Fees.

Action for.]—The court will restrain commissioners for examining witnesses from bringing an action for their fees against a solicitor in the cause, and will refer it to the master to ascertain what is due to them. *Blundell* v. *Gladstone*, 9 Sim. 455 ; 8 L. J., Ch. 109 ; 3 Jur. 413.

Commissioners for the examination of witnesses restrained from prosecuting an action at law for the recovery of their fees, and a reference made to the master to ascertain what was due to them. *Ambrose* v. *Dunmow Union*, 8 Beav. 43.

Principle of Payment.]—Commissioners for the examination of witnesses ought not to be paid according to the number of office folios of the depositions, but according to the number of days on which they actually sit. *Small* v. *Attwood*, 17 Coll. 53 ; 4 L. J., Ex. Eq. 1.

In respect of what.]—Under particular circumstances, the court allowed the commissioner a small fee for perusing the pleadings. *Howell* v. *Tyler*, 2 Y. & C., C. C. 284 ; 12 L. J., Ch. 223 ; 7 Jur. 525.

The defendant assented to the appointment of the person nominated commissioner examiner by the plaintiff. He cross-examined one of the plaintiff's witnesses, but did not examine any witness on the direct :—Held, that he was bound to pay the costs and expenses incurred by reason of his cross-examination, viz. for the attendance of the commissioner during the time occupied by the cross-examination, and for ingrossing the depositions to cross interrogatories ; but not to contribute to the commissioner's travelling expenses. *Rogers* v. *Aylmer*, 5 Ir. Eq. R. 516.

Who Liable.] — By consent of plaintiff and defendant, a commission was issued to J. M. to examine witnesses residing more than thirty miles from Dublin, and under it the plaintiff examined on the direct, and the defendant merely cross-examined. On a motion by J. M. against the defendant, for one-half of his fees and expenses as commissioner :—Held, that he was to be considered as having undertaken, and been appointed to the office, on the joint retainer of the parties, and his motion was granted with costs. The question, who is immediately liable to pay the commissioner, has nothing to do with the question as to the costs in the cause to be decided at the hearing. *Milner* v. *Joseph*, 5 Ir. Eq. R. 214.

A commission for the examination of witnesses being issued, witnesses were examined under it, both by the plaintiff and the defendant. The court held, that the defendant was liable to pay his proportion of the expenses of the execution of the commission. *Grove* v. *Young*, 20 L. J., Ch. 167 ; 15 Jur. 97.

On a petition by the commissioner appointed to examine witnesses in the cause, the solicitor for the defendants was ordered to pay the commissioner's expenses in attending the commission and the costs of his petition, although he had given no personal guarantee for the payment of such expenses. *Parsons* v. *Benn*, 19 L. J., Ch. 264. Affirmed—L. C.

Amount of.]—The sum of 2*l.* 2*s.* a day, which a special examiner is entitled to receive for his expenses, is a fixed sum payable in every case, without reference to the amount of expenses actually incurred by him, and does not include the expense of hiring a room for the purpose of the examination. *Wright* v. *Larmuth*, L. R. 10 Eq. 139 ; 22 L. T. 903 ; 18 W. R. 1103.

Special examiners are entitled to a fee of five guineas a day only, and, semble, their clerks are entitled to five shillings per diem. No extra fee is payable for an extended sitting during a day, nor for the preliminary labour of reading the papers. *Payne* v. *Little*, 21 Beav. 65.

Lien.]—Commissioners for the examination of witnesses have a lien on the depositions for their fees, and will not be compelled to return them until they have received payment. *Peters* v. *Beer*, 14 Beav. 101 ; 20 L. J., Ch. 424 ; 15 Jur. 1024.

A barrister has a lien for fees on a commission. *Smith* v. *Hallen*, 2 F. & F. 678.

The court will compel a commissioner examiner to deliver, for the purposes of the suit, the documents lodged with him for the examination of witnesses, though he has not been paid his fees or expenses, the solicitor undertaking to return them to the examiner after the termination of the suit. *Lucan* (*Lord*) v. *O'Malley*, 8 Ir. Eq. R. 386.

Duty of Commissioner.]—The commissioner examiner may before accepting the office stipulate for the security or the payment of his fees and expenses ; but if he accepts the office, he cannot stop in the execution of his duty, or refuse to examine witnesses until his fees are paid or secured. His duty is to examine all witnesses tendered to him unconditionally. *Doherty* v. *Doherty*, 8 Ir. Eq. R. 379.

d. Misconduct.

Commissioners to be examined, on occasions of partiality and malpractice. *Morgan* v. *Bowdler*, Toth. 40.

Commissioners, on affidavits of the facts, were attached for refusing to examine a witness because he was illiterate, and the witness was afterwards ordered to be examined by an examiner. *Reilley* v. *Reilley*, How. Pr. Ex. Ireland, 593.

Semble, that on complaint of an irregular examination, an examiner has been ordered to answer personal interrogatories, and not admitted to have a copy of them. *Ib.*

Defendant's commissioners met at the time and place appointed, but refused to act in the execution of the commission ; upon affidavit of which, the court ordered defendant to name other commissioners. The court doubted whether an attachment lay against defendant's commissioners. —— v. *Fortescue*, Hardr. 170.

Depositions suppressed for misbehaviour in the commissioners, and a new commission, directed to other commissioners, ordered to issue. *Dedore* v. *Day*, 2 Fowl. Ex. Pr. 158.

Some of the commissioners certified partiality in one of the others. Motion for a commission to examine in whom the misdemeanour was, denied; for such collateral certificates are not required of the commissioners; but let them certify the matters committed to their charge, and, if there be misdemeanour, let the party wronged make affidavit thereof, and take out his attachment. *Anon.*, Cary, 43.

A witness examined at a commission swears reflecting words, yet he ought not to pay costs, it being the commissioner's fault to take down such depositions. *Anon.*, 2 P. W. 406.

e. Oath and Qualifying.

In General.]—Where a commission issues for the examination of witnesses in a foreign country, the oath of the commissioners may, under special circumstances, be dispensed with. *Boelen* or *Bolin* v. *Melladew*, 10 C. B. 898; 20 L. J., C. P. 172. S. P., *Clay* v. *Stevenson*, 5 N. & M. 318; 3 A. & E. 807; 1 H. & W. 409; 4 L. J., K. B. 212.

By the law of Denmark none but burgomasters have power to administer oaths; and the mode of administering an oath to a witness is by causing him to hold up three fingers of his right hand, and declare that he will speak the truth. A commission having failed for want of the observance of these formalities, the court, on payment of all costs, allowed a second commission to go, addressed to burgomasters. *Ib.*

The 4 Geo. 4, c. 61, s. 43, applies as well where the witnesses are resident abroad, as where they reside within the jurisdiction of the court, and therefore the court will not make an order that a commission shall issue to take the examination of witnesses resident abroad, with a direction that the examiner shall not be required to qualify as directed by that act: but where the parties will not consent that such a commission shall issue, the court will direct publication to be respited. *D'Alton* v. *Trimleston* (*Lord*), Fl. & K. 663.

Commissioners, to take the examination of witnesses abroad, must qualify under 4 Geo. 4, c. 51, s. 43. *Huggins* v. *Muffett*, Fl. & K. 621.

In the Exchequer, commissioners appointed to examine witnesses, in aid of the master, after a decree, are not sworn to secrecy. *Hall* v. *Clee*, 2 Y. & Coll. 725; 1 Jur. 918.

Single Commissioner.]—When a single commissioner is appointed to take evidence abroad, the commission should authorise him to administer the oath to himself. *Wilson* v. *De Coulon*, 53 L. J., Ch. 248; 22 Ch. D. 841; 48 L. T. 514; 31 W. R. 839.

6. Form of Commission.

Form.]—The court will not, without special grounds, depart from the ordinary form of a commission for the examination of witnesses under 1 Will. 4, c. 22. *Follett* v. *Delany*, 7 C. B. 775.

And see *Spiller* v. *Paris Skating Rink Co.*, 27 W. R. 225; ante, col. 985.

Names of Commissioners.]—The order of a judge for issuing a commission to examine witnesses in places out of the jurisdiction of the court, need not contain the names of the commissioners. *Nichol* v. *Alison*, 11 Q. B. 1006; 17 L. J., Q. B. 355; 12 Jur. 598.

The names of such commissioners, as the parties agree upon, may be inserted in the commission. *Ib.*

The commission need not be tested in term. *Ib.*

On an application to have a witness, within the jurisdiction of the court, examined on interrogatories, the name of the person before whom the examination is to take place must be mentioned. *Doe* d. *Thorn* v. *Phillips*, 1 D. P. C. 56.

Place, Time, and Manner.]—Where a commission issues for the examination of witnesses abroad, the place of examination must be specified in the rule or order authorising the commission, or in some subsequent rule or order. *Greville* v. *Stulz*, 11 Q. B. 997; 17 L. J., Q. B. 14; 12 Jur. 49.

Examinations taken under such commission are inadmissible if the order is produced, omitting to specify the place, though the commission itself, under the seal of the court, contains all necessary particulars. *Ib.*

When a commission issued under a judge's order, which neither named the commissioners nor the time, place, nor manner of examination, the court set aside a verdict which had been influenced by the evidence so obtained. *Steinkeller* v. *Newton*, 1 Scott (N.R.) 148.

But the omission in the order of a judge for issuing a commission to examine witnesses abroad, and in the commission itself, to specify the time and place of examination, is at most only an irregularity. *Howkins* v. *Baldwin*, 16 Q. B. 375; 2 L. M. & P. 250; 20 L. J., Q. B. 198; 15 Jur. 749.

A judge ordered a commission to issue for the examination of witnesses vivâ voce at Newfoundland, returnable on a certain day. The commission commanded the commissioners to summon the witnesses at a certain day and place to be appointed by them for that purpose in Newfoundland, and then and there examine them apart on their oath vivâ voce, and reduce the examination into writing; and directed them to send the same on or before the return-day of the commission, closed up under their seals, together with the commission. At the trial a clerk from the master's office produced a packet of papers which he had received sealed up from a person who brought it to the office, but whom he did not know. The commission produced was identified as that issued under the order; and it was proved that the papers professing to be the return were in the handwriting of the commissioners. The depositions purported to contain separate examinations:—Held, first, that the place, the time, and the manner of examining witnesses were regularly provided for by the order and commission. *Sims* v. *Henderson*, 11 Q. B. 1015; 17 L. J., Q. B. 209; 12 Jur. 773.

Held, secondly, that it was to be presumed that the witnesses were examined apart. *Ib.*

Held, thirdly, that there was sufficient proof of the due return of the commission. *Ib.*

A strict and literal compliance with the directions in an order for a commission, under 1 Will. 4, c. 22, s. 4, for the examination of witnesses abroad is unnecessary. *Hodges* v. *Cobb*, 8 B. & S. 583; 36 L. J., Q. B. 265; L. R. 2 Q. B. 652; 16 L. T. 792; 15 W. R. 1038.

An order for a commission to examine witnesses upon interrogatories in the United States directed that the interrogatories should be exhibited to the witness, in the city of S., in the state of New York, and that the commission should be returned

in England on or before 1 March, 1848 :—Held, that the order was sufficiently specific as to the place and time of execution of the commission. *Bulham* v. *Mears*, 6 W. R. 597.

Name of Defendant.]—Where a commission for the examination of witnesses in Australia omitted the name of the defendant, but no application had been made to set aside or amend the commission :—Held, that it was too late to object at the trial that this defect rendered depositions taken under the commission inadmissible. *Hodges* v. *Cobb*, supra.

Pleadings.]—A commission, to examine witnesses, awarded to the judges of one of the supreme courts of India, under 13 Geo. 3, c. 63, s. 44, ought to recite the pleadings at length. *Murray* v. *Lawford*, 7 Sim. 139.

7. Compelling Attendance of Witnesses.

Subpœna.]—A witness required to attend before an examiner under Ord. XXXVII. r. 20, is not bound to attend unless served with a subpœna. *Stuart* v. *Balkis Co.*, 53 L. J., Ch. 791 ; 50 L. T. 479 ; 32 W. R. 676.

Commissioner's summons for attendance of witness, not sufficient ; he must be served with subpœna. *Wardle* v. *Dent*, Dick. 334.

If a witness, who has been duly served with a subpœna to attend to give evidence before commissioners in the country, neglects to do so, the court will order him to attend before the examiner in London to be examined, but will not give costs against him. *Pepper* v. *Pepper*, 4 L. J. (o.s.) Ch. 213.

—— **Witness resident in Scotland.**]—In a suit to perpetuate testimony, an order has been made appointing a special examiner to take evidence in Scotland. The plaintiff issued a subpœna duces tecum, directed to certain persons resident in Scotland, requiring them to appear in Rolls Yard, before one of the examiners, and there produce certain deeds and documents. An application was then made, under 22 Vict. c. 30, to the Court of Session in Scotland, for an order directing the same persons to appear before the special examiner in Scotland, and produce the deeds and documents. The principal defendant thereupon gave notice of his intention to move to discharge the writ, and the application in Scotland was ordered to stand over until after such motion had been disposed of :—Held, that the motion must be dismissed, inasmuch as the writ might be of some force and use if the persons to whom it was directed should come into England ; but the order was expressly not to prejudice, affect, or interfere with any order which the Court of Session might think fit to make upon the application pending before it. *Campbell* v. *Att.-Gen.*, 36 L. J., Ch. 600 ; 15 W. R. 915.

Under 6 & 7 Vict. c. 82, s. 5—Scotch Commission.]—The court will only grant a rule nisi in the first instance to compel the attendance of a witness or the production of documents under a commission from the Scotch courts, under this enactment. *Kay* v. *Gennell*, 2 D. & L. 21 ; 13 L. J., Q. B. 203.

A rule or order for compelling the attendance of witnesses under the above statute, is not in the nature of a subpœna, but is a rule to shew cause. *Reg.* v. *Alexander*, 8 Jur. 380.

—— **Order for Production of Documents in Hands of Third Persons.**]—An order was made, by consent of the parties in an action pending in Scotland for certain persons who were not parties to the litigation to attend before a commissioner in England and produce certain documents referred to in the order. These persons having failed to attend before the commissioner, an order for their attendance was made under s. 5 of 6 & 7 Vict. c. 82 :—Held, that there was no jurisdiction given by the section to make such an order, inasmuch as it was not an order for the examination of persons as witnesses and for the production of documents by them as ancillary to the examination, but was an order for discovery and production of documents before the trial by third persons who were not parties to and had no interest in the action. *Burchard* v. *Macfarlane*, 60 L. J., Q. B. 587 ; [1891] 2 Q. B. 241 ; 65 L. T. 282 ; 39 W. R. 694 ; 7 Asp. M. C. 93—C. A.

New Summons—Witness partially examined.]—Where a witness who had been partially examined did not attend on the day to which the examination had been adjourned, and no fresh adjournment was made, a new summons was necessary to compel his attendance for the purpose of completing the examination. *Lawson* v. *Stoddart*, 3 N. R. 241 ; 10 Jur. (N.S.) 33 ; 9 L. T. 569 ; 12 W. R. 286.

8. Execution of Commission.

At what Place.]—Commission granted to examine witnesses in an enemy's country. *Cahill* v. *Shepherd*, 12 Ves. 335.

A commission to take an answer of a person resident in a foreign country at war with us, must be executed in that very country ; a commission to examine witnesses is executed at the nearest neutral point. —— v. *Romney*, Ambl. 62.

An attachment being taken out against the defendant in Ireland, since he could not be examined in person to the contempt, a commission was granted into Ireland to examine him. *Anon.*, Mos. 85.

Commission for examination of witnesses in the West Indies, and injunction to stay proceedings at law on a policy, granted, as the voyage was at and from Carthagena to Porto Bello, and the facts must necessarily arise in the West Indies. *Chitty* v. *Selwyn*, 2 Atk. 359.

Commission to examine, &c., directed to Bencoolen in India, notwithstanding 13 Geo. 3, c. 63, s. 44. *Baskett* v. *Toosey*, 6 Madd. 261.

Where a special examiner in the country, and the examiner, solicitor, and parties reside there, the court will order the examination and cross-examination of witnesses generally there, on the assumption that it shall apply to witnesses on both sides. *Forster's Trusts, In re*, 2 W. R. 679.

At what Time.]—Commission executed after four in the afternoon :—Held, regular. *Moreton* v. *Moreton*, Dick. 21.

As to the time which commissioners may be required to sit daily, quære. *Blundell* v. *Gladstone*, 9 Sim. 455 ; 8 L. J., Ch. 109 ; 3 Jur. 413.

A special commission was granted, to examine the quantity and value of certain ore, &c. The six clerks appointed time and place ; per cur., the time and place are only for the first meeting of the commissioners ; but afterwards they may

adjourn to another time or another place. *Thornbrough* v. *Baker*, 1 Ch. Ca. 283.

Examination of Witness—Power of Commissioner.]—After a witness has been examined before an examiner of the court and his depositions have been signed, the examiner has power to adjourn the examination, and the witness may be recalled and is bound to attend upon notice given to him that his attendance is required. *Metropolitan (Brush) Electric Light and Power Co., In re, Offor, Ex parte*, 54 L. J., Ch. 253; 51 L. T. 816.

Commissioners under a commission to examine witnesses, may adjourn. *Brown* v. *Vermuden*, 1 Ch. Ca. 282.

Discretion of commissioners taking depositions, not to examine each witness to all the interrogatories, and to reject what is not evidence. *Whitelock* v. *Baker*, 13 Ves. 511; 9 R. R. 216.

Commissioners for examination of witnesses are to act impartially, though to a certain extent they have under their particular care the interest of the party appointing them. *Campbell* v. *Scougal*, 19 Ves. 553.

The practice in country causes is to feed the commissioners from time to time with interrogatories, as the witnesses can be presented, either for original or cross-examination, until the commissioners find the supply is exhausted. The chancellor said the practice was formerly different, and, with reference to the general practice both as to commissioners in the country and abroad, he should require the masters to certify the practice. But his lordship said, that in this country, where commissions have been executed, and even where no interrogatories have been exhibited, or are ready, the court has sometimes granted, and sometimes refused, a new commission, at the instance of such a defendant not having interrogatories ready, making it a subject of discretion in each particular case; but this discretion ought to be exercised with a very deliberate attention to circumstances; and the course is, not to suppress the depositions under the first commission, but (if necessary, and a regular account given) to grant defendant a new commission. *Ib.*

Until the time for closing the evidence in a suit has expired, the examiner may not reject the evidence of any witness tendered for examination by either party, notwithstanding that such party may have stated that he has no more witnesses to produce, and the taking of evidence on the other side has been proceeded with. Witness previously examined allowed to be recalled for further examination. *Wood* v. *Scarth*, 3 Eq. Rep. 485; 24 L. J., Ch. 392; 3 W. R. 305.

In an examination taken ex parte, the examiner ought not to refuse to allow questions to be put, unless upon matters which would clearly and palpably not be evidence. *Surr* v. *Walmsley*, L. R. 2 Eq. 439; 14 L. T. 621; 14 W. R. 888.

—— **Rights of Parties.**]—Witness examined on the defendant's part, after the plaintiff's commissioners were gone away with the commission. *Trevor* v. *Treveman*, Toth. 189.

On a bill for discovery, and a commission to examine foreign witnesses in aid of an action at law, a motion that the plaintiff might communicate to the defendant the interrogatories exhibited by him, was refused. *Butler* v. *Bulkeley*, 2 Swanst. 373.

The common order, giving leave to examine a party, need not be served on the opposite party. In an examination of witnesses before commissioners, a party is not bound to give a list of the names of his proposed witnesses to the opposite side. *Smith* v. *Pincombe*, 16 Sim. 497; 18 L. J., Ch. 211; 13 Jur. 91, 158.

—— **Priority of Witnesses.**] — There is no general rule as to the order of priority in which witnesses are to be examined before an examiner; but the examiner may exercise his discretion as to the most convenient order in which the examination of the witnesses may be taken. *Stuart* v. *Balkis Co.*, 53 L. J., Ch. 790.

An application was made by a shareholder, under s. 35 of the Companies Act, 1862, for the rectification of the register of the company. When the application came on for hearing, the shareholder applied to have the witnesses who had made affidavits on behalf of the company cross-examined on their affidavits, and an order was made that the witnesses on both sides should attend for cross-examination before an examiner. On attending before the examiner the question was raised whether the shareholder's witnesses or the company's witnesses ought to be cross-examined first:—Held, that, under the circumstances of the case, the shareholder's witnesses should be cross-examined first. *Doré Gallery, In re*, 62 L. T. 758; 38 W. R. 491.

—— **Interrogatories, Disallowance of.**] — When interrogatories are administered on a commission to be executed in a country out of the jurisdiction of an English court, the court, in its discretion, will disallow such interrogatories as may deter a witness from giving evidence before the commission. *Stocks* v. *Ellis*, 42 L. J., Q. B. 241; L. R. 8 Q. B. 454; 29 L. T. 267; 22 W. R. 17.

After a commission has been granted under 1 Will. 4, c. 22, s. 4, the court will, before its execution, disallow any cross interrogatories which in their discretion they may think improper. *Ib.*

The court will not restrain commissioners in their examinations, upon an allegation that the object of the examinations is to procure evidence against the parties examined, as to penalties incurred by gaming. *Burlton, Ex parte*, 1 Glyn. & J. 30.

Verbal Questions.] — When a commission, issued to take evidence abroad, authorises questions beyond the written interrogatories, and the commissioners appoint attorneys to put such questions, the allowance of the expenses occasioned thereby is a matter for the discretion of the master. *Potter* v. *Rankin*, 38 L. J., C. P. 130; L. R. 4 C. P. 76; 19 L. T. 383.

In cases of great importance and intricacy, the master may allow the successful party the expenses of sending out an English barrister on a commission to examine witnesses abroad, but as a general rule he would not be justified in so doing. *Yglesias* v. *Royal Exchange Assurance Corporation*, 39 L. J., C. P. 173; L. R. 5 C. P. 141; 22 L. T. 269; 18 W. R. 381.

A commission was sent out to Messina to take evidence at the instance of the plaintiff; the defendant did not join in it, but furnished written cross interrogatories to be administered to the

plaintiff's witnesses; at the execution of the commission, the plaintiff, who resided at Messina, was not examined, and those witnesses who were called were cross-examined by the defendant's agent verbally, and not from the written cross interrogatories; the defendant did not object until the trial:—Held, first, that there was no irregularity in executing the commission. *Grill* v. *General Iron Screw Collier Co.*, 35 L. J., C. P. 321; L. R. 1 C. P. 600; 12 Jur. (N.S.) 727; 14 L. T. 711; 14 W. R. 893.

Held, secondly, that the objection was too late. *Ib.*

An irregularity in the mode of taking the depositions cannot be a ground for refusing to admit them at the trial, but can only be taken advantage of by applying to the court to suppress the depositions. *Ib.*

An order for a joint commission to examine witnesses in Ireland, beside the provision for the delivery of interrogatories and cross-interrogatories by one party to the other, empowered the commissioners to put, or cause to be put, additional questions when it should appear to them to be necessary and proper, such questions to be put down in writing, and returned with the answers, together with the interrogatories and answers under the commission:—Held, that this power was not well exercised by the commissioners allowing the agent for one of the parties to put additional questions subject to the objection raised by the other party. *Williamson* v. *Page*, 1 C. B. 464; 3 D. & L. 14; 14 L. J., C. P. 172.

—— **Answer tending to Criminate.**]—Commissioners have no right to ask questions, the answers to which may subject the witness to fine or other criminal punishment. *Smith* v. *Beadnell*, 1 Camp. 30.

—— **De bene esse.**]—Examination of witnesses de bene esse is within the 15 & 16 Vict. c. 86, s. 28. *Cook* v. *Hall*, 9 Hare (App.) xx.; 22 L. J., Ch. 12; 16 Jur. 1008; 1 W. R. 31.

Witnesses to be examined de bene esse must in general, unless improper under the special circumstances of each case, be examined vivâ voce, in the manner directed by s. 28 of the 15 & 16 Vict. c. 86. The evidence will therefore necessarily be known to the opposite parties, but not published within the technical meaning of the term. *Ib.*

The examination of witnesses de bene esse is to be taken orally, according to the mode of examining witnesses prescribed by ss. 30, 31, and 32 of the statute 15 & 16 Vict. c. 86. *Ib.*

Documentary Evidence.]—The court has no jurisdiction to control the discretion of a commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. *Groom, Ex parte, Chambers, In re*, 4 Deac. & C. 640; 2 Mont. & Ayr. 143; 4 L. J., Bk. 22.

Certificate not Taken up.] — Where an examiner's certificate has not been taken up, its effect will not be allowed to be stated in court. *Stuart* v. *Balkis Co.*, 53 L. J., Ch. 790.

Use of Foreign Language.]—Court refused to permit depositions in French language to be delivered out for the purpose of being translated. *Fauquier* v. *Tynte*, 7 Ves. 292.

Under a commission for the examination of French witnesses who could not speak English, the depositions are not to be taken in French, but must be turned by the interpreter into English, and must be so taken down and returned. *Belmore* v. *Anderson*, 2 Cox, 288; 4 Bro. C. C. 90.

Interpreter appointed on oath to witness. *Smith* v. *Kirkpatrick*, Dick. 103.

When a commission to take answer of a foreigner issues, a power to take it through an interpreter is virtually implied, if necessary, and if the commissioners certify that defendant was duly sworn to such answers in presence of commissioners, and it appear by affidavit of one of the commissioners that the interpreter was duly sworn, and that he believes defendant understood the contents of answer, it is sufficiently verified. *Loughman* v. *Novaes*, 6 Price, 108.

Hostile Witness before Examiner.]—There is no rule that a witness on his examination in chief before the examiner may not be treated as a hostile witness. *Ohlsen* v. *Terrero*, 44 L. J., Ch. 155; L. R. 10 Ch. 127; 31 L. T. 811; 23 W. R. 195.

An examiner has no discretion to allow a witness to be treated as hostile by the party calling him, but the court has power to direct the examiner to do so. *Wright* v. *Wilkin*, 4 Jur. (N.S.) 804; 6 W. R. 643.

Under the 31st section of 15 & 16 Vict. c. 86, this court has no power to delegate to an examiner, whether general or special, the discretion to treat witnesses on examination in chief as adverse, and subject them to cross-examination. *Ib.*

Rules of Evidence.] — A person appointed under the Evidence in Foreign Suits Act, 1856 (19 & 20 Vict. c. 113), to take an examination in England of witnesses in a foreign action ought not to limit the questions put by the rules affecting the admissibility of evidence in this country. *Desilla* v. *Fells*, 40 L. T. 423.

Court of the Examiner.]—The office of the examiner of the court is not a public court, and if the presence of the public is objected to the examiner has no discretion to admit them. *Western of Canada Oil, Lands and Works Co., In re*, 46 L. J., Ch. 683; 6 Ch. D. 109; 25 W. R. 787.

When a clerk on commission of parties under examination before the examiner of the court was himself interested in the case, and was to be subsequently called as a witness:—Held, that he was not entitled to be present under 15 & 16 Vict. c. 86, s. 31, and that he ought properly to be excluded from the office. *Ib.*

An examiner has discretion to allow a shorthand writer to be present, and has discretion to admit the public, at the examination of witnesses. *Wright* v. *Wilkin*, 4 Jur. (N.S.) 804; 6 W. R. 643.

Where a witness under examination before a special examiner has a document exhibited to him by the solicitor in the cause; even although that is the document touching which the examination is taking place, such act, although a highly improper one, is not a contempt of court. *Ib.*

Irregularity.]—Commission executed before town clerk, instead of commissioners, suppressed. *Hereforth* v. *Gates*, Cary, 91.

Commissioners for the examination of witnesses employed as their ingrossing clerk on the execution of the commission one who, little more than three months previously, had been clerk to the solicitor of the plaintiff in the cause:—Held, that previous employment was no disqualification for the office of ingrossing clerk, and such appointment was no ground for suppressing the depositions. *Wood* v. *Freeman*, 4 Hare, 552; 14 L. J., Ch. 371; 9 Jur. 549.

—— **Depositions.**]—Depositions taken by commission suppressed, it appearing that the evidence had been taken by the clerk to the commissioners, and that the effect of some of the depositions had been communicated to the agent on the other side. *Lennox* v. *Munnings*, 2 Y. & J. 483.

Depositions suppressed, because the solicitor's clerk in the cause did write as a clerk to the commissioners in the execution of the commission. *Newte* v. *Foot*, 2 Ch. R. 393.

Depositions on part of defendant, suppressed after publication, because the clerk of defendant's solicitor acted as clerk to commissioners. *Cooke* v. *Wilson*, 4 Madd. 380.

Depositions suppressed, the commissioners having employed the clerk of one of the parties as their clerk. *Shaw* v. *Lindsey*, 15 Ves. 380.

Appointment of New Party.]—Pending the examination of witnesses, a new next friend of the infant plaintiffs was appointed:—Held, that it was not necessary to notice the alteration in the proceedings under the commission. *Lincoln* v. *Wright*, 4 Beav. 166; 10 L. J., Ch. 331.

Custody of Examination.]—The custody of an examination taken under a dedimus in the country, belongs to the clerk in court, who is entitled to make copies of it. If sworn in town, it belongs to the master. *Drake* v. *Woodford*, 1 Smith, 116.

Cross-examination—In what Cases.]—If one of the parties, after publication passed, has an order to examine upon the usual affidavit, the other party may not only cross-examine, but examine at large. *Anon.*, 1 Vern. 253.

Cross-examination as to the execution of deeds. Order in alternative, that the examiner with whom they were should cross-examine, or that they should be delivered to the examiner for the other party for that purpose. Power of the Court of Chancery to examine vivâ voce. *Turner* v. *Burleigh*, 17 Ves. 354.

Where, after depositions have been suppressed for irregularity, a re-examination is permitted, all the same witnesses must be examined and cross-examined. *Perry* v. *Silvester*, Jac. 83.

After the close of the examination of witnesses by commission under a decree to account, and after a return of the depositions, and copies of them being given out by the master, the plaintiff permitted to cross-examine the defendant's witnesses, upon an affidavit of his agent denying that he knew the contents of the depositions, and asserting that the defendant had examined his witnesses without giving any notice of their places of abode. *Tynte* v. *Roche*, Wall. Lyn. 36.

New commission granted to cross-examine plaintiff's witnesses abroad, upon subsequent discovery of matter material for such examination; but held that the plaintiff could only be allowed to re-examine on a special case being made, and then only as to matters not comprised in the former interrogatories. *Hanover (King)* v. *Wheatley*, 4 Beav. 78; 10 L. J., Ch. 253.

Form of the order in such cases. *S. C.*, 4 Beav. 85, n.

In a country cause, an order to file cross-interrogatories, for the cross-examination of the witnesses of the adverse party, is an order of course. *Anon.*, 6 L. J., Ch. 21.

Two witnesses to whom an interrogatory was exhibited by the examiner, with respect to certain drafts of deeds, then produced to them, were unable to answer the particulars of the interrogatory, by reason of their not having had an opportunity of previously inspecting the drafts. The drafts were marked, however, by the examiner as having been produced to the witnesses. The witnesses having afterwards inspected the drafts, an application was made that they might be re-examined to the same interrogatory, and the court, upon satisfying itself, by seeing the depositions already taken, that the former examination was nugatory, in consequence of the want of the previous inspection, allowed the re-examination to take place, the other party having liberty to cross-examine. *Stanney* v. *Walmsley*, 1 Myl. & Cr. 361.

A party who intends to cross-examine a witness must himself make an appointment, for that purpose, with the examiner, and give notice of the time appointed to the witness and the solicitor of the opposite party. *Keymer* v. *Pering*, 10 Sim. 179; 8 L. J., Ch. 355.

Party examining witness is bound to keep him in town forty-eight hours after his production at seat of adverse clerk in court, and if cross-interrogatories are left with examiner within forty-eight hours, party must keep him in town till cross-examination is finished; and if witness departs, party must bring him back at his own expense, or examination in chief will be suppressed. *Whittuck* v. *Lysaght*, 1 Sim. & S. 446.

The obligation of producing a witness lies with the cross-examining party, and personal service dispensed with where impossible. *Winthrop* v. *Elderton*, 1 W. R. 318.

A party attending proceedings in chambers under an administration decree is entitled to cross-examine before an examiner of the court as to matters in question connected with the accounts, an executor, whose accounts are being settled by the chief clerk. But notice of such cross-examination should be given before the chief clerk's decision has been given, and the cross-examination should be strictly confined to the particular matter in dispute. *Glover* v. *Ellison*, 41 L. J., Ch. 288; 26 L. T. 234; 20 W. R. 408.

Where a defendant received notice to attend before the examiner in order to be cross-examined, and actually attended, but refused to be sworn, and it was alleged on his behalf that in consequence of certain irregularities he need not have attended, so that, in fact, his attendance was voluntary:—Held, nevertheless, that the attendance was a waiver of the irregularities (if any), and that the defendant must attend to be cross-examined at his own expense. *Lawton* v. *Price*, 17 L. T. 163; 16 W. R. 73.

—— **At what Stage.**]—A party who omits to cross-examine a witness under a commission at the usual period, will be allowed to exhibit interrogatories for that purpose on a subsequent day. *Carter* v. *Draper*, 2 Sim. 52.

Cross-interrogatories must be lodged before the direct examination of the witness to whom they are to be exhibited is closed, unless a special order is obtained for the purpose on notice. *Keogh* v. *Pentland*, 2 Hog. 221. Varied, on appeal, 3 Moll. 44. And see *Sandford* v. *Seymour*, 2 Moll. 392. *Hickson* v. *Aylward*, 3 Moll. 37.

Cross-interrogatories must be filed whilst the witness is under his direct examination; otherwise, they are not to be received without a special order of the court, and the motion to suppress them for irregularity must be made after publication passed. *Aylward* v. *Hickson*, 2 Moll. 391; 2 Hog. 1.

Objecting to Answer.]—A witness objecting to answer interrogatories before the examiner or the commissioners, demurs by stating his objection on oath; his demurrer may then be set down for argument, and if overruled the witness pays the same costs as a defendant on demurrer. Demurrer to interrogatories by an attorney overruled, without prejudice to the witness's demurring on his re-examination, stating his reasons. *Parkhurst* v. *Lowten*, 2 Swanst. 194; 19 R. R. 63.

A witness objecting to answer interrogatories cannot be admitted to state by affidavit what would be the effect of his answer. *Ib.* 213.

Motion, that demurrer to interrogatories by witness be overruled, not being supported by affidavit, refused. *S. C.*, 3 Madd. 121.

Witness objecting to interrogatory before examiner, must demur. *Bowman* v. *Rodwell*, 1 Madd. 266.

Demurrer to interrogatory by witness, being too general, overruled, but leave given to put in written demurrer on re-examination. *Morgan* v. *Shaw*, 4 Madd. 54.

9. Notice of Proceedings.

Execution.]—A plaintiff may serve any two of defendant's commissioners with notice of the execution of a commission, and is not bound to those only whom defendant might choose; otherwise, if the two commissioners chosen by defendant should be absent or dead, the commission could not be executed, wherefore the court suffers four on each side. *Anon.*, 3 Atk. 633.

Where it appeared that no notice of the execution of a commission was given until after publication, depositions taken on plaintiff's part were suppressed as against some of the defendants. But, on evidence that the omission arose from a mistake of the clerk to plaintiff's solicitor, in giving at the examiner's office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which plaintiff's witnesses were produced only at the seat of the clerk in court so named, and on the examiner's certificate that the name of that clerk in court only was delivered to him, the Lord Chancellor gave defendants the option either of permitting plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with leave to cross-examine those witnesses, and examine others. *Cholmondeley* v. *Clinton*, 2 Mer. 81; 16 R. R. 167.

Commission to take the answer of two defendants, provided notice of the execution of the commission be given to J. S., who was the plaintiff's attorney. The commissioners gave notice of their intention to execute a commission to examine witnesses, and thereupon executed the commission as to one defendant:—Held, that the execution was good, inasmuch as J. S. could not be deceived by the notice. *Hall* v. *Connell*, 3 Y. & Coll. 528.

If there be a general demand of tithes, and a general replication put in, if plaintiff on the commission gives notice that he will proceed only as to certain matters, it is as well as if the demand had been abridged in the replication, sed quære. *Anon.*, Bunb. 22.

Leave given to sue out a commission to examine persons obliged to go abroad, de bene esse, defendants to have four days' notice of executing the commission. *Lee Dicher* v. *Power*, Dick. 112.

Notice must be given to the party before an examination de bene esse should be proceeded on, so as to give him an opportunity of joining in the commission, or the depositions will be suppressed. *Loreden* v. *Milford* (*Lord*), 4 Bro. C. C. 540.

Examination of Witnesses.]—The Order of the 5th of February, 1861, r. 22, requiring the party summoning a witness to give to the opposite party "forty-eight hours' notice at least of his intention to examine or cross-examine such witness," will not be applied strictly in the case of an examination taken abroad before examiners specially appointed. *De Britto* v. *Hillel*, 42 L. J., Ch. 307; L. R. 15 Eq. 213; 28 L. T. 59; 21 W. R. 379.

One who altogether disclaims having anything to do with a commission issued for the examination of witnesses under 1 Will. 4, c. 22, s. 4, is not entitled to notice of the proceedings thereunder. *M'Combie* v. *Auton*, 6 Scott (N.R.) 923; 6 Man. & G. 27.

Notice to Witness.] — A witness, who is required to attend and give evidence before the examiner, is not entitled absolutely under the 22nd rule of the order on evidence of the 5th February, 1861, to forty-eight hours' notice of such examination, but to such notice, whether more or less, as under the circumstances may be reasonable. *North Wheal Exmouth Mining Co., In re*, 31 Beav. 628; 1 N. R. 42; 8 Jur. (N.S.) 1168; 7 L. T. 306; 11 W. R. 58.

Where a witness, residing in the neighbourhood of London, received twenty-four hours' notice of examination, and he appeared before the examiner at the time appointed:—Held, to be no ground for objecting to be examined, that forty-eight hours' notice had not been given. *Ib.*

Cross-examination.]—*See last head.*

Computation of Time.] — Under the 86th general order the ten days' notice to be given of examining witnesses is exclusive both of the days of serving the notice, and of the day named for commencing the examination. *Att.-Gen.* v. *Ball*, 9 Ir. Eq. R. 463.

10. Return of Commission.

a. In General.

By Post.]—Depositions of witnesses who were examined in India, and by mistake transmitted from thence to the plaintiff's solicitor by post, will be received, if the packet is delivered unopened to the master, and the facts are verified by affidavit. *Kennedy* v. *Kennedy*, 1 Hog. 311.

The court directed a commission to examine witnesses abroad, to be delivered to a master to send the same by the post, and when executed to receive it back again. *Newland* v. *Horsman*, 2 Ch. Ca. 76.

Proof by Affidavit.]—Where commission is executed abroad, the sending it out and the receiving it back again must be proved by affidavit. *Bourdillon* v. *Alleyne*, 4 Bro. C. C. 100.

Carried off by Commissioners.]—A joint commission to examine on both parts, directed to three, four, or two commissioners; three met and examined witnesses, and appointed a new day to examine more; defendant's commissioners carried away the commission, and came not at the day appointed. Plaintiff's commissioners then came and examined witnesses, without having the commission, and certified these with the former depositions taken, and the whole matter. The court ordered the depositions certified to be sealed up again, and remain in court, and awarded a subpœna duces tecum against the commissioners to bring in the commission, and thereupon the court would take further order. *Anon.*, Pr. Reg. 126.

Premature Return.]—Under a commission for the examination of witnesses abroad, the commissioners examined the witnesses for the plaintiffs; and under an impression that the defendant had no witnesses to examine (whether he had or had not given notice of his intention to examine witnesses, was disputed), they closed the commission, and returned it to England; after the commission had been sent off, the defendant examined his witnesses before some of the commissioners; and the depositions of those witnesses, and the interrogatories upon which they were taken, were sealed up and forwarded to England. On motion to annex the last-mentioned depositions and interrogatories to the commission, and the depositions on the part of the plaintiff, the court expressed an inclination to grant the defendant a new commission, unless the plaintiff would consent to the motion; and upon such consent being given, the court made the order. When a commission to examine witnesses is returned, it is opened by the junior sworn clerk for the purpose of entering the names of the acting commissioners in the commission book, and the commission is then kept under lock and key until publication is passed. *Irving* v. *Viana*, 1 Y. & J. 416.

b. Form, Signature and Amendment.

Signature.]—The commissioner appointed to take the examination of witnesses in a cause should sign the interrogatories exhibited, as well as the depositions taken under the commission. *Staniland* v. *Willatt*, 17 L. J., Ch. 373; 12 Jur. 392.

Commissioners for examining witnesses need not sign every skin of the interrogatories; it is sufficient if they sign the last skin. *Brydges* v. *Branfill*, 12 Sim. 334; 11 L. J., Ch. 12. *And see cases*, 12 Sim. 346, n. et seq.; 11 L. J., Ch. 13, n., 14, n.

Although it is usual to express, in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting commissioners) and others directed," yet, if the names of all the commissioners are inserted, the depositions will not be suppressed because they are not signed by all the commissioners, provided they are signed by those who acted. *Ib.*

Execution on Commission itself.]—Return to commission to take an answer abroad, must be executed on the back of the commission, and not on the envelope inclosing it. *Philips* v. *Philips*, 4 Jur. 599.

Mistaken Title.]—Deposition of witnesses taken under commission, the title of which was mistaken, ordered to stand till mistake rectified. *Robert* v. *Millechamp*, Dick. 22.

Where Stamp Cannot be Had.]—Depositions taken in India, where no proper stamps could be had, ordered on motion of course to be ingrossed on parchment and stamped. *Chitty* v. *East India Co.*, 2 Cox, 190.

Form.]—Form of separate examination of a married woman, taken by commission. *Bryant, Ex parte*, 1 Ves. & B. 507; 12 R. R. 213.

Amendment.]—The return of a commission from Jamaica, which omitted to state that the commissioners and their clerks had taken the oaths, ordered to be amended, and to be received in evidence, though, in addition, the signature of the commissioners had not been affixed to the interrogatories. *Davis* v. *Barrett*, 14 Beav. 25.

Commissioners for examining witnesses omitted to certify, in their return to the commission, that they and their clerks, before acting, took the oaths annexed to the commission. The court first ordered the deposition to be suppressed; but on being satisfied, by the affidavit of one of the commissioners, that the oaths had been duly taken, allowed the return to the commission to be amended by inserting that fact. *Brydges* v. *Branfill*, 12 Sim. 334; 11 L. J., Ch. 12. *And see cases*, 12 Sim. 346, n. et seq.; 11 L. J., Ch. 13, n., 14, n.

Where, owing to special circumstances, the acknowledgment of a married woman, residing in Canada, had not been taken until two days after the time when the commission was returnable, the judge amended the commission nunc pro tunc, by extending the time of the return, so as to validate the acknowledgment already had. *Arabella Grierson, In re*, Ir. R. 4 C. L. 232.

c. Time for.

A commission returnable without delay, must be executed before the second return of next term. *Jones* v. *Mitchell*, 2 Vern. 197.

Home commissions to examine must be returned before third return of following term, but no period fixed for foreign commissions. *Wake* v. *Franklin*, 1 Sim. & S. 95.

Where the defendant obtains a commission to examine witnesses under the 17th amended Order of April, 1828, the commission must be

made returnable the first return of the second term next following the date of the order for such commission. *M'Gregor* v. *Topham*, 2 Hare, 516.

If a commission issued in term time be made returnable without delay, it is returnable the first day of the next term; if issued in vacation, the last day of the next term. *Anon.*, 2 Ken., Ch. 30.

Court cannot extend time mentioned in a commission to examine. *Hall* v. *De Tastet*, 6 Madd. 269.

If a commission be taken out in vacation, and has not a certain return, it does not expire the first day of the following term, but may be continued in execution the whole of the next term to the last return. *Barnsley* v. *Powell*, 3 Atk. 593.

In a country commission the party is not entitled to twenty-eight days, and as much more time as may be necessary for the post. *Henderson, Ex parte*, Coop. 227.

An order for a commission to examine witnesses, returnable upon a day subsequent to that to which publication stands enlarged, with liberty to apply to the master to enlarge publication, is irregular. *Maund* v. *Allies*, 4 Myl. & Cr. 503; 3 Jur. 309.

Dedimus.]—A dedimus issued to take the acknowledgment of a husband and wife, who were resident in Jamaica. Owing to accidental circumstances, the dedimus was not returned until a year after the teste; and on this account the cursitor refused to receive it, as being contrary to the practice of their office. But the court directed the cursitor to receive it. *Townsend* v. *Lowe*, 1 Cox, 410.

11. Quashing, Abatement, and Discharge of Commission.

Application to Quash.]—When an application is made by a plaintiff to quash a commission obtained by himself for the examination of witnesses abroad, the court will grant a rule absolute in the first instance. *Hodges* v. *Daly*, 8 D. P. C. 308; 4 Jur. 988.

Abatement.]—A commission being granted to examine witnesses at Algiers, the plaintiff died, by which in strictness the suit abated, but the witnesses were examined there before notice of plaintiff's death; the examination held regular, though one of the witnesses was yet living. *Thompson's Case*, 3 P. W. 195.

Feme sole sues out a commission to examine witnesses; before they are examined she marries. Their depositions ordered to stand. *Winter* v. *Dancie*, Toth. 99.

After commission to examine abroad was sent, witness, before commission had reached its destination, returned to England, and motion made to examine him de bene esse, but refused, and held that bill must be amended. *Atkins* v. *Palmer*, 5 Madd. 19.

Discharge.]—The plaintiff neglected to obtain an order for a commission to examine witnesses until after the expiration of three weeks from the time of filing the replication, when he obtained an order for that purpose ex parte:—Held, that the defendant's proper course was, not to move to dismiss the bill for want of prosecution, but to move to discharge the order for a commission. *Strickland* v. *Strickland*, Cr. & Ph. 151; 10 L. J., Ch. 261. Affirming 4 Beav. 120; 5 Jur. 319.

An order of the Court of Chancery directed the new trial of an issue, and a commission for examination abroad; and that the trial of the issue should be stayed until the return of the commission. The parties having improperly delayed the execution and return of the commission, upon application to the court the whole of the original order was discharged. But upon appeal:—Held, that the laches as to the commission ought not to affect the right to proceed to a new trial of the issue; and as regarded this last point the order was reversed. *Clovin* v. *Campion*, 8 Bli. (N.S.) 253.

Motion is proper step to discharge order for commission to examine on master's certificate. *Chaffen* v. *Wills*, Dick. 377.

Transfer into Court.]—A claim in an administration suit was brought in against a testator's estate which was disputed by the executors. A special examiner had been appointed at the instance of the executors, before whom the cross-examination of the claimants and their principal witnesses had been taken. The executors now moved to have the examination and cross-examination of the witnesses, and the hearing of the claim and the evidence thereon, transferred into court:—Held, notwithstanding the fact that the evidence had already been nearly completed before the special examiner, that the executors were entitled to have the whole matter transferred from chambers into court; all costs being reserved. *Commercial Union Assurance Co.* v. *Uzielli*, 39 L. T. 665; 27 W. R. 356.

12. Second Commission.

In General.]—It is sufficient to shew a probable cause for the granting of such commission. *Jessup* v. *Duport*, Barnard. 192.

Where Party has joined in Commission.]—Where a party hath a commissioner present at the examination, he shall not have another commission to examine as to the merits; but upon a suggestion that exhibits after being proved, before the commissioners, had been altered, a new commission was granted to examine as to that point. *Richardson* v. *Louther*, 1 Ch. Ca. 273.

Defendant present at execution of commission, though without interrogatories, cannot have new commission. *Mineve* v. *Row*, Dick. 18. But see *Coventry* v. *Coventry*, Dick. 25.

A defendant who has joined in commission, cannot obtain a new commission except upon a special application and with notice. *Bond* v. *Bond*, 4 Sim. 518.

Mistake.]—Under an impression that the tithe commissioners had power to determine the matters in issue, the defendants had neglected to examine witnesses under a commission from the Court of Exchequer: on motion of the defendants, supported by an affidavit of facts, a new commission was granted on payment of the costs thereof. *Wetherell* v. *Bellward*, 3 Y. & Coll. 319; 8 L. J., Ex. Eq. 85.

The plaintiff is first entitled to sue out a commission to examine witnesses; and if the defendant hath an opportunity to examine his witnesses, and doth not, he is not entitled to a

new commission, but if the plaintiff neglect to sue out a commission, the defendant may. *Barnsley* v. *Powell*, Dick. 793 ; 3 Atk. 593.

But where the plaintiff's commissioners closed the commission before the proper time by mistake, and without the knowledge of the defendant or his solicitor, the court, after the depositions had been seen, granted a new commission, but confined the defendant to the proving exhibits, and examining to credit and cross-examining a witness examined under the former commission ; but he was not to examine new witnesses. *Ib.*

Ignorance.]—Where commissioners on one side do not attend, in order to have a new commission, the affidavit must state that the party, or his agents, have not seen, heard, nor been informed of the depositions on the other side. *Geast* v. *Barber*, 2 Bro. C. C. 1.

Publication enlarged, and new commission to examine defendant's witnesses issued, on affidavit of ignorance of contents of former depositions. *Dingle* v. *Rowe*, Wightw. 99.

Upon commission, notice only given to one of defendants ; new commission is granted, and defendants to have carriage. *Hollingworth* v. *Lucy*, Cary, 91.

Where no Cross-examination.]—Commission to examine witnesses abroad executed and returned ; the defendant, who had not interrogatories prepared, not having had the opportunity of cross-examining, a new commission granted for that purpose ; the defendant to state whom he wishes and undertakes to cross-examine ; but the plaintiff's depositions not suppressed. *Campbell* v. *Scougal*, 19 Ves. 552.

The court having directed a commission to issue for the examination of witnesses upon the certificate of the master, and that commission having miscarried by reason of the defendant being deprived of an opportunity of cross-examining the plaintiff's witnesses, a new commission was directed by the court to issue without any further certificate of the master. *Forsyth* v. *Ellice*, 21 L. J., Ch. 590.

Fresh Evidence.]—New commission granted to cross-examine plaintiff's witnesses abroad, upon subsequent discovery of matter material for such examination ; but held that the plaintiff could only be allowed to re-examine on a special case being made, and then only as to matters not comprised in the former interrogatories. *Hanover (King)* v. *Wheatley*, 4 Beav. 78 ; 10 L. J., Ch. 253.

A general affidavit of having material witnesses beyond sea, is not sufficient for a new commission, but the witnesses must be named in the affidavit, and the point mentioned to which they can materially depose. *Anon.*, 1 Vern. 334.

Amendment.]—Bill to perpetuate testimony as to modus, being amended by adding an essential party after the commission executed, but before publication, a new commission was granted. *Biddiford* v. *Partridge*, 3 Anstr. 646.

A commission to examine witnesses was issued by the defendant ; the plaintiff joined in the commission and named commissioners. The plaintiff, afterwards, with leave of the court, withdrew his replication, and amended the bill, to which an answer was put in, and a replication filed thereto, and then the commission was re-sealed :—Held, that it was not necessary to issue a new commission, and that, if the commissioners named by the plaintiff, on the first issuing of the commission, were now unable to attend they ought to make a special application. And a motion by the plaintiff to discharge the commission for irregularity was refused with costs. *Page* v. *Fletcher*, Younge, 271.

Misconduct.]—Where the plaintiff by his conduct renders it impossible to examine all the witnesses under the first commission, and afterwards applies for a second commission, the court will order him to pay the extra costs occasioned by the second commission, as well as the defendant's costs of the motion, and will likewise put him under terms with respect to the time and mode of executing the second commission. *Morris* v. *Davies*, 1 L. J. (o.s.) Ch. 220.

A new commission granted, and publication enlarged, on the ground of misconduct of one of the commissioners nominated by the party applying. *Sayer* v. *Wagstaff*, 5 Beav. 462 ; 12 L. J., Ch. 35.

Other Cases.]—Where witness had demurred to interrogatory as tending to subject him to a penalty, and demurrer was overruled as too general, it was ordered without costs, and that new commission should issue, plaintiff undertaking by interrogatories, to make no use of the answer, for the purpose of enforcing such penalties. *Jackson* v. *Benson*, 1 Y. & J. 36.

Depositions under a commission having been suppressed with costs, the payment of those costs was made a condition for granting a new commission. *Chameau* v. *Riley*, 6 Beav. 419 ; 7 Jur. 711.

New commission ; witnesses not appearing on former. *Shepheard* v. *Shepheard*, Cary, 111.

New commission to defendant ; publication stayed of witness examined in court by plaintiff. *Mackworth* v. *Swayefield*, Cary, 112.

A second commission granted on special circumstances. *Turbot* v. ———, 8 Ves. 315.

13. Lost Commission.

Afterwards Found.]—Commission executed ; lost on road, and found ; on affidavit by finder, that it had not been opened, received. *Smales* v. *Chayter*, Dick. 99.

User of Draft.]—Commission de bene esse lost ; on return, witness being dead, paper draft sealed ordered to be sent up unopened and ingrossed by six clerks, and used as original deposition. *Jones* v. *Donithorne*, Dick. 352.

A commission for examination of witnesses in Lisbon was executed, but the ship in which the depositions were sent to England was lost on the passage. The court ordered the commissioners to transmit the drafts of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for the reading the drafts on the hearing of the clause until after the commissioners had made their return and certificate. *Burn* v. *Burn*, 2 Cox, 426.

Carried off by Commissioners.]—*See Anon.*, Pr. Reg. 126, ante, col. 1015.

14. Depositions.

a. Form, Title, and Signature.

Form.]—Depositions taken before commissioners in the country may be read, although taken in the third person, the 3 & 4 Will. 4,

c. 94, s. 27, referring only to such as are taken before the examiners. *Dryden* v. *Frost*, 8 Sim. 380.

Where depositions were returned on paper, the court allowed them to be ingrossed on parchment, and the ingrossment to be filed. *Willis* v. *Garbutt*, 2 Y. & J. 326. S. P., *Chitty* v. *East India Co.*, 2 Cox, 190.

Title.]—Depositions, taken under a commission, suppressed for irregularity, because, although the commission was intituled in an original cause of revivor, the deposition and the interrogatories upon which they were taken were intituled in the original cause only. *Pritchard* v. *Foulkes*, 5 Myl. & C. 330; 10 L. J., Ch. 17; 4 Jur. 1006. Affirming 2 Beav. 133.

Depositions in the Exchequer were suppressed for irregularity, there being no counsel's name attached to the ingrossment of the interrogatories, and the depositions being headed as taken under a commission out of the Court of Chancery. *Campbell* v. *Dickens*, 3 Y. & Coll. 720; 9 L. J., Ex. Eq. 33.

Where after publication had passed it was discovered that, in the title of the interrogatories and depositions filed on behalf of the plaintiff, the names of two of the defendants in the cause had been omitted by mistake, leave was given to amend the title of the interrogatories and depositions, and after the amendment that the several witnesses should be re-sworn to the truth of the depositions so altered. *Mitchell* v. *Roe*, 1 Ir. Eq. R. 144.

Depositions wrongly intituled cannot be read, but the party who seeks to use them will be allowed to have them re-sworn upon terms. *O'Hara* v. *Creagh*, 2 Ir. Eq. R. 419.

A commission to examine witnesses and the depositions taken thereunder were intituled in an original and revived suit, but the interrogatories were intituled as in a single suit, though in a manner applicable either to the original suit or to the suit as revived:—Held, that the interrogatories were not wrongly intituled, and a motion to suppress them was refused. *Jones* v. *Smith*, 2 Y. & Coll. C. C. 42; 12 L. J., Ch. 432; 6 Jur. 1078.

When a bill has been dismissed against one defendant, his name is properly omitted in the title of the cause at the head of depositions taken after such dismissal. *Prince Albert* v. *Strange*, 2 De G. & Sm. 652.

An order for a commission to examine witnesses was made, on the application of the plaintiffs, in a cause in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original and amended bill: and in which Sir J. Brydges and another were plaintiffs, and Lady Brydges and others were defendants, by bill of revivor and supplement. The commission was made out in a cause in which Sir J. Brydges and another were plaintiffs, and C. E. Branfill and others were defendants, by original bill and bill of revivor and supplement. In the title to depositions taken under that commission, both the original and amended bill and the bill of revivor and supplement were mentioned, and the names of the parties to each bill were set forth at length. A motion by the defendants to suppress the depositions, grounded on the variance between the title of the depositions, was refused. *Brydges* v. *Branfill*, 12 Sim. 334; 11 L. J., Ch. 12. *And see the cases in* 12 Sim. 346, n. et seq., and 11 L. J., Ch. 13, n. & 14, n.

Depositions are not vitiated by a difference between the title of the depositions and the title of the cause, where the suit in which the depositions are taken is clearly identified. *Harford* v. *Rees*, 9 Hare (App.) lxviii., lxx.

Signature of Witness.]—When an order for a commission described that the depositions of every witness should be signed by him, and by the commissioner, and the depositions were not signed by the witnesses but were authenticated by the seal of the commissioner:—Held, that this provision in the order was directory only, and that the non-compliance with it did not make the depositions taken under the commission inadmissible, no hardship to the party objecting having been proved. *Hodges* v. *Cobb*, 8 B. & S. 583; 36 L. J., Q. B. 265; L. R. 2 Q. B. 652; 16 L. T. 792; 15 W. R. 1038.

Where the commissioner for the examination of witnesses omitted to copy on the ingrossment of the depositions the signatures which the witnesses had affixed to the drafts, a motion to suppress the depositions on this ground was refused, and the clerk of records and writs was directed to supply the omission. *Lee* v. *Egremont*, 2 De G. & Sm. 363; 17 L. J., Ch. 437; 12 Jur. 860.

The court refused to suppress depositions, where, after publication passed, the officer of the court had, without the sanction of the court, erased the name subscribed to the depositions. *Nash* v. *Cochrane*, 1 Jur. 70.

Signature of Commissioner.]—The omission by an examiner to sign his name to the depositions of a witness, taken by him, and returned to the record and writ clerk's office, is not such an irregularity as to prevent the court from directing them to be filed on terms. *Stephens* v. *Wanklin*, 19 Beav. 585.

But where, in a suit at issue before the new practice, a special examiner had been appointed by order of the court, but no commission had been issued according to the old practice, and witnesses were examined upon interrogatories, and not orally, and there had been great delay, the court refused to order the depositions to be filed. *Ib.*

Depositions taken in the colonies, signed by, but not in the handwriting of, the examiner, received in evidence. *Cooper* v. *Macdonald*, 36 L. J., Ch. 304.

Depositions taken before an examiner who had died before affixing his signature to them, allowed to be received in evidence as if they had received such signature. *Bryson* v. *Warwick and Birmingham Canal Co.*, 1 W. R. 124.

The examiner to the court before whom a witness had been examined, died without having signed the deposition; the deposition was ordered to be filed without any signature. *Felthouse* v. *Bailey*, 14 W. R. 827.

Handwriting of Examiner.]—A witness's depositions de bene esse, not taken down by the examiner, specially appointed, in his own handwriting, as directed by 15 & 16 Vict. c. 86, s. 32, but taken down in the presence of the other parties and certified by the examiner to have been read over to the witness and signed by her in his presence were, under Ord. XXXVII. r. 4, ordered to be filed. *Bolton* v. *Bolton*, 2 Ch. D. 217; 34 L. T. 123; 24 W. R. 426.

It is not enough that evidence be taken down

in the presence of the examiner, and the depositions signed as directed, and authenticated by him, according to s. 34 of the 15 & 16 Vict. c. 86. Examiners are bound under the act to take down the depositions in their own handwriting. *Stobart* v. *Todd*, 2 Eq. R. 1144; 23 L. J., Ch. 956; 18 Jur. 618; 2 W. R. 617.

Filing.]—A special examiner, appointed to take the cross-examination of witnesses who had made affidavits on a motion for injunction, is at liberty to file the depositions from time to time, without waiting until the examination has been concluded. *Clark* v. *Gill*, 1 Kay & J. 19; 2 Eq. R. 1108; 23 L. J., Ch. 711; 2 W. R. 652.

Foreign Depositions — Authentication.] — Depositions taken in a foreign country may be filed if taken before persons duly authorised by the law of the country to administer oaths, and take similar depositions in the courts there. *Levitt* v. *Levitt*, 2 Hem. & M. 626.

In the case of a deposition taken in the United States of America, a certificate by the clerk of the supreme court, sealed with the seal of the court, is sufficient evidence that such a deposition has been taken before a proper officer. *Ib.*

b. Admissibility.

In General.]—Witnesses examined under a judge's order, in expectation of their going abroad, are examined as much for one side as the other, and either party may use their evidence on the trial, if it is shewn that the witnesses are abroad; but it must be proved that they are abroad, and the statement in their depositions, that they are going abroad, is not sufficient for this purpose. *Proctor* v. *Lainson*, 7 Car. & P. 629.

The evidence taken by any parties to a cause may be used by any of the other parties. *Sturgis* v. *Morse*, 26 Beav. 562.

Copies.]—A commission to examine witnesses at Hamburgh having issued, the commission, contrary to the directions of the court, was directed to the judges of the chamber of commerce at Hamburgh, and not to the judges as individuals. The evidence was returned as an extract from the records of the court, with the examination of the witnesses in German, of which a translation was made, and put in at the trial of the cause:—Held, that the evidence was inadmissible, as it purported to be a copy of, and was not the examination itself. *Clay* v. *Stephenson*, 2 N. & P. 189; 7 A. & E. 185; W. W. & D. 537; 6 L. J., K. B. 211; 1 Jur. 448.

Translation, when made.]—Where a commission directed the commissioners to examine the witnesses on interrogatories, and to reduce the examinations into writing in the English language, and send the same to this country, and to swear an interpreter to interpret the depositions of such witnesses as did not understand the English language, and it appeared by the return that the depositions in the first instance were reduced into writing in the foreign language, and translated by the interpreter into English within an interval of six weeks:—Held, that the commission was well executed by the commissioners returning the depositions so translated into the English language. *Atkins* v. *Palmer*, 4 B. & Ad. 377.

Affirmation by Person not qualified to affirm —Time for Objection.]—A commission was issued abroad for the purpose of taking the evidence of a witness touching certain matters relating to an action brought by the plaintiffs against the defendant. The witness objected to be sworn and was allowed by the commissioner to affirm. His evidence was then taken. The deposition was regular upon the face of it, and was returned by the commissioner in the following terms: "Affirmed before me, the witness objecting to an oath." The plaintiffs were represented at the commission, but took no objection at the time to the evidence being given upon affirmation; subsequently, however, they applied at chambers to have the deposition taken off the file, on affidavits shewing that the witness was not a person who was entitled to affirm:—Held, that the objection should have been taken at the time, and ought not now to be entertained, there being nothing on the face of the deposition itself to shew that it was not properly taken. *Richards* v. *Hough*, 51 L. J., Q. B. 361; 30 W. R. 676.

Opportunity of Cross-examination.]—In order to render depositions taken under any judicial proceedings evidence against a party, he must have had an opportunity to be present at the examination, and to cross-examine the witnesses. *Att.-Gen.* v. *Davison*, M'Clel. & Y. 160; 29 R. R. 774.

A commission having issued, to be executed at New York, returnable in a month, with leave to the defendant to cross-examine, there was, some weeks afterwards, a consent by him that no objection to the admissibility of the evidence taken should be made by reason of the time of taking or returning such evidence, saving all just exceptions to the evidence. The commission was returned executed two or three days after such consent, having been executed without any notice to the defendant of the time at which he might attend his execution:—Held, that nevertheless the evidence taken under it was admissible at the trial. *Whyte* v. *Hallett*, 28 L. J., Ex. 208; 7 W. R. 408.

The deposition of a deceased witness is admissible on condition, not only of its having been taken under the sanction of an oath, but also of sufficient notice having been given to the party against whom it is tendered, to have enabled him to attend and cross-examine the witness. Where notice was given, about two p.m. on a Saturday, to the respondent's solicitor in London, that a witness was to be examined at Bath on Monday, under an order of the court obtained by the petitioner:—Held, that the notice was insufficient to enable the respondent's solicitor to attend and cross-examine, and that the evidence so taken without cross-examination was inadmissible. *Fitzgerald* v. *Fitzgerald*, 3 Sw. & Tr. 397. Affirmed on appeal, 3 Sw. & Tr. 400.

Where the plaintiffs filed a bill in chancery for the examination of a witness de bene esse, to which the defendant did not put in any answer, and the plaintiff afterwards obtained an order of the court for the examination of the witness, and gave notice to the defendant, and of the interrogatories intended to be put, and on the same evening examined the witness, who left London the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the deposition of the witness should be published, in order that it might be read in evidence at the trial:—Held, that the

deposition was admissible at the trial, for as the defendant had notice of the time of the examination, he might have cross-examined at that time, or applied for further time for that purpose: and it must be presumed from his not having done either that he did not wish to cross-examine. *Cuzenove* v. *Vaughan*, 1 M. & S. 4; 14 R. R. 377.

It is no objection to the reception of the depositions taken on interrogatories, that there was an alleged breach of faith on the part of the defendant in examining witnesses on interrogatories at all. But if there was any irregularity in proceeding with the commission, as for instance, if it was executed without any notice to the plaintiff to enable him, if he pleased, to put cross-interrogatories, such irregularity is a good objection to the admissibility of the depositions, and the court, if they have been received at nisi prius, will grant a new trial, and direct a fresh commission to be issued. *Steinkeller* v. *Newton*, 1 Scott, (N.R.) 148; 8 D. P. C. 579; 9 Car. & P. 313; 6 Man. & G. 30, n.; 9 L. J., C. P. 262.

The Order of 5th February, 1861, r. 22, as to forty-eight hours' notice being given, will not be applied strictly in the case of an examination taken abroad before examiners specially appointed. *De Britto* v. *Hillel*, 42 L. J., Ch. 307; L. R. 15 Eq. 213; 28 L. T. 59; 21 W. R. 379.

On motion to suppress plaintiff's deposition for not producing his witnesses to be cross-examined, a new commission was ordered, defendant to have the carriage of it; the depositions of such witnesses already examined by plaintiff, as he would produce for cross-examination, to stand; the others to stand suppressed. *Charlton* v. *Robson*, 2 Fowl. Ex. Pr. 158.

Commission to examine witnesses abroad executed and returned; the defendant, who had not interrogatories prepared, not having had the opportunity of cross-examining, a new commission granted for that purpose; the defendant to state whom he wishes and undertakes to cross-examine; but the plaintiff's depositions not suppressed. *Campbell* v. *Scougal*, 19 Ves. 552.

Witness examined in chief, but before cross-examination secretes himself; unless produced a fortnight after notice his depositions suppressed. *Flowerday* v. *Collet*, Dick. 288.

—— **Ex Parte Deposition.**]—In a cause to be heard on motion for decree, an ex parte deposition before the examiner is irregular; but, if necessary to prevent substantial injustice, the court will allow a slip to be remedied. In a cause in which notice of motion for decree had been given, a deposition on behalf of the plaintiff had, by inadvertence, been taken ex parte before the examiner: the defendant having first tried to keep the witness out of the way, refused to cross-examine him when tendered for the purpose, and took the objection that the deposition was irregular. When the objection was taken, the time for the plaintiff to file evidence had expired. The court ordered the ex parte deposition to stand, with liberty for the defendant to cross-examine. *Smith* v. *Baker*, 4 N. R. 321; 2 Hem. & M. 498; 10 L. T. 599.

A plaintiff, replication not having been filed, subpœnaed before the examiner some witnesses who had refused to make affidavits. The examination took place, and the depositions were treated as ex parte by the examiner, notwithstanding a protest by counsel for the defendant, who, on its being overruled by the examiner, thereupon left the room. The plaintiff subsequently gave notice of a motion for a decree, reference to these depositions being appended to the notice; and the defendant afterwards applied for an enlargement of the time for answering the plaintiff's motion. A motion on behalf of the defendant, that these depositions might be taken off the file as being ex parte and irregular, having been dismissed by Malins, V.-C. (16 L. T. 408; 15 W. R. 828), on the ground that the case fell within the 15 & 16 Vict. c. 86, s. 40:—Held, on appeal, that s. 40 was confined to proceedings actually before the court; and that notice of the motion for a decree not having been given at the time of the examination, the examination in the present case had been irregular; but that the defendant, having had notice of the plaintiff's intention to use the depositions on the hearing of the motion for a decree, and having applied for further time to answer the motion which rested upon them, without in the interval complaining of them as having been taken ex parte, could not complain of them. *Coles* v. *Morris*, 36 L. J., Ch. 833; 17 L. T. 155; 15 W. R. 1157.

—— **Witness Dead.**]—Witness examined for the plaintiff, and was to be cross-examined by the defendant, but before he could be cross-examined he died, yet the Court of Chancery ordered his depositions to stand. *Arundel* v. *Arundel*, 1 Ch. Rep. 90.

A witness dying after his examination in chief, and before he was cross-examined, his depositions may be read, valeant quantum; but if his death happened before his examination in chief was completely finished, no use could be made of his testimony. *Nolan* v. *Shannon*, 1 Moll. 157.

Depositions of a witness read, though he had died before cross-examination; the cross-interrogatories not going to any point to which the witness had been examined in chief, nor to his credit, but to matters capable of proof by other witnesses. *O'Callaghan* v. *Murphy*, 2 Sch. & Lef. 158.

Where a witness dies after examination, but before such examination is signed by him, the depositions cannot be made use of. But yet, where the defendant, after publication, examined a witness, and on the usual affidavit that the defendant, his clerk or solicitor, had not seen the depositions, got an order to re-examine this witness, but the witness died before a re-examination, the court gave leave to the defendant to make use of the former depositions of the same witness. *Copeland* v. *Stanton*, 1 P. W. 414.

—— **Refusal of Witness.**]—The refusal of a witness to be cross-examined is no reason for suppressing his deposition, but the adverse party must at the same time enforce such right of cross-examination as he has. *Courtenay* v. *Hoskins*, 2 Russ. 253.

Reference to Documents in Answers.]—A witness, who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter, which was not produced:—Held, on the trial of the cause in England, that so much of the answer as related to the contents of the letter was not receivable. *Steinkeller* v. *Newton*, 1 Scott (N.R.) 148; 8 D. P. C. 579; 9 C. & P. 313; 6 Man. & G. 30, n.; 9 L. J., C. P. 262.

The depositions of a witness are admissible, though it appears that, on his examination, he referred to papers which he refused to allow the commissioners to see. *Steinkeller* v. *Newton*, 2 M. & Rob. 372.

If a witness examined upon interrogatories refers to a writing in itself not evidence, as containing a statement of the facts as to which he is interrogated, this writing may be read as part of his deposition. *Falconer* v. *Hanson*, 1 Camp. 171; 10 R. R. 663.

On an issue raising the question whether due diligence had been used to obtain the answer of A. to a bill in chancery, a witness stated on interrogatories that he did with due diligence endeavour to obtain the answer, but could not, and that he wrote a letter on that occasion to A.'s agent. The letter itself was not in evidence; and there was no proof that any endeavour had been made, except writing such letter:—Held, that the deposition to the extent above stated was admissible, though the part immediately following set forth the contents of the letter, and was therefore excluded. *Tufton* v. *Whitmore*, 12 A. & E. 307; 9 L. J., Q. B. 405.

Where, upon the examination of a witness before a special examiner, documents were placed in his hands for the purpose of being proved as exhibits, and no question was put to him on behalf of the defendant, whose witness he was, except such questions as merely led to the proof of handwriting, it was held that the counsel or solicitor for the plaintiff had no right, as mere matter of course, and in the absence of any special grounds, to inspect the documents so placed in the witness's hands. *Lord* v. *Colvin*, 5 De G. M. & G. 47; 23 L. J., Ch. 469; 18 Jur. 253; 2 W. R. 298.

Paper Annexed to Depositions.]—A witness for a defendant was examined on a commission; on his cross-examination a paper signed by him was produced to him, and a portion of his cross-examination and re-examination related to it and was founded on it; the paper was annexed to the deposition:—Held, that this paper was not to be read as a part of the cross-examination of the witness, but that, if the plaintiff's counsel wished it to be read before the cross-examination was read, it must be read as his evidence, so as to entitle the defendant's counsel to observe on it in a special reply. *Stephens* v. *Foster*, 6 Car. & P. 289.

Deposition taken under a joint commission—"I have nothing further to say. I hand you a legalised copy of a deposition (D.) which I made at the English consulate, and which I now confirm. Any discrepancies that may be between this document and my present deposition must be attributed to the length of time that has elapsed since this occurrence":—Held, that the copy of deposition (D.) was inadmissible. *Alcock* v. *Royal Exchange Assurance Corporation*, 13 Q. B. 292; 18 L. J., Q. B. 121; 13 Jur. 445.

Secondary Evidence of Contents of Written Documents received without Objection.]—Under a commission to take evidence abroad in an action, copies of certain documents and answers of witnesses with regard to the contents of such documents were received by the commissioners in evidence on behalf of the plaintiff, without objection on the part of the defendant who joined in the commission. The copy documents were appended to the depositions and returned by the commissioners:—Held, that the secondary evidence of the documents having been taken under the commission, without objection on the part of the defendant, was receivable before an arbitrator to whom the action was referred, and that it was too late then to take objection on the ground that the original documents were not produced. *Robinson* v. *Davies*, 49 L. J., Q. B. 218; 5 Q. B. D. 26; 28 W. R. 255.

Discretion as to admitting.]—An interrogatory being objected to as a leading question, and the answer obtained by it as objectionable for that reason, the judge caused part of the interrogatory and part of the answer to be suppressed, and the remainder, which appeared not affected by the context, to be read in evidence:—Held, that the judge was not bound to reject the interrogatory and answer, merely because the question was a leading one, but might exercise a discretion as to excluding or admitting the whole or part of the answer obtained by the leading question, and that the course taken at the trial was correct. *Small* v. *Nairne*, 13 Q. B. 840.

Part or Whole.]—Where the examination of an absent witness is read on the part of the plaintiff, the whole, including the answers to the cross-interrogatories, must be read as part of his case. *Temperly* v. *Scott*, 5 Car. & P. 341.

A party cannot abandon an interrogatory in part; he must abandon the whole. *Wheeler* v. *Atkins*, 5 Esp. 246.

Legality of.]—Illegal questions or answers returned by commissioners may be objected to and struck out at the trial; but counsel cannot object to answers to illegal questions put on his own side. *Hutchinson* v. *Bernard*, 2 M. & Rob. 1.

When Lost.]—Answers to lost interrogatories may be read as admissions by the answering party, although some of the answers are unintelligible per se. *Rowe* v. *Brenton*, 3 M. & Ry. 271; 8 B. & C. 765.

The court refused to order copies of depositions to be recorded and exemplified where the original had been lost, and in trials at law subsequent to the dismission of the suit the witnesses had sworn contrary to their depositions. *Brabant* v. *Perne*, 2 Ch. Rep. 36.

On Petition of Right.]—On a petition of right a commission issued and an inquisition was thereupon found and returned into chancery. Before any further proceeding the suppliant filed a bill against the attorney-general to perpetuate testimony, reciting the petition. A commission to examine witnesses issued thereupon. The suppliant proposed to the Crown to join in the commission, but the Crown did not consent and the commission issued ex parte. The Crown having traversed the inquisition, and the record being sent into the Queen's Bench:—Held, that depositions taken under the commission to examine witnesses were admissible on behalf of the suppliant, where the deponents were without the jurisdiction of the court. *De Bode's (Baron) Case*, 8 Q. B. 208.

Absence of Witness.]—In order to let in the depositions of a witness examined on interrogatories, his absence must be shewn by someone who can speak to the fact of his own knowledge. *Robinson* v. *Markis*, 2 M. & Rob. 375. S. P., *Proctor* v. *Lainson*, 7 Car. & P. 629.

Proof to satisfy the court that a witness whose evidence has been taken abroad under a commission is out of the jurisdiction when the evidence

is tendered may be less stringent when he is resident abroad than when the evidence has been taken of a witness going out of the jurisdiction for a temporary purpose. *Mills* v. *Mills*, *Pollack* v. *Pollack*, 2 Sw. & Tr. 310; 30 L. J., Mat. 183; 4 L. T. 479.

Where in an affidavit to found an order for a commission it was stated that the object was to examine A., resident abroad, and the summons was served on the co-respondents:—Held, that the presumption was that the witness continued abroad, unless the contrary was shewn, and the court allowed the evidence to be used. *Ib.*

—— **Proof of Sailing.**]—It will not be sufficient to prove, that on the evening before the trial the witness was, with his luggage, on board a ship bound for Montreal, the ship being then three-quarters of a mile below Gravesend, waiting for the captain to come on board. *Carruthers* v. *Graham*, Car. & M. 5.

But proof by a person that he had prepared the witness's outfit for Australia, and had seen him start by the Blackwall railway to go on board the "Asia," which lay at Gravesend, bound for Australia, and that he had received a letter from the witness from Sheerness, and another from Plymouth, at both of which places the "Asia" had put in, is sufficient for this purpose, as being evidence that his voyage had been commenced. *Varicas* v. *French*, 2 Car. & K. 1008.

—— **When driven Back.**]—Where, by a rule of court, a witness was examined upon interrogatories, on the ground of his being about to leave the kingdom, his depositions might be read, if he had actually sailed, though the vessel had been driven back into port by contrary winds. *Ward* v. *Wells*, 1 Taunt. 461; 10 R. R. 581. S. P., *Fonsick* v. *Agar*, 6 Esp. 92.

—— **Nature of Voyage.**]—A party was not entitled to read a deposition taken upon interrogatories, upon proof that the witness was a seafaring man, and that he lately belonged to a vessel in the Thames; he must likewise have shewn of what nature the vessel was, and whither bound, or that inquiry had been made for the witness. *Falconer* v. *Hanson*, 1 Camp. 171; 10 R. R. 663.

—— **Whether Permanent—On proof of Sickness or Infirmity of Witness.**]—The 1 Will. 4, c. 22, s. 10, which requires, before depositions taken under it can be read in evidence, that it should appear to the satisfaction of the judge that the deponent is unable from permanent sickness to attend the trial, does not mean that the sickness should be incurable, but that it should be of that degree of permanency as to make it last beyond the then impending trial. *Beaufort (Duke)* v. *Crawshay*, 1 H. & R. 638; 35 L. J., C. P. 342; L. R. 1 C. P. 699; 12 Jur. (N.S.) 709; 14 L. T. 729; 14 W. R. 989.

The decision of the judge at the trial, that the deponent whose deposition has been taken is unable from permanent sickness to attend the trial, is subject to review by the court, but the court will not exercise such jurisdiction unless satisfied that the judge has been misled by a fraudulent representation, or that injustice would otherwise be done. *Ib.*

Quære, whether an affidavit of a medical man is admissible to satisfy the judge as to the illness of the witness. *Ib.*

Quære, whether pregnancy and imminent delivery be a cause for the examination of a witness by the prothonotary under 1 Will. 4, c. 22, as a permanent sickness or infirmity in the contemplation of the statute. *Abraham* v. *Norton*, 1 D. P. C. 266; 1 M. & Scott, 384. *S. C.* nom. *Abraham* v. *Newton*, 8 Bing. 274; 1 L. J., C. P. 91.

If so, it must be shewn by affidavits of competent persons, that the delivery will probably happen about the time fixed for the trial of the cause. *Ib.* S. P., *Davies* v. *Lowndes*, 6 Scott, 738; 8 L. J., C. P. 10. *Pond* v. *Dimes*, 3 M. & Scott, 161.

A will purported to have been executed in the presence of two attesting witnesses. One was abroad, and the other in England. The executors who propounded the will applied for a commission for the examination de bene esse of the second attesting witness, who was resident in London. The affidavit alleged no physical infirmity, but described him as an elderly person. The court ordered the commission to issue, but intimated that if it was proposed at the trial to read the evidence taken under it, strict proof of inability to produce the witness would be required. *McPherson* v. *Parnell*, 40 L. J., P. 30; 24 L. T. 742; 19 W. R. 784.

Use of by Opposite Party.]—The defendant interrogated a witness as to a conversation between the witness and the plaintiff's testator. Quære, can the plaintiff read the deposition, the defendant declining to do so. *Long* v. *Long*, 5 Ir. Eq. R. 38.

The plaintiff had examined a witness respecting a conversation between the defendant and the witness. The plaintiff declined to read the deposition at the hearing of the cause, as it made against him. The defendant then proposed to read the deposition, as his evidence. But the Vice-Chancellor ruled that the defendant was not at liberty to read the deposition, as it was not evidence for the defendant as to whose conversation it related. *Wilson* v. *Calvert*, 5 Sim. 194.

Taken during Abatement.]—Depositions from abroad published, though taken during abatement. *Sinclair* v. *James*, Dick. 277.

Depositions allowed to be read though taken during abatement. *Thompson* v. *Took*, Dick. 115.

Feme sole sues out a commission to examine witnesses; before they are examined she marries. Their depositions ordered to stand. *Winter* v. *Dancie*, Toth. 99.

Where witnesses were examined during the abatement of a suit occasioned by the death of parties, the depositions of those who did not at the time of their examination know of the death of the parties which had caused the abatement, were received, and the depositions of those who did know such facts were suppressed. *Curtis* v. *Fulbrook*, 8 Hare, 29; 19 L. J., Ch. 65; 13 Jur. 1044.

Effect of Amendment of Bill.]—After witnesses examined upon original bill, amended bill was filed against new parties, some infants; court would not allow evidence taken on the original bill to be read against new defendants, the infants. *Quantock* v. *Bullen*, 5 Madd. 81.

Where a fact is put in issue by the original cause, and evidence examined to it, no evidence

can be adduced upon that fact upon a supplemental bill; neither will equity assist a party to make out a different case upon a second trial at law, upon that which he made upon the first. *Cockburne* v. *Hussey*, 2 Ridgw. P. C. 504.

An amendment, making the plaintiffs in the original bill sue on behalf of themselves and all other persons having the same interest, does not so alter the parties or the frame of the record, that depositions taken in the original suit cannot be used in the amended suit. *Milligan* v. *Mitchell*, 3 Myl. & C. 72; 7 L. J., Ch. 37; 1 Jur. 888. And see *S. C.*, 1 Myl. & Cr. 433, 511.

If a bill is amended, by adding parties, after witnesses have been examined, their depositions cannot be read against the new parties. *Pratt* v. *Barker*, 1 Sim. 1; 4 L. J. (O.S.) Ch. 149; 6 L. J. (O.S.) Ch. 186; 27 R. R. 136.

After publication, a bill filed by husband and wife was amended by making the wife sue by her next friend:—Held, that the evidence was still receivable. *Davis* v. *Prout*, 7 Beav. 288.

In a suit instituted jointly by husband and wife, in relation to the wife's separate estate, where the bill has been amended by making the husband a defendant, and adding a next friend for the wife, the depositions previously taken cannot be read at the hearing. *Haynes* v. *Jackson*, 4 Jur. 457.

A testator bequeathed the residue of his estate to his wife A. G. for her life, and the legatee, describing herself a A. G., widow, filed a bill against the executors for the administration of the estate; but, it appearing that J. P., the first husband of the legatee, was living at the time the ceremony of marriage was performed between her and the testator, and at the time of filing the bill, she filed a supplemental bill, describing herself as A. P. alias A. G., by her next friend, against J. P., for the purpose of making her husband a party to the suit:—Held, that this was not such an alteration of the frame of the record as to render the evidence taken in the first cause, inadmissible at the hearing of the two causes; and that the amended description of the plaintiff, in the supplemental bill, could not affect the liability of a witness, examined in the original suit, to be indicted for perjury if he swore falsely. *Giles* v. *Giles*, 1 Keen, 685; 5 L. J., Ch. 46.

After evidence taken in a cause, the bill was amended, and the title of the cause became thereby altered:—Held, that such change did not prevent the evidence being used, though taken in a cause differently intituled. *Penfold* v. *Giles*, 6 L. J., Ch. 4.

c. Amendment of.

Where Mistake.]—A deposition of a witness permitted to be amended after publication, where there clearly appeared to be a mistake made by him in a material part of his evidence. *Rowley* v. *Ridley*, 1 Cox, 281; Dick. 677.

A deposition of a witness amended after publication. *Griells* v. *Gansell*, 2 P. W. 646.

Deposition of witness rectified, he having been first examined by examiner before court. *Darling* v. *Staniford*, Dick. 358.

Upon an affidavit of the witness that the examiner had mistaken him, his depositions amended on examination in court. *Penderil* v. *Penderil*, Kel. 25.

But a similar application was subsequently refused. *Traherne* v. *Burdus*, Kel. 26.

Motion for liberty for witness to rectify his depositions after publication, the point appearing not to be mere mistake, and his affidavit not explaining it satisfactorily, refused with costs. *Kenny* v. *Dalton*, 2 Moll. 386.

Upon appeal against a decree after the case printed, and an appendix of the evidence, as entered in the registrar's notes of proofs on the hearing, it is irregular to proceed by order upon motion in the court below, to expunge any part of such evidence as entered by mistake, but the course is to apply to the House by petition for leave to proceed in the court below to rectify it. *Lopdell* v. *Creagh*, 1 Bli. (N.S.) 225.

The Christian name of one of the defendants having been mistaken in the title to interrogatories and depositions, an order was made for correcting that error, and re-swearing the witnesses. *Curre* v. *Bowyer*, 3 Swanst, 357.

Motion to amend depositions after publication, refused. *Ingram* v. *Mitchell*, 5 Ves. 297.

d. Suppressal of.

i. *For Irregularity.*

Want of Notice.]—Depositions of witnesses de bene esse, taken ex parte, and without notice of striking the names of commissioners, or of the execution of the commission, suppressed. *Loreden* v. *Milford*, 4 Bro. C. C. 540.

Depositions taken on the part of the plaintiff having been suppressed, as against some of the defendants, on the ground of no notice until after publication, upon evidence that the omission arose from a mistake committed by the clerk to the plaintiff's solicitor in giving at the examiner's office the name of the clerk in court for others of the defendants, as the name of the clerk in court for all the defendants, in consequence of which the plaintiff's witnesses were produced only at the seat of the clerk in court so named; and, upon the examiner's certificate that the name of that clerk in court only was delivered to him; the Lord Chancellor gave to the defendants the option; either of permitting the plaintiff to re-examine the same witnesses, or of allowing the depositions to stand, with liberty for them to cross-examine those witnesses, and to examine others. *Cholmondeley* v. *Clinton*, 2 Mer. 81; 16 R. R. 167.

On the 4th August, 1836, the plaintiff issued a commission to examine witnesses. Defendant did not join. Depositions returned October 23rd, and publication passed November 25th. Defendant takes out commission, gives notice on the 9th December of intention to execute it, and examine witnesses on the 23rd December:—Held, that depositions were irregular, and motion to suppress granted. *Heap* v. *Haworth*, 1 Jur. 351.

The court is not bound to suppress depositions in every case of irregularity, and where from a misconception of the 86th Order, nine days' notice of examining witnesses was only given, but the examination was not commenced till after ten days, and no party was prejudiced thereby, and publication passed without objection, the court refused, under the circumstances, to suppress the depositions. *Att.-Gen.* v. *Ball*, 9 Ir. Eq. R. 463.

Where a plaintiff's solicitor knew the names, &c., of the witnesses who were examined before a commissioner, and was at the inn where the examination took place, but had not received

any notice respecting them from the other side, an application to suppress the depositions after publication, no objection being made at the time, was refused, with costs. *Smith* v. *Pincombe*, 1 Hall & Tw. 250; 16 Sim. 497; 18 L. J., Ch. 211; 13 Jur. 158, 191.

Where witnesses are to be examined before a commissioner, whether it is necessary to give notice to the other side, of the names, &c., of the proposed witnesses, quære. *Ib.*

On Fresh Interrogatories.]—The plaintiffs and defendants applied to the master for a certificate for a commission to examine witnesses abroad, and they produced to him the proposed interrogatories. He certified in both cases that a commission was necessary to examine witnesses "under the said interrogatories," and orders were made accordingly. The parties afterwards by consent obtained an order for a single commission directed to a sole commissioner. The plaintiffs examined on fresh interrogatories:—Held, that under the first orders the proceeding of the plaintiffs was irregular: and secondly, that it was equally so under the consent order. The court, however, refused to suppress the depositions, but made the plaintiffs pay the costs of the application, and gave leave to the defendants to apply to be put on a footing of equality with the plaintiffs. *Nelson* (*Earl*) v. *Bridport* (*Lord*), 7 Beav. 195.

Plaintiff and defendant having joined in a commission, witnesses were examined on both sides; the commissioners of one party were present while the witnesses of the other were examined, and cross-examined them, and exhibited interrogatories before the commissioners, and examined several witnesses on their part, and having thereby discovered what the witnesses had sworn, they exhibited other interrogatories before a baron in London, differing in many material points from the interrogatories before the commissioners. Depositions taken on those interrogatories, varying from those exhibited before the commissioners, ordered to be suppressed. *Durham* v. *Newcastle-on-Tyne*, Colles's P. C. 18.

Subsequent Examination.]—Under a commission for the examination of witnesses, several witnesses on the part of the defendant having appeared and been examined by the plaintiff, the defendant then declining to examine them, their depositions on a subsequent examination by the defendant in the examiner's office without leave of the court, not suppressed. *Pearson* v. *Rowland*, 2 Swanst. 266.

A second set of depositions taken upon the same interrogatories, rejected. *Hadow* v. *Barnett*, 1 Y. & Coll. 164.

Where Cross-cause.]—A party defendant being examined as a witness without an order to examine him, his depositions cannot be read, although he be afterwards struck out of the bill in the original cause, if he is continued as a party in the cross-cause. *Barden* v. *Gorman*, 2 Moll. 376.

An order made by the Vice-Chancellor, for the suppression of depositions which had been taken in a cross-cause without leave of the court, after publication had passed in the original cause, and which related principally, but not exclusively, to matters at issue in the original cause, affirmed upon appeal, the parties by whom the depositions had been taken, having in the court below declined a reference to the master to distinguish what parts thereof related to matters not in issue in the original cause, and it being held that they were not entitled, under such circumstances, to have the objection to the evidence reserved to the hearing. *Pascall* v. *Scott*, 1 Ph. 110; 12 Sim. 550; 6 Jur. 251.

Acquiescence in.]—On the examination and cross-examination of an aged and infirm witness labouring under deafness, the questions were put and answers received through the medium of the daughter of the witness; and the examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life, and that much of the cross-examination and all the re-examination had been pretermitted. The defendant afterwards obtained an order for his costs, which recited that the testimony of the witness had been taken:—Held, that the defendant having concurred in the mode of examination adopted, could not afterwards object to the use of the testimony by impeaching its fidelity on that ground. *Watkins* v. *Atchison*, 10 Hare (App.) xlvi.

A supplemental bill was filed, in which a deceased person was named as co-plaintiff, and as next friend of infant plaintiffs, and in the title of the plaintiffs' interrogatories for the examination of witnesses his name was mentioned as being still a party:—Held, that a defendant who had acquiesced, and intituled his interrogatories in a similar manner, could not, after publication, move to suppress the depositions. *Lincoln* v. *Wright*, 4 Beav. 166; 10 L. J., Ch. 331.

How Shewn.]—A motion to suppress depositions taken under an order for the examination of a witness de bene esse, not asking to discharge that order, is not supported by shewing circumstances from which it would merely appear that the order was irregular; for the court will assume, for purpose of the motion, that the order was regular. *M'Intosh* v. *G. W. Ry.*, 1 Hare, 328; 11 L. J., Ch. 283; 6 Jur. 454.

Time to Move.]—The proper time to move to suppress depositions for irregularity is after publication has passed. *Dobbyn* v. *Adams*, 9 Ir. Eq. R. 275.

ii. *Where Answers prepared before Examination.*

By Witness Himself.]—Before the commencement of any suit between the parties, affidavits were made by certain persons in order to attest what passed in their presence, with a view, as it appeared, of vindicating the character of the present appellant. A suit being afterwards commenced, the same persons were examined on interrogatories as witnesses in the cause; and after publication passed, their depositions appeared to be in several instances in the same words as the affidavits they had before voluntarily made. This was held no ground for suppressing these depositions. *Bland* v. *Armagh* (*Archbishop*), 3 Bro. P. C. 620.

Depositions to direct interrogatories will not be suppressed upon the ground that the witness had been furnished with a copy of the interrogatories, previously to his examination, by the party producing him, or had written the answers

he could give thereto upon the margin. *Kelly* v. *French*, Ll. & G. t. Plunk. 166.

By Solicitor.]—The court will not reject depositions, on the certificate of the commissioners before whom they were taken, on the ground that the witness under examination had not only consulted minutes of her own, but a document drawn out for her by plaintiff's attorney, and had given her testimony upon them. *Anon.*, 2 Ken. Ch. 27.

Deposition suppressed on account that the whole was written down in the exact form of it by the attorney before it was taken. *Anon.*, Ambl. 282; 3 Keen, 27.

Witness cannot give as his evidence answers in writing prepared before the examination; nor is any suggestion to him by the attorney, counsel, or any other person, during the examination, permitted; and in equity, whenever such fact is disclosed, the deposition will be suppressed. *Shaw* v. *Lindsey*, 15 Ves. 381.

Deposition suppressed and a re-examination directed, the deposition being taken from the witness using, during the examination, full minutes in writing, which she stated to have been originally her own, put into method by the attorney, and so copied with some corrections by herself. *Ib.*

Depositions before publication suppressed, being taken by the commissioners ready prepared, the witness being agent in the cause; and the mode in which the court receives the information, whether from the commissioners or otherwise, is not material. The commission directed to proceed, for the purpose only of re-examining that witness; substituting another commissioner for one who, having refused to qualify, was not permitted to be present at the examination. This order not to prevent the court's opening the depositions, if a case of necessity should arise; as, if the witness could not again be examined. *Ib.*

A solicitor may communicate with a witness before his examination, and take down in writing what he can depose to; but to prepare the depositions of a witness beforehand would be improper, and form a ground for suppressing the depositions. *Sayer* v. *Wagstaff*, 5 Beav. 462; 12 L. J., Ch. 35.

By Party to Suit.]—The depositions of a witness who was examined in perpetuam rei memoriam were suppressed on a petition after his death, and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being corrupted; and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier* v. *Hart*, Mos. 321.

A motion to suppress the depositions of witnesses examined on behalf of the defendant after a conversation by him with one of the plaintiff's witnesses on the subject of his testimony, refused; the conversation not having been communicated to his solicitor before the defendant's interrogatories were prepared, but without costs; communications between witnesses and parties being disapproved. *Boughton* v. *Pierrepoint*, 3 Swanst. 550.

Depositions under Previous Order.]—Depositions were suppressed for irregularity in the order under which they had been taken. The examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, and inquired whether they were correct, and on being answered in the affirmative, he caused them to be signed by the witnesses. The court suppressed the depositions as having been irregularly taken. *Att.-Gen.* v. *Nethercoat*, 10 Sim. 311; 9 L. J., Ch. 17.

iii. *Other Grounds.*

Mistake.]—Upon a motion by the plaintiff to suppress a deposition, on the ground of a mistake of the witness in making it, the defendant has a right to choose whether the motion should stand over and come on with the cause, or whether the plaintiff should have liberty, without prejudice to the deposition, to examine the witness again upon the same interrogatory, with liberty for the defendant to cross-examine him at large; and, on the defendant selecting the latter alternative, the court ordered accordingly, directing the costs of the motion and the additional examination to be paid by the plaintiff. *Edwards* v. *Brown*, 9 Jur. 421.

Upon the motion by a defendant to suppress depositions supported by the affidavit of a witness, that the evidence which she gave before the commissioners was not truly represented in the depositions, and that she had mistaken the meaning of a technical expression used in the interrogatories, the court refused to suppress the depositions, but gave the parties liberty to re-examine and cross-examine the witness vivâ voce before the master (the commission being issued after decree), upon the disputed parts of the depositions; and also gave the plaintiff liberty in the same manner to examine, and the defendant to cross-examine the commissioner and his clerk. *Dobson* v. *Land*, 7 Hare, 296; 18 L. J., Ch. 240; 13 Jur. 823.

Depositions set down in a wrong sense, suppressed, and witness re-examined. *Peacock* v. *Collens*, Cary, 47.

On a motion made on behalf of the relator, after the cause had been argued, to suppress the depositions of the trustees, it was ordered that they should be suppressed, on the relator entering into admissions, and on the defendants being permitted to add to their evidence; but on appeal the order was discharged, the Lord Chancellor being of opinion that even on these terms the relator could not be relieved from the mistake. *Att.-Gen.* v. *Dew*, 3 De G. & Sm. 488.

Fraud.]—Witness examined by fraud, suppressed, and parties to fraud to be proceeded against by bill. *Walford* v. *Walford*, Cary, 56.

Impertinence.]—Court refused (with costs) to order interrogatories, however impertinent, to be suppressed, if witnesses have answered them; they should demur: answering them waives impertinence. *Jefferis* v. *Whittuck*, 9 Price, 486.

Where a witness deposed to facts to which he could not have been examined, the court upon motion suppressed the depositions. *Smith* v. *Harding*, Fl. & K. 347; 3 Ir. Eq. R. 336.

Presence of Third Party.]—A commissioner-examiner having permitted a solicitor in the cause to come into the room during the examination of witnesses, and being also in communication and concert with the solicitor, the court

suppressed the depositions. *Doherty* v. *Doherty*, 8 Ir. Eq. R. 379.

Fresh Objection.]—The court refused to suppress depositions on a ground of objection to which the attention of the commissioners had not been called, where a different objection had been made before them, and had been properly overruled. *Wood* v. *Freeman*, 4 Hare, 552; 14 L. J., Ch. 371; 9 Jur. 549.

Where Witness has demurred.]—Where a commissioner for the examination of witnesses had taken upon himself, notwithstanding the demurrer of a witness, to examine her:—Held, that the deposition must be suppressed, although upon hearing the demurrer the court held it to be untenable. *Goodale* v. *Gawthorn*, 4 De G. & Sm. 97.

Held, in the same case, that where the witness was not informed by the commissioner that her statement as to the reasons for her demurrer should be upon oath, her demurrer was not invalid by reason of her not having been sworn to the truth of the statement; and also that the commissioner ought not to have been served with a petition to suppress the depositions, and the petition as against him was dismissed with costs. *Ib.*

Delay in Prosecution of Cause.]—Where nothing has been done in a cause for many years till November, 1847, the court, after having refused the defendant leave to file a new replication, and having refused to dismiss the cause, but having ordered it to be set down, refused to suppress depositions taken in December, 1847. *Lewis* v. *Thomas*, 12 Jur. 67.

iv. *Practice on.*

Application—Time for.]—Motion to suppress depositions upon groundless objections, and not only after publication, but even after the cause had been called on and struck out, refused. *Whitelocke* v. *Baker*, 13 Ves. 511; 9 R. R. 216.

Depositions will not be suppressed before the hearing of the cause, unless in a case where the party ought to be allowed to examine over again. *Lysaght* v. *Lysaght*, 1 Hog, 208.

Party is too late to move to suppress a deposition for irregularity, after having exhibited articles to discredit the witness. *Malone* v. *Morris*, 2 Moll. 324.

Cross-interrogatories must be lodged before the examination in chief has closed, and the motion to suppress them for irregularity must be made after publication passed. *Aylward* v. *Hickson*, 2 Hog, 1.

—— **By Consent.**]—Motion by consent, that depositions taken during the long vacation, 1852, might be suppressed, and that both sides might proceed to examine witnesses orally under the new statutes. The vice-chancellor said, that applications by consent, for suppression of depositions, ought in general to be made at chambers; but as this application was besides to take the evidence orally under the new practice, it was proper to make the application in court. *Anon.*, 16 Jur. 1129.

Notice.]—Motion by one of several defendants, that the deposition of a witness who had been examined by the plaintiff should be suppressed:—Held, that notice of the motion ought to have been served on the other defendants. *Barnett* v. *Papineau*, 18 L. J., Ch. 466. *S. C.* nom. *Barnard* v. *Papineau*, 3 De G. & Sm. 498.

Time to find whether Deposition regular.]—When the interval is short between the publication and the hearing, the court will grant time to examine whether the deposition was regularly taken, it being too late to object during the hearing. *Gordon* v. *Gordon*, 1 Swanst. 171.

15. Costs.

Defendant's Commission—Verdict.]—Where a commission issued at the instance of a defendant for the examination of a witness abroad, and he obtained a verdict:—Held, that he was not entitled to the costs of the commission. *Bridges* v. *Fisher*, 1 Scott, 485; 1 Bing. (N.C.) 510; 1 Hodges, 36; 4 L. J., C. P. 117.

Irregularity.]—An order and commission to examine a witness residing out of the jurisdiction did not specify the time or place of examination:—Held, on motion to review the taxation, that the master acted rightly in allowing these costs, as the defect was an irregularity merely, which the opposite party had, by cross-examining the witness, waived. *Howkins* v. *Baldwin*, 2 L. M. & P. 250; 16 Q. B. 375; 20 L. J., Q. B. 198; 15 Jur. 749.

Not used.]—A witness was examined on interrogatories, but his examination was not used at the trial:—Held, that the costs thereof were properly disallowed. *Curling* v. *Robertson*, 8 Scott (N.R.) 288; 2 D. & L. 307; 7 Man. & G. 525; 13 L. J., C. P. 169.

If a witness is so old and infirm that it is a prudent course to take his examination, but he is afterwards able to attend the trial, the plaintiff may be allowed the costs of the commission, as well as the costs of the witness's attendance at the trial. *Beaufort* (*Duke*) v. *Ashburnham* (*Earl*), 13 C. B. (N.S.) 598; 32 L. J., C. P. 97; 9 Jur. (N.S.) 822; 7 L. T. 710; 11 W. R. 267.

A commission was taken out by the defendant to examine a witness at Paris. At the trial, the plaintiff's counsel abandoned that part of his case to which the evidence under the commission applied, and the defendant had a verdict on that issue:—Held, that he was entitled to the costs of the commission. *Jewell* v. *Parr*, 17 C. B. 636; 25 L. J., C. P. 179.

Where New Trials.]—A. sued B. upon two bills of exchange and a promissory note, and obtained a verdict, subject to a bill of exceptions. A venire de novo was awarded, and upon the second trial the evidence obtained by B. under a commission to Paris, induced A. to abandon the second bill, and he had a verdict on the other bill and the note, subject to a second bill of exceptions. Proceedings were afterwards instituted in chancery, which resulted in a decree that the bill of exceptions should be abandoned, and the second bill given up to B., and the cause retried, striking out the count upon that bill. Upon that trial B. succeeded:—Held, that on the taxation of the costs, B. was not entitled to the costs of the commission as costs in the cause, the evidence taken thereunder not being applicable to any part of the record as it then stood. *Jewell* v. *Parr*, 2 C. B. (N.S.) 809.

When Costs in Cause.]—The costs of executing a commission in a foreign country, under 1 Will. 4,

c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise. *Prince* v. *Samo*, 4 D. P. C. 5.

The costs of taking the evidence of a witness under the 1 Will. 4, c. 22, s. 4, cannot be allowed to the party taking it as costs in the cause, unless the deposition has been used at the trial by the party taking it. *Ridley* v. *Sutton*, 1 H. & C. 741 ; 32 L. J., Ex. 122 ; 9 Jur. (N.S.) 358 ; 7 L. T. 693 ; 11 W. R. 314.

Party having Benefit.] — Party obtaining commission to examine abroad, pays costs ; but if other party examines under it in chief, he pays proportionately. *Jackson* v. *Strong*, 13 Price, 309.

The defendant assented to the appointment of the person nominated commissioner-examiner by the plaintiff. He cross-examined one of the plaintiff's witness, but did not examine any witness on the direct :—Held, that he was bound to pay the costs and expenses incurred by reason of his cross-examination, viz., for the attendance of the commissioner during the time occupied by the cross-examination, and for ingrossing the depositions to the cross interrogatories ; but not to contribute to the commissioners' travelling expenses. *Rogers* v. *Aylmer*, 5 Ir. Eq. R. 516.

Where a commission to examine witnesses issues at the instance of one of the parties to the suit, the other not concurring in it, the party issuing it must pay all the expenses of the commissioner, even though the other party should cross-examine the witnesses of the person issuing the commission ; but if the opposite party examines under the commission on the direct, he must pay the commissioner for the examination and cross-examination of his own witnesses. *Lucan* (*Earl*) v. *O'Malley*, 2 Jo. & Lat. 681 ; 8 Ir. Eq. R. 712.

On demurrer allowed to bill for commission to examine de bene esse, the plaintiff having, on an ex parte application, obtained an order to examine witnesses, was ordered to pay to the defendants, besides the usual costs of the demurrer, the costs of the depositions, but not those taken on cross-examination. *Dew* v. *Clarke*, 1 Sim. & S. 115 ; 1 L. J. (O.S.) Ch. 37.

A party who sues out a commission at his own expense, must pay the costs of cross-examination of his witnesses by his opponent. *O'Hara* v. *O'Hara*, 1 Hog. 234.

Costs of discovery refused ; a commission having gone out, the defendant, taking the benefit of it, cannot have all the costs. *Noble* v. *Garland*, 19 Ves. 376 ; G. Coop. 222.

Plaintiff sued out a commission ; defendant's commissioners joined and signed plaintiff's interrogatories, and witnesses were examined on plaintiff's part, and defendant's commissioners signed the depositions, after which it was discovered that in the commission the title of the cause was mistaken. On a motion to suppress the depositions, Lord Chancellor ordered the commission to be amended, but plaintiff to pay the costs of the motion, and to be at the expense of sealing a new commission for the examination of defendant's witnesses, and the Master to settle a time and place for the execution of such commission. *Robert* v. *Millechamp*, Dick. 22.

Discretion of Master.]—It is a question for the discretion of the Master, in each particular case, whether the expenses of witnesses brought from abroad should be allowed on taxation : the 1 Will. 4, c. 22, for the examination of witnesses on interrogatories has made no alteration in this respect. *M'Alpine* v. *Powles*, 1 C. & M. 795 ; 3 Tyr. 871 ; 2 D. P. C. 299 : 2 L. J., Ex. 272.

The master having allowed a large sum for costs incurred in the execution of a commission for the examination of witnesses in India, without exercising any discretion as to the propriety of the particular charges, the court directed him to review his taxation. *Stewart* v. *Steele*, 4 C. B. 460.

Counsel on Execution of Commissions.] — Though the increased expenses occasioned by sending out counsel to act as commissioner in taking evidence abroad will not generally be allowed, yet it may be allowable under the circumstances of a particular case ; and if the master has used his discretion the court will not interfere unless it sees he is clearly wrong. *Yglesias* v. *Royal Exchange Assurance Corporation*, 39 L. J., C. P. 173 ; L. R. 5 C. P. 141 ; 22 L. T. 269 ; 18 W. R. 381.

But to entitle a successful party to the costs of counsel's attendance on a commission abroad, special circumstances must be shewn for such attendance. *Leecy* v. *S. E. Ry.*, 7 B. & S. 415 ; 14 L. T. 401 ; 14 W. R. 649.

Solicitor.] — Where a commission has been issued to examine witnesses abroad, the court will not interfere with the discretion of the master in granting or refusing the costs of an attorney to attend the commission. *Cornet* v. *Dempsey*, 1 D. (N.S.) 422 ; 6 Jur. 86. S. P., *Potter* v. *Rankin*, 38 L. J., C. P. 130 ; L. R. 4 C. P. 76 ; 19 L. T. 383.

Costs of solicitor attending execution of commission abroad, not allowed. *Hammond* v. *Wordsworth*, Dick. 381.

In Colony.]—The costs incurred in a colony, under a commission to examine witnesses, must be taxed in England upon the scale which would be allowed in the colony, and the Master, in case of difficulty, ought to refer to the colony for information, but not to send the bill of costs there for taxation. *Wentworth* v. *Lloyd*, 34 Beav. 455 ; 13 L. T. 226 ; 13 W. R. 486.

Examination to Credit.] — Commission to examine to credit should be executed before decree : costs given on this ground. *White* v. *Fussell*, 1 Ves. & B. 151.

Bill for Discovery and Commission.]—The bill praying discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission. *Anon.*, 8 Ves. 69.

On a bill for discovery and commission abroad and injunction, defendant was entitled to costs on the discovery and injunction as incidental thereto, but costs refused to either party as to commission. *London Assurance Co.* v. *Hankey*, 1 Anstr. 9.

Production of Deponent for Cross-examination.]—*See cases*, post, col. 1103.

VIII. PERPETUATION OF TESTIMONY.

(*See* Ord. XXXVII. rr. 35–38.)

1. General Principles.

Nature of Suit.]—Distinction between examination to perpetuate and de bene esse. In a suit for the former purpose, after the examination,

there is an end to the issue. *Morrison* v. *Arnold*, 19 Ves. 671.

Distinction between a bill to perpetuate testimony and a bill of discovery. The former is not a bill of discovery in the strict technical sense of the term. *Ellice* v. *Roupell*, 32 Beav. 299; 2 N. R. 3; 32 L. J., Ch. 563, 624; 9 Jur. (N.S.) 530; 8 L. T. 191; 11 W. R. 579. *And see* 32 Beav. 308.

A bill of discovery must be in aid of proceedings pending or about to be instituted, but the existence of such proceedings would be fatal to a bill to perpetuate testimony. *Ib.*

A bill to perpetuate testimony cannot, by amendment, be converted into a bill of discovery. *Ib.*

Where Substantive Action brought.]—The plaintiffs filed a bill to perpetuate testimony as to the validity of a deed, which question, they alleged, could not at present be tried. After the defendants had, by answer, admitted the plaintiffs' right to perpetuate the testimony, the plaintiffs filed another bill, raising the question of the validity of the same deed. A motion by the defendants to stay proceedings in the suit to perpetuate testimony, on the ground of the existence of the second suit, was refused with costs. *Ellice* v. *Roupell*, 32 Beav. 318.

Effect of 5 & 6 Vict. c. 69.]—It was not intended by the 5 & 6 Vict. c. 69, to give a party seeking to perpetuate testimony rights stronger than those which would belong to him in an actual and present litigation. *Campbell* v. *Dalhousie* (*Earl*), L. R. 1 H. L. (Sc.) 462; 22 L. T. 879.

And it is of course that, when parties are in immediate litigation, they cannot investigate the title-deeds of the opponent. *Ib.*

2. Action for, when Proper.

Plaintiff must establish Right at Law.]—A bill to examine witnesses in perpetuam rei memoriam is not proper, until the party has established his right at law. *Pawlet* v. *Ingres*, 1 Vern. 308.

A man cannot bring a bill to examine witnesses in perpetuam rei memoriam to establish his title, until he has made it good by a verdict at law, if he is under no impediment of trying his title at law. *Parry* v. *Rogers*, 1 Vern. 441.

Devisee shall not examine witnesses in perpetuam rei memoriam, to prove a will against a purchaser without notice, till the will has been established by a verdict at law. *Beckinall* v. *Arnold*, 1 Vern. 354.

Court will not give leave to plaintiff to examine witnesses to perpetuate testimony, though in case of a purchase of reversion, where there can be no trial at law during the estate for life. *Hitchcock* v. *Sedgwick*, 2 Vern. 159.

A man who is in possession of a fishery, may bring a bill to examine his witnesses in perpetuam rei memoriam, and establish his right, though he has not recovered an affirmance of it at law. Secus, if he is not in possession. *Dorset* v. *Girdler*, Pre. Ch. 531.

Unless Impossible.]—Bill will not lie to perpetuate testimony, &c., before trial, unless affidavit be made of the witnesses being infirm and unable to travel. *Philips* v. *Carew*, 1 P. W. 171.

Where lands are devised by will, and there is no opportunity to prove and establish it at law, a bill to perpetuate testimony thereto will lie. *Anon.*, Pr. Reg. 74.

Parties must have an Interest.]—A bill to perpetuate testimony cannot be filed but by a person who has some interest, present or future, and not by those who would be next of kin to a lunatic if he was to die immediately. *Smith* v. *Att.-Gen.*, Romilly's Notes of Cases, 54; 6 Ves. 256, 260.

To support a bill to perpetuate testimony, the plaintiff must have an interest; but the minuteness or remoteness of it is no objection. A mere contingency, however near and valuable (with the exception of the case of a wager), the expectation of issue in tail, heir-apparent, or next of kin of a lunatic, is not sufficient; therefore a demurrer to a bill by tenant in tail in remainder and his issue, to perpetuate testimony of the validity of his marriage, allowed. *Allan* v. *Allan*, 15 Ves. 130.

Bill to perpetuate testimony of legitimacy of plaintiff, entitled to remainder in tail, after estate for life. Demurrer by seventh and eighth in remainder, after plaintiffs, and other defendants, all infants, overruled; any interest, however slight, being sufficient. *Dursley* (*Lord*) v. *Berkeley*, 6 Ves. 251; 5 R. R. 285.

Next of kin of lunatic, however hopeless his condition, have no interest whatever in the property, and cannot, therefore, restrain bill to perpetuate testimony. So heir-apparent cannot have a writ de ventre inspic. in life of his ancestor; but they may contract upon their expectations, and may perpetuate testimony with reference to interest so created. *Id.* 260.

Bill to perpetuate will not lie where defendant might immediately bar that right. *Id.* 262.

In other Cases.]—Landlord may file a bill to perpetuate evidence of a demand, made under the Tenantry Act, on his tenant to renew. *Keating* v. *Sparrow*, 1 Ball & B. 372.

Bill lies to perpetuate the testimony of witnesses to prove a modus; but quære if it will lie to establish a modus. *Somerset* v. *Fotherby*, 1 Vern. 185.

Demurrer to bill to perpetuate the testimony of witnesses in aid of plaintiff's defence to an action, because the agreement relied on as a defence, and touching which the testimony of witnesses was sought to be perpetuated, was, as stated by the bill, corrupt and illegal, and because the subject-matter of the bill was altogether unfit to be the subject of discussion in a court of equity, allowed at the rolls; overruled on appeal. *Longfield* v. *Aubrey*, 2 Moll. 426.

When Refused.]—This court will not take the least step against a purchaser for valuable consideration without notice, not even to perpetuate testimony against him. *Jerrard* v. *Saunders*, 2 Ves. J. 458.

A bill will not lie to perpetuate the testimony of witnesses to a lunatic's will in his lifetime, made before his lunacy. *Sackvill* v. *Ayleworth*, 1 Vern. 105.

A tenant in tail out of possession, cannot bring bill to perpetuate testimony. *Brandlyn* v. *Ord*, 1 Atk. 571.

A bill to perpetuate testimony relating to a matter which is the subject of an existing suit

against the plaintiff is demurrable, although the plaintiff could not himself have made such matter the subject of present judicial investigation. *Spencer (Earl)* v. *Peck*, L. R. 3 Eq. 415; 15 W. R. 478.

Jurisdiction.]—Semble, this court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. *Morris* v. *Morris*, 2 Ph. 205; 16 L. J., Ch. 286; 11 Jur. 93.

Quære, whether equity has jurisdiction to entertain bill to perpetuate testimony to claims to a dignity. *Belfast (Earl)* v. *Chichester*, 2 Jac. & Walk. 439.

Issue in tail cannot file bill to perpetuate testimony, even in case of an entail that cannot be barred. *Ib.*

A dignity is entailed on A., who dies leaving issue two sons, B. and C. To bill filed in lifetime of B., by his eldest son, for perpetuating testimony of his father's marriage, demurrers by eldest son of C., who was dead, and attorney-general, were allowed. *Ib.*

Illegitimacy — How Action brought.] — A lunatic, having several children, obtained a divorce from his wife on the ground of her adultery. It was alleged that one of the children born before the divorce was illegitimate, and the committee presented a petition that proceedings might be taken to perpetuate the testimony of the illegitimacy:—Held, that the proper course was for the court to settle some of the lunatic's property on his children, and the legitimate children, having raised the question as to the right of the child, who it was alleged was illegitimate, to participate, could then bring an action to perpetuate the testimony. *Stoer, In re*, 9 P. D. 120; 51 L. T. 141; 32 W. R. 1005—C. A.

3. Taking Evidence.

Subpœna.]—Affidavit must be made of service on defendant of subpœna to examine witnesses in perpetuam rei memoriam before they can be so examined. *Hatcham* v. *Winchcombe*, Cary, 34. S. P., *Porter* v. *Baker*, *Id.*

By Commission.] — Commission to examine in perpetuam rei memoriam granted to examiner of court. *Barentine* v. *Harbert*, Cary, 43.

Commission to examine in perpetuam rei memoriam granted. *Hearing* v. *Fisher*, Cary, 110.

Commission to examine in perpetuam rei memoriam, on oath that witness is impotent and sick. *Bagshawe* v. ——, *Robins* v. *Foster*, Cary, 35.

Leave given to plaintiff, before answer, to sue a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. *Lancaster* v. *Lancaster*, 6 Sim. 439.

A commission to examine witnesses de bene esse, upon a bill to perpetuate testimony, though the defendant had not appeared, and was not in contempt. *Allen* v. *Annesley (Earl)*, 2 Jones, 260.

Examination de bene esse granted to plaintiffs in a bill to perpetuate testimony after subpœna served, but before appearance of infant defendants, in contempt by the messenger's return that they had absconded and were not to be found, on affidavit of the materiality of the evidence and danger of its loss, and undertaking to proceed with all due diligence to issue, and examination in chief to be proved before publication of the depositions de bene esse. *Frere* v. *Green*, 19 Ves. 319.

Witnesses being old and infirm, and resident out of the jurisdiction, the court, in a suit to perpetuate testimony, before appearance of some of the parties, made an order for their examination de bene esse. *Campbell* v. *Att.-Gen.*, 11 Jur. (N.S.) 922; 13 L. T. 356; 14 W. R. 45.

Amendment of Bill.] — Bill to perpetuate testimony of modus being amended, by adding essential party, after commission executed, but before publication, a new commission was granted. *Biddiford* v. *Partridge*, 3 Anstr. 646.

Order for.]—After a replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses. *Allen* v. *Hacket*, 11 Ir. Eq. R. 355.

Suppressal of Depositions.]—The depositions of a witness who was examined in perpetuam rei memoriam were suppressed on a petition after his death, and the examiner discharged and committed for foul practice and irregularity in the taking of them, the plaintiff being suffered by the examiner to instruct him, and the witness being corrupted; and as he had been examined on a trial to the same points, the plaintiff might give evidence of what he swore. *Hosier* v. *Hart*, Mos. 321.

Further Examination.] — In a suit to perpetuate testimony, motion for a further examination of witnesses as to the facts lately discovered, refused on the ground that a demurrer to a supplemental bill for the same purpose had been allowed. *Knight* v. *Knight*, 1 Jac. & Walk. 165.

Discovery.] — The only discovery which a plaintiff in a bill to perpetuate testimony can require from a defendant is a sufficient admission of his title to examine such witnesses as they may think fit, on the various matters and issues stated in the bill. *Ellice* v. *Roupell*, 32 Beav. 308.

An appellant, on a bill to perpetuate testimony, under 5 & 6 Vict. c. 63, obtained from the Court of Chancery a subpœna duces tecum, directed to the respondents. The appellant, being unable to enforce this writ against the respondents who were resident in Scotland, applied to the Court of Session, under 22 Vict. c. 20, to compel them to search for and exhibit the documents mentioned in the subpœna. The respondents stated as a reason for non-search and non-production of the documents, that they were locked up in the muniment room at a certain castle, and that though they were, as trustees of the late owner of the castle, in possession of the key of the muniment room, yet they could not search that room, because there was a dispute between them and the present owner of the castle as to the right of the possession of the documents:—Held, that the respondents could not be compelled to produce the documents. *Campbell* v. *Dalhousie (Earl)*, L. R. 1 H. L. (Sc.) 462; 22 L. T. 879.

It was not intended by 5 & 6 Vict. c. 69, to give to the person who wished to perpetuate testimony, as against the person with whom he

contemplated a future litigation, rights of any stronger character than those which would be possessed by him in a suit actually commenced; and it is of course that, when parties are in immediate litigation, they cannot investigate the title-deeds of the opponent. *Ib.*

4. PUBLICATION AND USER OF DEPOSITIONS.

In General.]—Semble, there has been no alteration in the rule, that, in suits to perpetuate testimony, the evidence given ought to be kept secret until the time for using it arrives. *Ellice* v. *Roupell*, 2 N. R. 3; 32 Beav. 299; 32 L. J., Ch. 563, 624; 9 Jur. (N.S.) 530; 8 L. T. 191; 11 W. R. 579.

On a bill for examining witnesses in perpetuam rei memoriam:—Held, that publication of the depositions should not be allowed unless in a strong case. *Harris* v. *Cotterell*, 3 Mer. 678.

Witness Dead.]—Witnesses examined in perpetuam rei memoriam, one dead other sick, moved to use testimony, and granted. *Senhawes* v. *Senhawes*, Cary, 88.

Publication of depositions of witnesses examined in perpetuam rei memoriam, cannot pass by a side bar rule; but there must be a special motion for the purpose. *Green* v. *Green*, 1 Hog, 312.

Depositions in in perpetuam rei memoriam not published in the life of the witness, except on incapacity to travel by sickness, &c.; such orders, except in the excepted cases, proceeding on affidavit of the death of the witness, some expressly declaring that the depositions of the other witnesses shall not be read. *Morrison* v. *Arnold*, 19 Ves. 670.

Publication of depositions of witness who is dead taken on bill to perpetuate may be moved for as of course. *Bourne* v. *Bligh*, 1 Price, 307; 16 R. R. 732.

Publication ordered of the depositions of a deceased witness, examined on the behalf of the defendant, under the plaintiff's commission, on a bill to perpetuate testimony. *Abergavenny* (*Earl*) v. *Powell*, 1 Mer. 434.

The court will not make an order for the publication of depositions taken in a suit to perpetuate testimony, whilst the witnesses are alive. *Barnsdale* v. *Lowe*, 2 Russ. & M. 142.

—— **Abroad.**] — Depositions of witnesses examined under a bill to perpetuate testimony, in aid of an ejectment, and who were resident abroad and refused to come to this country, ordered to be published. *Biddulph* v. *Camoys* (*Lord*), 19 Beav. 467.

—— **Infirm.**]—A similar application refused, as to a witness in England, who, on account of blindness and infirm state of health, was stated to be unable to leave home, and who had stated his age to be eighty-three. *Ib.*

A witness, examined under a bill to perpetuate testimony, was very old, and unable, through illness, to leave his home without danger; another was resident in Canada. Their depositions were ordered to be published and produced at the trial about to take place, and that either party might make such use of them "as by law they can." *S. C.*, 20 Beav. 402.

Order to read on the trial of an issue, the depositions of a living witness taken in a suit to perpetuate testimony, the witness being too infirm to attend at the trial. *Watkins* v. *Atchison*, 10 Hare (App.) 46.

The defendant having obtained an order for the payment of his costs by the plaintiffs, which order recited that the testimony of the witness had been taken, the depositions of the witness must be regarded as having been completely taken, and are not therefore to be excluded on the ground of the want of a sufficient cross-examination. *Ib.*

On the examination and cross-examination of an aged and infirm witness labouring under deafness, the questions were put, and answers received, through the medium of the daughter of the witness; and the examiner certified that the state of the witness did not permit the examination to be proceeded with without danger to her life, and that much of the cross-examination and all the re-examination had been pretermitted. The defendant afterwards obtained an order for his costs, which recited that the testimony of the witness had been taken:—Held, that the defendant having concurred in the mode of examination adopted, could not afterwards object to the use of the testimony by impeaching its fidelity on that ground. *Ib.*

In Subsequent Suit.] — Depositions in the custody of the court, which were taken in a former suit to perpetuate testimony, were ordered to be published, on the application of one of the parties to a subsequent suit, the other of whom was a stranger to the former suit, and the time for taking evidence in the second suit was extended in order to give both parties an opportunity of considering the information so obtained; the court being of opinion that though the depositions might not themselves be evidence, they might be the means of supplying valuable information to both parties. *Vane* v. *Vane*, 45 L. J., Ch. 589; 24 W. R. 565—C. A. Varying 34 L. T. 477.

For Use in Foreign Court.]—It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony, that the proceedings for which they are required are in the court of a foreign country, or that other depositions taken in a similar suit in that country have already been published. *Morris* v. *Morris*, 2 Ph. 205; 16 L. J., Ch. 286; 11 Jur. 93.

Taken de bene esse.]—In a suit to perpetuate the testimony of witnesses, liberty was given to the plaintiffs, under the 13 Geo. 2, c. 9, to pass publication of depositions of witnesses examined de bene esse in the cause. *Scanlan* v. *M'Coy*, Fl. & K. 366.

To Show Title.]—Court will not order copies of depositions taken to perpetuate testimony of witnesses to be delivered out for the purpose of perfecting title to an estate, even where witnesses are dead. *Teale* v. *Teale*, 1 Sim. & S. 385.

Time.]— Commission having been issued, &c., to examine witnesses in perpetuam rei memoriam a year past, publication ordered. *Gravenor* v. *Brearton*, Cary, 33.

5. Pleading.

Bill.]—Bill to perpetuate cannot pray other relief. *Anon.*, 2 Vent. 366.

In a bill to perpetuate testimony of a right of common and way, the plaintiffs claimed in right of their estates, or otherwise; this is too loose; a demurrer therefore allowed. *Cressett* v. *Mytton*, 3 Bro. C. C. 481. *And see* 1 Ves. J. 449.

Demurrer to bill to perpetuate, and that plaintiff could try eo instanti, allowed. *North* v. *Gray*, Dick. 14.

Demurrer will lie to bill to perpetuate, if it does not state that no action can be immediately brought. *Angell* v. *Angell*, 1 Sim. & S. 83; 1 L. J. (O.S.) Ch. 6; 24 R. R. 149.

Bill to perpetuate testimony merely, ought not to be brought to a hearing; but if it prays relief, the defendant may set it down for dismissal. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

Upon a bill to perpetuate the testimony of witnesses touching a right to a way, the plaintiff must set out the way exactly in his bill per et trans, as he ought to do in a declaration at law. But such a bill ought not to be brought for such trivial things as right of common, or for ways or watercourses, or at least not till after a recovery at law. *Gell* v. *Hayward*, 1 Vern. 312.

Answer.]—To a bill to perpetuate the testimony of witnesses with respect to the execution and attestation of a will of 1845, whereby a will of 1838, under which the defendant claimed, was stated to be revoked; the defendant pleaded that the plaintiff put the defendant by force out of a part of the lands, and that the remainder was in the occupation of tenants under leases or from year to year, who had not acknowledged the plaintiff's title or paid him rent due, and that the plaintiff would, by action at law against the tenants, forthwith try the title:—Held, on the authority of *Dew* v. *Clarke* (1 Sim. & S. 108), that the plea was good. *Lindesay* v. *Lindesay*, 12 Ir. Eq. R. 508.

The plaintiffs filed a bill to perpetuate testimony. The defendants put in a full answer, and replication having been filed, witnesses were examined. The plaintiffs afterwards amended their bill, and filed fresh interrogatories. The defendants pleaded to the amended bill that the plaintiffs, since filing the original bill, had instituted another suit, in which they made the several matters raised in issue by the amended bill the subject of judicial investigation:—Held, that the plea was bad; that although it might have been good if filed to the original bill, yet that the defendants, having answered the original bill, could not plead to the amended bill. The plea was ordered to stand for an answer, with liberty to the defendants to except. *Ellice* v. *Roupell* 32 Beav. 299; 2 N. R. 3; 32 L. J., Ch. 563, 624; 9 Jur. (N.S.) 530; 8 L. T. 191; 11 W. R. 579.

The plaintiffs having excepted:—Held, that although a bill to perpetuate is, to a certain extent, a bill of discovery, yet it is so only to the extent of enabling the plaintiffs to obtain the relief asked by the bill, viz., the examination of witnesses as to the issues raised by the bill; and that the answer already put in being sufficient for that purpose, the plaintiffs could not require a further answer. *Ib.*

A bill to perpetuate testimony alleged that the plaintiff was in possession of lands, and if any proceedings were taken by the defendant to recover the land, the plaintiffs would be able by the testimony of creditable witnesses to prove their title, and disprove that of the defendant. The defendant put in a voluntary answer, whereby he deposed that it was not true that the plaintiff was in possession, but, on the contrary, that he (the defendant) was in possession. The plaintiff replied. Thereupon the defendant did not plead, but moved to dismiss the plaintiff's bill, on the ground that a plaintiff out of possession could not bring the bill without alleging that he could not immediately bring an ejectment:—Motion ordered to stand over, with liberty to either party to examine such witnesses as he might be advised to prove that he was in possession. *Brigstocke* v. *Roch*, 7 Jur. (N.S.) 63; 3 L. T. 401.

Delivery of Defence, Default in.]—In an action to perpetuate testimony, the time for delivery of defence having expired, and the defendant not having applied for an extension of time, the plaintiff obtained, on motion, an order that the action might proceed, notwithstanding the defendant's default, and that he might be at liberty to examine the witnesses (one of whom was of advanced age and in failing health) as if the pleadings were closed. *Bute* (*Marquis*) v. *James*, 55 L. J., Ch. 658; 33 Ch. D. 157; 55 L. T. 133; 34 W. R. 754.

6. Dismissal of Action for Want of Prosecution.

Application and Order.]—A motion to dismiss a bill to perpetuate testimony for want of prosecution is irregular. The proper application is that the plaintiff may proceed within a given time, or may pay the defendant his cost. *Wright* v. *Tatham*, 2 Sim. 459. And see *Barham* v. *Longman*, *id.* n.

A bill to perpetuate testimony is not dismissed for want of prosecution, but the plaintiff is ordered to proceed forthwith, and complete his examination, or pay the defendant his costs. *Skrine* v. *Powell*, 10 L. J., Ch. 18.

A bill for a commission to examine witnesses abroad in aid of an action at law cannot be dismissed under the 93rd General Order. *Parr* v. *Howlin*, Sau. & Sc. 124.

An order for a commission to examine witnesses should specify the time within which it is to be executed, but where no time has been specified, the proper application is that the plaintiff should proceed within a given time, or pay the defendant his costs, or semble, that the defendant might apply to discharge the order for a commission, on the ground of unreasonable delay in proceeding upon it. *Ib.*

Time for.]—Bill to perpetuate testimony may be dismissed for want of prosecution any time before replication and examination. If cause is set down to be heard, the bill will be dismissed with costs, so as not to prejudice the perpetuating the testimony. *Anon.*, Ambl. 237; 2 Ves. 497.

The court will not, even before replication, dismiss a bill to perpetuate testimony for want of prosecution, but will order the plaintiff to reply, and examine his witnesses, and procure the examination to be completed by a certain time, and in default thereof to pay to the defendant his costs of the suit. *Beavan* v. *Carpenter*, 11 Sim. 22.

7. Costs.

When Defendant entitled to.]—Bill to perpetuate by devisee and no relief prayed, defendant has costs, if he do not examine witnesses. *Blinkehorne* v. *Feast*, Dick. 153.

On a bill brought to prove a will per testes, and to perpetuate the testimony of witnesses, the defendant has no other remedy to have his costs than by moving for them. —— v. *Andrews*, Barnard. 333.

And though the defendant has cross-examined the plaintiff's witnesses, yet if he has examined no witnesses of his own, he shall be allowed his costs. *Ib.*

And the circumstance that the defendant has brought a cross bill makes no difference as to his right to costs in the original cause upon the return of the commission. *Ib.*

Where a devisee brings a bill merely in perpetuam rei memoriam and the heir-at-law only cross-examines the witnesses produced to confirm the will, he is entitled to his costs; but if he examines witnesses to encounter the will, he shall not have his costs. *Berney* v. *Eyre*, 3 Atk. 387.

Plaintiff having examined his witnesses under a bill to perpetuate, defendant moved for his costs. Order to shew cause granted. *Bower* v. *Thomson*, 1 Fowl. 50.

On a bill to perpetuate testimony, defendant entitled to costs of answering, there being no examination of witnesses. *Lecky* v. *Murray*, 1 Ball & B. 391.

Defendant to a bill to perpetuate testimony, entitled to his costs immediately after the commission executed, upon the allegation that he did not examine any witnesses. *Foulds* v. *Midgley*, 1 Ves. & B. 138.

Where a plaintiff in a bill to perpetuate the testimony of witnesses has examined, and thereby had the fruit of her bill, neither herself nor defendant is entitled to costs. *Coddrington* v. *England*, 2 Atk. 167.

When a multiplicity of actions has been brought where the custom might have been tried in one, it is such a vexation that the plaintiff in equity shall have the costs both in law and equity. *Ib.*

Where it appears reasonable, though not absolutely necessary, to perpetuate the testimony of witnesses to a will, the court will, in the case of a purchaser, allow him his costs. *Mackrell* v. *Hunt*, 2 Madd. 37, n.

Bill for Discovery and to Perpetuate.]—A defendant to a bill of discovery, and to perpetuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief. *Skrine* v. *Powell*, 15 Sim. 81; 9 Jur. 1054.

Where Bill brought to Hearing.]—A bill for perpetuating testimony only ought not to be brought to a hearing; if it be, it will be dismissed with costs; but plaintiff has the benefit of the depositions at law, notwithstanding such dismissal. *Hall* v. *Hoddesdon*, 2 P. W. 162. *Anon.*, 2 Ves. 497; Ambl. 237.

Bill to perpetuate testimony merely ought not to be brought to a hearing; but if it prays relief, the defendant may set it down for dismissal. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

A bill for perpetuating testimony, if brought to a hearing, will be dismissed with costs. *Ellice* v. *Roupell*, 32 Beav. 308.

Order as to.]—A wealthy lunatic had made two wills before he was found lunatic. The court, without giving any opinion whether a bill to perpetuate testimony as to their validity would lie, ordered that such costs as the master should think proper of a bill to be filed with his approbation for that purpose should be paid out of the lunatic's estate. *Tayleur, In re*, L. R. 6 Ch. 416.

IX. Evidence on Affidavit.

1. Before whom Taken.

a. In England.

Statute.]—See 53 Vict. c. 7.

Commissioners—Duty of.]—Observations as to the duty of commissioners to administer oaths where a witness is swearing to the contents of an affidavit. *Bourke* v. *Davis*, 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.

—— **Authority Apparent.**]—The court will not receive an affidavit unless it distinctly appears to have been sworn before a party competent to take it. *Reg.* v. *Bloxham*, 6 Q. B. 528; 14 L. J., Q. B. 13.

The taking of an affidavit is a ministerial not a judicial act. *Kerr* v. *Ailsa (Marquis)*, 1 Macq. H. L. 736.

No affidavit can be used on an application for a new trial, unless sworn before a commissioner of the court in which it is to be used. *Blakeley* v. *Abeles*, 11 Jur. (N.S.) 325; 11 L. T. 716.

On the trial of an indictment for perjury, assigned on an affidavit sworn in the Queen's Bench, proof of the defendant's signature to the affidavit, and proof that under a jurat "sworn in open court at Westminster Hall, on the 10th day of June, 1846," the words "by the court," are in the handwriting of one of the masters of the court, is sufficient evidence of the swearing of the affidavit in the Queen's Bench, without any further proof that the master was in court when the affidavit was sworn. *Reg.* v. *Turner*, 2 Car. & K. 732.

An affidavit of the acknowledgment of bail is properly sworn before a commissioner, for the purpose of taking bail. *Anon.*, 2 Y. & J. 101.

An affidavit sworn before a commissioner acting as such, is admissible without proof of the commission. *Rex* v. *Howard*, 1 M. & Rob. 187.

—— **Jurisdiction.**]—Oaths may be taken by the commissioners appointed to administers oaths in chancery under the act 16 & 17 Vict. c. 78, not only at their respective places of business, but anywhere within the limits of their jurisdiction. *Record and Writ Clerk, In re*, 3 De G. M. & G. 723; 23 L. J., Ch. 1002; 18 Jur. 499.

A commissioner may administer an oath at any place within ten miles of his residence. *Oaths in Chancery Act, In re*, 2 Eq. R. 175; 2 W. R. 140.

A commissioner may administer an oath at any place within ten miles of Lincoln's Inn Hall, notwithstanding such place may be a public office. *Oaths in Chancery Act, In re, Hill* v. *Tollit*, 18 Jur. 499; 2 W. R. 504.

In a pressing case an affidavit which was wanted for the purpose of a motion was allowed to be sworn in open court. *Mercers' Co.* v. *Witham Navigation Co.*, 14 Beav. 20; 20 L. J., Ch. 557.

—— **Title.**]—It is no objection to an affidavit that it is not intitled "in the King's Bench," or that it appears to have been taken before "A. B., a commissioner, &c.," without adding "of the court of K. B.," if in fact he was a commissioner of that court. *Kennet and Avon Canal Co.* v. *Jones*, 7 Term Rep. 451.

The commissioner before whom the answer was sworn described himself as "a commissioner to administer oaths in the High Court of Justice":—Held, that the answer must be filed notwithstanding the inaccuracy of the description. *Barwick* v. *Yeadon Local Board*, 33 L. T. 322; 24 W. R. 23.

—— **Under 11 Geo. 4 and 1 Will. 4, c. 70, s. 4.**]—The swearing of an affidavit of debt is "a business depending in court," within this section, over which the judges of all the courts have a jurisdiction in common. *Griffin* v. *Taylor*, 6 D. P. C. 620; 4 Bing. (N.C.) 369; 6 Scott, 141; 2 Jur. 305.

—— **Judicial Notice of.**]—The court will not take judicial notice of who are its commissioners, or inspect the list to see if A. B. is one. *Frost* v. *Hayward*, 10 M. & W. 673; 2 D. (N.S.) 566; 12 L. J., Ex. 84; 6 Jur. 1045.

Under Bills of Sale Acts.]—*See* BILLS OF SALE.

Solicitors' Clerks.]—It is no objection to the admissibility of an affidavit of a party to a cause who is a solicitor, that it is sworn before a clerk in the employ of the firm of which such party is a member, such clerk being duly qualified to administer oaths in chancery, the firm not being—but the town agents of the firm, as independent solicitors, being—the solicitors on the record for the deposing party. *Foster* v. *Harvey*, 4 De G. J. & S. 59; 2 N. R. 443; 9 L. T. 404; 11 W. R. 899.

The rule which forbids the admission of affidavits sworn before the solicitors in the cause or any of their clerks should not be extended. *Ib.*

The rule against swearing an affidavit before the solicitor conducting proceedings or his clerk, does not necessarily extend to his agent to get the affidavit sworn. *Gregg, In re*, and *Prance, In re*, 39 L. J., Ch. 107; L. R. 9 Eq. 137; 23 L. T. 234; 18 W. R. 589.

An affidavit sworn before a commissioner employed as clerk to the attorney in a cause, in his character of clerk to the commissioners for the sale of the land-tax, is good. *Goodtitle* d. *Pye* v. *Badtitle*, 8 Term Rep. 638.

An affidavit sworn before the clerk to an attorney, who makes an application that his client may be admitted as a party to a cause, is not within the prohibition of the above rule. *Doe* d. *Grant* v. *Roe*, 5 D. P. C. 409; W. W. & D. 68.

Affidavits sworn before a master extraordinary, who was the clerk of plaintiff's attorney, rejected. *Wood* v. *Harpur*, 3 Beav. 290.

—— **Partners.**]—In an action in the Chancery Division, the plaintiff's London solicitors, who were his only solicitors on the record, employed a firm who were his country solicitors in getting up evidence. This business was done entirely by one of the partners in the country firm, but some of the affidavits filed on behalf of the plaintiff were sworn before the other partner:—Held, that such affidavits were inadmissible. *Northumberland (Duke)* v. *Todd*, 47 L. J., Ch. 343; 7 Ch. D. 777; 38 L. T. 746; 26 W. R. 350.

The university of Cambridge employed, in making a claim of conusance, T., an attorney, who had been appointed attorney to the university. M., an attorney, was in partnership with T., but was not attorney to the university, and had taken no part in making the claim of conusance; it did not appear whether or not he had any share in the profits of the proceeding. M. and T. had not jointly or severally been concerned in the cause of which conusance was claimed:—Held, no objection to affidavits in support of the claim that they were sworn before M., who was a commissioner. *Turner* v. *Bates*, 10 Q. B. 292.

Solicitor struck off Roll.]—A solicitor was in 1875 appointed by the Court of Exchequer a commissioner to administer oaths; he was struck off the rolls in 1883, but his commission had never been superseded:—Held, that as the duration of the commission was the pleasure of the Court of Exchequer, there was no power to take off the file an affidavit sworn before him. The commission could only be put an end to at the present time by the Lord Chancellor under the Commissioners for Oaths Act, 1889. *Ward* v. *Gamgee*, 65 L. T. 610; 40 W. R. 39.

Whether engaged in Cause.]—Affidavits taken before a person who was a solicitor in the cause, cannot be read. *Hogan, In re*, 3 Atk. 813.

Where affidavits in support of a petition were sworn before the solicitors in the cause, he was ordered to pay the costs. *Ib.*

Affidavits in future were directed not to be sworn before the attorneys in the cause. *Smith* v. *Woodroffe*, 6 Price, 230.

The affidavit verifying a petition, under the 1 & 2 Vict. c. 109, s. 30 (Tithe Rent-charge Act), may be in a proper case made by the agent of the petitioner; as where the agent has peculiar knowledge of the facts. *Kellett* v. *Sturgeon*, 5 Ir. Eq. R. 159.

A plaintiff cannot sign judgment after a plea in abatement, because the affidavit was sworn before the defendant's attorney. *Horsfall* v. *Matthewman*, 3 M. & S. 154.

A plea in abatement set aside for irregularity, on the objection that the affidavit had been sworn before the plaintiff's attorney as commissioner for taking affidavits in the Court of Exchequer in the country. *Cooper* v. *Archer*, 12 Price, 149.

An affidavit made before a commissioner or an attorney who acts as the attorney of the defendant, before an appearance is entered, cannot be used, but it must be clearly shewn that he acted as such attorney at the time of taking the affidavit: it is not sufficient to shew that he is so at the time of making the objection. *Kidde* v. *Davis*, 5 D. P. C. 568. S. P., *Beaumont* v. *Dean*, 4 D. P. C. 354.

Such an objection is made sufficiently to appear by the general declarations of the party himself, though it is not positively stated he was the attorney at the time the affidavit was sworn. *Haddock* v. *Williams*, 1 W. W. & H. 415; 7 D. P. C. 327.

The description of a particular attorney, as the attorney to the plaintiff, in a declaration, sufficiently shews him to be such attorney, in order to support an objection that the affidavit has been sworn before him. *Doe* d. *Pryme* v. *Roe*, 8 D. P. C. 340.

If a rule is obtained on affidavits of a party, sworn before his own attorney in the cause, the court will discharge it with costs. *Hopkinson* v. *Buckley*, 8 Taunt. 74.

An affidavit cannot be used in court if sworn before a commissioner who is acting in the matter as attorney for the applicant, though there is no action pending, and no attorney on the record. *Gray, In re*, 1 B. C. C. 93; 21 L. J., Q. B. 380.

Attachments.]—The court will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agents of the prosecutor. *Rex* v. *Wallace*, 3 Term Rep. 403.

The rule does not apply to proceedings on the Crown side of the court. *Reg.* v. *Mizen*, 1 D. (N.S.) 865.

b. In Scotland.

An affidavit made by a defendant in a suit in the exchequer, and sworn before a magistrate in Scotland, was permitted to be read. *Ellis* v. *Sinclair*, 3 Y. & J. 273.

Affidavit, sworn before a baron of the exchequer in Scotland, admitted to be read. *Braham* v. *Bowes*, 1 Jac. & Walk. 296.

Affidavits sworn before a justice of the peace in Scotland are admissible, if his handwriting is authenticated. *Turnbull* v. *Moreton*, 1 Chit. 463, 721.

It is no objection to an affidavit sworn in Scotland, that it is taken before a justice of the peace, and not before a lord of session. *Watson* v. *Williamson*, 1 D. P. C. 607.

No instance of this court taking notice of an affidavit before a justice of peace in Scotland, though the courts of late have acted upon affidavits before judges of the superior courts there. *Hyde* v. *Whitfield*, 19 Ves. 345; 13 R. R. 215.

c. In Ireland.

Evidence of Authority.]—The chief justice's clerk's list of commissioners is conclusive evidence as to whether a particular person is a commissioner of the English Court of Common Pleas, pursuant to 3 & 4 Will. 4, c. 42. *Sharp* v. *Johnson*, 2 Bing. (N.C.) 246; 2 Scott, 407; 4 D. P. C. 324; 1 Hodges, 298; 5 L. J., C. P. 11.

If an affidavit in a cause in an English court is sworn in Ireland before one who is not a commissioner of the English courts, the signature of such person must be verified. *Ib.*

Where it appears from the jurat of an affidavit that it was sworn before a commissioner of the Court of Queen's Bench in Ireland, such affidavit cannot be received in the Queen's Bench in England. *Griffin* v. *Smith*, 8 D. P. C. 490; 4 Jur. 413.

The courts, by the courtesy which subsists between the two countries, take judicial notice that so great an officer as the chief justice of a superior court in Ireland is competent to administer an oath, and therefore will be satisfied with a mere verification of his handwriting. *French* v. *Bellew*, 1 M. & S. 302.

Affidavit before master extraordinary in Ireland, read in court, but not affidavit from plantations, unless under seal of Ireland. *Annesley* v. *Anglesey (Earl)*, Dick. 90. *Johnson* v. *Smith*, Dick. 592.

The court allowed an affidavit, sworn before a commissioner of the Court of Exchequer in Ireland, to be read. *Kilby* v. *Stanton*, 2 Y. & J. 75.

An affidavit purporting to be sworn before a master extraordinary of the Court of Chancery in Ireland is, under the statute 14 & 15 Vict. c. 99, s. 10, admissible in evidence in a matter before this court without proof of the signature or official character of the person before whom it is stated to have been sworn. *Mahon's Trust, In re*, 9 Hare, 459; 22 L. J., Ch. 75.

d. Abroad.

British Consul.]—The 6 Geo. 4, c. 87, s. 20, only empowered a British consul abroad to administer such oaths and take such affidavits as might be administered or taken before a justice of the peace in this country; and an affidavit of service of a rule to shew cause, sworn before a British consul in Paris, was insufficient, although it was suggested that a magistrate in France had no power to administer an oath. *Williams* v. *Welch*, 3 D. & L. 357; 1 B. C. Rep. 71, n.; 15 L. J., Q. B. 7; 9 Jur. 1078.

Where, by foreign law, a British consul is not allowed to administer an oath, the affidavit may be sworn before a foreign judge. *Fauveus, In goods of*, 54 L. J., P. 47; 9 P. D. 241; 33 W. R. 323; 48 J. P. 743.

British Vice-Consul.] — An affidavit sworn before a British vice-consul, will be admitted as cause against a conditional order for a receiver. *Walsh* v. *Prendergast*, Hayes, 334.

Secretary of British Legation.]—The affidavit verifying the execution of a power of attorney executed at Brussels, was sworn by one of the witnesses to the execution of the power, before the secretary of the British legation at Brussels, and when produced, appeared to be under the seal of the legation. There was no affidavit verifying the signature of the secretary of legation to the affidavit taken by him, but an attorney of the court stated in open court, that he knew the signature to be that of the secretary: —Held, that the affidavit should be acted upon as being properly taken. *O'Connor* v. *Bernard*, 4 Ir. Eq. R. 689.

Colonial Commissioner.]—An affidavit sworn in a colony before an officer describing himself as "a commissioner for taking affidavits," receivable, whether sworn antecedently to the act or not, on the ground that the court is to take judicial notice of the signature of any person lawfully authorised to administer oaths. *Anon.*, 1 W. R. 187.

Affidavits taken in the colonies previously to the passing of the act 15 & 16 Vict. c. 86, in the presence of a person lawfully authorised to administer oaths, are receivable in this country under the 22nd section of that act, without verification of the signature of the person before whom they have been taken. *Bateman* v. *Cooke*, 3 De G. M. & G. 39; 22 L. J., Ch. 744; 17 Jur. 170; 1 W. R. 242.

Foreign Consul.]—Affidavits having been sworn before the United States consul at Vera

Cruz, as there was no English consul or diplomatic agent there :—Held, that the court had no power to receive them. *De Salazar, In goods of*, 21 W. R. 776.

Foreign Magistrates.]—The courts will take cognisance of affidavits sworn before foreign magistrates, if properly authenticated to them. *Dalmer* v. *Barnard*, 7 Term Rep. 251.

An affidavit not signed by the deponent, but having been sworn before a justice of the peace in America, whose signature was duly certified by the governor of that state, was refused to be filed by the clerk in the affidavit office. On motion, the court refused to order the clerk to file the affidavit. *Anderson* v. *Stather*, 9 Jur. 1085.

Quære, whether the defect could be supplied by the production of another affidavit verifying the former as an exhibit. *Ib.*

Where an affidavit in a proceeding in a court here is made in a foreign country, it must distinctly appear that the functionary before whom it is sworn abroad is authorised by the laws of his own country to administer an oath. *Warren* v. *Swinburne*, 9 Jur. 510.

Affidavits in an English suit are properly sworn before a juge de paix and certain other officials in Belgium having limited jurisdiction within the district where such affidavits were sworn, and with power to administer oaths there only for certain purposes. *Kevan* v. *Crawford*, 45 L. J., Ch. 658—C. A.

In a suit in which infants jointly with their mother were plaintiffs, an affidavit, sworn abroad, by the defendants, not before a British consul or vice-consul, as required by 15 & 16 Vict. c. 86, s. 22, but before the burgermeister of the town at which the defendants resided, was allowed, with the consent of the mother, to be filed. *Bell* v. *Turner*, L. R. 17 Eq. 439 ; 22 W. R. 391.

Foreign Governor.]—Affidavits made by parties in the United States of America, and attested by the governor as being sealed with the great seal of the state, will be received and ordered to be filed in this country. *Scriven, In re*, 17 L. T. 641.

Clerk of Foreign Court.]—An affidavit was sworn before the clerk of the circuit court of Monroe county, in the state of Wisconsin, U.S., Chicago, distant about 250 miles from Monroe county, being the nearest place where a British consul or vice-consul was resident. The British vice-consul at Chicago certified that the clerk of the circuit court had authority to administer oaths. The court, on motion ex parte for leave to file the affidavit, made the order. *Brittlebank* v. *Smith*, 50 L. T. 491.

Evidence of Authority.]—Where an affidavit had been sworn in Wisconsin, in the United States of America, a certificate of the clerk of the circuit court of Walworth county, state of Wisconsin, was held sufficient evidence that the official before whom the affidavit was sworn had power to administer an oath. *O'Neill* v. *Doran*, Ir. R. 10 Eq. 187.

The court will judicially notice the seal on a notarial certificate verifying an affidavit sworn before a magistrate abroad. *Cole* v. *Sherard*, 11 Ex. 482.

Affidavit to prove a foreign debt must be attested by a notary. *Moens, Ex parte, Maiden, In re*, Mont. 15.

Notary.]—All parties to account, &c. ; plaintiff residing at Amsterdam, allowed to swear affidavit before notary public there, according to law of Holland. *Chicot* v. *Lequesne*, Dick. 150.

Where a fund only amounted to 35*l.* the court dispensed with the verification of the signature to an affidavit abroad of a notary public, on the personal undertaking of the solicitor. *Mayne* v. *Butler*, 11 L. T. 410 ; 13 W. R. 128.

An affidavit sworn at a place out of the jurisdiction, before a notary public having authority there to administer oaths, and verified in the manner usual before the statute 15 & 16 Vict. c. 86, s. 22, is still receivable as evidence in a suit. *Haggett* v. *Ineff*, 5 De G. M. & G. 910 ; 3 Eq. R. 144 ; 24 L. J., Ch. 120 ; 1 Jur. (N.S.) 49 ; 3 W. R. 141.

Where an affidavit is sworn before a notary public of a foreign country not under the dominion of the Queen, the signature of the notary must be verified before the affidavit can be filed, unless by consent, and the court cannot take judicial cognisance of the notarial seal alone as a sufficient verification. *Earle's Trusts, In re*, 4 K. & J. 300.

Affidavits sworn before a notary public in America ordered to be filed without proof of the notary filling that character. *Smith* v. *Davies*, 19 L. T. 376 ; 17 W. R. 69.

When an affidavit is sworn before a notary abroad, the signature must be verified by affidavit before it can be received here, though the rule has been relaxed where the fund was very small. *Davis, In re*, L. R. 8 Eq. 98.

The court, on a petition under the Trustee Relief Acts, allowed an affidavit, sworn in the United States of America before a notary public instead of before a consul, to be filed, on the solicitor who acted for all parties giving a written consent. *Lane's Trusts, In re*, 22 W. R. 39.

Affidavits made on behalf of a plaintiff, sworn abroad before a notary at a place a considerable distance from the residence of any of her Majesty's consuls, were, on the written consent of the solicitor for the defendant, allowed to be filed. *Lyle* v. *Ellwood*, 42 L. J., Ch. 80 ; L. R. 15 Eq. 67 ; 27 L. T. 671 ; 21 W. R. 69.

Where an affidavit sworn before a notary in foreign parts is tendered, it must appear that none of the British authorities authorised by 18 & 19 Vict. c. 42, s. 2, were resident in such place. *Bernard, In goods of*, 2 Sw. & Tr. 489 ; 6 L. T. 726.

Before and after the act 15 & 16 Vict. c. 86, affidavits sworn in foreign parts out of her Majesty's dominions before a notary public might be filed, and that practice continued in force down to the time when the Rules of the Supreme Court, 1883, came into operation :—Held, that this practice is not abrogated by Ord. XXXVIII. r. 6, and Ord. LXXII. r. 2, of the Rules of 1883 ; and may be followed at any rate in cases where the practice under the Rules of 1883 would be very inconsistent. *Cooke* v. *Wilby*, 53 L. J., Ch. 592 ; 25 Ch. D. 769 ; 50 L. T. 152 ; 32 W. R. 379.

Translation.]—It is no objection to an affidavit sworn before a native court, that it is originally in a foreign language, if it is translated, and the translation verified ; and the oath may be administered in the foreign language if it is translated by an interpreter to the deponent. *Eady, In re*, 6 D. P. C. 615.

Affidavits sworn in a foreign language, with an

English translation attached (such translation not being verified by an interpreter) allowed by consent to be filed, and office copies of the English parts only authorised to be issued. *Reimers* v. *Druce*, 4 W. R. 665.

2. By Whom Made.

By Marksmen.]—When affidavits made by marksmen had been properly read over to them before they made their mark, but the jurat, stating that they had been so read, had been omitted, and the commissioner after the deponent had made his mark refused to supply the omission, the court, on the refusal of the clerk of records and writs to file the affidavits without the jurat, ordered the affidavits to be filed as they stood. *Fernyhough* v. *Naylor*, 23 W. R. 228.

If the jurat of an affidavit made by a marksman omits to state that he made his mark, it is bad; but it may be amended without re-swearing. *Wilson* v. *Blakey*, 9 D. P. C. 352; 5 Jur. 367.

A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. It was ordered to be taken off the file. —— v. *Christopher*, 11 Sim. 409; 10 L. J., Ch. 145.

The practice of verifying the mark of a marksman in an affidavit sworn in America before a notary public, not requiring, as in this country, the notary to insert in the jurat that "the witness saw the deponent make his mark": —Held, that the omission of these words was immaterial. *Savage* v. *Hutchinson*, 3 Eq. R. 368; 24 L. J., Ch. 232.

Where an affidavit is made by a marksman, the jurat should state that it was read and explained by the commissioner to the party before it was sworn by him; and a statement in the margin that the affidavit was read and explained to the party by a third person, is insufficient. *Bredin* v. *Bredin*, 7 Ir. Eq. R. 501.

An affidavit that P. was a marksman, and that a certain mark was his mark:—Held, sufficient proof of his signature. *Pearcy* v. *Dicker*, 13 Jur. 997.

Illiterate Person.]—Observations on the value of testimony given by affidavit, when the witness is illiterate and ignorant, the language is not his own, but that of the person preparing the affidavit; being taken ex parte it is almost always incomplete, and often inaccurate. *Johnston* v. *Todd*, 5 Beav. 597.

By Insane Persons.]—Before an affidavit of a person suffering from mental delusions, and in confinement in a lunatic asylum, can be received, his mental condition must first be ascertained by preliminary inquiry before the court or some person specially delegated for that purpose; and therefore an affidavit by a person in a lunatic asylum, without any notice in the jurat of the circumstances under which or the place where it was sworn, was ordered to be taken off the file. *Spittle* v. *Walton*, 40 L. J., Ch. 368; L. R. 11 Eq. 420; 24 L. T. 18; 19 W. R. 405.

By Foreigners.]—The court will give credit to its own officers, that they have observed all proper forms in taking affidavits. Therefore, where a jurat to an affidavit made by a foreigner, certified "that the affidavit was interpreted by F. C., professor of languages (he having first sworn that he understood the French and English languages), to the deponent, who was afterwards sworn to the truth thereof":—Held, that the jurat was sufficient, though it did not appear thereby that the deponent understood the language in which the affidavit was interpreted, or that the interpreter was sworn truly to interpret. *Rose* v. *Solliers*, 6 D. & R. 514; 4 B. & C. 358. S. P., *Marzetti* v. *Du Jouffroy* (*Comte*), 1 D. P. C. 41.

Evidence of Counsel.]—The practice is not to allow an affidavit by counsel as to matters that occurred within his knowledge as counsel at a trial to be read, but to request such counsel to attend, and to state to the court what occurred. *Kempshall* v. *Holland*, 14 R. 336—C. A. S. P., *Hickman* v. *Berens*, 64 L. J., Ch. 785; [1895] 2 Ch. 638; 12 R. 602; 73 L. T. 323—C. A.

3. Title.

Causes.]—A motion on behalf of the same plaintiff in two different actions, upon the same ground of application, may be made upon one affidavit, intitled in both actions. *Pitt* v. *Evans*, 2 D. P. C. 226.

An affidavit cannot be intitled in two causes. *Harper* v. *Mount*, 2 Jur. 990.

Where a rule is obtained in two causes, the affidavits must be intitled in both of them, though the plaintiff and defendant are the same in both. *Corry* v. *Wharton*, 2 Scott, 436.

The title of affidavits in a cause should pursue the writ of summons. *Marshall* v. *Adams*, 2 Jur. 944; 1 W. W. & H. 296.

An affidavit to verify a plea puis darrein continuance, which refers to the plea which was intitled in the cause, is sufficient without being itself specially intitled. *Prince* v. *Nicholson*, 1 Marsh. 70; 5 Taunt. 333; 15 R. R. 612.

When a prohibition is applied for, the affidavit of the applicant ought not to be intitled in a cause, but "in the matter of an action" in the inferior court. *Wallace* v. *Allan*, 44 L. J., C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830; 23 W. R. 703.

The affidavit in support of the application to discharge the solicitor from custody, should be intitled in the cause in respect of which the privilege is claimed. *Keane, In re*, Sau. & Sc. 81.

In consideration of an indictment being allowed to stand over, P., an attorney, gave a personal undertaking for the costs, &c.:—Held, that "In the matter of P." was a proper title for the affidavits in support of a rule calling on P. to pay such costs. *Philip, In re*, 1 W. R. 449.

No objection to an affidavit, that it was not headed in the matter of bankruptcy in which it was used, if from the accompanying circumstances it is manifest that it was judicially used in the bankruptcy. *Simmonds, Ex parte*, 2 Glyn. & J. 44; 3 L. J. (o.s.) Ch. 99.

Where the affidavit of a judgment creditor for a receiver in a petition matter under 4 & 5 Will. 4, c. 55, was intitled as in a cause, and the parties were styled plaintiff and defendant, and the petitioner was apprised of the irregularity:—Held, that the affidavit was insufficient. *Fawcett* v. *Fawcett*, 6 Ir. Eq. R. 388.

—— **In the Matter of an Act.**]—By an order, intitled in a cause and in the matter of the Trustee Act, A. was ordered to transfer a sum of money into court. The affidavit of service of this order on A. was intitled in the cause only. A. was committed for contempt for refusing to

obey the order. The writ of attachment was discharged for irregularity, on the ground of the difference between the title of the order and the title of the affidavit. *Mackenzie* v. *Mackenzie*, 21 L. J., Ch. 386; 16 Jur. 723.

An affidavit in support of an application to serve a defendant out of the jurisdiction, should be intitled in the contemplated action and also in the Judicature Act. *Young* v. *Brassey*, 45 L. J., Ch. 142; 1 Ch. D. 277; 24 W. R. 110.

—— **No Title.**]—When affidavits are made abroad and sworn, but without any heading, shewing in what cause or matter they are made, they will be ordered to be filed, on a special application for that purpose. *Salvidge* v. *Tutton*, 20 L. T. 300.

—— **With Statutory Declaration.**]—A statutory declaration not intitled in a cause will be filed in an affidavit intitled in the cause, verifying the signatures of the declarants. *Whiting* v. *Bassett*, 41 L. J., Ch. 551; L. R. 14 Eq. 70.

Names of Parties.]—In affidavits in support of or against a rule, as well the christian as the surnames of all parties, as well plaintiffs as defendants, must be inserted in the title. *Fores* v. *Diemar*, 7 Term Rep. 661; 2 East, 182. S. P., *Noel* v. ——, 1 Smith, 457; *Theobald* v. *Brame*, W. W. & D. 219; *Masters* v. *Carter*, 4 D. P. C. 577; 1 H. & W. 672.

The parties should be described as "plaintiff" and "defendant." *Harris* v. *Griffiths*, 4 D. P. C. 289; 1 H. & W. 515.

In an affidavit made by a defendant in a cause in support of a rule moved for by him, it is not necessary for him expressly to swear that he is the defendant: it will be sufficient if it appears with reasonable certainty, from the language of the affidavit, that he is so. *Loutreuil* v. *Philippe*, 1 B. C. Rep. 87; 10 Jur. 757.

When a case is de facto in the Court of Queen's Bench, all affidavits should be intitled in the names of the parties. *Johnson* v. *Simpson*, 1 L. T. 60.

An order, obtained on affidavit of service, discharged with costs, on the ground of a misnomer of a party in the affidavit. *Salomon* v. *Stalman*, 4 Beav. 243; 10 L. J., Ch. 327.

—— **In Particular Cases.**]—Affidavits must be intitled "A. *v.* B." and not "B. at suit of A." *Richards* v. *Isaac*, 2 D. P. C. 710; 1 C. M. & R. 136; 4 Tyr. 863.

An affidavit intitled in the name of the plaintiff against "B. and another," or "and others," as defendants, is defective, as it should have described such defendants. *Doe* d. *Spencer* v. *Want*, 2 Moore, 722. *Thomkins* v. *Geach*, 5 D. P. C. 509.

Where an action has been brought against a defendant by the initial of his christian name "W.," and has been proceeded in to execution so intitled, an affidavit in support of an application against the sheriff for not returning a fi. fa. cannot be read, if it describes the defendant by the christian name of "William." *Reg.* v. *Surrey* (*Sheriff*), 8 D. P. C. 510; 4 Jur. 559.

An affidavit, intitled "W. W., carrying on business under the name or style of W. T. & Co., plaintiff, and C. F. defendant"—the plaintiff having so described himself in the writ, is sufficient. *White* v. *Feltham*, 3 C. B. 658.

Where a defendant was described in the writ as "Frederick C. Prosser," an affidavit to set aside a judgment for irregularity intitled, "Henry Symes *v.* Frederick Coulston Prosser" (his real name), is insufficient. *Symes* v. *Prosser*, 15 M. & W. 151; 3 D. & L. 49; 15 L. J., Ex. 199.

A defendant was described in the writ as "W. W. Kilpin." He entered an appearance as William Wells Kilpin, sued as W. W. Kilpin. In the title of an affidavit he was described as "William Wells Kilpin":—Held, well intitled. *Lomax* v. *Kilpin*, 16 M. & W. 94; 16 L. J., Ex. 23.

Where a defendant, whose name was J. G., had been described in the writ as H. G., and a person named H. G. had appeared:—Held, that affidavits were rightly intitled "B. *v.* J. G., sued by the name of H. G." *Belcher* v. *Goodered*, 4 C. B. 472; 4 D. & L. 814; 16 L. J., C. P. 176.

In the writ and declaration the cause was described as "T. *v.* S. & H." They appeared under that title, and pleaded:—Held, that an affidavit, on which a rule to set aside a judgment was obtained, was incorrectly intitled "T. *v.* S. & P., sued as H." *Tugg* v. *Simmons*, 4 D. & L. 582; 16 L. J., Q. B. 319.

In a writ the plaintiff described the defendant as James S. Hodson; he entered an appearance as James Shirley Hodson; in affidavits to set aside an interlocutory judgment, the title described him as James Shirley Hodson, sued as James S. Hodson:—Held, well intitled. *Dunn* v. *Hodson*, 1 D. & L. 204; 7 Jur. 971. S. P., *Jones* v. *Elridge*, 1 D. (N.S.) 10; 4 Scott (N.R.) 751; 4 Man. & G. 266; 11 L. J., C. P. 192. *Hodgson* v. *May*, 7 D. & L. 4; 18 L. J., Q. B. 249; 14 Jur. 653.

A rule nisi for a commission to examine witnesses was obtained upon an affidavit intitled "H. J., plaintiff, and G. A. F. L. Curzon, commonly called Viscount Curzon, defendant," the title of the cause being "H. J. *v.* G. A. F. L. Howe, commonly called Viscount Curzon":—Held, insufficient. *Joll* v. *Curzon* (*Lord*), 5 C. B. 205.

A rule was obtained in a cause of B. *v.* D., calling upon A. to render an account of and pay over money due to B.; and the matters of this rule were, by a subsequent rule, referred to the Master. B. afterwards died. A rule was then obtained, calling upon A. to shew cause why B.'s executors should not be made parties to the rules instead of B. This rule, and the affidavits on which it was granted, were intitled "B., deceased, *v.* D." Held, a fatal objection, there being no such cause as "B., deceased, *v.* D." *Bland* v. *Dax*, 15 L. J., Q. B. 1; 10 Jur. 8.

—— **"The Elder."**]—An affidavit on which a rule was founded, was intitled, "Between J. S., plaintiff, and G. J., defendant." An affidavit in answer stated that there were two G. J.'s, and that all former proceedings in the cause were intitled "J. S. *v.* G. J. the elder":—Held, sufficient. *Singleton* v. *Johnson*, 9 M. & W. 67; 1 D. (N.S.) 356; 11 L. J., Ex. 88; 5 Jur. 114.

An affidavit by one of the parties in a cause, to whose name the title of elder was not added:—Held, nevertheless, that it must be presumed to be that of the elder. *Young* v. *Young*, 1 D. (N.S.) 865; 6 Jur. 916.

If no addition is given to the surname of a party in the title of an affidavit, it will be assumed to be that of the elder. *Ib.*

But an affidavit intitled "G. S. *v.* W. C. the elder," sued as "W. C.," the cause being "G. S. *v.* W. C.," is badly intitled. *Shrimpton* v. *Carter*, 3 D. P. C. 648.

—— **Omission of Name.**]—A notice of motion, and affidavit in support, professed in its title to give names of all the parties, but omitted one; the court would not proceed, but gave leave to amend, and re-swear. *Davis* v. *Barrett*, 7 Beav. 171.

Affidavit intitled by mistake in a suit between X., plaintiff, and A., B., C., and D., defendants, admitted in a suit between X., plaintiff, and A., B., C., D., and E., defendants, on its being shewn that no suit existed in which X. was plaintiff, and A., B., C., and D., defendants, except that between X., plaintiff, and A., B., C., D., and E., defendants. *Fisher* v. *Coffey*, 1 Jur. (N.S.) 956.

Alteration of Title.]—Use of affidavits filed in support of a petition after the title of the petition has undergone alteration since the filing of the affidavits, and therefore differs from the title of the affidavits. *Varley Iron Works Wesleyan Chapel, In re*, 10 Hare (App.) xxxv.

An affidavit was filed and intitled in a cause in which there were three defendants. Afterwards the plaintiff struck out the name of one of the defendants, and then obtained the injunction on the affidavit, as it was originally intitled: —Held, that the injunction was regularly obtained. *Hawes* v. *Bamford*, 9 Sim. 653.

On Change of Names.]—Where, pending an action against a company, the name of the company is changed by act of parliament, and a motion is afterwards made in such action, a suggestion should be entered of the change of name and the affidavits intitled in the new name. *Hibblethwaite* v. *Leeds and Thirsk Ry.*, 21 L. J., Ex. 37; 15 Jur. 1015.

Surplusage.]—Intitling an affidavit by describing the plaintiff as "gent., one, &c." he not being an attorney, does not vitiate it, but the description may be rejected as surplusage. *Reeves* v. *Crisp*, 6 M. & S. 274.

So, an addition of "widow" in the title of a cause is not necessary. *Miller* v. *Miller*, 2 Scott, 117.

Money had been paid into court under the Trustee Relief Act, and an affidavit of the trustees was intitled "In the matter of the trusts of the settlement bearing date the 12th July, 1812, and made on the marriage of." A petition was presented for payment out of court of part of the money so paid in, and an affidavit in support was intitled "In the matter of the trusts of an indenture of settlement bearing date the 12th July, 1812, and made on the marriage of": —Held, that the variation was not material, and that the affidavit might be received. *Harris In re*, 8 Jur. (N.S.) 166.

Idem Sonans.]—An omission of a letter in the name of a party in the title of an affidavit, the word being idem sonans, is no ground for discharging a rule obtained upon such affidavit. *Gray* v. *Coombes*, 10 C. B. 72. S. P., *Cooper* v. *Tilly*, 7 Jur. 679.

Where a writ of summons ran "Baldwin *v.* H. W. B.," appearance was entered as "Henry William B.," and the declaration described the defendant as "Henry William B., sued as H. W. B.," the court admitted an affidavit intitled "Baldwin *v.* Hilary John B.," sued as Henry William B., as the identity of the cause sufficiently appeared from the declaration. *Baldwin* v. *Bauerman*, 12 C. B. 152; 21 L. J., C. P. 160; 16 Jur. 892.

Mala Grammatica.]—An affidavit in a cause in which A., suing by his next friend, was plaintiff, intitled the cause as "A. suing by *her* next friend": —Held, an immaterial variance. *Abrahams* v. *Taunton*, 1 D. & L. 319; 7 Jur. 678.

Representative Parties.]—Where a party sues or is sued in a representative character, the affidavits in the cause should be intitled accordingly. *Engler* v. *Twysden*, 6 Scott, 580; 1 Arn. 269, 4 Bing. (N.C.) 714: 8 L. J., C. P. 128. *Bland* v. *Dax*, 15 L. J., Q. B. 1; 10 Jur. 8.

The court declined to act upon an affidavit which was intitled "A. *v.* B.," executor, &c., or administrator, &c., without specifying the party to whom he was executor or administrator. *Clarke* v. *Martin*, 3 D. P. C. 222. *Fletcher* v. *Lechmere*, 5 Man. & G. 265; 2 D. (N.S.) 848; 6 Scott (N.R.) 173; 12 L. J., C. P. 151.

Affidavits intitled in a cause, without giving the plaintiff the addition of "assignee," cannot be used in a cause where he sues as assignee. *Wright* v. *Hunt*, 1 D. P. C. 457. S. P., *Steyner* v. *Cottrell*, 3 Taunt. 377.

"Phillips, assignee, &c.," is an irregular mode of describing a plaintiff. *Phillips* v. *Hutchinson*, 3 D. P. C. 20. S. P., *Casley* v. *Smith*, 4 D. P. C. 477.

Consequences of non-compliance with Rule.]—If affidavits which require a title are put in without, the court cannot take any notice of them though the counsel on the other side do not wish to take the objection. *Owen* v. *Hurd*, 2 Term Rep. 644.

Appearing to oppose a rule does not waive an objection to the form of an affidavit upon which the rule was obtained, such as the omission of the christian name of one of the parties in the title of the cause. *Clothier* v. *Ess*, 3 M. & Scott, 216; 2 D. P. C. 731. S. P., *Barham* v. *Lee*, 2 D. P. C. 779; 4 M. & Scott, 327.

The court cannot entertain an objection patent on a proceeding attached to an affidavit bringing that objection before the court, if from wrong intitling the affidavit cannot be read. *Harris* v. *Mathews*, 4 D. P. C. 608.

If there is a defect in intitling affidavits produced on shewing cause against a rule, the court will allow the rule to be enlarged, in order that the title may be amended. *Anderson* v. *Ell*, 3 D. P. C. 73.

Where a rule has been substantially disposed of, it cannot afterwards be objected that the affidavits upon which the rule was drawn up are not correctly intitled. *Viner* v. *Langton*, 5 D. P. C. 92.

4. Contents.

a. Certainty.

What Errors Vitiate.]—Where the meaning is plain, mere ungrammatical construction will not vitiate. *Anon.*, Lofft, 274.

Nor are clerical errors and bad spelling sufficient grounds of rejection. *Bromley* v. *Foster*, 1 Chit. 562.

Such as "defendant" instead of "deponent," or "court" instead of "office," where the meaning is clear; otherwise, where the mistake leaves the meaning doubtful. *Anon.*, 1 Chit. 562, n.

An affidavit with the word "said" instead of

"says" is insufficient. *Howorth* v. *Hubbersty*, 3 D. P. C. 455.

What Certainty required.]—That an affidavit is so framed that perjury could not be so assigned thereon, is a defect not to be cured by waiver. *Watson* v. *Walker*, 1 M. & Scott, 437.

The following words, "and deponent further objects" that there was no notice, &c., are bad, as not amounting to a categorical allegation. *Reg.* v. *Manchester and Leeds Ry.*, 3 N. & P. 439; 7 L. J., Q. B. 192; 2 Jur. 857.

An affidavit in support of a rule to set aside an interlocutory judgment must state in express terms that judgment has been signed. *Classey* v. *Drayton*, 6 M. & W. 17; 8 D. P. C. 184; 9 L. J., Ex. 145.

It is sufficient in an affidavit of service of a rule to swear to the service of "a true," without adding the word "copy." *Rex* v. *Stafford (Sheriff)*, 5 D. P. C. 238.

An affidavit of service must swear to the service of the "rule annexed," and not merely of the "rule in this cause." *Fidlett* v. *Bolton*, 4 D. P. C. 282.

To make a rule absolute, on no cause being shewn, it is not sufficient that a deponent should swear to notice of the rule nisi having been left at the dwelling-house of the opposite party in his absence, with a person who afterwards told the deponent that she had delivered the notice; the deponent must state that he believes this to be true. *Doe* d. *Hungate* v. *Roe*, 4 A. & E. 83, n.

The affidavits in support of a motion made pursuant to the 1st Order of April, 1842, ought to be not only sufficient in substance, but technically sufficient, and to adopt the very words of the order. *Edwards* v. *Bromfield*, 11 L. J., Ch. 256; 6 Jur. 831.

Omission of "Oath."]—The omission in the formal part of an affidavit of the words "make oath and," will render it inadmissible. *Allen* v. *Taylor*, 39 L. J., Ch. 627; L. R. 10 Eq. 52; 22 L. T. 512.

The omission of the word "oath," or some equivalent expression, is not cured by the jurat representing it as duly sworn. *Doe* d. *Britton* v. *Clark*, 2 D. (N.S.) 393; 12 L. J., Q. B. 69; 7 Jur. 327.

An affidavit omitting the word "oath" is bad. *Oliver* v. *Price*, 3 D. P. C. 261.

An affidavit which does not express that the deponent "made oath," is not admissible. *Phillips* v. *Prentice*, 2 Hare, 542; 12 L. J., Ch. 497; 7 Jur. 528.

Objection after Filing.]—In an affidavit the words "severally make oath and say" were omitted by mistake:—Held, that the affidavit could not be objected to on that ground after it had been filed. *Torkington, Ex parte, Torkington, In re*, L. R. 9 Ch. 298; 22 W. R. 602.

Joint and Several Affidavit.]—An affidavit, instead of being headed, "We, A. B., C. D., and E. F., severally make oath and say," was headed, "The joint and several affidavit of A. B., C. D., and E. F. We, the said A. B., C. D., and E. F., say as follows." Leave to file it was refused. *Newton, In re*, 4 De G. F. & J. 3; 8 W. R. 425.

In Third Person—Number and Kinds of Trees.]—Affidavits made in the third person, and sworn in America, admitted in evidence. *Husband, In re*, 12 L. T. 303.

By the 23 & 24 Geo. 3, c. 39, s. 1 (Irish), for the encouragement of planting timber trees, tenants for lives, by settlement, &c., impeachable of waste, or tenants for years, exceeding fourteen unexpired, who should plant or cause to be planted any timber trees, might fell and dispose of them at any time during the term. To secure the landlords, s. 2 enacted, that "any tenant so planting," "should within twelve calendar months after such planting lodge with the clerk of the peace of the county," "an affidavit" "reciting the number and kinds of trees, and the name of the lands, in form following:—I, A. B., do swear that I have planted," &c., "on the lands of ——, in the parish of ——, held by me from ——, the following trees, (here reciting the number and kinds of trees,)" &c. The form throughout was couched in the first person, and in fact, in its terms, was only applicable to a tenant for years. A lessee for three lives having planted many trees, his agent made the affidavit required, in his own name, as agent for the lessee:—Held, that as the form given in the statute could not possibly apply to the majority of the cases which its provisions sought to meet, it did not mean that no one but the tenant was to make the affidavit; and that the form, if another person made the affidavit, might be varied. *Mountcashell (Earl)* v. *O'Neill (Viscount)*, 2 Jur. 1030.

Held, also, where the tenant for life held two denominations of land under the same landlord of both, but by different demises, that the affidavit was sufficient if it stated the total number and kinds of trees, without distinguishing how many, or what kinds, were planted on each denomination of land. *Ib.*

But where the two denominations of land were held under different landlords, it was necessary in the affidavit to specify the number and kinds on each. *Ib.*

Sums of Money.]—Sums of money ought to be written in words at full length and not in figures. *Crook* v. *Crook*, 3 Eq. R. 544; 24 L. J., Ch. 504; 1 Jur. (N.S.) 654; 3 W. R. 398.

In an affidavit made upon payment of money into court under the Trustee Relief Act, the sum to be paid in must be expressed in words, and not in figures. *Watts's Will, In re*, 34 L. T. 647; 24 W. R. 701.

Date.]—In the statement of a particular date, where that date is essential, it must be stated positively. *Willes* v. *James*, 1 D. P. C. 498.

An affidavit in support of a motion to set aside a judgment, stated that the judgment was signed "*this day*":—Held, that the jurat might be looked to in order to fix the date. *Holmes* v. *L. & S. W. Ry.*, 13 Q. B. 211; 6 D. & L. 536; 18 L. J., Q. B. 87; 13 Jur. 81.

So where an affidavit stated the date of an event, as "the 19th of this present month of January":—Held, that the jurat might be looked at to see that the month of January, 1849, was intended. *Craig* v. *Lloyd*, 3 Ex. 232; 6 D. & L. 487; 18 L. J., Ex. 165; 20 L. J., Q. B. 89.

Means of Knowledge.]—An affirmation not stating the affirmant's means of knowledge will not be received. *Fry* v. *James*, Ir. R. 4 Eq. 255.

"It was Understood."]—In 1843 a tenant in tail joined in re-settling one of two family estates. He disputed the validity of the transaction, and

subsequently, in 1845, married. On that occasion a settlement was executed, making provision for the younger children only of the marriage. The instructions stated that it was desired to keep his landed estates free from any settlement, and contained this note: "N.B. The eldest son will take the family estate." In a suit to set aside the re-settlement of 1843, affidavits were produced on behalf of the infant eldest son of the marriage, to shew that, on the negotiation for the marriage, it was understood, that under existing settlements, the eldest son would become entitled to considerable landed estates, and therefore, that it was only necessary to provide for the younger children:—Held, first, that these affidavits were inadmissible under Sir George Turner's Act (13 & 14 Vict. c. 35); and, secondly, that if admitted, they did not shew that the marriage proceeded on the faith of the re-settlement of 1843, and that in this suit no decree or inquiry could be made in favour of the infant. *Hoghton* v. *Hoghton*, 15 Beav. 278; 21 L. J., Ch. 482; 17 Jur. 99.

Letters "without Prejudice."]—Letters written "without prejudice" not to be introduced into affidavits, and the costs thereof to be disallowed on taxation. *Fripp* v. *Bridgwater and Taunton Canal Co.*, 3 W. R. 356.

Scandalous.]—If an affidavit is filed containing scandalous statements, the court can act in the matter, not only on the application of the aggrieved party, but also on the application of any party to the action, or without any application at all. *Cracknell* v. *Janson*, 48 L. J., Ch. 168; 11 Ch. D. 1; 39 L. T. 32; 27 W. R. 55.

b. Information and Belief.

As to affidavits as to hearing and belief. *Carpenter* v. *Poe*, 2 Moll. 338.

The not swearing expressly to words spoken, but adding to that effect, is a proper caution in an affidavit. *Ayliffe* v. *Murray*, 2 Atk. 60.

Quære, whether affidavit of notice must state positively that the person served acts as clerk in court, or whether upon information and belief only is sufficient. *M'Cauley* v. *Collier*, 1 Ves. J. 141.

If material fact be charged in injunction bill and deposed to in affidavit in support of it, not positively, but as plaintiff has reason to know, and that he believes it to be true, and fact is one which, if true, lies only within knowledge of defendant, and who may, if not true, deny it, the court will grant injunction, it not being denied by him. *Scott* v. *Becher*, 4 Price, 346.

An application to the court under the 4th section of 5 Vict. c. 5, must be founded on affidavit expressed in positive terms. *Field, Ex parte*, 1 Y. & Coll. C. C. 1; 5 Jur. 984.

An affidavit that the deponent has inquired of and been informed by the clerk in court, and the deponent believes it to be true, that no appearance has been entered by the defendant, is sufficient to satisfy the court of that fact. *Tatham* v. *Williams*, 1 Hare, 159; 11 L. J., Ch. 117.

An affidavit in support of an application to examine a witness de bene esse, on belief only that the witness is the sole witness to a particular fact, is not sufficient; it ought to state the reasons for such belief. *Hope* v. *Hope*, 3 Beav. 317; 10 L. J., Ch. 70; 4 Jur. 1124.

Security required where, after an order to pay costs, the party went abroad, upon belief (not denied) to avoid payment, and proceedings in the meantime stayed. The effect of an affidavit as to belief is, to put the other side on answering the fact sworn to. *Bush* v. *Beetham*, 2 Beav. 537.

Upon an application for an injunction to stay proceedings at law, affidavits cannot be read against the answer, as to facts therein stated on information and belief. *Barwell* v. *Barwell*, 5 Beav. 373; 12 L. J., Ch. 9; 7 Jur. 272.

An affidavit of the service of a petition respecting the trustees of a corporation, which stated that it had been served on A., who was, "as the deponent had been informed and believed," the clerk of the trustees:—Held, insufficient. *Lichfield Municipal Corporation Charities, In re*, 12 L. J., Ch. 439.

Evidence of belief only is admissible on interlocutory application, though not at the hearing of a cause, and the grounds of such a belief are properly stated in the affidavit, even in the case where such grounds consist in great part of conversations with third persons, who might be, but are not produced, and where the deponent swears that he disbelieves the statements made to him by such persons. *Bird* v. *Lake*, 1 Hem. & M. 111; 8 L. T. 632.

The words "I am informed," where there is no personal knowledge, are the same as "I believe"; and where an affidavit is sworn at different places, by different defendants, one date is sufficient. *Woodhatch* v. *Freeland*, 11 W. R. 398.

In a suit by a married woman to establish her equity to a settlement of leasehold and personal estate to which she was entitled as next of kin of her father and of her brother, a defence was set up by answer, on the part of the husband, on the ground of her intemperance and adultery, part of the evidence in support of that defence being an affidavit of a person stating a conversation with the plaintiff's alleged paramour, in which the latter admitted acts of adultery:—Held, that after replication filed, apart from the ground of scandal, an affidavit of mere hearsay evidence ought to be removed from the file on the ground of irrelevancy. *Kernick* v. *Kernick*, 9 L. T. 800; 12 W. R. 336.

Upon a proceeding, which, though interlocutory in form, finally decides the rights of the parties, evidence on information and belief is not admissible, and the party against whom it is adduced is not bound to contradict it; but if in the court below he deals with the evidence as admissible, he may be precluded from objecting to it before the Court of Appeal. *Gilbert* v. *Endean*, 9 Ch. D. 259; 39 L. T. 404—C. A.

As to Defence on the Merits.]—*See post*, col. 1074.

c. Addition and Description of Deponent.

When Necessary.]—The addition and true place of abode of every person making an affidavit shall be inserted therein. *D'Argent* v. *Vivant*, 1 East, 334.

An affidavit in which the addition or place of abode of a deponent is not inserted will not be admitted. *Bernard, In goods of*, 2 Sw. & Tr. 489; 31 L. J., P. 89; 6 L. T. 726.

Where a joint affidavit was made by A. and by B., and B.'s addition was omitted, the court treated the affidavit as that of A. only. *Woodburn, In goods of*, 31 L. J., P. 89, n.

In affidavit in a cause, plaintiff need not state his residence. *Crockett* v. *Bishton*, 2 Madd. 446.

Affidavits made in actions by a plaintiff or a defendant are exempted from the operation of this rule. *Shirer* v. *Walker*, 2 Man. & G. 917; 3 Scott (N.R.) 235; 9 D. P. C. 667; 10 L. J., C. P. 228. S. P., *Angel* v. *Ihler*, 5 M. & W. 163; *Jackson* v. *Chard*, 2 D. P. C. 468, contrà; *Lawson* v. *Case*, 1 C. M. & R. 481; 3 Tyr. 489; 2 D. P. C. 40; 2 L. J., Ex. 216.

An affidavit made in an action by one of the parties thereto, who is described in the affidavit as plaintiff or defendant, need not contain the addition or residence of the deponent. *Harte* v. *M'Cullagh*, Ir. R. 5 C. L. 537.

Description—"Gentleman."]—On an application to appoint new trustees it is not sufficient to describe a person making an affidavit of fitness merely as "gentleman." *Orde, In re*, 52 L. J., Ch. 832; 24 Ch. D. 271; 49 L. T. 430; 31 W. R. 801—C. A.

In support of a petition for the appointment of a new trustee in the place of a trustee who had become lunatic, two affidavits were filed as to the fitness of the person proposed to be appointed. The deponent of one affidavit was described as a "gentleman," the other deponent being described as an accountant. Each affidavit described the proposed new trustee as a "gentleman," but also stated that he was a person of independent means:—Held, that the description of the deponent as a "gentleman" was insufficient, that the position in life of the deponent ought to be stated so as to enable the court to judge whether his evidence was reliable, but that the other affidavit was sufficient. *Horwood, In re*, 55 L. T. 373—C. A.

In an affidavit it is not sufficient to describe the deponent as a "gentleman" if he has a trade or profession. *Spaddacini* v. *Treacy*, 21 L. R., Ir. 553.

For the filing of an affidavit, a description of the deponent as "gentleman" is sufficient. *Orde, In re* (24 Ch. D. 271), explained. *Dodworth, In re, Spence* v. *Dodworth*, 60 L. J., Ch. 768; [1891] 1 Ch. 657; 64 L. T. 282; 39 W. R. 362.

—— **"Esquire."**]—A. was described in an affidavit as an "esquire." Upon objection taken it was proved that he was a miller and a farmer, but it was not disproved that he was an "esquire":—Held, that the affidavit was sufficient. *Doughty, In re*, 18 L. T. 188; 2 Ir. Eq. 235.

"Agent."]—A deponent who describes himself as "agent of the above-named plaintiff (or defendant) in this cause," is sufficient. *Luxford* v. *Groombridge*, 2 D. (N.S.) 332; 12 L. J., Q. B. 99; 7 Jur. 87. S. P., *Mathewson* v. *Bairstow*, 3 D. & L. 327; 15 L. J., Q. B. 40.

"Clerk."]—But "H. B., clerk to the above-named defendant," is not. *Elton* v. *Martindale*, 5 D. & L. 248. S. P., *Daniels* v. *May*, 5 D. P. C. 83.

A deponent's addition is not sufficiently stated by styling him "articled clerk," without saying to whom, or in what profession. *Reg.* v. *Reeve*, 4 Q. B. 211; 3 G. & D. 560.

So where a deponent was described as M. B., clerk S. N. (the word "to" being omitted):—Held, insufficient. *Shakespear* v. *Willan*, 19 L. J., Ex. 184; 14 Jur. 92.

Abode.]—An affidavit commencing in these terms: "R. J., late of the city of W., victualler, but now of, &c.," without any further addition, is sufficient. *Angel* v. *Ihler*, 5 M. & W. 163.

By Ord. XXXVIII. r. 8, every affidavit shall state the description and true place of abode of the deponent; where therefore a deponent gave an illusory address or no address at all, the court would not allow them to be used. *Hyde* v. *Hyde*, 59 L. T. 523.

An affidavit by a person who is a stockbroker does not state the description and true place of his abode by describing him as "Stock Exchange, stockbroker." *Levy, In re, Levin* v. *Levin*, 60 L. T. 317; 37 W. R. 396.

A foreigner, whose general residence is abroad, and who only landed here for a temporary purpose, viz. to make an affidavit, may properly describe his place of abode to be in his own country, and not at the place where the affidavit was sworn. *Bouhet* v. *Kittoe*, 3 East, 154.

A description, as "late" of a place, is not sufficient. *Sedley* v. *White*, 11 East, 528.

But an affidavit, in which a deponent described himself as "late of Tyrone, in the county of Tyrone, in Ireland, but now in Dublin Castle," is sufficient. *Stuart* v. *Gavernan*, 1 H. & W. 699.

But where a deponent had been a few days before discharged out of prison, but, by permission, had continued to lodge there at night, having no other place of residence, his describing himself bonâ fide as "late" of such prison, was sufficient. *Ib.*

—— **Residence of Clerk.**]—In an affidavit by an attorney's clerk, it is unnecessary for him to state his own residence, if he states that of his master. *Strike* v. *Blanchard*, 5 D. P. C. 216; 2 H. & W. 329. S. P., *Cooper* v. *Folkes* or *Folks*, 2 Scott (N.R.) 200; 1 Man. & G. 942; 9 D. P. C. 46.

Therefore "A. B., clerk to Mr. K., 73, Basinghall-street," is sufficient. *Allen* v. *Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249; 2 Jur. (N.S.) 451; 4 W. R. 506.

So, the residence of an attorney's clerk need not be given in an affidavit made by him jointly with his master, in which the residence of the latter is stated. *Bottomley* v. *Bellchamber*, 4 D. P. C. 26; 1 H. & W. 362.

A deponent described himself as S., "clerk to E. J., Esq., barrister-at-law, and assessor of the court of passage at the borough of L.":—Held, insufficient, for not stating his place of residence. *Winch* v. *Williams*, 12 C. B. 416; 21 L. J., C. P. 216; 16 Jur. 935.

"A. B., clerk to B. & Co., of 201, Regent-street, music sellers," is a sufficient description of a deponent. *Philip, In re*, 1 W. R. 449.

Omissions may be Waived.]—The omission of a deponent's addition in an affidavit constitutes an irregularity only, and may be waived. *King, Ex parte*, 41 L. J., C. P. 59; L. R. 7 C. P. 74; 25 L. T. 935; 20 W. R. 316.

When a rule nisi had been obtained to strike two attorneys in partnership off the rolls, and on shewing cause against the rule, they appeared separately, and counsel for one took objection to the affidavit on which the rule had been obtained, on the ground that it did not give the deponent's addition, but counsel for the other waived the objection so far as his client was concerned:—Held, that though the rule must be quashed so

far as it related to the one, counsel for the other might proceed to shew cause against the rule so far as it concerned his client. *Ib.*

Effect of Omission.]—The omission of the addition is an irregularity merely, and the party seeking to take advantage of it must come to the court within a reasonable time. *Seymour* v. *Maddox*, 1 L. M. & P. 543; 15 Jur. 629.

A reasonable time dates from the time when the party complaining of the irregularity had the means of knowing it; although, in point of fact, he did not know of it till afterwards. *Ib.*

If an affidavit is joint, an objection to the description of one of the deponents does not render the statements of the other inadmissible. *Edmonds, Ex parte*, 5 D. P. C. 702; W. W. & D. 369; 1 Jur. 515. S. P., *Nathan* v. *Cohen*, 3 D. P. C. 370; 1 H. & W. 107.

Where, in an affidavit to found a motion, the addition of a deponent is omitted, the court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application. *Rex* v. *Caernarvon JJ.*, 5 N. & M. 364.

d. Signature.

Proof of.]—An affidavit cannot be used as evidence even against him by whom it is sworn, without proof of the handwriting. *Barnes* v. *Parker*, 15 L. T. 218.

An affidavit described a deponent as "Edward Charles Pownall"; the signature at the end was "Charles E. Pownall":—Held, no objection. *Hands* v. *Clements*, 11 M. & W. 816; 1 D. & L. 379; 12 L. J., Ex. 437; 7 Jur. 658.

An affidavit signed by a deponent in some foreign character, which is illegible, may be read in court. *Nathan* v. *Cohen*, 3 D. P. C. 378; 1 H. & W. 107.

Re-swearing.]—An affidavit re-sworn need not be re-signed. *Liffin* v. *Pitcher*, 1 D. (N.S.) 767; 6 Jur. 537.

Statutory Declarations.]—A statutory declaration not intitled in a cause will be filed with an affidavit intitled in the cause verifying the signatures of the declarants. *Whiting* v. *Bassett*, 41 L. J., Ch. 551; L. R. 14 Eq. 70.

Of Husband to Wife's Affidavit.]—An affidavit by a married woman made before a notary abroad, was signed by the husband as well as the wife:—Held, that it might be received. *Gates* v. *Buckland*, 13 W. R. 67; 5 N. R. 32.

5. Jurat.

Names of several Deponents.]—The rule that the names of the several parties shall be written in the jurat, applies as well to affidavits sworn before a judge as to those sworn before a commissioner. *Luckington* v. *Atherton*, 6 Scott (N.R.) 240; 2 D. (N.S.) 904.

The rule is imperative. *Pardoe* v. *Terrett*, 6 Scott (N.R.) 273; 5 Man. & G. 291; 2 D. (N.S.) 903; 12 L. J., C. P. 143; 7 Jur. 217.

Where a rule is obtained on an affidavit, the jurat of which is defective in this respect, the court will discharge the rule with costs. *Cobbett* v. *Oldfield*, 4 D. & L. 492; 16 M. & W. 469; 16 L. J., Ex. 150.

But where the names of the deponents are omitted in the jurat through the inadvertence of the judge's clerk, it will be amended by the direction of the judge. *Smith, Ex parte*, 2 D. P. C. 607.

The notarial jurat appended to an affidavit was worded "sworn to and subscribed before me," without specifying by whom the affidavit was sworn:—Held, that the affidavit might be received. *Gates* v. *Buckland*, 13 W. R. 67; 5 N. R. 32.

Interlineations and Erasures, avoiding.]—A line drawn through two lines in the jurat, leaving them, however, perfectly legible, is an erasure, though the omission or retention of the words would not vary the sense. *Williams* v. *Clough*, 1 A. & E. 376.

The jurat is not vitiated by an erasure of words which form no necessary part of the jurat, and might be separated from it without altering the sense. *Wills* v. *Dawson*, 10 M. & W. 662; 2 D. (N.S.) 465; 12 L. J., Ex. 24; 6 Jur. 1068.

Part of the jurat was written on one side of the paper, and below it the words "a commissioner for taking affidavits in this court" were erased; the remainder of the jurat was written on the other side of the paper:—Held, that the affidavit was not vitiated thereby. *Ib.*

If the words "before me," in a jurat, are struck out, and the words "by the court," introduced, it is not an objection. *Austin* v. *Grange*, 4 D. P. C. 576; 1 H. & W. 670.

An affidavit in which the christian names of two persons were interlined in the place where they were first mentioned allowed to be filed. *Vorweig* v. *Barwiss*, 3 W. R. 259.

Motion to file altered affidavits, refused. *Gillbart* v. *Gill*, 1 W. R. 4.

The same paper contained the affidavits of two persons, A. and B., sworn before a notary public in the United States of America; there were certain erasures and alterations in the affidavit of A. On a motion that the affidavit might nevertheless be filed, the Vice-Chancellor said, he was not aware that there was any authority for allowing an affidavit, which had been altered, to be filed, without proof that the alteration was made before the affidavit was sworn. *S. C.*, nom. *Gill* v. *Gilbard*, 9 Hare (App.) xvi.

Application was subsequently made to the court to expunge that part of the document which contained the alterations and erasures, and allow the rest to be filed; the Vice-Chancellor ordered the document to be filed as the affidavit of B., rejecting the affidavit of A. *Ib.*

—— **As to Date.**]—If the date mentioned in the jurat is struck out with a pen, and the right date introduced, it is an erasure. *Chambers* v. *Barnard*, 9 D. P. C. 557.

The alteration of a figure in the date in the jurat, by writing one figure over another, does not constitute an erasure or interlineation. *Jacob* v. *Hungate*, 3 D. P. C. 456.

The court set aside an order for better particulars of set-off, on the ground that the plaintiff's attorney's clerk had, without authority, altered the date of the jurat of the affidavit on which the order had been obtained. *Finnerty* v. *Smith*, 1 Bing. (N.C.) 649; 1 Scott, 743.

Time of Swearing.]—An affidavit must state in the jurat the day on which it was sworn. *Doe* d. *Roe*, 1 Chit. 228.

A rule obtained on an affidavit, the jurat of which is without date, will be discharged with costs. *Blackwell* v. *Allen*, 7 M. & W. 146, 10 L. J., Ex. 65; 4 Jur. 1137. S. P., *Frost* v. *Heywood*, 6 Jur. 1045.

A jurat as follows: "Sworn by A. B., at my chambers, Rolls' Gardens, Chancery Lane, dated the 24th April. E. V. W.":—Held, defective, for not stating the time when it was sworn. *Lloyd, In re*, 1 L. M. & P. 545; 15 Q. B. 682; 19 L. J., Q. B. 457; 14 Jur. 621.

But where a jurat was as follows: "Sworn by A. B., at Glasgow, in the county of Lanark, in Scotland, the fifth day of June, One thousand eight hundred and fifty *years*, before me, G. R. T., a commissioner for Scotland, for taking affidavits in the Court of Queen's Bench at Westminster":—Held, that the date and the authority of the commissioner were sufficiently stated. *Bell* v. *Port of London Assurance Co.*, 1 L. M. & P. 691.

In the jurat the day of the month was omitted:—Held, a fatal objection. *Brunswick (Duke)* v. *Harmer*, 1 L. M. & P. 505; 19 L. J., Q. B. 456; 4 Jur. 620. S. P., *Wood* v. *Stephens*, 3 Moore, 236.

The jurat of an affidavit purported to be "sworn in court this 9th day of November, 1845":—Semble, that as the 9th of November, 1845, was a Sunday, the jurat was defective. *Doe* d. *Williamson* v. *Roe*, 3 D. & L. 328.

—— **Reference.**]—The want of a date in a jurat is not cured by reference to it in another affidavit, "as an affidavit of A. B., sworn on such a day." *Brunswick (Duke)* v. *Slowman*, 8 C. B. 617; 7 D. & L. 251.

Place of Swearing.]—Affidavits in answer to a rule sworn must contain in the jurat the place sworn, otherwise they cannot be read. *Cass* v. *Cass*, 1 D. & L. 698; 13 L. J., Q. B. 52; 7 Jur. 1087.

A jurat which stated an affidavit to have been sworn at the judge's chambers, in the county of Middlesex, was sufficient. *Hemsworth* v. *Brian*, 2 D. & L. 844; 1 C. B. 131; 14 L. J., C. P. 134.

An affidavit so sworn need not state in the jurat that it was sworn before the judge. *Empey* v. *King*, 2 D. & L. 375; 13 M. & W. 519; 14 L. J., Ex. 48; 8 Jur. 1034.

So an affidavit, intitled in a superior court, and sworn before a judge of that court, as stated in the jurat "at the Central Criminal Court, in the city of London," is sufficient. *Thomas* v. *Stannaway*, 2 D. & L. 111; 13 L. J., Q. B. 263.

An affidavit intitled "in the Exchequer" is sufficient, if it appears to have been sworn before an officer of the plea side of the court. *Hands* v. *Clements*, 11 M. & W. 816; 1 D. & L. 379.

"Sworn in court the 5th day of November, 1846, before E. V. W." (the judge's signature), is a sufficient jurat. *Thorne* v. *Jackson*, 3 C. B. 661.

Where an affidavit was sworn at judge's chambers, but through mistake was not laid before the judge, and therefore the jurat was not signed by him:—Held, irregular. *Bill* or *Bell* v. *Bament*, 8 M. & W. 317; 9 D. P. C. 810; 10 L. J., Ex. 302; 5 Jur. 510.

The place of swearing an affidavit may be stated in the jurat by reference to the place in the body of the affidavit. *Grant* v. *Fry*, 8 D. P. C. 234.

Where the jurat of an affidavit, sworn by a person confined in a lunatic asylum, did not state the place where it was sworn, it was ordered to be taken off the file. *Spittle* v. *Walton*, 40 L. J., Ch. 368; L. R. 11 Eq. 420; 24 L. T. 18; 19 W. R. 405.

An answer taken by commission will be taken off the file, if the jurat does not state where it was sworn. *Kenny* v. *Costello*, 1 Hog. 130.

Affidavit sworn abroad ordered to be filed, although the place at which it was sworn was omitted in the jurat. *Meek* v. *Ward*, 10 Hare (App.) i.; 1 W. R. 275.

Before Commissioners.]—The jurat of an affidavit, sworn before a commissioner in the country, must state him to be a commissioner. *Howard* v. *Brown*, 4 Bing. 393; 1 M. & P. 22; 6 L. J. (O.S.) C. P. 9.

An affidavit was sworn before a commissioner to administer oaths, but in the jurat he merely signed his name, and did not add his title as commissioner:—Held, that notwithstanding this omission, the affidavit was sufficient. *Johnson, Ex parte, Chapman, In re*, 53 L. J., Ch. 762; 26 Ch. D. 338; 32 W. R. 693—C. A.

An affidavit intitled in the proper court, and purporting to be sworn before A. B., "a commissioner, &c.," is sufficient; the jurat need not state that he is a commissioner for taking affidavits in that court. *Burdekin* v. *Potter*, 9 M. & W. 13; 1 D. (N.S.) 134; 11 L. J., Ex. 82; 5 Jur. 992. S. P., *Munden* v. *Brunswick (Duke)*, 4 C. B. 321; 4 D. & L. 807.

It was objected on shewing cause against a rule nisi, that the affidavits were in the jurat attested thus: "A. B., commr.," instead of commissioner written in full; but it also appearing, from the office copy of the affidavits on which the rule was granted, that a similar abbreviation existed, the court (as the office copies are always copies of the original) discharged the rule nisi on the objection raised against the affidavits in shewing cause. *Hill* v. *Royston*, 7 Jur. 930.

An affidavit purporting to be sworn "before H. B. by commission," sufficiently shews that H. B. was a commissioner for taking affidavits. *Hopkins* v. *Pledger*, 1 D. & L. 119; 12 L. J., Q. B. 313; 7 Jur. 941. S. P., *Fairbrass* v. *Pettitt*, 1 D. & L. 622; 12 M. & W. 453; 13 L. J., Ex. 121.

An affidavit sworn before a commissioner, omitting in the jurat the words "before me," is bad. *Graham* v. *Ingleby*, 1 Ex. 651; 5 D. & L. 737. S. P., *Reg.* v. *Norbury*, 2 New Sess. Cas. 344; 15 L. J., Q. B. 264.

The court being satisfied that an affidavit was sworn before the person who signed the jurat, though it was not so stated in it, made an order under Ord. XXXVIII. r. 14, that the affidavit should be received. *Eddowes* v. *Argentine Loan Co.*, 59 L. J., Ch. 392; 62 L. T. 514; 38 W. R. 629—C. A.

Although an exhibit is annexed, having subscribed to it the words: "This is the notice referred to in the annexed affidavit, sworn before me." *Reg.* v. *Bloxham*, 6 Q. B. 528; 2 D. & L. 168; 1 New Sess. Cas. 370; 14 L. J., Q. B. 13; 8 Jur. 1117.

A jurat of an affidavit sworn before a commissioner, stating it to have been received "by virtue of a commission forth," and omitting the word "issued," is sufficient. *Daley* v. *Mahon*, 6 D. P. C. 192; 1 Jur. 798.

An affidavit filed with a bill of sale was intitled

"In the Queen's Bench," and the person before whom it was sworn described himself as "a commissioner for taking affidavits in the Exchequer of Pleas at Westminster":—Held, sufficient; for that the court would presume until the contrary was shewn omnia rite esse acta, and, if the commissioner had, in fact, authority to take the affidavit, perjury might be assigned on it. *Cheney* v. *Courtois*, 13 C. B. (N.S.) 643; 32 L. J., C. P. 116; 9 Jur. (N.S.) 1057; 7 L. T. 680. S. P., *Bell* v. *Port of London Assurance Co.*, 1 L. M. & P. 691.

—— **In Scotland.**]—An affidavit not intitled in any court, but sworn in Scotland before a commissioner, who states himself to be a commissioner by virtue of a commission from the courts of Common Pleas and Exchequer, is sufficient. *White* v. *Irving*, 2 M. & W. 127; 5 D. P. C. 289; 2 Gale, 230; 6 L. J., Ex. 15.

—— **In Ireland.**]—Where an affidavit was sworn in Ireland, before a commissioner of the common pleas and exchequer:—Held, that the title of the court need not be prefixed to the affidavit when sworn; but that the affidavit might be taken before such commissioner, to be afterwards intitled and used in either court. *Perse* v. *Browning*, 1 M. & W. 362; 1 Tyr. & G. 864.

Initialling Alterations.]—A commissioner need not put his initials opposite to an immaterial alteration in an affidavit sworn before him. *Imeson, In re*, 8 D. P. C. 651.

Effect of Defective Jurat.]—There is no inflexible practice to discharge a rule with costs in all cases where it has been drawn up on reading an affidavit with a defective jurat. *Lloyd, In re*, 15 Q. B. 612; 19 L. J., Q. B. 457.

Where a rule has been obtained on an affidavit which is defective, in not having a proper jurat, the party moving cannot, when cause is shewn and the objection taken, remove the effect of it, by producing a fresh affidavit similar to the first, with a proper jurat; the proper way is to re-swear the original affidavit, and the court will enlarge the rule for that purpose, or allow the new affidavit to be filed. *Goodricke* v. *Turlay*, 4 D. P. C. 392; 2 C. M. & R. 636; 1 Tyr. & G. 146.

Illiterate Deponent.]—*See* post, cols. 1081, 1082.

Heathen Deponent.]—As to the form of the jurat of answer of a heathen or disbeliever. See *Ramkissenseat* v. *Barker*, 1 Atk. 19.

6. When Stale.

Rejection.]—The court will not reject affidavits merely upon the ground of their staleness. *Wynne* v. *Wynne*, 2 Scott (N.R.) 615; 9 D. P. C. 306; 5 Jur. 72.

An affidavit more than a year old cannot be used on moving for a rule. *Burt* v. *Owen*, 1 D. P. C. 691.

Afterwards, held that such an affidavit may be used in moving for a rule, unless the case is one in which the lapse of time affects the matters of the affidavit. *Doe* d. *Clarke* v. *Stillwell*, 3 N. & P. 701; 1 W. W. & H. 532; 8 A. & E. 645; 2 Jur. 591.

An affidavit is not considered stale till it is a year old. *Ramsden* v. *Maugham*, 4 D. P. C. 403; 2 C. M. & R. 643; 1 Tyr. & G. 40.

7. Of Merits.

By whom to be made.]—An affidavit of merits must appear to have been made either by the party himself, or his attorney or agent. *Morris* v. *Hunt*, 1 Chit. 97. S. P., *Rowbotham* v. *Dupree*, 5 D. P. C. 557.

It may be made by the managing clerk to the defendant's attorney, who may know more of the cause than the attorney himself. *Anon.*, 1 Smith, 61. S. P., *Neeson* v. *Whytock*, 3 Taunt. 403.

Or by some person who has had such a connection with the cause as acquaints him with the merits. *Rowbotham* v. *Dupree*, 5 D. P. C. 557.

An affidavit by the London agent to the country attorney, stating that he believed, from the instructions received from the country attorney, that the defendant had a good defence to the action on the merits, is sufficient. *Schofield* v. *Huggins*, 3 D. P. C. 427. S. P., *Johnson* v. *Popplewell*, 2 Tyr. 715.

An affidavit of merits, sworn by the managing clerk of the defendant, must state, not merely that he is the managing clerk generally, but must state that he had the management of the particular cause. *Doe* d. *Fish* v. *M'Donnell*, 8 D. P. C. 501; 4 Jur. 578.

Advice and Belief.]—An affidavit is not sufficient which states that both the defendant and his attorney "are advised and believe" that there is a good defence on the merits. *Worthington* v. *Price*, 2 C. M. & R. 315; 5 Tyr. 1029; 4 L. J., Ex. 292.

An attorney must swear positively to his belief of a defence on the merits, and not that he is instructed and advised, as a party may. *Ib.*

An affidavit, swearing to merits, by the defendant, "as he is advised and believes," is sufficient. *Crossby* v. *Innes*, 5 D. P. C. 566; W. W. & D. 192; *Westerley* v. *Kemp*, 1 Tyr. 261.

An affidavit by a clerk of the defendant's attorney, in which he deposed that he had the management and conduct of the defence to the action, and that the defendant had been advised by counsel that the defendant had a good defence to the action on the merits, and which the deponent verily believed to be true, is insufficient. *Nash* v. *Swinburn* or *Swinburne*, 4 Scott (N.R.) 326; 1 D. (N.S.) 190; 3 Man. & G. 630.

So an affidavit by a clerk to the defendant's attorney, "that he hath had the conduct of the cause, and is apprised and believes, that the defendant has good grounds of defence upon the merits," not saying, "upon the merits in the cause," is insufficient. *Bromley* v. *Gerish* or *Geridge*, 1 D. & L. 768; 7 Scott (N.R.) 516; 6 Man. & G. 750; 13 L. J., C. P. 16; 7 Jur. 1136.

See further as to information and belief, ante, cols. 1065, 1066.

Affidavit verifying Petition—Statement as to Belief.]—Notwithstanding the 3rd rule of Ord. XXXVII., which provides that "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions," the common affidavit by a petitioner verifying a petition (according to r. 4, and form 2 of schedule 3 to the General Order of November, 1862) is sufficient, although some of the allegations in the affidavits are only as to belief, and although there are other affidavits in

support of the petition, which shew the source of the petitioner's belief:—Semble, that the court will not now consider the question whether a rule of the Order of November, 1862, made under the Companies Act, 1862, is ultra vires. *New Callao Co., In re*, 47 L. T. 175; 30 W. R. 647—C. A.

Terms.]—Where a defendant swore that he was informed and believed that he had a good, substantial and available defence to the action:—Held, insufficient; and that he ought to have sworn distinctly and in terms to merits. *Page* v. *South*, 7 D. P. C. 412.

An affidavit that the defendant has a good defence on the merits, without words applying it to the particular action, is insufficient. *Tate* v. *Bodfield*, 3 D. P. C. 218.

So, an affidavit that the defendant had merits, and a good cause of defence to the action, is insufficient. *Lane* v. *Isaacs*, 3 D. P. C. 652.

It is not sufficient to say that the deponent believes the defendant has a "defence on the merits"; he should say, "a good defence." *Kenney* v. *Hutchinson*, 4 Jur. 106.

When Necessary.]—Where a defendant moves to set aside proceedings for irregularity—as for not giving notice of the execution of a writ of inquiry—it is not necessary to swear to merits. *Williams* v. *Williams*, 2 C. & M. 473; 4 Tyr. 368.

Where a defendant makes an affidavit of merits to set aside a judgment, the plaintiff cannot make an affidavit in answer, to shew that the defendant has no merits. *Blewitt* v. *Gordon*, 1 D. (N.S.) 815; 6 Jur. 825. S. P., *Heane* v. *Batterby*, 3 D. P. C. 213.

8. Filing.

When not allowed.]—The court, under 30 & 31 Vict. c. 44, s. 108 (Ir.), corresponding with the 13 & 14 Vict. c. 35, s. 28, will allow no affidavit to be filed to prove a matter not directly in issue, even after the cause has been heard, but before judgment delivered. *Hewson* v. *Hewson*, 20 W. R. 310.

A party to a cause will not, except under special circumstances be allowed to file affidavits after he has cross-examined witnesses on the other side. *Mayes* v. *Mayes*, 11 Jur. (N.S.) 1033; 13 L. T. 549; 13 W. R. 169.

Duty of Solicitor.]—Under rr. 10 and 15 of Ord. XXXVIII. it is the imperative duty of the solicitor of any party to any proceedings to cause to be filed every affidavit sworn and used in the course of such proceedings. *Taylor* v. *Gates*, 72 L. T. 436—C. A.

Necessity of.]—All affidavits used in court must be filed. *Elderton, Ex parte*, 2 D. P. C. 560.

Whether the motion is granted or refused. *Dicas, Ex parte*, 2 D. P. C. 92.

In order to obtain a rule calling on a party to file affidavits which have been used in applying for a rule, the party must first have been expressly required to file them; it is not enough that copies have been demanded, although it is the duty of the party to file them in the first instance. *Pilmore* v. *Hood*, 8 D. P. C. 21; 3 Jur. 1153.

Where a party improperly delayed serving a rule, and on that ground the rule was enlarged, the court would not compel the party enlarging the rule to file his affidavits previously to shewing cause. *Reg.* v. *Anderson*, 9 D. P. C. 1041.

Motion cannot be grounded on an affidavit to be filed. *Reeves* v. *Nagle*, 8 Ir. Eq. R. 521.

Affidavit mentioned in notice to be filed to be used on motion, cannot be read unless actually filed before notice served. *Nolan* v. *Lewis*, 2 Moll. 369.

—— **Foreign Affidavits.**]—Foreign affidavits must be either filed or made exhibits. *Hewitson, Ex parte*, 1 W. R. 58.

Time for.]—When a plaintiff applies for leave to use, at the hearing of a cause, affidavits and depositions, most of which had been made within the proper time, but through misapprehension none of them filed till after it, the court, on being satisfied as to bona fides, and that no injury could result to the defendant, granted the application. *Armstrong* v. *Armstrong*, Ir. R. 7 Eq. 84.

On the hearing of a summons adjourned from chambers into court, affidavits filed after the time fixed by the chief clerk for the filing of the evidence cannot be used before the judge in court unless special leave to use the new affidavits has been given either by the judge or the chief clerk. This rule does not apply where no time has been fixed by the chief clerk for the filing of evidence. *Chifferiel, In re, Chifferiel* v. *Watson*, 58 L. J., Ch. 137; 58 L. T. 877; 36 W. R. 806.

An affidavit used on a motion, but not filed until afterwards, may be entered in the order as read, even though the fact of its not having been filed has not been brought to the notice of the court, provided it does not interfere with the date of the order, as where the filing is on the same day. *King & Co.'s Trade Mark, In re*, 62 L. J., Ch. 153; [1892] 2 Ch. 462; 66 L. T. 491.

An affidavit filed after, but sworn before issue joined, may be read at the hearing without special leave. *Nicholl* v. *Jones*, 36 L. J., Ch. 554.

Affidavits filed while a case stands over part heard will not be admitted in evidence if objected to. *General Provident Assurance Co., In re, Cross, Ex parte*, 38 L. J., Ch. 583.

Affidavits on petitions in bankruptcy may be filed after petition day, but petition must stand over to give time to answer them. *Sparrow, Ex parte*, 2 Madd. 184.

A petition having received the Lord Chancellor's fiat. The affidavits were filed. An informality being discovered, the petition was then amended, and received the Lord Chancellor's fiat anew, and was ordered by his lordship to be received into the petition paper:—Held, that the petition could not be heard, because the affidavits were filed before the amended petition was regularly in court. *Bygrove, Ex parte*, 2 L. J. (O.S.) Ch. 147.

The court will, at any time previous to the hearing of a motion, postpone the hearing, in order to allow time for filing affidavits; but no affidavits filed after the hearing has begun may be read. *Electric Telegraph Co.* v. *Nott*, 2 Coop. C. C. 67; 11 Jur. 273.

It is only in very special cases and not at the option of the parties, that affidavits are admitted on a motion, after it has been opened to the court. *East Lancashire Ry.* v. *Hattersley*, 8 Hare, 86.

Where the court directs that affidavits shall be filed on both sides by a certain day, and some of the affidavits on one side happen not to be filed on that day, it is the established rule of the court not to enlarge the order further, that the other side may be required to give an answer to those affidavits. *Burton* v. *Maloon*, Barnard. 401.

No objection to a motion that the affidavit was filed only the day before, if it is an affidavit that cannot be answered, as that the plaintiff cannot go to trial with safety until the answer comes in. *Jones* v. ——, 8 Ves. 46.

Affidavits in answer, filed twenty-four hours before motion made, can be used on it, and always allowed in the costs to the party on whose behalf made, if he gets the costs of the motion. *Hynde* v. *Holmes*, 2 Moll. 378.

An affidavit must be filed in time to be read on the day when the application is to be made. *Watson* v. *Fairlie*, 4 L. J. (O.S.) Ch. 53.

A party cannot, on a motion, use affidavits filed prior to service of notice of motion, or after the day for which notice is given, without giving notice of his intention to do so. *Clement* v. *Griffith*, C. P. Cooper, 470.

Affidavits will be received, although filed after a time appointed, if a failure of justice or great inconvenience would be occasioned by their rejection. *Anderton* v. *Yates*, 15 Jur. 883.

Where an act of parliament required that to all bills which should be filed under its provisions an affidavit of a certain form should be annexed: —Held, that it was no objection to an affidavit which had been annexed to a bill filed under the act, that it had been sworn three days before the bill was filed. *Walker* v. *Fletcher*, 1 Ph. 115; 12 Sim. 420; 11 L. J., Ch. 103; 6 Jur. 4.

Affidavits filed so far back as the day of the notice of motion may be used on the motion, although the notice was not served until some days after the day of its date. *Bowdler* v. *Bowdler*, 9 L. J., Ch. 394.

On a motion to discharge an order made by the Vice-Chancellor, affidavits may be read, sworn after the order was made, and stating facts which were not before the Vice-Chancellor. *Const* v. *Barr*, 2 Russ. 161.

Affidavit sworn in June and not filed until the next February after the death of the person swearing it, was received as evidence quantum valeat. *Morley* v. *Morley*, 5 De G. M. & G. 610; 25 L. J., Ch. 1; 1 Jur. (N.S.) 1097; 4 W. R. 75.

An affidavit sworn on the day before the filing of the bill, is not admissible in evidence. *Fennall* v. *Brown* (18 Jur. 1051), not followed. *Francome* v. *Francome*, 5 N. R. 289; 12 L. T. 123.

Extending Time.]—The court, upon reasonable ground being shewn, will extend the time within which affidavits must be filed. *Reg.* v. *Keen*, 4 D. & L. 622; 1 B. C. Rep. 285; 11 Jur. 308.

Where additional time for filing affidavits is required, application for an extension of time ought, in the first instance, to be made to the opposite solicitor. *Moclare* v. *Moclare*, 8 Ir. Ch. R. 610.

Affidavits by way of evidence should only contain legal evidence directed to the matters put in issue by the pleadings. *Ib.*

Where it appears that the plaintiff's evidence under the new practice cannot be completed within the prescribed time, the court will enlarge the time, though there have been already several orders for enlarging the time. *McIntosh* v. *G. W. Ry.*, 2 W. R. 439.

Where notice of replication filed was not served on the defendant until after a month from the actual filing of the replication, the court refused to set aside the service for irregularity, or to take the replication off the file, but enlarged the time for closing the evidence to eight weeks from the service of the notice, exclusive of the long vacation, and gave no costs, the defendant not having previously communicated with the plaintiff. *Lloyd* v. *Solicitors' and General Life Assurance Society*, 3 Eq. Rep. 951.

Where a witness has been examined upon affidavit, four weeks additional beyond the nine weeks will be allowed before the evidence will be closed, and the plaintiff will have four weeks beyond the first four weeks to set down his cause for hearing, before the expiration of which no motion to dismiss can be made. *Jenkyn* v. *Vaughan*, 3 Eq. Rep. 300; 3 W. R. 151.

Time for Defendant to file Affidavits where Plaintiff files none.]—In an action in which the evidence is directed to be taken by affidavit, and no affidavits are filed by the plaintiff, the time for the filing of the defendant's affidavits does not commence to run (in the absence of an agreement between the parties, or a special order limiting such time), until the plaintiff gives the defendant express notice that he does not intend to file affidavits. *Eames* v. *Brady*, 5 L. R., Ir. 580.

Re-swearing.]—A party is not precluded from using an affidavit sworn before the day fixed, but re-sworn after that day, for the purpose of rectifying a mistake in the jurat. *Ouchterlony* v. *Gibson*, 5 Man. & G. 579.

In Enlarged Rules.]—Affidavits to shew cause against an enlarged rule must be filed a week before the term to which it is enlarged. *Gilson* v. *Carr*, 4 D. P. C. 618.

Although not so expressed in the rule of enlargement. *Barker* v. *Richardson*, 1 Y. & J. 362; 30 R. R. 795.

And the court will refuse to hear affidavits filed afterwards. *Turner* v. *Unwin*, 1 H. & W. 186. S. P., *Wright* v. *Lewis*, 8 D. P. C. 298; 4 Jur. 124.

Unless clearly shewn that the not filing them arose from inevitable accident. *Ib.*

When a rule is enlarged upon the motion of the party required to shew cause, that the affidavits used against the rule shall be filed a certain number of days before the ensuing term, the party cannot use affidavits which have not been so filed, and he will not be allowed a further postponement of the rule, unless he has been prevented by some special cause from filing his affidavits within the time. *Cosby* v. *Betts*, 3 Man. & G. 882.

A rule having been enlarged, upon the terms that all affidavits to be used in shewing cause should be filed one week before the ensuing term, the court nevertheless allowed the plaintiff to shew cause upon an affidavit sworn and filed for the purposes of the motion to enlarge. *Chambers* v. *Bryant*, 2 D. (N.S.) 671; 12 L. J., Q. B. 139.

Where a rule is enlarged from one term to another, and the rule states that affidavits to be used on shewing cause are to be filed by a certain day before the term, if affidavits are filed accordingly, and the other party takes office copies of them, the latter has a right to use them, though the party filing them may not be desirous of doing so. *Price* v. *Hayman*, 4 M. & W. 8; 7 D. P. C. 47; 1 H. & H. 191; 7 L. J., Ex. 297.

Waiver of Objection.]—Affidavits not having been filed within a prescribed time, an objection

was raised to them on that ground; but the party raising the objection having taken copies of the affidavits, held precluded from availing himself of the objection. *Mackay, In re*, 1 D. & L. 206; 12 L. J., Q. B. 337; 7 Jur. 945.

Excuses.]—Poverty and residence of the party at a distance from London are no excuses for not filing them in time. *Lewis* v. *Kirby*, 8 Scott, 179.

Or when he omits, by excusable accident, to do so, the court will only grant a rule nisi for him to use such affidavits. *Pryor* v. *Swaine*, 2 D. & L. 37; 13 L. J., Q. B. 214.

Used at Chambers.]—Where affidavits used before a judge out of court are required to be produced before the ordinary time for returning them, the proper course is to give notice to the judge's clerk to that effect. *Needham* v. *Bristow*, 1 D. (N.S.) 700.

Not in Writing of Special Examiner.]—A witness's depositions de bene esse, not taken down by the examiner, specially appointed, in his own handwriting, as directed by 15 & 16 Vict. c. 86, s. 32, but taken down in the presence of the other parties and certified by the examiner to have been read over to the witness and signed by her in his presence, were, under Ord. XXXVII. r. 4, ordered to be filed. *Bolton* v. *Bolton*, 2 Ch. D. 217; 34 L. T. 123; 24 W. R. 426.

Interlineation—Jurisdiction of Masters.]—A Master of the Queen's Bench Division has no jurisdiction to initial an interlineation in an affidavit sworn in support of an application in the Chancery Division. According to the practice in the Chancery Division, such an affidavit ought not to be filed without an order of the court. *Cloake, In re*, 61 L. J., Ch. 69; 65 L. T. 455; 40 W. R. 74.

Effect of Delay.]—Where unnecessary delay in filing affidavits had taken place, injunction granted till next seal, with liberty to file affidavits. *Carew* v. *Yates*, 1 W. R. 11.

After Evidence Closed.]—After the time for closing the evidence in a cause has expired, the court will not, under the 15 & 16 Vict. c. 86, s. 38, extend it, except under special circumstances. *Thompson* v. *Partridge*, 4 De G. M. & G. 794; 2 Eq. R. 73; 23 L. J., Ch. 158; 17 Jur. 1108; 2 W. R. 113.

Both parties may abstain from filing their affidavits till immediately before the expiration of the time fixed for closing the evidence. *Ib.*

Therefore where the time for closing the evidence in a suit, after having been once enlarged at the instance of the plaintiff, had been fixed, the court, holding the grounds alleged to be insufficient, refused to enlarge the time for closing the evidence upon the application of the defendant, grounded upon an affidavit stating that, having received notice of affidavits filed by the plaintiff only on the last day of the time so fixed, he, the defendant, took copies thereof, and submitted them to counsel, who thereupon advised him to enter into evidence, although before he had seen those affidavits he had advised him not to do so. *Ib.*

Three days after the time fixed for closing evidence had expired, the plaintiff filed an affidavit, founded upon allegations which appeared in an affidavit of the defendant, and containing matter which, as was alleged, ought properly to have been brought forward by way of reply:—Held, on motion, that the plaintiff was at liberty to read such affidavit at the hearing; the time for cross-examination to be enlarged for one month. *Phillips* v. *Wardle*, 2 Jur. (N.S.) 608; 4 W. R. 305.

The plaintiff moved under the 38th section of the 15 & 16 Vict. c. 86, on notice immediately before the hearing of a cause, for leave to read thereat an affidavit already sworn, or that the time for closing the evidence might be enlarged, on the ground that the defendant's affidavits were not filed till the day when the evidence closed. The plaintiff deposed that such affidavit was necessary. The court gave special leave to read the affidavit, and the defendant not requiring to answer the affidavit, the court directed the cause to proceed, reserving to the defendant all right of examination, if asked. *Hope* v. *Threlfall*, 1 Sm. & G. (App.) xxi.; 2 Eq. R. 49; 17 Jur. 1021; 2 W. R. 4.

Leave granted, after time for closing evidence had passed, to file affidavits verifying extracts from a register of a Scotch court of law. *M'Lachlan* v. *Lord*, 14 L. T. 98.

Semble, where an affidavit, filed after the expiration of the period for closing the evidence, relates to matters which happened after that period, the court may take upon itself at the hearing, and without a special application, to give leave for its admission. *Boyse* v. *Colclough*, 1 Kay & J. 124; 24 L. J., Ch. 7; 3 Eq. R. 78; 3 W. R. 8.

Where the plaintiffs, by affidavits filed immediately before the time for closing evidence, made specific charges against two of the defendants' witnesses, with a view to discredit their testimony, the bill not clearly raising any issue which could prepare the defendants to meet such charges, though the persons against whom they were made were named in the bill in connection with the transaction as to which their evidence was given:—Held, that an order allowing the defendants to file affidavits as to these charges, after the time for closing the evidence, had been properly made. *Scott* v. *Liverpool Corporation*, 1 De G. & J. 369; 3 Jur. (N.S.) 832. Affirming 26 L. J., Ch. 651.

By inadvertence, an affidavit was not filed until after the evidence had closed, though prepared before. The court, on motion, gave liberty to use it on payment of the costs of the motion. *Douglas* v. *Archbutt*, 23 Beav. 293; 5 W. R. 393.

A witness made an affidavit on behalf of the plaintiff on the 10th November, 1856, and died on the 10th May, 1857. On the 22nd May, the day appointed for closing the evidence, the plaintiff filed this affidavit. Held, that although the affidavit ought to have been filed before, and had lost much of its value, it could not be taken off the file. *Abadom* v. *Abadom*, 24 Beav. 243.

There must be some special reason for allowing further evidence to be filed. If at the hearing it is found that the defendants have been taken by surprise, an opportunity of producing further evidence will be given them. *Poupard* v. *Fardell*, 18 W. R. 37.

After evidence is closed the court will not, under 15 & 16 Vict. c. 86, s. 38, allow new evidence to be received on the ground that a material witness has since been discovered, whose evidence the party who desired that the

affidavit of such witness should be filed, had no previous means of knowing to be obtainable. *Thexton* v. *Edmonston*, 37 L. J., Ch. 329; L. R. 5 Eq. 373; 16 W. R. 833.

It is not of itself a sufficient ground for admitting evidence in a cause after the time for closing evidence has expired that material evidence has been discovered since that time. *Ib.*

Circumstances under which the court will receive such evidence. *Ib.*

After the time for closing evidence has expired, application, to read further affidavits, should be made at the hearing. *Bayley* v. *Cass*, 10 W. R. 370.

In a cause where replication is filed, if the question turns upon a particular matter of fact not specifically alleged in the pleadings, the court will not give the defendant leave to put in further evidence after the evidence is closed, but will at the hearing direct an inquiry as to such fact. *Weston* v. *Empire Assurance Corporation*, L. R. 6 Eq. 23.

9. Taking off File.

Irregularity.]—Semble, the court will not take the deposition of a witness off the file for irregularity in taking it. *De Britto* v. *Hillel*, 42 L. J., Ch. 307; L. R. 15 Eq. 213; 28 L. T. 59; 21 W. R. 379.

Notice was given by the party that had obtained a commission to examine witnesses at Lisbon that their agent was proceeding there, and notice of the time and place of examination could be obtained of him at the hotel D. at Lisbon. The court refused to take the deposition of a witness examined at Lisbon off the file. *Ib.*

The court has power to dispense with notice under r. 22 of the Orders of the 5th February, 1861, ex post facto. *Ib.*

—— **Illiterate Witness.**]—Affidavits made by an illiterate person were sworn with the usual form of jurat not containing the certificate required by Ord. XXXVIII. r. 13. The managing clerk of the deponent's solicitor deposed that he had prepared the affidavits from the deponent's personal instructions, that he carefully read them over to him before they were sworn, and that the deponent appeared perfectly to understand them. It was not, however, deposed that the affidavits were read over in the presence of the commissioner:—Held, that there was no sufficient evidence to satisfy the court that the affidavits were read over to and appeared to be perfectly understood by the deponent within the meaning of Ord. XXXVIII. r. 13, and that the affidavits must be taken off the file. *Longstaffe, In re, Blenkarn* v. *Longstaffe*, 54 L. J., Ch. 516; 52 L. T. 681.

Where an answer is put in by a defendant who cannot read or write, his solicitor swears to having read the contents of the answer to the defendant, and that he appeared perfectly to understand the same, and this is stated in the jurat; where, therefore, the jurat stated the answer to have been read over to the defendant by one of the commissioners, and that the defendant appeared to understand it, the answer was on motion taken off the file for irregularity, with costs. *Att.-Gen.* v. *Malim*, Younge, 376.

Where an answer had been put in by an illiterate defendant, unaccompanied by any affidavit by his solicitor, as to its having been read over and explained to him previous to his being sworn, and the jurat did not state that he had affixed his mark to it in the presence of the commissioners; ordered, upon motion, that the answer should be taken off the file for irregularity, with costs. Objections to the form of this part of an answer cannot be waived by the parties to the suit. *Pilkington* v. *Himsworth*, 1 Y. & Coll. 612; 5 L. J., Ex. Eq. 47.

The court held the jurat on taking an answer to be regular, though the officer who signed it did not add his description to his name, and though, it being the case of an illiterate party, there was no statement that he appeared to understand the answer. *Wilton* v. *Clifton*, 2 Hare, 535; 12 L. J., Ch. 425; 7 Jur. 215. And see *Johnson* v. *Todd*, 5 Beav. 597.

Witness examined ex parte.]—In a cause in which notice of motion for decree was given, a witness was examined ex parte. On a motion to take the deposition off the file for irregularity:—Held, that the deposition was taken irregularly, but under the circumstances it was ordered to stand on the file, with liberty for the opposite party to cross-examine. *Smith* v. *Baker*, 2 Hem. & M. 498; 4 N. R. 321; 10 L. T. 599.

The plaintiff, replication not having been filed, subpœnaed before the examiner some witnesses who had refused to make affidavits. The examination took place, and the depositions were treated as ex parte by the examiner, notwithstanding a protest by counsel. The plaintiff subsequently gave notice of motion for a decree, reference to these depositions being appended to the notice; and defendant afterwards applied for an enlargement of the time for answering the plaintiff's motion. On motion by defendant that these depositions might be taken off the file as being ex parte and irregular:—Held, that s. 40 of 15 & 16 Vict. c. 86, was confined to proceedings actually before the court; and that notice of the motion for a decree not having been given at the time of the examination, it was irregular; but that defendant, having had notice of plaintiff's intention to use the depositions on the hearing of the motion for a decree, and having applied for further time to answer the motion which rested on them, without complaining of them as having been taken ex parte, could not now complain. *Coles* v. *Morris*, 36 L. J., Ch. 833; 17 L. T. 155; 15 W. R. 1157.

For Purpose of being Used in another Case.]—The court will not allow documents, necessary evidence in a case sub judice, to be taken off the file for the purpose of being sent out of the kingdom for identification by witnesses to be examined abroad upon a mandamus in an action brought in another court. *Stephens, In re*, L. R. 9 C. P. 187; 22 W. R. 615.

Where a plan has been filed in support of a motion, at the instance of a particular party, and which has been disposed of, the court will not allow that plan to be taken off the file, at the instance of the same party, in order to enable him to make a defence to another proceeding. *Price* v. *Seeley*, 8 D. P. C. 653.

Objection to, for want of Form.]—In an affidavit the words "severally make oath and say" were omitted by mistake:—Held, that the affidavits could not be objected to on that ground after it had been filed. *Torkington, Ex parte, Torkington, In re*, L. R. 9 Ch. 298; 22 W. R. 602.

Petition and affidavits in support, filed under an incorrect title. The petition was amended and affidavits were ordered to be taken off file, amended as to title, and re-sworn. *Burton, Ex parte*, 18 L. J., Bk. 17 ; 13 Jur. 297 ; *Id.* 420.

Affidavits erroneously entitled allowed to be taken off the file and re-sworn in their proper title, without a fresh stamp. *Pearson* v. *Wilcox*, 1 Eq. Rep. 239 ; 10 Hare (App.) xxxv. ; 1 W. R. 492.

Motion to take off File.]—A motion to take off the file the affidavits of a deponent who, after an order to attend before the examiner at his own expense, had not been produced for cross-examination, is irregular, as the affidavits could not be used as evidence except by special leave. *Meyrick* v. *James*, 46 L. J., Ch. 579.

Discretion.]—The court has a discretion to take affidavits or depositions off the file, at the request of the parties or otherwise. *Fox* v. *Bearblock*, 46 L. T. 145 ; 30 W. R. 342—C. A. See also *Cracknell* v. *Janson*, 48 L. J., Ch. 168 ; 11 Ch. D. 1 ; 39 L. T. 32 ; 27 W. R. 55.

Cross-examination—Withdrawal of Affidavit.]—Where a person has made and filed an affidavit for the purpose of being used in a matter pending before the court, he cannot be exempted from cross-examination by the withdrawal of the affidavit. *Clarke* v. *Law* (2 K. & J. 28) approved, and held to be applicable where the person making the affidavit is not a party to the proceedings. *Quartz Hill Consolidated Gold Mining Co., In re, Young, Ex parte*, 51 L. J., Ch. 940 ; 21 Ch. D. 642 ; 31 W. R. 173—C. A.

In the High Court the deponent can be cross-examined even if the affidavit were not used by the party who filed it. *Child, Ex parte, Ottaway, In re*, 51 L. J., Ch. 494 ; 20 Ch. D. 126 ; 46 L. T. 118 ; 30 W. R. 282.

Affidavits in Reply—Leave at Trial to Answer.]—Affidavits filed by a plaintiff in reply will not upon interlocutory motion be ordered to be taken off the file upon an allegation by the defendant that they are not confined to matters strictly in reply ; though at the hearing, if it should turn out to be so, the court will not regard them, or may give leave to the defendant to answer them. *Gilbert* v. *Comedy Opera Co.*, 16 Ch. D. 594 ; 43 L. T. 665 ; 29 W. R. 169.

Other Cases.]—Where an affidavit was made by one who had been convicted of subornation of perjury, the court made a rule absolute to take it off the file. *Sawyer, In re*, 2 G. & D. 141 ; 2 Q. B. 721 ; 11 L. J., Q. B. 234. S. P., *Holmes* v. *Grant*, 1 Gale, 59.

Although affidavits cannot be read in reply, yet the court will under particular circumstances, either grant a rule for taking off the file an affidavit into which matters have been introduced, disclosed in professional confidence, or for preventing such portions of the affidavit from being read. *Bury* v. *Clench*, 1 D. (N.S.) 848 ; 6 Jur. 346.

When a rule calling on an attorney to answer the matters of an affidavit is discharged by consent, the court will not allow the affidavits filed in support of the rule to be taken off the file. *Anon.*, 12 W. R. 1012.

When an affidavit has been read and filed, it becomes a record of the court, and cannot be taken off the file. *Beal* v. *Langstaff*, 2 Wils. 371. S. P., *Plant* v. *Butterworth*, 5 Tyr. 183.

Where Scandalous.]—*See* post, col. 1093, et seq.

10. EXHIBITS.

When inadmissible in Evidence.]—A witness who made an affidavit on behalf of a plaintiff, had at another time made statements to the solicitor for the defendant which were inconsistent with those which he made in his affidavit. The solicitor had taken down these statements in writing at the time, and the witness had signed the written statement. The solicitor made this statement an exhibit to an affidavit which he made in the cause on behalf of the defendant :—Held, that this exhibit was inadmissible. *Hemming* v. *Maddick*, 41 L. J., Ch. 522 ; L. R. 7 Ch. 395 ; 26 L. T. 565 ; 20 W. R. 433.

The proper way to make it admissible would have been to summon the witness for cross-examination, and to put the written statement into his hand and question him upon it, but even then it could only be used to discredit him. *Ib.*

What may be.]—A statutory declaration made in New South Wales by husband and wife will be allowed to be annexed as an exhibit to an affidavit filed in the cause. *Whiting* v. *Bassett*, 41 L. J., Ch. 551 ; L. R. 14 Eq. 70.

Foreign affidavits must be either filed or made exhibits. *Hewitson, Ex parte*, 1 W. R. 58.

Certificate as to.]—A commissioner before whom an affidavit is sworn, ought to certify that any exhibit annexed is the document referred to in the affidavit. *Allison, In re*, 10 Ex. 561 ; 3 C. L. R. 319 ; 3 W. R. 62.

Handing in.]—Documents referred to in affidavits, and exhibited, must be handed in with the affidavits, and remain in court until the matter, in respect of which the affidavits are sworn, has been disposed of. *Attenborough* v *Clark*, 2 H. & N. 588.

Retained by Deponent—Production.]—The committee of a lunatic jointly interested with the lunatic in certain property under a will, being desirous of having the trusts of the will administered, obtained leave to add the lunatic as a co-plaintiff in the action on affidavit evidence with certain exhibits, which, according to the present practice, are not filed with the affidavit but retained by the deponent. The lunatic died, and her executor, disapproving of the action, and desiring to impeach the proceedings of the committee, demanded all the documents in the possession of the committee, including the exhibits to the above-mentioned affidavit. The committee refused to produce them :—Held, that the exhibits being described in the affidavit as "hereto annexed," were part of the evidence, and that the committee was bound to produce them. *Hinchliffe, In re*, 64 L. J., Ch. 76 ; [1895] 1 Ch. 117 ; 12 R. 33 ; 71 L. T. 532 ; 43 W. R. 82—C. A.

Copies.]—Where exhibits have been made in the course of an inquiry before the Master, the court will not, after the conclusion of the inquiry, compel the party exhibiting to give copies of those exhibits to his opponent. *Devonport* v. *Jones*, 8 D. P. C. 497 ; 4 Jur. 720.

Parties are not bound to take office copies of exhibits. *Hawkyard* or *Hawks* v. *Stocks*, 2 D. & L. 936 ; 9 Jur. 451.

If a paper is used as an exhibit in connection with an affidavit, but is not annexed thereto, the party against whom it is exhibited is entitled to have a copy in the same manner as though it were filed. *Tebbut* v. *Ambler*, 3 Jur. 435; 7 D. P. C. 674.

Erasures.]—An erasure in an affidavit occurring in a recital of the contents of an exhibit, is immaterial. *Savage* v. *Hutchinson*, 3 Eq. R. 368; 24 L. J., Ch. 232.

How Identified.]—It is not enough to identify a document that it should be inseparably connected with and referred to as so connected in the affidavit. The document must be impressed with some mark to which the affidavit refers. *Hewetson* v. *Todhunter*, 2 Sm. & G. (App.) ii.

An affidavit connected by a ribbon under a consular seal with a copy of a deed, referring to the deed and stating that the copy is correct, but where the paper so annexed contains no reference to the affidavit, is irregular, and may not be filed. Neither will it be received valeat quantum. *S. C.*, 2 W. R. 298.

11. Office Copies.

Proof by.]—It being necessary to prove the death of a person, office copies of affidavits, which had proved that death to the satisfaction of the Courts of Chancery and of Probate in other matters, were allowed to be taken as sufficient evidence of the death in the present case. *Woolley's Trusts, In re*, 24 W. R. 783.

On an application for a new trial one of the witnesses made an affidavit. The same witness was called on the second trial. It was proposed to cross-examine the witness from an office copy of her affidavit, which was ordered by the judge's order (in the usual form) to be admitted as a true copy:—Held, that this might be done, and that it was not necessary to have the original affidavit to cross-examine upon. *Davies* v. *Davies*, 9 Car. & P. 252.

In an action for maliciously holding plaintiff to bail, the declaration stated, that defendant had sued out the writ, which he caused to be indorsed for bail, by virtue of an affidavit for that purpose filed:—Held, that a copy of the affidavit was admissible in support of this allegation. *Cook* v. *Dowling*, 3 Doug. 75.

Necessity of Taking.]—The court will in no case dispense with the practice which requires a party shewing cause against a rule to take office copies of the affidavits upon which it is moved. *Chaffers, In re*, L. R. 8 C. P. 376.

A party who has not taken office copies of affidavits cannot be heard to shew cause against a rule. *Hilton* v. *Green*, 10 W. R. 627.

An office copy is the only evidence the court will admit of the filing of the affidavit. *North, Ex parte*, Buck. 396.

Where counsel, on appearing to shew cause, is not prepared with office copies of the affidavits, on which a rule has been obtained, it is a matter of discretion in the court, whether time shall be allowed to take office copies. *Rogers, In re*, 9 D. P. C. 926.

The practice that, when cause is to be shewn in a different term from that in which a rule nisi was obtained, office copies of the affidavits on which the rule was moved, must be taken by the party intending to shew cause before he can be heard, applies equally to motions for an attachment as to other motions. *Reg.* v. *Carttar*, 1 L. M. & P. 274; 19 L. J., Q. B. 422; 15 Jur. 176.

That office copies of affidavits upon which a rule is moved have not been taken, is not an objection which the court will entertain after the argument has been allowed to commence. *Mason* v. *Haddan*, 6 C. B. (N.S.) 526.

On shewing cause against a rule nisi for a new trial in a cause tried before the sheriff, the party shewing cause must be provided not only with an office copy of the affidavits on which the rule was obtained, but of the sheriff's notes also. *Walker* v. *Needham*, 3 Man. & G. 557; 4 Scott (N.R.) 222; 1 D. (N.S.) 220.

Office copies of affidavits were dispensed with on the hearing of an appeal, on the ground of expense, and an order was made that the officer having the custody of the original affidavits should attend with them upon the hearing of the appeal. *Sickles* v. *Norris*, 45 L. J., C. P. 148; 24 W. R. 102—C. A.

Cause cannot be shewn till an office copy is taken of the affidavit on which the rule nisi was obtained. *Brown* v. *Probert*, 1 D. P. C. 659.

Office Copy of Office Copy.]—The plaintiff in an action of ejectment on a judgment-mortgage, omitted to prove that the actual office copy of the affidavit on the judgment had been lodged in the registry office as required by the act, but produced an office copy of the document lodged there:—Held, that the office copy last mentioned was sufficient evidence that the document lodged in the registry office was the actual office copy of the affidavit. *Moriarty* v. *Moriarty*, 18 W. R. 145.

Costs.]—If notice that certain affidavits will be read at the hearing of appeal be given to one of the parties, to the admission of which he objects, his proper course is to inform the party, who has given him notice, of his objection, and to oppose their reading at the opening of the appeal without having taken copies, and, if the court decides that they are admissible, to ask for time to furnish himself with copies. If, however, he has previously taken copies, and the affidavits be not read, he will have to bear the cost of the copies, although he gets the cost of the appeal. *Brampton and Longtown Ry., In re, Shaw's Claim*, 44 L. J., Ch. 670; L. R. 10 Ch. 186; 33 L. T. 5; 23 W. R. 813.

12. User of.

a. Generally.

Power of Court.]—The court, if it be of an opinion that such a course is necessary for the purposes of justice, has authority to exclude affidavit evidence altogether, and to direct that the same shall not be used, but that the witnesses shall be examined orally at the trial. *Lovell* v. *Wallis*, 53 L. J., Ch. 494; 49 L. T. 593.

On motion for judgment the court has no power under the Rules of Court, 1875, to order that the evidence shall be taken by affidavit. *Ellis* v. *Robbins*, 50 L. J., Ch. 512.

Where Inquiry Pending.]—The court will not try by affidavits a fact, respecting which an inquiry is pending before the Master. *Stag* v. *Grey (Earl)*, 4 Jur. 1007.

Where Not the Best Evidence.]—On interlocutory applications, which are necessarily heard

upon affidavits, the court does not dispense with the rule, that on disputed points, the best evidence in the power of the parties must be given; and therefore, it is not sufficient for a party to state, upon affidavit, the purport and effect of a document which he has the means of producing. *Stamps* v. *Birmingham, Wolverhampton, and Stour Valley Ry.*, 7 Hare, 251; 2 Ph. 673; 17 L. J., Ch. 431.

To Control Deed.]—Affidavits are inadmissible to control the operation of a deed. *Cowlishaw* v. *Hardy*, 25 Beav. 169.

When Sworn.]—An affidavit sworn before the bill was filed cannot be used on a motion for an injunction. *Bowen* v. *Bowen*, Ir. R. 7 Eq. 251.

An application, that affidavits in support of an interim injunction might be received in evidence, notwithstanding that they were sworn before the filing of the bill, refused. *Francome* v. *Francome*, 11 Jur. (N.S.) 123; 11 L. T. 757; 13 W. R. 355.

Upon an interlocutory motion, counsel are entitled to use any affidavit which is in existence at the time when they are called upon to address the court. *Munroe* v. *Wivenhoe and Brightlingsea Ry.*, 4 De G. J. & S. 723; 12 L. T. 562; 13 W. R. 880.

Affidavits by a defendant before pleading allowed to be used in support of a motion. *Kitchen* v. *Turnbull*, 20 W. R. 253.

Although unfiled affidavits may be read on an ex parte application, they cannot be read when the respondent has been served but does not appear, and the application is made on affidavit of service on him of the notice of motion. *Furrer* v. *Sykes*, 43 L. J., Ch. 392.

The court refused to allow an affidavit (on which a rule for a new trial had been obtained), sworn after the first four days of the term, to be used in support of the rule, though (the cause having been entered in the list of motions for new trials) the rule had in fact been obtained after the affidavit was sworn. *Williams* v. *Mortimer*, 11 M. & W. 104; 12 L. J., Ex. 164.

It is no objection to an affidavit used in opposing a motion, that it has been sworn after the day upon which the rule was due, if sworn before cause is actually shewn. *Graham* v. *Beaumont*, 5 D. P. C. 49; 3 Scott, 287; 5 L. J., C. P. 270. S. P., *Braine* v. *Hunt*, 2 D. P. C. 391. *Pin* v. *Grazebrook*, 3 Man. & G. 863; 4 Scott (N.R.) 567. *Hicks* v. *Marreco*, 3 Tyr. 216.

Cross Suits.] — On the day on which the evidence was closed in a suit in which replication had been filed, the plaintiffs in a cross suit served notice of motion for decree in their suit. A month's time was obtained by the plaintiff in the original suit for putting in his evidence upon the motion for decree, and the plaintiffs in the cross suit subsequently filed a large mass of affidavits in reply. On motion by the plaintiff in the original suit to suppress this evidence in reply, on the ground that it was an unfair attempt by the plaintiffs in the cross suit to obtain an advantage by putting in new evidence on matters in issue in the original suit after publication had passed: — Held, that there had been no such irregularity on the part of the plaintiffs in the cross cause in the conduct of their suit, as to justify the court in suppressing the evidence filed by them in reply, but that the cross-examination in court would be directed upon the affidavits in reply notwithstanding such affidavits were filed in a suit intended to be heard on motion for decree. *Hall* v. *Hargreaves*, 40 L. J., Ch. 255; L. R. 11 Eq. 414; 24 L. T. 126; 19 W. R. 560.

In Different Suits.] — Two days before the closing of the evidence, the defendant obtained an order of course to use at the hearing the bill and some affidavits in another suit instituted by the same plaintiffs, but raising a different issue. The court, being of opinion that the order was obtained because the defendant's own evidence was not ready, discharged the order with costs. *Peru Republic* v. *Ruzo*, 32 L. T. 598; 23 W. R. 546.

Though against the same defendant, there must be affidavit in every cause that he is not to be found. *Lumbrozo* v. *White*, Dick. 150.

On Appeals and Renewed Applications.]—In the absence of arrangement, affidavits used on a motion cannot be used at the hearing of the cause except by agreement between the parties. *Perkins* v. *Slater*, 45 L. J., Ch. 224; 1 Ch. D. 83; 24 W. R. 39.

Affidavits, which had been used before the chief clerk, were rejected by the Vice-Chancellor, on the ground that no notice of intention to read them had been given by the defendant. The plaintiff in his notice of appeal gave notice of motion for leave to read them on the appeal:— Held, that they were "further evidence," within the meaning of Ord. LVIII. r. 5, and leave to read them was given. *Chennell, In re, Jones* v. *Chennell*, 47 L. J., Ch. 80; 8 Ch. D. 492; 38 L. T. 494; 26 W. R. 595.

Further Consideration — Affidavit not before Chief Clerk.]—Where proceedings in an action had been carried on under an order made in pursuance of Ord. XV., and there had been no trial of the action, the court, on further consideration of the action, allowed an affidavit to be read which had not been before the chief clerk, and therefore was not mentioned in the certificate. *Michael, In re, Dessau* v. *Lewin*, 52 L. T. 609.

Filed on Interlocutory Motion.]—At the trial of a cause with vivâ voce evidence, the court admitted in evidence an affidavit filed upon an interlocutory motion which had been ordered to stand over to the hearing, although the deponent had since died, and had not been cross-examined. *Elias* v. *Griffith*, 46 L. J., Ch. 806.

Affidavits in support of a motion, which the plaintiff is prevented from making, may be read, if the answer is not filed until the day for which the notice is given. Semble, *Goodman* v. *Whitcomb*, 1 Jac. & Walk. 589.

Admissibility.] — Affidavits made by third persons on behalf of the plaintiff upon an interlocutory application, are admissible as evidence against him at the trial. *Campbell* v. *Rothwell*, 38 L. T. 33.

A party shewing cause against a rule has a right to read an affidavit of his filed in court, which was made in support of a former application for a rule involving the same question, and of which the other side took an office copy. *Ryan* v. *Smith*, 9 M. & W. 223; 11 L. J., Ex. 77.

Where a rule obtained in the name of the plaintiff to set aside an order had been discharged on an affidavit of the plaintiff, that the application was made without his authority or consent, the court allowed a second application to be

made on the same affidavits in the name of the party on whose behalf the action was brought. *Tilt* v. *Dixon*, 4 C. B. 736; 17 L. J., C. P. 61.

Where an affidavit has been used on one rule, it cannot be used on another, to prove facts stated in it, which, though material on the second rule, were immaterial on the first. *Reg.* v. *Mixen*, 1 D. (N.S.) 865.

Affidavits sworn in opposition to one rule, on which the allegations in them may be immaterial, cannot be used without reswearing, in opposition to another rule, on which they may become material, although the same question might be intended to be raised on the first rule, which was actually raised on the second. *Quelly* v. *Boucher*, 3 D. P. C. 107; 1 Scott, 283.

An affidavit sworn in order to resist an application to a judge at chambers, may be used on showing cause before the court against the same application, if referred by the judge to the court. *Worthington* v. *Price*, 5 Tyr. 1029.

So, affidavits sworn at chambers, and used before the judge, may be used in court on moving to set aside the order. *Pickford* v. *Ewington*, 1 Gale, 357.

Made after Notice of Trial.]—Evidence by affidavit taken under a judge's order after notice of trial has been given, may be used at the trial notwithstanding R. S. C. (1875) Ord. XXXVIII. r. 6. *Waring* v. *Lacey*, 24 W. R. 318.

At Hearing.]—An affidavit, which was filed to verify a fact, of which the court at the hearing required some information, was received. *Gay's Case*, 1 De G. M. & G. 347; 21 L. J., Ch. 284; 16 Jur. 183.

Altered.]—An affidavit cannot be used if altered after it is sworn. *Wright* v. *Skinner*, 5 D. P. C. 92.

Of Opposite Party.]—A petitioner may read as his evidence a portion of a respondent's affidavit, without making the whole his evidence. *Archbold* v. *Scully*, 9 Ir. Ch. R. 152.

Though a petitioner may read a portion of the respondent's affidavit by way of answer without making the whole his own evidence, he cannot read any other affidavit filed on behalf of the respondent without making the whole his own evidence. *Farrer* v. *Mercer*, 10 Ir. Ch. R. 502.

Shewing to Opponent.]—Affidavits intended to be used on shewing cause against a rule should be handed to the opposite party. *Reg.* v. *Hudson*, 9 Jur. 355.

As to Practice.]—Affidavits cannot be read as to practice. *Christy, Ex parte, Barrow, In re*, 3 Mont. & Ayr. 94. See *S. C.*, 2 Deac. 113; 6 L. J., Bk. 68.

As to Proceedings.]—Affidavit verifying proceedings at law, not evidence, and taken off the file with costs. *Barnes, Ex parte*, Mont. & M'Ar. 9.

Where Evidence taken Orally—Former Practice in Chancery.]—Where, before the month of January, 1855, issue was joined in a cause in which the plaintiff elected to take evidence orally, and had examined his witnesses, a defendant applied, under the 7th order of January 13th, 1855, for leave to prove his case by affidavit, Lord Justice Turner, agreeing with the master of the rolls in the particular case before the court, refused the application. *Musgrove* v. *Smith*, 24 L. J., Ch. 439.

When the evidence in a cause is taken orally, a general application, under the 36th section of the 15 & 16 Vict. c. 86, to be at liberty to use at the hearing affidavits already filed, is irregular. The particular facts or circumstances proposed to be proved by affidavits should be specified both in the notice of motion and in the order. *Ivison* v. *Grassiot*, 17 Beav. 321.

Case in which a plaintiff was held not to be entitled to take the evidence of a witness on his behalf by affidavit under the 36th section of the statute 15 & 16 Vict. c. 86. *Crofts* v. *Middleton*, 9 Hare (App.), xviii.

Undertaking not to use.]—An affidavit in a suit, but being objected to was withdrawn, on an undertaking that it should not be used at the hearing, and it was not used accordingly. On an inquiry in the suit the same affidavit was sought to be used, but objected to on the ground that the undertaking precluded its being used at all: —Held, admissible. *Jenner* v. *Morris*, 10 W. R. 640.

b. Notice to Read.

When required.]—Where affidavits are intended to be read in support of a motion made on notice, the general rule of the court requires that notice that such affidavits are filed, and are intended to be read, be given, in the notice of motion; and unless this be done, the affidavits cannot be read. The rule does not apply to affidavits of service of notices of motion. *Rock* v. *Unett*, Younge, 268.

Answering an affidavit is a waiver of any objection which might be taken to it, on the ground of notice not having been given that it was to be used. *Blackmore* v. *Glamorganshire Canal Co.*, 5 Russ. 151.

Affidavits taken before notice of motion cannot be read on motion without notice of reading them, unless they are answered subsequent, and with reference to the notice of motion. *Longman* v. *Tyson*, per Vice-Chancellor, 10th November, 1829.

Case in which affidavits filed before the bankrupt and wife were made parties to the suit, were used against the assignee, though no notice was given that they would be read. *Pearson* v. *Kensit*, 6 Jur. 982.

If a plaintiff gives notice of his intention to read an affidavit on the hearing of a motion, but declines to do so, the defendant is nevertheless entitled to read it. *Cauty* v. *Houlditch*, 14 Sim. 75.

Where notice is given to read affidavits on motion, and they are actually filed and briefed, they must be entered in the order as read, though not even mentioned on the hearing of the motion. *Catholic Printing and Publishing Co.* v. *Wyman*, 1 N. R. 49; 32 L. J., Ch. 53; 9 Jur. (N.S.) 436; 11 W. R. 49.

c. Leave to Read.

When Unfiled.]—An affidavit, though not filed, may be read, upon an undertaking to file it. *Baker, Ex parte*, 2 Deac. & C. 362.

In the long vacation, when a matter presses, the court will sometimes take the original affidavits into its custody and act upon them as if they had been filed; but when the court is sitting, office copies alone can be used. *Att.-Gen.* v. *Lewis*, 8 Beav. 179.

In a pressing case an affidavit which was wanted for the purpose of a motion was allowed to be sworn in open court. *Mercers' Co.* v. *Witham Navigation Co.*, 14 Beav. 20; 20 L. J., Ch. 557.

When, on account of the offices of the court being closed, the filing of a bill has been delayed, the court may grant an injunction before bill filed, and direct the bill and affidavit to be filed as on the day when the offices were closed. *Carr* v. *Morice*, 42 L. J., Ch. 787; L. R. 16 Eq. 125.

When Filed too Late.]—When in a cause heard on replication it is sought to put in evidence filed after the time for closing evidence has expired, leave to read such evidence must be applied for previously to the hearing, in order to enable the court to provide an opportunity to the adverse party to answer such evidence. It will not be sufficient to deliver a copy of the evidence to the other party in time for him to answer it. *Smith* v. *Pilgrim*, 2 Ch. D. 127; 34 L. T. 408.

If a party seeks to read affidavits not duly filed, a substantive motion must be made for liberty to do so. *Mackay, In re*, 1 D. & L. 206; 12 L. J., Q. B. 337; 7 Jur. 945.

In another Suit.]—When the defendants in one suit were some of the defendants in another suit instituted by the same plaintiff, and the facts to be proved were the same, but different relief was prayed in the two suits, the court on an ex parte application by the plaintiff allowed the affidavits sworn and to be sworn in the first suit to be read as evidence in the second suit against such of the defendants therein as were defendants in the first suit. *Brown* v. *White*, 24 W. R. 456.

Two days before the closing of the evidence, the defendant obtained an order of course to use at the hearing the bill and some affidavits in another suit instituted by the same plaintiffs, but raising a different issue. The court, being of opinion that the order was obtained because the defendant's own evidence was not ready, discharged the order with costs. *Peru (Republic)* v. *Ruzo*, 32 L. T. 598; 23 W. R. 546.

A defendant having given evidence in another suit, to which she was not a party, affecting the statements contained in the answer, the plaintiff applied, after the cause was in the paper, for leave to use such evidence upon the hearing. The plaintiff having been guilty of no laches, leave was given; the defendant to be at liberty to file affidavits in explanation, and to use the evidence of the plaintiff in the same cause, subject to like conditions. *Watson* v. *Cleaver*, 20 Beav. 137; 1 Jur. (N.S.) 270; 3 W. R. 265.

B. instituted two suits against A., in which A. put in answers, and also made an affidavit upon an interlocutory application. Replication was filed on both suits, and A. died after the time for taking evidence had expired and without having made any affidavit verifying the answers, or having given notice of his intention to read the affidavit at the hearing. The executors of A. afterwards instituted a suit against B., relating to the same matters as the former suit, and applied for liberty to read the answers and affidavit as evidence in the new suit:—Held, that neither the answers nor affidavit could be so read. *Williams* v. *Williams*, 3 N. R. 701; 10 Jur. (N.S.) 608; 10 L. T. 286; 12 W. R. 663.

A plaintiff cannot use against one defendant evidence taken in another suit, and referred to in an affidavit of a co-defendant. *Rhodes* v. *Rhodes*, 3 N. R. 701; 14 W. R. 515.

Affidavits made and used in a cause for one purpose may be used again instead of new affidavits; but the party using them a second time will not be allowed to charge for them, though he would have been entitled to charge for new affidavits. *Westmeath* v. *Westmeath*, 1 Hog. 354.

Where original petition is filed and affidavits put in, and then petition is amended by adding the name of another party as respondent, those affidavits cannot be read against him. *Mascarenas, Ex parte, Dawson, In re*, 1 Deac. & C. 507.

Affidavits made in one cause or matter in this court used as evidence in another cause or matter. *Pickance's Trust, In re*, 10 Hare (App.), xxxv.

Affidavits filed in the suit allowed to be made use of on the hearing of a petition. *Jones* v. *Turnbull*, 22 L. J., Ch. 1055; 17 Jur. 851.

Depositions in the custody of the court, which were taken in a former suit to perpetuate testimony, were ordered to be published, on the application of one of the parties to a subsequent suit, the other of whom was a stranger to the former suit, and the time for taking evidence in the second suit was extended in order to give both parties an opportunity of considering the information so obtained; the court being of opinion that though the depositions might not themselves be evidence, they might be the means of supplying valuable information to both parties. *Vane* v. *Vane*, 45 L. J., Ch. 589; 24 W. R. 565—C. A. Varying 34 L. T. 477.

Attesting Witness not to be Found.]—In a suit for revocation of probate on the grounds of undue execution and incapacity, where it appeared that every effort had been made to find one of the attesting witnesses, but without success, the court allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution and capacity. *Gornall* v. *Mason*, 56 L. J., P. 86; 12 P. D. 142; 57 L. T. 601; 35 W. R. 672; 51 J. P. 663.

Party wishing to Cross-Examine.] — When affidavits have been filed in support of an interlocutory application in an action, the court has no power to authorise the reading of the affidavits at the trial if the other side bonâ fide desires the production of the witnesses for cross-examination, and the witnesses can be produced. *Blackburn Union* v. *Brooks*, 47 L. J., Ch. 156; 7 Ch. D. 68; 37 L. T. 427; 25 W. R. 57. *And see cases* infra, CROSS-EXAMINATION.

When not in Form.]—When an application was made to the court that an affidavit should be allowed to be given in evidence notwithstanding its not being in the form required by 30 & 31 Vict. c. 44, s. 104 (15 & 16 Vict. c. 86, s. 37, England): it appeared that the affidavit proposed to be used was sworn before issue was joined in the cause, that the defendant kept it in his possession for more than a year without giving any notice of it, that the deponent had died since the affidavit was sworn, and before notice of its being sworn was served, and that when notice was served after the death of the deponent no mention was made of his being dead: under these circumstances the affidavit was not allowed to be used, independently of any mere technical objections. *Evans* v. *Cook*, 22 W. R. 252.

d. Containing Irrelevant or Scandalous Matter.

Irrelevant or Prolix.]—When long affidavits are filed in support of a motion, a great part of which is unnecessary, the court will refer them to the Master, and make the party applying pay the costs of the unnecessary affidavits. *Lewis* v. *Woolrych*, 3 D. P. C. 692.

Where affidavits contain irrelevant matter, the court will direct the Master to ascertain what parts are material to bring the question in dispute before the court, and to allow costs to the parties making the affidavits for such parts only as are material, and to the opposite party the costs occasioned by the irrelevant matter. *Cassen* v. *Bond*, 2 Y. & J. 531. S. P., *Balls* v. *Smythe*, 2 Man. & G. 350; 2 Scott (N.R.) 495.

The court will not order an affidavit which is not shewn to be scandalous or irrelevant to be taken off the file merely because it cannot, upon some technical ground, such as a defect in the jurat, be read in the cause in which it is filed. *Brunswick (Duke)* v. *Sloman*, 1 L. M. & P. 247.

Where an affidavit was filed which the court considered to be of unnecessary length, a direction was made, under the 122nd Order of May, 1845, that the taxing-master should, on taxing the costs, look into the affidavit, and distinguish those parts which he might consider to be of unnecessary length, and disallow the costs occasioned thereby. *Skidmore's Estate, In re*, 24 L. J., Ch. 711; 1 Jur. (N.S.) 696; 3 Eq. R. 736; 3 W. R. 584.

Where, in an interpleader suit, the plaintiffs filed an affidavit of some length as to merits:—Held, that in making an order on the defendants to interplead, and for taxation of costs, there should be a direction to the Master to have regard to any prolixity in the affidavits. *Scottish Union Insurance Co.* v. *Steele*, 9 L. T. 677.

Directions given to the taxing-master under rule 18 of Ord. VI. of the additional Rules of Court, August, 1875, to look into and disallow costs of affidavits of unnecessary length. *Cracknell* v. *Janson*, 48 L. J., Ch. 168; 11 Ch. D. 1; 39 L. T. 32; 27 W. R. 55.

Remarks as to the effect of the 122nd Order of May, 1845, as to costs of prolix or unnecessary affidavits, and jurisdiction of Master in respect of them on their taxation. *Moore* v. *Smith*, 14 Beav. 393.

Impertinent.]—Where libellous and impertinent matter was introduced into an affidavit in support of a rule, the court deprived the party of the costs of the rule, to which otherwise he would have been entitled. *Thompson* v. *Dicas*, 2 D. P. C. 93.

A person who has himself introduced into his evidence matter not relevant to the real issues between himself and his opponent cannot be heard to complain if his opponent, in answer to the matter so introduced, inserts in his affidavit passages which would otherwise be liable to be expunged for impertinence. *Bruff* v. *Cobbold*, 26 L. T. 786; 20 W. R. 734—L. JJ.

When affidavits alleged to be impertinent are not read, the court refers it to the officer to disallow, in taxation, costs of all affidavits which in his opinion are impertinent. *Harvey, Ex parte*, *Box, In re*, 2 Mont. & Ayr. 593; 1 Deac. 571.

On dismissing a claim, the court may direct the defendant to pay the costs of any scandalous and impertinent portion of his affidavits. *Dufaur* v. *Sigel*, 4 De G. M. & G. 520; 22 L. J., Ch. 678.

Quære, whether it can also order the defendant to pay any portion of the costs of the suit. *Ib.*

Anciently, where affidavits were prolix or impertinent, it was thought to be too late to complain after the party had used the affidavits; but now the court will apply itself to set right the extra costs caused by the prolixity or impertinence at any time. *Townsend, Ex parte*, 3 Moll. 74.

An affidavit made to resist a motion may be used on the motion, notwithstanding that it has been referred for impertinence and scandal, and that the reference is still pending. *Birch* v. *Alt*, 1 Ir. Eq. R. 228.

Scandalous.]—If an affidavit is filed containing scandalous statements, the court can act in the matter, not only on the application of the aggrieved party, but also on the application of any party to the action, or without any application at all. *Cracknell* v. *Janson*, 48 L. J., Ch. 168; 11 Ch. D. 1; 39 L. T. 32; 27 W. R. 55. S. P., *Fox* v. *Bearblock*, 46 L. T. 145; 30 W. R. 342—C. A. *Devonsher* v. *Ryall*, Ir. R. 11 Eq. 460.

Where an affidavit is reported to be scandalous, the agent in London who files the affidavit, is responsible for the costs as between attorney and client, notwithstanding the country attorney may have himself drawn the affidavit. *Wake, Ex parte*, 3 Deac. & C. 246; Mont. & Bli. 259; 2 L. J., Bk. 38.

Affidavits ordered to be taken off file for containing scandalous and irrelevant matter. *Goddard* v. *Parr*, 24 L. J., Ch. 783; 3 W. R. 633.

The statement in an affidavit that is irrelevant to the action will be ordered to be struck out. *National Folding Box and Paper Co.* v. *National Folding Box Co.*, 13 R. 60; 43 W. R. 156.

Striking out.]—Semble, that, after an affidavit has been entered in an order of the court as read, the court cannot entertain an application to strike out of it impertinent and scandalous matters. *Bruff* v. *Cobbold*, supra.

Although there is no rule of court specially giving power to the court to take affidavits off the file for prolixity, yet the court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. *Hill* v. *Hart-Davis*, 53 L. J., Ch. 1012; 26 Ch. D. 470; 51 L. T. 279—C. A.

e. Fresh Evidence and in Reply.

When Allowed.]—When, after replication, the plaintiff's evidence raised new issues of fact not raised in the bill, the court allowed the defendant to file fresh affidavits after the time for closing evidence had expired; but the fresh evidence was to be strictly confined to the new issues raised by the plaintiff; and the plaintiff was to be at liberty to cross-examine. *Leech* v. *Bolland*, L. R. 10 Ch. 362; 33 L. T. 87; 23 W. R. 763.

In a patent suit which had been set down for hearing, an application made by the defendant, after notice given to the plaintiff, for leave to produce at the hearing of the cause the evidence as to prior user of a new witness discovered since the closing of the evidence, was allowed. *Wilson* v. *Gann*, 23 W. R. 546.

On a rule for a new trial, on the ground of

rejection of evidence, an affidavit in answer alleging that it was withdrawn and not rejected, the affidavit in reply, stating how it came to be withdrawn, is not receivable, as stating new matter arising out of the affidavit in answer. *Whitehouse* v. *Hemmant*, 27 L. J., Ex. 295.

This court will not lay down any rule of practice under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 45), as to the cases in which affidavits in answer to affidavits disclosing new matter will be allowed. *Pritchard* v. *Leech*, 2 Jur. (N.S.) 475.

Affidavits in reply are only to be permitted in cases where new matter is introduced in the affidavits, answering the petition. *Shayle, Ex parte*, Dick. 244.

Affidavits, in reply to answers, may be read in support of motion. *Coates* v. *Baldwin*, 2 Jur. 775.

By the practice of this court, a supplemental affidavit cannot be used upon a motion to make a conditional order absolute. *Smithwick* v. *Bradshaw*, 2 Ir. Eq. R. 94.

In a motion from one branch of the court to another leave is always given to add to the evidence, if necessary. *Gay's Case, In re, London and Birmingham Extension and Northampton, Daventry, Leamington and Warwick Ry.*, 1 De G. M. & G. 347; 21 L. J., Ch. 284; 16 Jur. 183.

Leave to read an affidavit in rejoinder on a motion for decree refused. *Richards* v. *Curlewis*, 2 W. R. 481.

Time.]—At no period of a cause is it too late to produce additional evidence for the purpose of shewing that confusion or error has arisen from the double signification of a name or word. *Bigsby* v. *Dickinson*, 46 L. J., Ch. 280; 4 Ch. D. 24; 35 L. T. 679; 25 W. R. 89—C. A.

Affidavits filed on behalf of a plaintiff in reply to a defendant's affidavits may contain matter which is merely confirmatory of the plaintiff's general case, and need not be absolutely restricted to matter cutting down or negativing the defendant's evidence. The practice of the court in this respect has not been altered by the orders and rules of the Supreme Court. *Peacock* v. *Harper*, 47 L. J., Ch. 238; 7 Ch. D. 648; 38 L. T. 143; 26 W. R. 109.

The proper time for an application for leave to file affidavits in answer to new matter is when the new matter has been brought before the court by the other side. *Swinfen* v. *Swinfen*, 1 C. B. (N.S.) 364; 26 L. J., C. P. 97; 3 Jur. (N.S.) 85; 5 W. R. 203.

Time will not be enlarged to allow of affidavits in reply being filed after cross-examination of a witness on the other side. *Edwards* v. *Spaight*, 2 J. & H. 617.

Where a plaintiff filed affidavits in reply, introducing a new state of facts in the nature of a new assignment, the defendants were allowed at the hearing to read affidavits in reply without having given notice of them, the cause being allowed to stand over in order to give the plaintiff time to answer them. *Heath v. Wallingford*, 12 L. T. 631.

The day before the time for closing the evidence in a suit, the plaintiffs filed an affidavit impeaching the credibility of a material witness of the defendants. After the time for closing the evidence, the defendants applied for special leave to file an affidavit in reply. The court held that as the point was not raised by the pleadings, but arose out of the evidence, it was a proper case for indulgence, and granted the application. *Scott* v. *Liverpool Corporation*, 3 Jur. (N.S.) 533; 5 W. R. 669.

It is only in very special cases, and not at the option of the parties, that affidavits are admitted on a motion, after it has been opened to the court. *East Lancashire Ry.* v. *Hattersley*, 8 Hare, 86.

The rule, that no new evidence can be adduced on a motion after it has been opened, extends to the case of documents which it is proposed to verify viva voce by the attesting witness. *Bird* v. *Lake*, 1 H. & M. 111; 8 L. T. 632.

Renewed Application.]—On motion to set aside a judge's order, made at chambers upon reading certain affidavits, the party moving omitted to bring before the court the affidavits produced at chambers; and the rule was therefore discharged with costs:—Held, that he might, after payment of costs, renew the same motion, putting in fresh affidavits. *Pocock* v. *Pickering*, 18 Q. B. 789.

On motion to rescind an order made at chambers on affidavit, as having been erroneously granted, the party moving cannot impeach the order on affidavits not used at chambers and containing matters which were known to the party moving, or of which he could have obtained knowledge, before the order was made. *Edwards* v. *Martyn*, 17 Q. B. 693; 21 L. J., Q. B. 86.

Where a summons was taken out before a judge at chambers, for an order for the plaintiff's costs, on the ground that the case was one in which the superior courts had concurrent jurisdiction with the county court, and the judge on the facts refused to make the order, upon a like application to the court, affidavits in addition to those used at chambers may be used. *Sanderson* v. *Procter*, 10 Ex. 189; 2 C. L. R. 1283; 23 L. J., Ex. 320; 18 Jur. 702.

An application to discharge a defendant out of custody, on an affidavit that he had never been served with process, and that it had not been brought to his knowledge, having been made at chambers, and answered by an affidavit of the party who had made the affidavit of service, fixing the place and circumstances of the supposed service, the defendant was allowed on a subsequent application to the court, to use fresh affidavits disproving the supposed service by shewing a mistake as to identity on the occasion alluded to; and this being clearly shewn:—Held, that the defendant was entitled to be discharged without any terms. *Moseley* v. *Blake*, 28 L. J., Ex. 35.

Where a judge refuses to make an order, the unsuccessful party, in moving the court for the same purpose, is not confined to the same affidavits, but may use further ones, disclosing additional facts; although, upon a motion to rescind an order made at chambers, he is confined to the same materials. *Cesarini* v. *Ronzani*, 4 Jur. (N.S.) 813; 6 W. R. 678.

After a rule nisi has been obtained, the party obtaining it will not be allowed to file additional affidavits containing new matter. *Ransome* v. *Eastern Counties Ry.*, 6 Jur. (N.S.) 998; 2 L. T. 237.

When a judge dismisses a summons, on the ground of the insufficiency of the affidavit in support of it, the party cannot, in renewing his application to the court, use fresh affidavits. *Hawkins* v. *Akrill*, 1 L. M. & P. 242; 14 Jur. 1069.

—— **Formal Defect.**]—A party failing upon an objection to the affidavits will not be allowed to make a second application upon amended affidavits, unless the defect occurred exclusively in the title of the affidavits or the jurat. *Reg.* v. *G. W. Ry.*, 5 Q. B. 597; D. & M. 471; 1 D. & L. 742; 3 Railw. Cas. 700; 13 L. J., Q. B. 129; 8 Jur. 107. S. P., *Reg.* v. *Jones*, 8 D. P. C. 307; 4 Jur. 654.

Amending.]—An affidavit in support of motion for costs of the day for not proceeding to trial, allowed to be amended. *Larkin* v. *Bovill*, 2 Tyr. 746.

The title of an affidavit, on which a rule has been obtained, may be amended on payment of costs, the opposite party having leave to file affidavits in reply. *Rex* v. *Warwickshire JJ.*, 5 D. P. C. 382.

On shewing cause against a rule, the court allowed an affidavit which omitted the deponent's addition, to be amended and resworn. *Boskay* v. *Luster*, W. W. & D. 216. S. P., *Marriott* v. *Chapman*, 1 W. W. & H. 309.

But the court will not allow a defendant's affidavit to be amended after cause is shewn against the rule. *Robinson* v. *Gardner*, 7 D. P. C. 716.

Where a rule is obtained upon affidavit erroneously entitled, the court will not discharge it, but will permit the affidavit to be amended and resworn. *Cooper* v. *Talbot*, 7 Scott, 345; 2 Arn. 50.

But, if an affidavit of merits in opposition to a rule is insufficient, the court will not, on hearing the rule, allow the affidavit to be amended and resworn. *Rowbotham* v. *Dupree*, W. W. & D. 215.

Where a rule has been discharged on the ground of defective materials to support it, the court will not allow the application to be renewed on amended affidavits, although it is made by a prisoner, on a suggestion that the process on which he is detained is a nullity. *Saunderson* v. *Westley*, 8 D. P. C. 652.

Affidavits amended by permission of the court were allowed to be read without the addition of fresh jurats. *Grantham, In re*, 10 Jur. 1038.

Where a party obtained a rule nisi upon affidavits which were badly entitled, and, discovering his mistake, applied for leave to take the affidavits off the file, and amend and reswear them, the court refused to allow such a course to be taken, on the ground that the affidavits would appear to have been sworn after the rule was drawn up; and also refused to allow a fresh rule to be drawn up on amended affidavits, but suggested a new motion upon affidavits disclosing the circumstances of the error, giving no opinion, however, upon the validity or effect of such new motion. *Doe* d. *Hill* v. *Tollett*, 1 D. & L. 121; 8 Jur. 60.

—— **Alteration.**]—If an affidavit has an interlineation, which has not the initials of the Master in the margin, it cannot be read at all. *Doe* d. *Cox* v. ——, 5 Jur. 531.

Ex parte Application.]—An application under the 26th Order of the 7th August, 1852, for liberty to use further evidence on a motion for a decree, cannot be made ex parte. *Richards* v. *Gurlewis*, 18 Beav. 462.

f. Consent to Trial by.

Vivâ voce or by Affidavit.]—The only exceptions to the rule, that the evidence at the trial of an action shall be taken vivâ voce and in open court, are where the evidence is by agreement taken by affidavit, and where it appears to the judge necessary for the purposes of justice that an examination of particular witnesses shall be taken before any officer of the court or other person. *Warner* v. *Mosses*, 50 L. J., Ch. 28; 16 Ch. D. 100; 43 L. T. 401; 29 W. R. 201—C. A.

Rule 14 of Ord. XXXVIII. R. S. C., 1876, is copied from 1 Will. 4, c. 22, and like that statute can only be made use of where the person to be examined cannot be examined at the trial. *Ib.*

If a party to an action by mistake consents to the evidence being taken by affivadit, he will, on proving to the satisfaction of the judge that to his surprise witnesses will not make affidavits, be relieved from the consequences of his mistake. *Ib.*

Witnesses Refusing to make Affidavit.]—After consenting that the evidence should be taken by affidavit a solicitor for one part was unable to get his witnesses to make affidavits:—Held, that the court had no jurisdiction to allow him to "examine witnesses ex parte" before a special examiner, and to use the depositions on the trial subject to cross-examination of the witnesses at the trial. *Ib.*

Consent—What is.]—The "consent for taking evidence by affidavit" under R. S. C., 1876, Ord. XXXVIII. r. 1; must be a formal consent in writing. *New Westminster Brewery Co.* v. *Hannah*, 1 Ch. D. 278; 24 W. R. 137. *See also preceding case.*

—— **Who may Give.**]—The guardian ad litem of an infant is competent to give the consent requisite for taking evidence by affidavit. *Knatchbull* v. *Fowle*, 1 Ch. D. 604; 24 W. R. 629. S. P., *Fryer* v. *Wiseman*, 45 L. J., Ch. 199; 33 L. T. 779; 24 W. R. 205.

Matter tried by Judge alone.]—When parties agree that the evidence shall be taken by affidavit, and numerous affidavits are filed and the evidence is closed, it is the duty of a judge in the exercise of his judicial discretion under Ord. XXXVI. r. 26, to direct that the action shall be tried before a judge without a jury. *Brooke* v. *Wigg*, 47 L. J., Ch. 749; 8 Ch. D. 510; 38 L. T. 732; 26 W. R. 729—C. A.

In such a case an application that the action may be tried before a judge and jury can only be entertained if the applicant comes to the court soon after the agreement, and then only upon the terms that he pays, as between solicitor and client, all costs, charges and expenses that have been incurred in taking the evidence by affidavit up to that date. *Ib.*

Part of Evidence by Affidavit.]—The words of Ord. XXXVII. r. 1, "In the absence of any agreement in writing," apply to the taking of part of the evidence by affidavit as well as the whole; accordingly, an application for an order that the affidavit of a particular witness may be read at the hearing should not be made without a consent having been previously tendered. *Miller* v. *Dwyer*, 27 L. R., Ir. 510.

Not by Affidavit only.]—Where an agreement has been come to between the parties to an action, that the evidence at the trial shall be taken by affidavit—the agreement not stating that the evidence shall be taken by affidavit only—a witness who is present in court for the purpose of being cross-examined on his affidavit, may be called by the party on whose behalf he has made the affidavit, and give fresh evidence vivâ voce. *Glossop* v. *Heston and Isleworth Local Board*, 47 L. J., Ch. 536 ; 26 W. R. 433.

g. Cross-Examination.

In what Cases.]—When a motion is ordered to stand on terms till the hearing of the cause, no new evidence can be filed by the parties on the motion, which must be dealt with at the hearing in the manner in which it was originally brought on ; and if the motion stands over in consequence of an affidavit of the defendant, the motion is not a matter depending in or a proceeding before the court, which entitles the plaintiff to cross-examine the defendant on his affidavit ; even although the plaintiff may have given notice that he is going to use it at the hearing of the cause. *Singer* v. *Audsley*, 41 L. J., Ch. 229 ; L. R. 13 Eq. 401 ; 26 L. T. 238 ; 20 W. R. 438.

After affidavits received as evidence by order, by the Master, the opposite side was at liberty to cross-examine the same witnesses generally, although other witnesses could not be examined after the case made by the affidavits is disclosed, nor the same witnesses by the party on whose behalf they made the affidavit, except upon interrogatories to be settled by the Master ; Lord Chancellor disregarding the objection, that the party cross-examining would do so with the advantage of knowing what the witnesses were brought to prove, and expressing his opinion in favour of an alteration in the course of examination, by which interrogatories should be open in all cases. *Booth* v. *Parks*, 2 Moll. 314.

—— **Summons for Administration by Infants.**]—Infants were entitled under a will to legacies of considerable amount, and they were also entitled in remainder subject to the life interests of four persons to seven-elevenths of the residuary estate. An originating summons was taken out by one of the tenants for life and the infants asking for administration of the testator's estate. Affidavits were filed in support of the summons, and the witnesses were cross-examined at considerable length :—Held, that the cross-examination was most improper, and that it should not be resorted to in such a case, and a direction was given that in future cross-examinations should not be resorted to in such cases without an application to the court. *Wilson, In re, Alexander* v. *Calder*, 54 L. J., Ch. 487.

—— **Production of Affidavit.**]—A witness cannot be cross-examined as to what he swore in an affidavit, unless the affidavit is produced. *Sainthill* v. *Bound*, 4 Esp. 74.

A party may be cross-examined as to the contents of an affidavit which is not put in. *Sladden* v. *Sergeant*, 1 F. & F. 322.

At what Stage.]—Notice of motion for decree was served on the 21st of April, and a defendant then had notice of an affidavit to be used against him. The time for filing affidavits in reply expired in the ensuing long vacation. On the 12th of November, after the cause was in the paper for hearing, the defendant gave notice to cross-examine the witness :—Held, that he was entitled to do so. *Ranken* v. *Alfaro*, 24 W. R. 53.

An accounting defendant, who has carried in an account and verified it by affidavit, may be cross-examined on his affidavit as well before he has vouched his account as afterwards. *Meacham* v. *Cooper*, 42 L. J., Ch. 876 ; L. R. 16 Eq. 102 ; 21 W. R. 745.

The fourteen days from the filing of an affidavit in support of a petition having been allowed to expire without notice having been given to cross-examine on the affidavit as provided by r. 19 of Order of 5th February, 1861 :—Held, that the court was not thereby precluded from exercising its discretionary power under 15 & 16 Vict. c. 86, s. 40, and leave to cross-examine was granted accordingly. *Sadler's Wells Theatre, In re*, 42 L. J., Ch. 737.

Where the defendant had filed an affidavit denying that he ever assented to the terms of a certain agreement, and the plaintiff had, after the enlarged time for closing evidence had expired, filed an affidavit in reply, the court, on motion by the plaintiff that he might read and use such affidavit on the hearing, notwithstanding the expiration of the time for closing evidence, or that the time for closing evidence might be further enlarged, ordered that the plaintiff should be at liberty to read the affidavit, and that the time for cross-examination should be enlarged for a month. *Philips* v. *Warde*, 2 Jur. (N.S.) 608 ; 4 W. R. 305.

Where a cause is set down for hearing in the ordinary course, a defendant cannot be compelled to come in and be cross-examined after the expiration of a month from the time fixed for closing the evidence ; but this rule does not apply to the case of a cause being set down upon motion for decree, in which case a party can be cross-examined, and affidavits may be filed up to the actual time of hearing. *Bedwell* v. *Prudence*, 8 W. R. 702.

A party to a cause, filing or giving notice to read an affidavit before the evidence is closed, may be cross-examined upon such affidavit at once, without waiting until the evidence is closed. *Clarke* v. *Law*, 2 Kay & J. 28 ; 2 Jur. (N.S.) 228 ; 4 W. R. 35.

Injunction bill by the plaintiff. On the motion one of the defendants filed and used an affidavit. All the defendants afterwards put in answers (sufficiently long before the present motion) to interrogatories on the bill. By the direction of the court a cross-bill had been filed, to which the plaintiff was not required to answer. The time for closing the evidence had not arrived when the plaintiff moved that the defendant, who had made the affidavit used on the motion for an injunction, might be cross-examined :—Held, that he was liable to cross-examination, although the evidence was not yet closed. *Ib.*

Though the fourteen days limited by the 19th rule of the Order of the 5th February, 1861, for the production for cross-examination of a party witness who has made an affidavit have expired, the court, on motion, will order him to attend for examination within a specified time. *Spittle* v. *Hughes*, 11 Jur. (N.S.) 151; 11 L. T. 691.

Where affidavits made before decrees were subsequently used in chambers, and the witnesses objected, before the examiner, to be cross-

examined, the objection not having been made in chambers, they were ordered to be cross-examined within two months, before the examiner, but not at their own expense, and no costs of a motion to compel them were given. *S. C.*, nom. *Hughes* v. *Spittal*, 13 W. R. 251.

The 19th rule of General Orders, February 5th, 1861, is merely permissive, and does not abrogate the practice under 15 & 16 Vict. c. 86, s. 40. *Singer Sewing Machine Manufacturing Co.* v. *Wilson*, 2 Hem. & M. 584; 5 N. R. 268; 11 Jur. (N.S.) 58; 11 L. T. 670.

Therefore, a deponent served with a subpœna under that act is bound to submit himself to cross-examination on his affidavit, notwithstanding the lapse of fourteen days from the time when it was filed. *Ib.*

When a plaintiff has filed an affidavit on a motion for an injunction, his witnesses may be cross-examined, under the 15 & 16 Vict. c. 86, s. 40, before the defendant files his affidavits. *Besemeres* v. *Besemeres*, 1 Kay (App.), xvii.; 2 Eq. R. 668; 23 L. J., Ch. 198; 2 W. R. 124.

The 15 & 16 Vict. c. 86, and the Orders made in pursuance thereof, do not so far change the practice of taking evidence in equity as to make it essential that a defendant should know all the plaintiff's evidence before he adduces his own. *Londonderry* (*Marchioness*) v. *Bramwell*, 2 Kay & J. 162; 5 W. R. 247. And see *Morey* v. *Vandenberg*, 14 L. T. 542.

Therefore the court will not, on a motion for decree, enlarge the time for the defendant to file his affidavit, simply to enable him to cross-examine the plaintiff's witnesses before so doing. *Ib.*

But the court would probably grant this indulgence if the defendant could not afford the expense of a special examiner, and if his application for an enlargement of time were made without delay. *Ib.*

Subpœnas ad testificandum et duces tecum for the cross-examination of a defendant at the hearing ordered to be sealed, notwithstanding that more than fourteen days had elapsed since the closing of the evidence, but the hearing of the cause not to be delayed by reason of such order. *Coæ* v. *Stephens*, 2 N. R. 436; 9 Jur. (N.S.) 1144; 8 L. T. 721; 11 W. R. 929.

On a motion for a decree, the plaintiff's affidavit in reply was filed on the 4th August. The defendant took no steps to cross-examine until after the long vacation, and he then asked that the cause might stand over, to enable him to cross-examine the plaintiff:—Held, that he was not entitled as of right, and that it was matter of discretion; and the court, having heard the cause, and seeing no necessity for a cross-examination, made a decree. *Bourdillon* v. *Baddeley*, 26 Beav. 255.

By the General Orders, evidence in a cause is to close within eight weeks after issue joined, but a witness who has made an affidavit may be cross-examined within one month after such eight weeks. *Hart* v. *Roberts*, 32 Beav. 231.

A defendant may move to dismiss, if the plaintiff does not set down the cause "within four weeks after the evidence closed." *Ib.*

Where there was no cross-examination, the evidence closed at the end of eight weeks, and not of twelve weeks. *Ib.*

Filing Affidavits after Cross-examination.]—As a general rule, a party should file his affidavits before cross-examining a party on the other side. *Lancefield* v. *Iggulden*, 41 L. J., Ch. 473; 26 L. T. 687; 20 W. R. 621.

Therefore an affidavit filed in a creditors' administration suit by executors subsequently to their cross-examination of the plaintiff upon his affidavit in support of his claim is not generally admissible in proceedings in chambers for the adjudication of the claim, but it was allowed to be used upon leave given to the deponent to reply. *Ib.*

In an administration action inquiries were directed and the plaintiff was ordered to furnish certain accounts. After the plaintiff had filed his accounts and affidavits in the matter the defendants obtained an order for his cross-examination. By direction of the judge, the general practice in his chambers, of which the defendants were aware, was not to make an order for cross-examination until the evidence was closed. After the plaintiff had been cross-examined the defendants applied for leave to file further evidence generally:—Held, that, there being no rule of court expressly referring to the point, the judge had a discretion, provided he made no hard-and-fast rule, to adopt a general practice in such matters, and therefore the defendants were not entitled to the leave asked as a matter of right, but only on shewing special circumstances. *Davies, In re, Issard* v. *Lambert*, 59 L. J., Ch. 516; 44 Ch. D. 253; 62 L. T. 715; 38 W. R. 584—C. A.

Notice and Attendance of Witnesses.]—A plaintiff, having filed three affidavits, goes to Paris. The defendant desires to cross-examine him upon them, but he refuses to come to England. A motion made for an order that he shall come to this country to be cross-examined refused; costs to be costs in the cause. *Wellesley* v. *Mornington*, 5 W. R. 393.

A witness who has made an affidavit has no right to insist upon having his cross-examination taken at the place where the affidavit has been made, it being in the discretion of the court to excuse his attendance for cross-examination in London. Such witness should communicate with the party on whose behalf the affidavit has been made, throwing upon him the duty of applying for a special examiner. *Townsend* v. *Williams*, 6 W. R. 734.

A question arose whether the other side was entitled to cross-examine on the affidavit, and, if so, on whom the onus lay to produce the witness; and whether the signing of the certificate by the chief clerk, and a reference to the objection in such certificate, make any difference:—Held, that there was a right of cross-examination, that the other side must produce the witness, and that the signing of the certificate did not affect the question, although the chief clerk was wrong in inserting a reference to the objection. *Jenner* v. *Morris*, 10 W. R. 640.

The cross-examination of one of the defendants to a suit was proceeded with without any notice being given to a co-defendant who had given notice to read the first defendant's evidence:—Held, that this proceeding was utterly void. *Pennell* v. *Davison*, 13 L. T. 533; 14 W. R. 174.

The practice as to closing evidence does not apply to motions for decree, and a notice to cross-examine, given after the seven days, for filing affidavits in reply, is regular. *Bedwell* v. *Prudence*, 1 Dr. & Sm. 221; 8 W. R. 702.

An accounting defendant will not be ordered to submit to cross-examination upon his account

and the affidavits filed in support of it, without notice of the points on which the cross-examination is required. *M'Arthur* v. *Dudgeon*, 42 L. J., Ch. 263; L. R. 15 Eq. 102; 21 W. R. 166.

A defendant who is summoned to be cross-examined on an account he has filed, is entitled to notice of the items objected to. *Ib.*

Form of Notice requiring Production of Deponents.]—On the prosecution of an inquiry added to a decree, one party filed an affidavit by a person resident in South America, and gave notice to read it, whereupon the opposite party gave notice that he required to cross-examine the deponent, not saying when, where, or before whom:—Held, that Ord. XXXVIII. r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination—even supposing that Ord. XXXVIII. rr. 21, 22, make that rule applicable to evidence on an inquiry, and supposing that Ord. XXXVIII. r. 28, applies to a witness resident out of the jurisdiction—did not exclude the present affidavit, as the notice for cross-examination did not follow the terms of Ord. XXXVIII. r. 28:—Held, also, that the order of the Court of Appeal admitting the affidavit as evidence, without prejudice to any application by the opposite party, within fourteen days, for the cross-examination of the deponent in any place in South America, before some proper person to be appointed for that purpose, was right under all the circumstances. *Concha* v. *Concha*, 56 L. J., Ch. 257; 11 App. Cas. 541; 55 L. T. 522; 35 W. R. 477—H. L. (E.)

Expenses of Production of Deponent.]—The provision in Rules of Court, 1875, Ord. XXXVIII. r. 4, that the party producing deponents for cross-examination upon their affidavits shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, is confined to a cross-examination of the deponent before the court at the trial of the action, and does not apply to a cross-examination on an affidavit filed after decree for the purpose of proceedings in chambers. *Knight, In re, Knight* v. *Gardner*, 53 L. J., Ch. 183; 25 Ch. D. 297; 49 L. T. 545; 32 W. R. 469—C. A.

The direction in Ord. XXXVIII. r. 23, of Rules of the Supreme Court, 1883, that the party producing a dependent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Ord. XXXVII. r. 21, of the same rules, which provides that evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial, is not confined to the cross-examination of the deponent before the court at the trial of the action, but applies also to a cross-examination before the chief clerk in chambers or before an examiner. *Backhouse* v. *Alcock*, 54 L. J., Ch. 842; 28 Ch. D. 669; 52 L. T. 542; 33 W. R. 407.

The effect of Ord. XXXVIII. r. 28, of the Rules of the Supreme Court, 1883, which provides that the party producing a deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production, taken in conjunction with Ord. XXXVII. r. 22, which provides that the practice with reference to the examination, cross-examination and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage, is that the expenses of production of a witness for cross-examination upon affidavit before a trial must be borne in the first instance by the party producing such witness. *Mansel* v. *Clanricarde*, 54 L. J., Ch. 982; 53 L. T. 496.

—— **After Judgment in Administration Action.**]—The plaintiff after judgment in an administration action obtained an order for cross-examination of defendant (the executor) upon his affidavit, in answer to inquiries directed by the judgment, denying possession of any part of the testator's estate. The defendant declined to attend before the examiner until plaintiff had paid his expenses. The plaintiff having subsequently served defendant with a subpœna, moved that he be ordered to attend at his own expense:—Held, that it was open to the plaintiff to combine the two methods of procedure, and that the defendant was bound to produce himself at his own expense for cross-examination; and further, that regarding the defendant as a deponent whose attendance was required for cross-examination, the penalty imposed by Ord. XXXVIII. r. 28, of having his affidavit rejected, did not relieve him from the obligation to attend at his own expense. *Baker, In re, Connell* v. *Baker*, 54 L. J., Ch. 844; 29 Ch. D. 711; 52 L. T. 421.

—— **Discretion of Court or Judge.**] — The court or judge has a discretion in making an order under Ord. XXXVIII. r. 1, for the attendance for cross-examination of a person who has made an affidavit, and is not bound to make such an order. *La Trinidad* v. *Browne*, 36 W. R. 138.

On what Affidavit.]—When a plaintiff has given notice of motion for a decree, and filed an affidavit in support of his motion, he may be cross-examined by the defendant as in the case of any other motion. *Williams* v. *Williams*, 1 W. R. 318.

A common affidavit as to documents is not the subject of cross-examination. *Manby* v. *Bewicke*, 8 De G. M. & G. 470; 26 L. J., Ch. 20; 2 Jur. (N.S.) 672; 4 W. R. 757.

A defendant, who at the instance of the plaintiff makes the common affidavit as to the possession of documents, is not thereby made liable to be cross-examined, unless he afterwards gives notice to use the affidavit as evidence for himself. *Ib.*

The true construction of the 15 & 16 Vict. c. 86, s. 40, is, that a party in any cause or matter, who has made an affidavit, is liable to be cross-examined if the affidavit was made to be used or is used as evidence for himself on any claim, motion, petition, or other proceeding before the court on which evidence can be received. *Ib.*

The case of *Kay* v. *Smith* (20 Beav. 566; 24 L. J., Ch. 788; 3 W. R. 622) overruled. *Ib.*

An affidavit made under an administration decree in support of a claim of debt is made in a proceeding under the meaning of the 40th section of the 15 & 16 Vict. c. 86, so as to subject the deponent to cross-examination. *Cust* v. *Poyser*, 3 Sm. & G. 369; 26 L. J., Ch. 93; 3 Jur. (N.S.) 38. Affirmed 26 L. J., Ch. 353—L. JJ.

The leave of the judge is not necessary to

authorise the examiner to take the cross-examination. *Ib.*

When a notice has been served upon a party under General Ord. XIX. of February, 1861, requiring his attendance for cross-examination on an affidavit filed by him, the court will not compel his attendance for that purpose when the affidavit has been used on a motion for an injunction, and an order has been made which disposes of the matter. *Hooper* v. *Campbell*, 12 L. T. 755; 13 W. R. 1003.

On the hearing of a cause the plaintiff is not at liberty to cross-examine a defendant whose affidavit has not been read. *Fielden* v. *Goschen*, 18 W. R. 85.

An order had been obtained by a plaintiff to amend his bill. Before the order was obtained the plaintiff's solicitor had filed an affidavit in support of the application to amend, and the defendant had served a summons for the solicitor to be cross-examined on the matters of his affidavit:—Held, that, as the order to amend had been actually made before the cross-examination could take place—the same state of circumstances not existing—the defendant was not entitled to cross-examine the solicitor on the affidavit. *Catholic Publishing Co.* v. *Wyman*, 1 N. R. 468; 7 L. T. 849; 11 W. R. 399.

Upon a motion for an injunction, the defendant asking for time to answer affidavits, was put upon terms to file his affidavits in two days, and an interim injunction being granted until the next seal. He then applied for an order appointing a special examiner, and directing the plaintiff, who had made an affidavit in support of the motion, to attend on the next day, without further notice, before such special examiner, to be cross-examined upon his affidavit:—Held, that the plaintiff, upon an interlocutory motion for an injunction, was under the control of the court, and that the indulgence which was asked was only to enable the defendant to do what he could have done without any order, if the examiner had been at liberty; and the application was accordingly granted. Held also, that the plaintiff should have the like liberty of cross-examining the defendant upon an affidavit by him, denying a simple fact alleged by the plaintiff, and made for the purpose of gaining time; and that the defendant would not be prevented by such cross-examination and his own re-examination from afterwards filing further affidavits. *Besemeres* v. *Besemeres*, 1 Kay (App.), xvii.; 2 Eq. R. 668; 23 L. J., Ch. 198; 2 W. R. 124.

A person coming in under an administration decree to prove a debt in chambers, and making an affidavit in support of his claim, is liable to cross-examination before an examiner, and a subpœna may issue against him as of course, without leave of the judge. *Londonderry* (*Marchioness*) v. *Bramwell*, 3 Kay & J. 162; 5 W. R. 247.

A motion for an injunction was ordered to stand over, with liberty to bring an action:—Held, that a witness, who had made an affidavit on the occasion, might, afterwards and before the trial, be cross-examined, under the 15 & 16 Vict. c. 86, s. 40. *Lloyd* v. *Whitty*, 19 Beav. 57.

Where no Cross-examination.]—No weight is to be attached to an affidavit where the oppposite party has had no opportunity to cross-examine the witness. *Wightman* v. *Wheelton*, 23 Beav. 397; 3 Jur. (N.S.) 124; 5 W. R. 337.

An application in an injunction suit for leave to bring an action should be supported by an affidavit of the plaintiff's title; such an affidavit, however, will be sufficient to found the application upon, although the defendant may have had no opportunity of cross-examining the plaintiff upon it. *Mayer* v. *Spence*, 29 L. J., Ch. 552; 1 John. & H. 87; 6 Jur. (N.S.) 672; 2 L. T. 536; 8 W. R. 559.

On a motion to dissolve an injunction to stay proceedings at law, the plaintiff in equity has no right, under the 40th section of the statute 15 & 16 Vict. c. 86, to require that the motion shall stand over, in order that he might examine orally witnesses who had made an affidavit for the defendant. *Normanville* v. *Stanning*, 10 Hare (App.), xxvi.

Where Impossible.]—A plaintiff filed an affidavit made by a dying witness, and offered an opportunity for cross-examination, and afterwards filed replication, and having omitted to give notice of reading the affidavit within the prescribed time, took out a summons for leave to read the affidavit, which summons was adjourned to the hearing of the cause. The plaintiff printed the affidavit, with the others proposed to be read at the hearing, and thereupon the defendant moved to take it off the file and expunge it from the printed affidavits:—Held, that this motion was irregular. *Lautour* v. *Att.-Gen.*, 43 L. J., Ch. 313.

A suitor in the Court of Appeal in chancery is not entitled as of right to examine or cross-examine witnesses upon merely serving notice for the purpose: the court will itself exercise a spontaneous discretion in ordering such examination during the progress of the hearing. *Long* v. *Donegan*, Ir. R. 7 Eq. 494.

Liberty given to read the affidavit of a witness, who had been prevented by illness from being cross-examined, but the court intimated that little attention would be paid to such an affidavit. *Braithwaite* v. *Kearns*, 34 Beav. 202.

Liberty given, under the 19th General Order of February, 1861, to use the affidavits of persons who, by death and lunacy, could not be cross-examined, saving just exceptions. *Ridley* v. *Ridley*, 34 Beav. 339.

An affidavit was made in favour of the plaintiff, who, after a long delay, filed it after the death of the witness, whereby no cross-examination could be had. A motion to take it off the file was refused, though the court intimated that it would have less weight. *Abadom* v. *Abadom*, 24 Beav. 243.

A plaintiff whose evidence was of great importance to the issue in the suit, made an affidavit which was duly sworn and filed. He then died. No notice of the affidavit was given to the defendants, and they had not cross-examined the plaintiff upon it. The court allowed the affidavit to be received at the hearing of the cause on motion for decree. *Tanswell* v. *Scurrah*, 11 L. T. 761.

The affidavit of a witness who dies before he can be cross-examined, is admissible, unless the witness had kept out of the way to avoid cross-examination. *Davis* v. *Otty*, 35 Beav. 208; 5 N. R. 391; 34 L. J., Ch. 252.

A witness made an affidavit and died four days afterwards, and before she could be cross-examined. Her evidence was admitted at the hearing. *Ib.*

—— **Withdrawal of Affidavit.**]—The non-production of a witness for cross-examination

is no ground for a postponement of the hearing if the affidavit of the witness is withdrawn. *Sykes's Trusts, In re*, 2 John. & H. 415; 6 L. T. 350.

Where a witness, who has made an affidavit for the plaintiff, and whom the defendant desires to cross-examine, is unable through illness to be present at the day fixed for the hearing of the cause, the defendant may insist upon the affidavit being withdrawn, or the cause standing over till the witness can appear; and the court will not proceed with the examination of the other witnesses. *Nason* v. *Clamp*, 10 L. T. 682; 12 W. R. 973.

An affidavit was made by a plaintiff residing out of the jurisdiction, and he received notice to appear in London to be cross-examined thereon, but refused. An objection taken to its being received, was overruled, on the ground that it was the duty of the defendants' solicitor to have applied for the appointment of a special examiner to cross-examine the plaintiff. *Rawlings* v. *Wickham*, 4 Jur. (N.S.) 990.

Withdrawal to avoid Cross-examination.]—A party having filed or given notice to read an affidavit, is not at liberty to withdraw it. *Clarke* v. *Law*, 2 Kay & J. 28; 2 Jur. (N.S.) 228; 4 W. R. 35.

The court will not allow a party to withdraw an affidavit, bearing upon the merits of a case, so as to avoid cross-examination; otherwise, where an affidavit is filed unnecessarily. *National Insurance and Investment Association* v. *Carstairs*, 2 N. R. 255; 9 Jur. (N.S.) 955; 11 W. R. 866.

It is the established practice of the court that a witness, not a party to the suit, may be cross-examined on an affidavit made by him for the purposes of an interlocutory application. *Catholic Publishing Co.* v. *Wyman*, 1 N. R. 468; 7 L. T. 849; 11 W. R. 399.

An affidavit after being filed cannot be withdrawn, so as to prevent the other side from making use of it, on the hearing of the petition. *Labrey, Ex parte*, 3 Deac. & C. 232.

After an affidavit has been read at the hearing of a matter, it cannot be withdrawn without the consent of the other party. *Prole* v. *Soady*, L. R. 3 Ch. 220; 17 L. T. 485; 16 W. R. 294.

Where a person has made and filed an affidavit for the purpose of being used in a matter pending before the court, he cannot be exempted from cross-examination by the withdrawal of the affidavit. *Clarke* v. *Law* (2 Kay & J. 28), approved, and held to be applicable where the person making the affidavit is not a party to the proceedings. *Quartz Hill Consolidated Gold Mining Co., In re, Young, Ex parte*, 51 L. J., Ch. 940; 21 Ch. D. 642; 31 W. R. 173—C. A.

In the High Court the deponent can be cross-examined even if the affidavit were not used by the party who filed it. *Child, Ex parte, Ottaway, In re*, 51 L. J., Ch. 494; 20 Ch. D. 126; 46 L. T. 118; 30 W. R. 862.

A party will not be allowed to withdraw an affidavit in order to escape cross-examination. *Pike* v. *Dickinson*, 21 W. R. 862.

Leave to Read after Notice of Cross-examination.]—At the hearing of a cause on replication, the plaintiff proposed to read the affidavit of a witness occupying an official position in the United States. Notice to cross-examine this witness had been given, and he had come over to this country for the purpose of being cross-examined, but had been obliged to return before the cause came on to be heard. The plaintiff had given the defendant only one day's notice before the witness left the country:—Held, that the affidavit could not be read. *Dunne* v. *English*, L. R. 18 Eq. 524.

When one party desires the production of a witness for cross-examination, the court has no power to order an affidavit used on a previous application to be read at the trial. *Blackburn Union* v. *Brooks*, 47 L. J., Ch. 156; 7 Ch. D. 68; 37 L. T. 427; 26 W. R. 57.

Used before Cross-examination completed.]—Semble, that the fact that a cross-examination on affidavit is not concluded does not prevent the court from looking at the affidavit. *Lewis* v. *James*, 54 L. T. 260—C. A.

Abuse of Process of Court.]—The court will prevent the process of the court from being abused for the purpose of oppression. *Mundell, In re, Fenton* v. *Cumberlege*, 52 L. J., Ch. 756; 48 L. T. 776.

The plaintiff in an administration action having without any necessity made an affidavit for the purpose of an application in chambers for accounts, the defendants proposed to cross-examine her on her affidavit, and on her refusing to appear, applied for an order on her to attend:—Held, that the affidavit having been immaterial to the relief sought, and no reason having been suggested for supposing that the cross-examination could be productive of any result, the application was an abuse of the process of the court for the purpose of oppression, and must be refused. *Ib.*

Several Defendants—Order of Cross-examination.]—Where one defendant calls a witness who has made an affidavit filed by the plaintiff, it is a convenient practice that the defendant calling the witness shall proceed to cross-examine him, that then the defendants in the same interest with the plaintiff shall cross-examine the witness, and the defendant calling the witness shall re-examine upon the points touched upon in the cross-examination. *Harrison* v. *Southampton*, 2 Jur. (N.S.) 435.

Evidence to be taken orally.]—Where time for taking evidence has not expired, but replication only applies to some answers of many defendants, the court will order one replication for all on the terms of its being filed instanter, but will not allow affidavits filed and to be filed to be used in cross-examination, where parties have elected to take evidence orally. *Rogers* v. *Hooper*, 2 Drew. 97; 2 Eq. Rep. 452; 23 L. J., Ch. 449; 2 W. R. 215.

Answer used as an Affidavit.]—A notice of motion for a decree gave a list of affidavits intended to be read, and that the plaintiff would read the defendant's answer. The plaintiff gave notice of intention to cross-examine the defendant on the answer, but it was objected before the examiner, that the plaintiff had made the defendant his witness, and the examiner allowed the objection:—Held, that the plaintiff was entitled to cross-examine the defendant on his answer. *Brumfit* v. *Hart*, 9 Jur. (N.S.) 12; 7 L. T. 310; 11 W. R. 53.

On a motion for a decree the answer is an affidavit, and the defendant may be cross-

examined on it. *Wightman* v. *Wheelton*, 23 Beav. 397 ; 3 Jur. (N.S.) 124 ; 5 W. R. 337.

Semble, on a motion for an injunction, the plaintiff who has compulsorily obtained an answer cannot cross-examine the defendant on it, unless it is to be used on the defendant's behalf. *Ib.*

Semble, upon motion for injunction, the plaintiff is at liberty to cross-examine a defendant upon his answer. *Ib.*

On a notice of motion for a decree, the plaintiff had given notice to use the answers of some of the defendants :—Held, that he might cross-examine those defendants on their answers without prejudice to the right of the other defendants to object to the cross-examination being used against them. *Rheden* v. *Wesley*, 26 Beav. 432 ; 28 L. J., Ch. 797.

But held, also, that the plaintiff could not examine in chief other witnesses not mentioned in his notice of motion for a decree. *Ib.*

The answer of a defendant who was unable to be cross-examined on account of illness was not allowed to be read as evidence on his behalf. *Parker* v. *M'Kenna*, 43 L. J., Ch. 802 ; 30 L. T. 807.

h. Other Cases.

Suits pending when Judicature Acts came into Force.]—A motion was made for leave to take evidence in a suit by affidavit. It was opposed by the defendants, who were trustees, and the court held that they were entitled to have the evidence taken vivâ voce, but reserved the costs of the motion. On the cause coming on for hearing no witnesses were called, and no reason was given for insisting upon the evidence being taken vivâ voce :—Held, that the costs of the motion must be paid by the defendants, the trustees, who had perversely, unreasonably and unjustly refused to adopt the cheaper and more familiar mode of taking evidence. *Patterson* v. *Wooler*, 45 L. J., Ch. 274 ; 2 Ch. D. 586 ; 34 L. T. 415 ; 24 W. R. 455.

Admissibility.]—If a party on motion before a judge uses the affidavit of another person, such affidavit is, on any subsequent occasion, admissible against him who so used it ; even on a trial, when the person who swore the affidavit is present in court and is not called. *Brickhill* v. *Hulse*, 7 A. & E. 454 ; 2 N. & P. 426 ; 7 L. J., Q. B. 18.

On the trial of an information by the attorney-general, for penalties, the defendant (who had been held to bail) had subpœnaed the officer from the Queen's Remembrancer's office, to produce the affidavit on which he had been held to bail, with a view of being able to give it in evidence to cross-examine the person who had made the affidavit, if he should be called as a witness on the trial. The person who made the affidavit was called as a witness on the trial, and, for the purpose of cross-examining him, the defendant's counsel wished to put in the affidavit :—Held, that the officer was bound to produce it, and that the defendant had a right to make use of it in this way ; but that, if the affidavit was made by another deponent besides the witness, and related to other persons besides the defendant, the latter would be only entitled to use so much of the affidavit as was sworn by the witness and related to the defendant himself. *Att.-Gen.* v. *Bond*, 9 Car. & P. 189.

An affidavit to ground a commission of bankruptcy is conclusive evidence against the deponent of the fact of the bankruptcy. *Ledbetter* v. *Scot*, 4 Bing. 623 ; 1 M. & P. 597 ; 6 L. J. (O.S.), C. P. 147.

An affidavit filed in court on a motion may be read in evidence at the sittings, without proof of its being sworn. *Cameron* v. *Lightfoot*, 2 W. Bl. 1190.

The affidavit of a deceased solicitor, made and filed in the course of a chancery suit, may be admitted in evidence in conjunction with an order of the court made upon a motion in the suit shortly afterwards, although it does not appear on the face of the order that the affidavit was upon the motion. *Whaley* v. *Carlisle*, 17 Ir. C. L. R. 792.

—— **As to Title.**]—On motion for an issue to try the plaintiff's heirship, affidavits of facts of which the defendant, by his answer, professes to be ignorant, are inadmissible. *Lancashire* v. *Lancashire*, 9 Beav. 259.

Where a plaintiff moves upon the answer, he is not allowed to verify by affidavit any allegation in the bill of a fact connected with his title, though such allegation be neither admitted nor denied by the answer. Where the bill set forth a letter as containing an admission of the plaintiff's title, and which it charged to have been written by the defendant ; but the defendant, who was very old, and nearly blind, stated that such a letter might have been written by somebody about him, but that to the best of his recollection and belief he had never written such a letter :—Held, on a motion for production of documents, that the letter, with an affidavit of its being in the defendant's handwriting, could not be admitted as evidence of the plaintiff's title for the purpose of the motion. *Edwards* v. *Jones*, 1 Ph. 501 ; 13 Sim. 632 ; 13 L. J., Ch. 371 ; 8 Jur. 416.

Where the defence was that the deed of assignment under which the plaintiff claimed was executed after bill filed, and was in trust for the assignor against whom the defendant filed a cross-bill :—Held, that the assignment could not be proved by affidavit at the hearing under the 97th General Order. *Joly* v. *Swift*, 9 Ir. Eq. R. 195.

In Cases of Lunatics and Infants.]—In cases of lunatics and infants, the court will look at all the affidavits, however numerous, and will not insist on an undertaking to file no more. *Dyce Sombre, In re*, 1 Coop. C. C. 332.

Sufficiency—By Third Party.]—An affidavit by a third party is not sufficient evidence that proposed trustees will consent to act. Semble, that such consent may be sufficiently shewn by the instruction of counsel or by letter. *Parke's Trust, In re*, 1 W. R. 477.

The affidavit of a person present at the seizure of a vessel, though not the seizer himself, is sufficient to ground a monition, citing the Master in particular, and all others in general, to appear, &c. Evidence of the owner's claim, not tendered in the court below, received by the judicial committee on the hearing of the appeal. *Guimaraens* v. *Preston*, 4 Moore, P. C. 167.

The only evidence of notice of a settlement to a subsequent mortgagee, was an affidavit by E. that he had apprised him thereof :—Held, fact of notice sufficiently put in issue to let in this evidence. *Stuart* v. *Ferguson*, Hayes, 452.

On Motion for Inquiry as to Damages.]—Motion to stay the execution of a writ of inquiry of damages, not supported by the ordinary affidavit upon a motion to stay trial, refused with costs. *Rodenhurst* v. *Tudman*, Turn. & R. 305.

X. COSTS OF EVIDENCE.

1. OF WITNESSES.—*See* ante, cols. 874 et seq.

2. OF PREPARATION FOR TRIAL.

In former Stage.]—An injunction obtained by a plaintiff having been dissolved with costs on motion by the defendant, the plaintiff gave notice to read, on motion for decree, his evidence on the motion to dissolve the injunction. The decree, which was made with costs, recited part of this evidence:—Held, that the plaintiff was entitled to include the charges for this evidence in his bill of costs. *Stempson* v. *Jepson*, 18 W. R. 962.

A cause and cross-cause being dismissed with costs:—Held, that the costs of evidence, taken in the former cause, but used in both, should be paid for in the cause in which it was taken. *Arundel Corporation* v. *Holmes*, 4 Beav. 325; 5 Jur. 884.

Abandoned Motion or Discontinuance of Action.]—On an abandoned motion, or on the discontinuance of an action, the costs of all work in preparing, briefing or otherwise, relating to affidavits or pleadings are allowed; provided, in the opinion of the taxing-master, such work has not been prematurely done. *Harrison* v. *Leutner*, 50 L. J., Ch. 264; 16 Ch. D. 559; 44 L. T. 331; 29 W. R. 393.

Abstracts of Documents.]—In an action a defendant justified under a distress for a fee-farm rent, deducing his title so far back as the reign of Charles II. After issue joined the plaintiff discontinued:—Held, that the defendant was not entitled to the costs of taking any abstracts or documents relating to his proposed defence. *Davis* v. *Hatton*, 8 D. P. C. 164; 4 Jur. 28.

Evidence to meet Right denied on Pleadings.]—In trover for goods seized under a claim of toll, alleged to be due by reason of landing them at a particular wharf, it is open to a defendant to set up his claim to the toll under the plea of not possessed, and the plaintiff ought, therefore, to be prepared with evidence against the claim; and he will be allowed the costs of such evidence, though, at the trial, the defendant does not raise the question. *Webb* v *Tripp*, 1 D. (N.S.) 589; 6 Jur. 237.

Necessary for Conduct of Litigation.]—On taxation of costs as between party and party, the only costs chargeable against the unsuccessful party are such as are necessary for the conduct of the litigation. Therefore, in a suit to restrain the infringement of a patent, in which the defendant had set up several cases as anticipations, the costs of drawings of exhibits for the purpose of affixing to the margin of counsel's briefs were disallowed. *Smith* v. *Buller*, 45 L. J., Ch. 69; L. R. 19 Eq. 473; 31 L. T. 873; 23 W. R. 332.

Shorthand Notes.]—It is a settled rule that the costs of shorthand writer's notes of evidence will not be allowed on taxation unless there is in the order a direction to that effect. Such a direction will only be inserted in exceptional cases: the notes of the judge, supplemented by those of counsel, being amply sufficient, if not better, for all ordinary purposes. The general utility of shorthand writers' notes considered. *De la Warr* (*Earl*) v. *Miles*, 19 Ch. D. 80; 45 L. T. 424; 30 W. R. 35—C. A.

Upon the hearing of an action the principal evidence was given vivâ voce, and the solicitors on each side agreed together that one shorthand writer should be engaged on behalf of both plaintiff and defendant. Shorthand notes were accordingly taken of the speeches of counsel, of the evidence and of the judgment of the court. An order having been made in favour of the defendant, the plaintiff appealed, and the Court of Appeal dismissed the appeal with costs, nothing being said about the shorthand writers' notes. On taxing the defendant's costs of the appeal, the Master disallowed the costs of copies of the shorthand notes, except those of the judgment of the vice-chancellor, and further disallowed the sum paid by the defendant for shorthand writer's charges. Malins, V.-C., decided that the two items in question must be allowed as costs in the cause:—Held, on appeal, that the Master was right in disallowing the two items, there having been a simple dismissal of the appeal with costs, without any special directions. *Ashworth* v. *Outram*, 9 Ch. D. 483; 39 L. T. 441; 27 W. R. 98—C. A.

The agreement between the solicitors was merely an arrangement for saving expense, and left the case on the same footing as if each party had employed his own shorthand writer. *Ib.*

A motion to vary the Master's certificate by allowing costs of supplying copies of shorthand notes to counsel during the progress of trial was refused on the ground that special directions ought to have been asked for at the trial. *Kirkwood* v. *Webster*, 47 L. J., Ch. 880; 9 Ch. D. 239; 26 W. R. 812.

The court declined to give the successful plaintiff the costs of the shorthand writer's notes of the proceedings which had been taken by each side, as the court had not required them to be produced for its own use. *Thorley's Cattle Food Co.* v. *Massam*, 41 L. T. 543.

Shorthand writers' notes cannot ordinarily and without consent be allowed. *Croom* v. *Gore*, 1 H. & N. 14; 25 L. J., Ex. 267; 2 Jur. (N.S.) 427.

At an arbitration, which lasted several days, the successful party had only one counsel, and employed a shorthand writer to take down the evidence, and after each meeting a transcript of his notes were made, and a copy furnished to counsel for his guidance at the subsequent meetings:—Held, that the expense of the shorthand writer, the transcripts, and the copies ought not to be allowed, although the expense of a second counsel, or of a copy of the notes of the evidence, if taken by an attorney's clerk, would have been allowed. *Ib.*

The court will not include in the costs of an action the costs of the shorthand writer's notes of evidence unless there has been an agreement between the parties on the subject. *Mostyn* v. *Lancaster*, 51 L. J., Ch. 705.

Shorthand notes are not allowed as between party and party. *Beaufort* (*Duke*) v. *Ashburnham* (*Lord*), 13 C. B. (N.S.) 598; 32 L. J., C. P. 97; 9 Jur. (N.S.) 822; 7 L. T. 710; 11 W. R. 267.

—— **On Reference.**]—Where an action is referred, the cost of brief copies of the transcript of the shorthand writer's notes of each day's proceedings in the reference made for the use of counsel, will not, in the absence of any order and of agreement between the parties, be allowed on taxation. *Wells* v. *Mitcham Gas Light Co.*, 48 L. J., Ex. 75; 4 Ex. D. 1; 39 L. T. 667; 27 W. R. 112.

Shorthand writer's notes on a reference are as a general rule properly disallowed on taxation. *Autothreptic Steam Boiler Co., In re*, 59 L. T. 632.

—— **For Personal Use of Solicitor.**]—In party and party costs a solicitor is not entitled to charge for a copy of the transcript of shorthand writer's notes for proceedings in an arbitration for his own use, when he himself is in possession of the transcript, even though he appears as advocate and makes use of a typewriter copy for his own greater convenience. *Latimer, Clarke & Co., Ex parte*, infra.

—— **In what Cases allowed.**]—The court allowed the respondents the costs of copies of a shorthand writer's notes of evidence taken before the registrar, on the ground that they had been served by the appellant with notice that such notes would be read. *Harris, Ex parte, Ward, In re*, 30 W. R. 561—C. A.

Where the court has used the shorthand writer's notes of evidence taken in the court below, the costs will be allowed. *Smith* v. *Chadwick*, 51 L. J., Ch. 621; 20 Ch. D. 81—C. A.

Where shorthand notes of evidence are essential to the proper hearing of the case, the costs of such notes will be allowed. *Lee Conservancy Board* v. *Button*, 12 Ch. D. 383; 41 L. T. 481—C. A.

It is competent to this court to make an order for the allowance, on taxation between party and party, of the expense of the shorthand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where, from the nature and extent of the evidence, it is manifest that the matter could not have been properly disposed of without their aid. *Watson* v. *G. W. Ry.*, 50 L. J., Q. B. 302; 6 Q. B. D. 163; 29 W. R. 427.

The court allowed the costs of copies of the transcript of the shorthand writer's notes of the judgment below, furnished to the defendants' two original counsel. *Wegmann* v. *Corcoran*, 41 L. T. 792.

Shorthand writer's notes of the cross-examination of witnesses in court allowed, but costs of his notes of the judgment disallowed, on a taxation between party and party. *Clark* v. *Malpas*, 31 Beav. 554; 1 N. R. 221; 32 L. J., Ch. 313; 9 Jur. (N.S.) 612; 7 L. T. 659; 11 W. R. 251.

—— **Number of Copies.**]—A defendant in an action upon a policy of insurance, obtained a rule for a new trial on the payment of the costs of and occasioned by the former trial. The Master allowed only one copy of the shorthand notes of the evidence, though he allowed three counsel:—Held, a proper exercise of discretion. *Stewart* v. *Steele*, 5 Scott (N.R.) 517; 4 Man. & G. 669.

—— **Duty of Taxing-Master.**]—It is the duty of the taxing-master in a bankruptcy appeal to decide as to the costs of the transcript of a shorthand writer's notes of the depositions. *Cocks, Ex parte, Poole, In re*, 21 Ch. D. 397, at p. 407.—C. A.

Judgment as in case of a nonsuit having been signed in an action for a malicious prosecution, the Master allowed three copies of the shorthand writer's notes of the evidence on the trial of the prosecution, considering himself bound by the certificate of counsel that they were necessary:—Held, that the Master was wrong in considering himself bound by the certificate, and was directed to review his taxation, in order that he might exercise his discretion as to the propriety of the allowance. *May* v. *Turn*, 12 M. & W. 730; 1 D. & L. 997; 13 L. J., Ex. 234; 8 Jur. 383.

—— **On Appeal.**]—*See* APPEAL.

Copies made by Typewriter.]—The allowance of 4*d.* a folio for manuscript copies of documents does not apply to carbon copies produced by a typewriter. *Latimer, Clarke & Co., Ex parte*, 60 L. J., Q. B. 626; 65 L. T. 552—C. A.

Specimens.]—In an action for an injury to a watercourse by the deposit of noxious materials, the Master disallowed costs incurred by the plaintiff in obtaining specimens of earths and plants from the lands, for the purpose of analysation and production at the trial:—Held, that such disallowance was right. *Lamb* v. *Simpson*, 4 Ex. 85; 18 L. J., Ex. 377.

Plans.]—Costs of preparing plans for the better elucidating of the case before the court and jury, may be allowed, at the discretion of the Master. *Pilgrim* v. *Southampton and Dorchester Ry.*, 8 C. B. 25.

Searches for Evidence.]—On the trial of a replevin, in which the defendants made cognisance as collectors of Crown rent, much old documentary evidence was given by them, and they obtained a verdict; but a new trial was granted on the ground that one of those documents had been improperly received in evidence. A fresh notice of trial, without any alteration in the pleadings, was then given, subsequently to which the plaintiff discontinued:—Held, that the Master had rightly allowed the defendants the costs of a search made by an officer of the Crown in one of its offices for all the documentary evidence used, except that portion for the reception of which the new trial had been granted; and also of the briefs used at the trial. *Daniel* v. *Wilkin*, 8 Ex. 156; 22 L. J., Ex. 73.

In an action involving the title to a manor, an antiquarian's charges for researches for and translations of ancient records and documents at the Record Office and elsewhere (which were known to exist), were allowed. *Beaufort (Duke)* v. *Ashburnham (Lord)*, 13 C. B. (N.S.) 598; 32 L. J., C. P. 97; 9 Jur. (N.S.) 822; 7 L. T. 710; 11 W. R. 267.

—— **Antiquary.**]—In a suit in equity, raising the question of title to a chapel, the defendant employed an antiquary to search after, translate, and report upon various ancient records, and the judgment of the court turned, in a great measure, upon the evidence so collected. The bill having been dismissed with costs, the antiquary's

fees and expenses amounted to 334*l.*, in respect of which the Master allowed 220*l.*; also, of two sums of 26*l.* 5*s.* and 22*l.* for journeys and reports to two other experts. The plaintiff objected, on the ground that the evidence was procured only for the purpose of informing the mind of the defendant as to the best mode of framing his case, that the defendant had no prior knowledge of the existence of many of the documents, and that he had refused to make the antiquary himself a witness in the cause:—Held, that the costs in question had been necessarily and properly incurred by the defendant, and rightly allowed by the Master. *Churton* v. *Frewen*, 36 L. J., Ch. 660; 16 L. T. 171; 15 W. R. 559.

Held, also, that the travelling expenses of two eminent architects, who had made affidavits in the cause, were rightly allowed. *Ib.*

Notice to Admit—Want of.]—A party to a cause, proposing to adduce in evidence at the trial any written or printed document, ought to serve a notice to inspect and admit the same, although the document is not in his possession, or even in a place inaccessible to him; and in the event of his neglecting to do so, he will not be allowed the costs of proving it. *Rutter* v. *Chapman*, 8 M. & W. 388; 1 D. (N.S.) 118; 11 L. J., Ex. 178; 5 Jur. 610.

A party proposing to adduce documentary evidence at a trial is bound, in every case, to give a notice to admit, even although the genuineness of the document is put in issue by the pleadings. *Spencer* v. *Barough*, 9 M. & W. 425; 11 L. J., Ex. 378; 6 Jur. 154.

He is equally bound to serve this notice, notwithstanding an intimation from the opposite side that no such admission would be made, and that the document proposed to be adduced was a forgery. *Ib.*

The expenses of a witness at nisi prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for and obtaining copies and translations of such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them. *Bastard* v. *Smith*, 10 A. & E. 213; 2 P. & D. 453; 8 L. J., Q. B. 242.

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of issuing them at a trial to check the testimony of the same deponents at nisi prius, will be allowed on taxation between party and party, though the opposite party has not been called on to admit them. *Ib.*

—— **Refusal to Admit.**]—A party refused to admit the handwriting of a third person to a document. The judge made the usual order for the costs of proving it at the trial: the handwriting of the document was proved, but the document itself was one which was not receivable in evidence. The judge at nisi prius would not certify for the costs of proving it. *Phillips* v. *Harris*, Car. & M. 492.

Where the counsel of the party refusing, admitted the documents, in consequence of which no proof was given, and the judge did not certify:—Held, that the Master was right in refusing to allow the costs of the witnesses subpœnaed to prove such documents. *Freeman* v. *Rosher*, 18 L. J., Q. B. 105; 13 Jur. 427.

The plaintiff's attorney, in possession of a probate essential to the defendant's case, having given an oral, but having refused to give a written undertaking to produce it at the trial, the defendant's attorney warned him that an exemplification of the will must be procured at a heavy expense. The probate was produced at the trial on the plaintiff's part:—Held, that the defendant, who obtained the verdict, was entitled only to the expense of an ordinary copy of the will, and of a summons to call on the plaintiff to admit it. *Goldstone* v. *Tovey*, 8 Scott, 562; 6 Bing. (N.C.) 274.

In an action for running down a ship, tried at Newcastle, the plaintiff having got a verdict, the Master refused to allow him the expense of proving the registers and transfers, &c., of the ship, upon the ground that reasonable notice had not been given to defendant to allow copies to be given in evidence. The commission day was on 4th March; notice of trial had been given on 21st February, and the notice to admit the documents was not served till Saturday, 28th February, on the London agent. He, however, refused to admit the copies, and another application was made on Monday following, and the copies were produced to him; but he again refused, and a summons was then taken out, returnable next day, but not attended. On the previous evening the agent sent off the briefs. The court ordered the Master to review the taxation. *Tynn* v. *Billingsley*, 3 D. P. C. 810.

On plaintiff paying defendant the expenses of examining a judgment and other documents abroad, an order was made for defendant to pay the expenses of proving them at the trial (such proof being satisfactory to the judge, and so certified by him), whatever might be the result of the case, if after such examination defendant did not admit them. *Smith* v. *Bird*, 3 D. P. C. 641.

What to be Admitted.]—A notice to admit documents called on the defendant to admit the authority by which the documents were written:—Held, that the party called on to make the admissions had a right to reject the whole, and having done so, and a verdict having been obtained by the defendant, the plaintiff, who proved these documents at the trial, had no right to the costs of such proof under the 15 & 16 Vict. c. 76, s. 117. *Oxford, Worcester, and Wolverhampton Ry.* v. *Scudamore*, 1 H. & N. 666.

Each admission sought is to be treated as a separate part of the notice. *Ib.*

Costs of Voluminous Notice.]—In an action by a carrier against a railway company, to recover back exorbitant and unequal charges made upon him for the conveyance of goods on their line, a verdict being found against the company, the Master, on taxation, disallowed a charge of 566*l.* 17*s.* 4*d.* for a voluminous notice to admit, setting forth descriptions of upwards of 21,000 tickets and receipts for goods carried by the company for the carrier, and moneys paid on account, and in respect of which the overcharges arose:—Held, that the Master had exercised a sound discretion in so doing, the notice, though apparently in strict compliance with, being virtually in fraud of, the rule of court. *Edwards* v. *G. W. Ry.*, 12 C. B. 419.

Affidavits.]—The costs of documentary evidence not read, nor entered as read, were disallowed. *Stuart* v. *Greenall*, M'Clel. 705; 13 Price, 755.

Where a motion for an injunction had been

refused, with costs, on the ground of want of parties, the defendant is not to be entitled to the costs of affidavits which have been filed by him, but not used on the motion. *Camille* v. *Donato*, 11 Jur. (N.S.) 26 ; 11 L. T. 584 ; 13 W. R. 358.

The costs of affidavits, used to qualify the answer of a defendant, so as to excuse him from the production of documents, must be paid for by the defendant. *Smith* v. *Massie*, 4 Beav. 417 ; 5 Jur. 1053.

The costs of an affidavit, filed in support of a motion, but not entered in the order as read, will not be allowed on taxation, even as between solicitor and client. *Stephens* v. *Newborough (Lord)*, 11 Beav. 403 ; 17 L. J., Ch. 332 ; 12 Jur. 319.

Costs may be allowed for affidavits used in reference to the common injunction. *Small* v. *Attwood*, 1 Y. & Coll. 53 ; 4 L. J., Ex. Eq. 1.

When a petition is dismissed with costs, the court will not limit the payment of costs merely as to the affidavits that were read on the hearing of the petition, for in general all affidavits filed are entered as read. *Lucas, Ex parte, Oldham, In re*, 3 Deac. & C. 664 ; 1 Mont. & Ayr. 405.

Plaintiffs filing unnecessary affidavits ordered to pay the defendants' costs occasioned thereby. *Att.-Gen.* v. *Halifax*, 18 W. R. 37.

—— **Taking Unnecessary Copies.**]—The appellants from an order on a claim in a winding-up gave notice to read a mass of affidavits made in the winding-up but not used on the hearing below. The respondent objected to their being admitted, but took copies. The Court of Appeal confined the argument in the first instance to a question not affected by these affidavits, and being against the appellants on that question, dismissed the appeal with costs, so that the question as to the admissibility of the affidavits was not decided. The respondent applied to have the affidavits entered in the order, as otherwise he would not be able to get the costs of having taken copies : —Held, that the application could not be granted, and that the respondent ought not to have taken copies unless and until the court held the evidence admissible, in which case it would have given him time to enable him to meet it. *Brampton and Longtown Ry., In re, Shaw's Claim*, 44 L. J., Ch. 670 ; L. R. 10 Ch. 186 ; 33 L. T. 5 ; 23 W. R. 813.

—— **Irrelevant or Scandalous.**]—*See* ante, col. 1093.

Interrogatories.]—Action for work and labour. Pleas, the general issue and payment. The verdict being for the plaintiff on the first, and for the defendant on the second issue, the Master rightly disallowed the costs of cross-examining upon interrogatories a witness whose examination in chief proved the first issue, and whose cross-examination was material only in reducing the damages on that issue, but did not affect the second issue. *Gravatt* v. *Attwood*, 1 B. C. C. 27 ; 21 L. J., Q. B. 215.

Costs of preparing interrogatories, which were not used, owing to admissions being put in, allowed as between party and party. *Davies* v. *Marshall*, 1 Dr. & Sm. 564 ; 7 Jur. (N.S.) 669 ; 9 W. R. 756.

So much of a bill for an account against trustees, and to have sums claimed by them disallowed, as charged fraud, was dismissed with costs, and accounts were directed. The Master, in taxing the defendant's costs, had refused to allow to the plaintiff any costs whatever in respect of the interrogatories, answer, or production of documents, considering that all these items were unnecessary upon a mere bill for an account :—Held, that the Master was not justified in disallowing these items without distinguishing those portions which related to the part of the bill which had not been dismissed, and as to which his certificate was sent back for review. *Heming* v. *Leifchild*, 8 W. R. 352. Affirmed, 9 W. R. 174.

Depositions.] — Where the Master reported passages in depositions taken for the defendants to be scandalous, but made no report as to the frame of the interrogatories :—Held, that they were not liable to the costs of the reference. *Gude* v. *Mumford*, 2 Y. & Coll. 445 ; 1 Jur. 577.

But where the attorney for the defendant made such statements in his examination, the court ordered him to pay the costs of expunging them, and would only visit the examiner in an extreme case. *Ib.*

Expense of Production of Deponent.] — *See* ante, col. 1103.

J. R.

EXCHANGE OF ESTATES.

See ESTATE.

EXCHEQUER BILLS AND BONDS.

See NEGOTIABLE INSTRUMENTS.

EXCISE.

See REVENUE.

EXECUTION.

A. Issue.
1. *Generally*, 1119.
2. *On Rule or Order of Superior Court*, 1121.
3. *On Judgment of Inferior Court*, 1123.
B. Several Writs on Same Judgment, 1124.
C. Several Writs on Several Judgments: Priority of Executions, 1125.
D. Fieri Facias.
1. *The Writ itself*, 1128.
2. *Time of Operation*, 1131.
3. *Liability of Execution Creditor*, 1132.
4. *Seizure and Sale by Sheriff*, 1133.
5. *What Property Seizable.*
a. Fixtures and Machinery, 1137.
b. Real Property and Chattels Real, 1138.
c. Money and Securities for Money, 1141.
d. Goods.
i. Of Debtor, 1143.
ii. Of other Persons, 1144.
e. Partnership Property, 1149.
f. Growing Crops, 1149.
g. Effect of Bankruptcy, 1150.
6. *Landlord's Claim for Rent*, 1151.
7. *Husbandry Provisions*, 1158.

E. ELEGIT.
1. *Generally*, 1159.
2. *Writ and Registration*, 1159.
3. *Property Extendible*, 1160.
4. *Position of Execution Creditor.*
a. Generally, 1162.
b. Account, 1165.
c. Determination of Tenancy by Elegit, 1167.
5. *Discharge of Writ*, 1167.

F. WRIT OF POSSESSION, 1168.

G. LEVARI FACIAS BY THE CROWN, 1168.

H. SEQUESTRATION.
1. *Generally*, 1169.
2. *The Writ*, 1170.
3. *What Persons and Property Liable.*
a. What Persons, 1173.
b. What Property, 1174.
c. Priorities, 1178.
4. *Powers and Liabilities of Sequestrator*, 1179.
5. *Of Benefice—See* ECCLESIASTICAL LAW.
6. *Other Matters relating to*, 1182.

I. CHARGING STOCKS, FUNDS, AND SHARES.
1. *Jurisdiction to Charge*, 1183.
2. *What are Companies within Judgment Act*, 1838, 1 & 2 Vict. c. 110, 1184.
3. *Order Charging*, 1185.
4. *Reviewing or Rescinding Order*, 1193.
5. *Operation and Effect of*, 1195.
6. *Other Matters*, 1198.

J. EQUITABLE EXECUTION.
1. *Generally*, 1199.
2. *Limit of One Year under s.* 13 *of Judgments Act*, 1838, 1 & 2 Vict. c. 110, 1205.
3. *What Property Liable, and what not*, 1206.
4. *Sale or Foreclosure*, 1210.
5. *Appointment of Receiver*, 1211.
6. *Control of Receiver by Court*, 1215.
7. *Effect of Order for Receiver*, 1217.
8. *Cases before Judgments Act*, 1838, 1218.

K. DISCOVERY IN AID OF EXECUTION, 1219.

L. ARREST OF THE PERSON—*See* ATTACHMENT—CONTEMPT OF COURT—DEBTORS ACT—SHERIFF.

M. STAY AND SETTING ASIDE EXECUTION.
1. *Stay*, 1220.
2. *On what Grounds Set Aside*, 1220.
3. *Conditions to Setting Aside*, 1222.

N. EXPENSES OF EXECUTION, 1223.

A. ISSUE OF EXECUTION.

1. GENERALLY.

See R. S. C. Ord. XLII.

Debtor's Interest.]—A judgment creditor can only by execution take such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. *Badeley* v. *Consolidated Bank*, 57 L. J., Ch. 468; 38 Ch. D. 238; 59 L. T. 419; 36 W. R. 745—C. A.

Variation of Forms.]—The true interpretation of the words, Ord. XLII. r. 14, of the Rules of 1883, "The forms used in Appendix H. shall be followed, with such variations as circumstances may require"—is, that the forms in Appendix H. can only be varied for the purpose of making them to be in accordance with the terms of the judgment or order. *Boswell* v. *Coaks*, 57 L. J., Ch. 101; 57 L. T. 742; 36 W. R. 65—C. A.

Time of.]—A petition for the winding-up of a company was presented at one o'clock in the day. At four o'clock in the same day execution was levied on part of the company's property in pursuance of a writ issued before the time when the petition was presented:—Held, that the execution was void. *London and Devon Biscuit Co., In re*, 40 L. J., Ch. 574; L. R. 12 Eq. 190; 24 L. T. 650; 19 W. R. 943.

Judgment for 20*l.* having been recovered and signed against the defendant, a man of known and undoubted wealth, the costs were taxed at 72*l.*, and on the allocatur being given for that sum about one o'clock in the day, the attorney's clerk, who represented the defendant at the taxation, asked the attorney's clerk attending for the plaintiff to grant time until a return of post in which to pay the money. This the latter refused to do, and he at once issued execution, which was levied at four o'clock the same afternoon. A Master made an order setting aside the fi. fa. and all proceedings thereunder, with costs, on the ground that the execution had been issued with unreasonable haste:—Held, that such order was wrong, as the plaintiff had a right to issue execution instanter, not being bound to wait during the time asked for, and no other indulgence of a more reasonable kind having been craved. *Smith* v. *Smith*, 43 L. J., Ex. 86; L. R. 9 Ex. 121; 30 L. T. 429.

Held, also, that a party who has signed judgment is entitled to issue execution without waiting for a return of post. *Ib.*

Semble, he is entitled to issue execution immediately, and is not bound to wait a reasonable time. *Ib.*

When a defendant in a chancery suit had, in pursuance of an order of the court, given judgment in an action at law commenced against him by the plaintiff "to be dealt with as the court should direct," the court, under the circumstances, gave the plaintiff leave to issue execution before the hearing of the cause, on his undertaking to pay the proceeds into court. *Hodges* v. *Fincham*, 1 Ch. D. 9; 33 L. T. 711; 24 W. R. 36—C. A.

Where a verdict is taken for a plaintiff in an action subject to a reference of the cause, and all matters in difference by order of nisi prius, and an award is made directing the verdict in the action to stand for the plaintiff for a certain sum, and finding another sum to be due to the defendant in respect of the matters in difference, the plaintiff is entitled to sign judgment for the sum awarded to him in the action in fourteen days after the making the award. *O'Toole* v. *Pott*, 7 El. & Bl. 102; 26 L. J., Q. B. 88; 3 Jur. (N.S.) 361; 5 W. R. 256.

Service of a decree or an order directing payment of money or costs is not requisite as a preliminary to issuing a writ of fi. fa. *Land Credit Co. of Ireland* v. *Fermoy (Lord)*, *Munster, Ex parte*, 39 L. J., Ch. 477; L. R. 5 Ch. 323; 22 L. T. 394; 18 W. R. 393.

To issue execution on the same day on which

costs are taxed is an abuse of the procedure of the court, and the costs of such an execution will be ordered to be returned. *Cruickshank* v. *Moss*, 8 L. T. 439.

On Judgment more than a Year old.]—A writ of execution issued on a judgment more than a year old, without a scire facias, was not void, but voidable only. *Blanchenay* v. *Burt*, 4 Q. B. 737; 3 G. & D. 613; 12 L. J., Q. B. 291; 7 Jur. 575.

—— **More than Six Years old.**]—Leave will not be given, in the absence of special circumstances, to issue execution on a judgment more than six years old, without notice to the party liable. *National Bank* v. *Cullen*, [1894] 2 Ir. R. 683—C. A.

For Balance after previous Execution.]—Where, in an action in the Exchequer Division to recover a sum of money admitted to have been received by the defendant as trustee, and to which the plaintiff was entitled, the plaintiff had obtained final judgment and issued execution:—Held, that the court had no jurisdiction to make an order directing the defendant to pay in four days the balance of the amount of the judgment unrealised by the execution. *Drewett* v. *Edwards*, 37 L. T. 622; 26 W. R. 122—C. A.

Changing Solicitor.]—A plaintiff may sue out execution by a different attorney from the attorney in the cause, without obtaining an order for changing the attorney. *Tipping* v. *Johnson*, 2 Bos. & P. 357.

On Death or Change of Parties.]—When a change had taken place by death in the parties entitled to execution on a judgment, the executors of the party who obtained the judgment obtained leave to issue execution on an ex parte application. *Mercer* v. *Lawrence*, 26 W. R. 506.

Where a defendant died between eleven and twelve o'clock in the morning, and a fi. fa. was sued out against his goods between two and three in the afternoon of the same day, the court set aside the execution as irregular. *Chick* v. *Smith*, 8 D. P. C. 337; 4 Jur. 86.

When improperly issued.]—S., as solicitor for a shareholder, presented a petition for the winding-up of a company, which was dismissed with costs. K., the solicitor of the company, made a demand for these costs upon S., who had received a cheque for the amount, but through a misunderstanding between the solicitors as to the authority to receive the costs, payment was not made until after a writ of fieri facias had been issued and executed for the amount. On a motion by S.'s client to set aside the writ, as issued contrary to good faith; or in the alternative that K. might be ordered to pay the costs of the execution and of the motion. The court refused to set the writ aside, but, considering that it ought not to have been issued, ordered K. to pay the costs of the execution and motion. *Commonwealth Land, Building, Estate and Auction Co., In re Hollington, Ex parte*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

2. On Rule or Order of Superior Court.

On Rule of Superior Courts—Judgments Act, 1838, 1 & 2 Vict. c. 110, s. 18.]—An order of the Court of Chancery, requiring the defendants in a suit to pay a certain sum into the bank, with the privity of the accountant-general, to the credit of the cause, is not an order which has the effect of a judgment within 1 & 2 Vict. c. 110, s. 18. *Gibbs* v. *Pike*, 8 M. & W. 223; 9 D. P. C. 131; 10 L. J., Ex. 308.

Where an order for payment of a sum of money is made against several persons, process can be issued separately against one of them, though the order is not in terms joint and several. *Land Credit Co. of Ireland* v. *Fermoy (Lord)*, *Munster, Ex parte*, 39 L. J., Ch. 477; L. R. 5 Ch. 323; 22 L. T. 394; 18 W. R. 393.

A judge's order for payment of money, obtained ex parte, cannot be made the foundation of an execution. *Rickards* v. *Patterson*, 1 D. (N.S.) 52; 8 M. & W. 313; 10 L. J., Ex. 272; 5 Jur. 894.

The rule when granted is a rule nisi only; and the court refused to make such rule absolute without personal service, where it appeared that such service might be effected. *Winwood* v. *Hoult*, 3 D. & L. 85; 14 M. & W. 197; 15 L. J., Ex. 10.

A judge at the assizes made an order to postpone a cause to the next assizes, the defendant forthwith to pay to the plaintiff costs of the day, to be taxed. This order was afterwards made a rule of court, before which, however, the action having abated by the defendant's death, the court refused to order the costs to be taxed, with a view to the plaintiff's issuing execution. *Hill* v. *Brown*, 16 M. & W. 696; 11 Jur. 290.

Where a party has obtained a rule absolute for costs of the day, and has procured the costs to be taxed, and the allocatur to be indorsed on the rule, he may issue execution for the amount of those costs, without any fresh rule specifying in distinct terms what their amount is. *Hodgson* v. *Patterson*, 5 Scott (N.R.) 76; 4 Man. & G. 333; 2 D. (N.S.) 129; 11 L. J., C. P. 289.

A conditional order to pay money is not an order upon which execution can issue. *Gibbs* v. *Flight*, 13 C. B. 803; 22 L. J., C. P. 256; 17 Jur. 1034.

A writ of execution cannot issue out of a court of common law upon a decree or an order of a court of equity. *Stanford, In re*, 4 Scott (N.R.) 23; 1 D. (N.S.) 183; 3 Man. & G. 407; 11 L. J., C. P. 49; 6 Jur. 38. S. P., *Gibbs* v. *Pike*, 9 M. & W. 351; 1 D. (N.S.) 409; 6 Jur. 465.

—— **Effect of Statute.**]—By 1 & 2 Vict. c. 110, s. 18, rules of court are not made equivalent to judgments, except so far as concerns the remedy for the recovery of the moneys payable by virtue of them. *Farmer* v. *Mottram*, 1 D. & L. 781; 6 Man. & G. 684; 7 Scott (N.R.) 408; 13 L. J., C. P. 10; 7 Jur. 994.

A judge's order under 6 & 7 Vict. c. 73, s. 43, ordering judgment to be entered up for the amount found by the master's allocatur to be due on an attorney's bill of costs, has the same force as a rule of court for the payment of money under the 1 & 2 Vict. c. 110, s. 18, and no action, therefore, need be brought on such order, and if brought the costs of the writ, declaration and appearance will not be allowed. *Griffiths* v. *Hughes*, 16 M. & W. 809; 16 L. J., Ex. 176; 11 Jur. 313.

—— **Obtaining Leave.**]—A party, to whom a sum of money has been made payable by a rule of court, is entitled to sue out execution for the amount, without any leave obtained from the court for that purpose. *Wallis* v. *Sheffield*, 7 D. P. C. 793; 3 Jur. 1002.

In cases in which a rule of court for the payment of money has the effect of a judgment, under 1 & 2 Vict. c. 110, s. 18, a rule nisi, call-

ing upon the parties to shew cause why the amount should not be paid is unnecessary. *Doe* d. *Harrison* v. *Hampson*, 4 C. B. 745; 5 D. & L. 484; 17 L. J., C. P. 147.

Where an application to a judge to set aside an execution is ordered to be referred to the master, the costs of the reference to be in his discretion, and if the judge's order has been made a rule of court, it is not necessary to apply to the court for leave to issue execution on the master's allocatur as to such costs. *Watson* v. *Holcombe*, 4 Man. & G. 136; 11 L. J., C. P. 190.

—— **When Rule is more than a Year old.**]—Where a rule for payment of money is more than a year and a day old, it is not necessary to sue out a scire facias, or to obtain the leave of the court, before issuing execution upon it. *Spooner* v. *Payne*, 5 D. & L. 310; 11 Q. B. 136; 17 L. J., Q. B. 68; 12 Jur. 282.

Attachment of Debtor's Person—Rights of Creditor.]—On an attachment for nonpayment of a sum of money under a decree of a court of equity, the defendant was taken into custody by the sheriff:—Held, that the plaintiff had not lost his right to proceed under the decree against the defendant's property. *Roberts* v. *Ball*, 3 Sm. & G. 168; 24 L. J., Ch. 471; 1 Jur. (N.S.) 585; 3 Eq. R. 632; 3 W. R. 466.

The seizure of the person of the debtor for contempt of court, is not, under 1 & 2 Vict. c. 110, s. 18, a release of the debts against the debtor's property. *Ib.*

3. On Judgment of Inferior Court, by Removal.

Removal from Inferior Court—19 Geo. 3, c. 70.]—In term time a rule should be obtained to remove the record of a judgment in an inferior court under 19 Geo. 3, c. 70. *Smithers* v. *Tanner*, 1 W. W. & H. 84.

19 Geo. 3, c. 70, s. 6, applies only to causes removed from an inferior court before judgment. *Longden* v. *Croots*, 7 Scott, 377. *S. C.* nom. *Crookes* v. *Longden*, 7 D. P. C. 413; 5 Bing. (N.C.) 410; 3 Jur. 317.

The court will remove a judgment from an inferior court, in order to issue execution thereon, though part of the debt has been levied by process from the inferior court. *Knowles* v. *Lynch*, 4 Tyr. 477.

Semble, that 19 Geo. 3, c. 70, s. 4, does not apply to judgments obtained by defendants. *Batten* v. *Squires*, 4 D. P. C. 53.

Where the original judgment in an inferior court has been destroyed by fire, the court will allow execution to be issued under a verified copy of the judgment. *Cheesewright* v. *Franks*, 6 D. P. C. 471.

The removal of a judgment in an inferior court, under 1 & 2 Vict. c. 110, s. 22, into the Court of Queen's Bench, is for the purpose of execution only, and the court will not set aside the judgment for irregularity in the service of the process, or because the action was prematurely commenced. *Simon* v. *De Witts (Count)*, 4 Jur. 989.

Removal from County Court.]—The judgment of a county court, constituted under 9 & 10 Vict. c. 95, is not removable into a superior court for the purpose of execution, either under 19 Geo. 3, c. 70, s. 4, or 1 & 2 Vict. c. 110, s. 22. *Moreton* v. *Holt*, 10 Ex. 707; 3 C. L. R. 348; 24 L. J., Ex. 169; 1 Jur. (N.S.) 215; 3 W. R. 207.

Removal from Mayor's Court.]—By the Mayor's Court of London Procedure Act, 1857, s. 48, execution might be issued in a superior court upon a judgment obtained in the Mayor's Court. By the Borough and Local Courts of Record Act, 1872, s. 6, where final judgment has been obtained in any local court for a sum not exceeding 20*l.*, "such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels . . . and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court":—Held, that the two statutes were not inconsistent, and that the Mayor's Court of London Procedure Act, 1857, s. 48, had not been repealed by the Borough and Local Courts of Record Act, 1872, s. 6; and that notwithstanding the latter statute, execution might be issued in the High Court of Justice upon a judgment for a sum not exceeding 20*l.* obtained in the Mayor's Court. *Paine* v. *Slater*, 52 L. J., Q. B. 282; 11 Q. B. D. 120; 48 L. T. 623; 31 W. R. 941—C. A.

Under the Mayor's Court of London Procedure Act, 1857, s. 48, a plaintiff who has recovered a judgment, in an action in the Mayor's Court, against a defendant having goods within its jurisdiction, is entitled, as of right, to remove such judgment into one of the superior courts, and to issue execution thereout against the goods of the defendant; and such execution will not be set aside as an abuse of the process of the court, notwithstanding that execution could have been issued out of the Mayor's Court with as full effect as out of the superior court, and that the only object of removing the judgment into the superior court may have been to obtain the increased costs of such execution. *Haywood* v. *Saint*, 32 L. T. 566.

The court to which such judgment is so removed may set it aside, if satisfied that it was obtained in a matter over which the inferior court had no jurisdiction. *Bridge* v. *Branch*, 1 C. P. D. 633; 34 L. T. 905.

B. Several Writs on Same Judgment.

Issue of Two Writs of Fi. fa. for different Parts of same Debt.]—It is no ground for setting aside the proceedings for irregularity, that the plaintiff has issued two writs of fi. fa. and caused part of the debt to be levied under the second, and that no return has been made to either. *Green* v. *Elgie*, 3 B. & Ad. 437; 1 L. J., K. B. 150.

Where a plaintiff from mistake has issued a fi. fa. for less than the sum for which he has obtained judgment, the court will, on conditions, allow him to issue a fi. fa. for the residue. *Hunt* v. *Passmore*, 2 D. P. C. 414.

Issue of Second Fi. fa. before returning the First.]—A sheriff having seized the defendant's goods under a fi. fa., it was agreed between the plaintiff and the defendant that the sheriff should withdraw upon payment of part of the debt, and that the judgment should stand as a security for the residue, which was to be paid by instalments; and that, in default thereof, the plaintiff should be at liberty to re-enter into possession; default having been made in payment of the first instalment, the plaintiff issued a second fi. fa. without returning the first:—Held, that the second writ was irregular.

Chapman v. *Bowlby*, 1 D. (N.S.) 83; 8 M. & W. 249; 10 L. J., Ex. 299.

Issue of Fi. fa. after Party discharged under Insolvent Act.]—A ca. sa. issued against four joint defendants, under which one was taken in execution and discharged under the Insolvent Debtors Act. The plaintiff afterwards issued a fi. fa. against the four defendants, under which the sheriff seized the goods of the one who had been discharged:—Held, that the writ was irregular, in having been issued against a party discharged under the Insolvent Act, and that it should have issued against the three only, suggesting the discharge of the one. *Raynes* v. *Jones*, 9 M. & W. 134; 1 D. (N.S.) 373; 11 L. J., Ex. 62; 6 Jur. 133.

C. SEVERAL EXECUTIONS ON SEVERAL JUDGMENTS: PRIORITY OF EXECUTIONS.

Generally.]—The proceeds of the sale of goods under an execution on a warrant of attorney, invalid by reason of a prior act of bankruptcy, under the repealed 6 Geo. 4, c. 16, s. 108, became vested in the assignees for the benefit of the whole body of creditors, subject, however, while in the hands of the sheriff, to any writs of execution in adverse actions, lodged with him before the fiat issued. *Goldschmidt* v. *Hamlet*, 1 D. & L. 501; 6 Scott (N.R.) 962; 6 Man. & G. 187; 12 L. J., C. P. 304. S. P., *Graham* v. *Witherby*, 7 Q. B. 491; 14 L. J., Q. B. 290. See *Congreve* v. *Evetts*, 10 Ex. 298.

Where two writs of fi. fa. against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure was first made under the subsequent execution; and if the person claiming under the second execution pays the sheriff the amount of the debt under the first execution for his security, the court will not compel the sheriff to refund that money on motion. *Hutchinson* v. *Johnston*, 1 Term Rep. 729; 1 R. R. 380. See *Rybot* v. *Peckham*, 1 Term Rep. 731, n.; 1 R. R. 382, n.

Two writs of fi. fa. were issued at the suit of different plaintiffs against one defendant; the goods taken under them were only sufficient to satisfy the first execution, but the officer under the second writ continued in possession until the goods were sold by the sheriff: the defendant then obtained a rule for setting aside the first execution, which was made absolute, and the sheriff was ordered by the court to pay the defendant the proceeds of the levy. The sheriff having so done without application to the court for relief, or without having given notice to the plaintiff in the second execution, he was liable to him for that amount, in an action for a false return of nulla bona. *Saunders* v. *Middlesex (Sheriff)*, 3 B. & Ald. 95.

Where the sheriff seized goods under a fi. fa. and left a man in possession, and a second fi. fa. issued, under which a warrant was granted, and left with the man in possession:—Held, that the second writ operated in favour of the first, and could not be set aside as irregular. *Jones* v. *Atherton*, 2 Marsh. 375; 7 Taunt. 56; 17 R. R. 442.

Delivery of Writ with Instructions to suspend Execution—Subsequent Writs.]—Where a fi. fa. is delivered to the sheriff with directions to suspend the execution, and in the meantime another writ is delivered by another creditor, the sheriff is bound to levy under the latter writ in preference to the former, although the former writ was not delivered with any fraudulent intent or purpose to protect the goods of the debtor. *Hunt* v. *Hooper*, 1 D. & L. 626; 12 M. & W. 664; 13 L. J., Ex. 183; 8 Jur. 203.

If a fi. fa. is delivered to the sheriff, and he is directed not to levy thereon till a future day, and in the meantime another writ is delivered, he is to levy under the second writ as if no other writ had been delivered to him. *Kempland* v. *Macauley*, Peake, 66.

In March the then sheriffs of London seized the goods of a debtor, by virtue of a fi. fa.; an officer was put in possession of the goods, but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the control of his goods until November, when another execution creditor sued out a fi. fa. directed to the succeeding sheriffs of London:—Held, that the latter were bound to levy this second fi. fa., and that it was their duty, when they found the officer of the former sheriffs in possession, to inquire into the facts, and if they had done so, they would have learned that the first execution was fraudulent. *Lovick* v. *Crowder*, 8 B. & C. 132; 2 M. & Ry. 84; 6 L. J. (O.S.) K. B. 263.

Where the attorney of a judgment creditor delivered to the sheriff a fi. fa. returnable on a day certain, with directions by letter not to execute it till the return, unless another execution should come in in the meantime, and afterwards sent in an alias, accompanied with the same directions; and the sheriff, upon another execution coming in, issued warrants on and executed both writs on the same day, giving precedence to the last execution, and satisfying that wholly, first, out of the money levied, and then paid over the remainder in part satisfaction of the execution first delivered, and returned that payment and nulla bona as to the residue:—Held, that the plaintiff could not maintain an action against the sheriff for a false return, and that a nonsuit on that ground had been properly directed. *Pringle* v. *Isaac*, 11 Price, 445.

Instructions to withdraw countermanded before obeyed.]—P. having recovered judgment against F., the sheriff, on the 15th of April, seized F.'s goods in Hampshire, under a fi. fa. in that action, and left a man in possession. On the same day F. executed a bill of sale to W., and a fi. fa. in an action by N. against F. was lodged with the sheriff for execution. On the 1st of May, F. was taken in Middlesex under a ca. sa. issued at the suit of P., and thereupon P.'s attorney at Southampton immediately wrote to request the sheriff to withdraw from possession under the fi. fa. The officer received the letter, but his man continued in possession of the goods, and did not in fact withdraw. The officer, however, told W. that he would hold for him under his writ. A summons to set aside the ca. sa., on the ground that it had been irregularly issued, "no return to the fi. fa. under which the sheriff now holds the defendant's property having been made," was taken out on the 3rd of May, and on the 4th F. was discharged out of custody, and an order was made by consent that P. should be at liberty to proceed on the fi. fa. under which the sheriff was in possession. The summons was taken out and the consent to the order given by R., the London agent of W., who was the attorney

for F. in the action of *P.* v. *F.*, upon F.'s instructions. W. knew nothing about the terms of the order at the time it was made; and when he heard it, took no steps to inform P. that he objected to it, or that it was made without his authority:—Held, that the sheriff's officer having continued in actual possession under P.'s writ, and the direction of the sheriff to withdraw having been countermanded before it was actually obeyed, W. acquired no right to the goods seized as against P. *Withers* v. *Parker*, 4 H. & N. 524; 28 L. J., Ex. 292. Affirmed, on appeal, 5 H. & N. 725; 29 L. J., Ex. 320; 6 Jur. (N.S.) 1833; 2 L. T. 602; 8 W. R. 550—Ex. Ch.

Several Writs delivered at one Time.]—There being one attorney employed by six several plaintiffs in various actions against one defendant, in each of which judgment was obtained, and a writ of execution issued, the whole of the writs were delivered to the sheriff for execution at one time and in one bundle. The court refused, upon application by the sheriff, to compel the plaintiffs, or their attorney, to direct in what priority the writs should be executed. *Ashworth* v. *Uxbridge (Earl)*, 2 D. (N.S.) 377.

Writ issued with Knowledge of Garnishee Order.]—A. recovered judgment against the plaintiff in the Mayor's Court. He levied execution on the plaintiff's goods after he had notice that all the moneys due under the judgment were at that time attached by a garnishee order of the High Court. The plaintiff brought an action of trespass in respect of such execution:—Held, that no action lay. *Cronmire* v. *Maccolla*, 58 J. P. 149—C. A.

Liability to Sheriff.]—A fi. fa. issued at the suit of one creditor, and before it was executed the attorneys of another creditor obtained a warrant upon another fi. fa. from the same sheriff, directed to their clerk, and executed it before the prior execution was put in:—Held, that the attorneys were liable to the sheriff (who had made a return that he had levied the money under the first writ, and had in fact paid the amount of the debt to the creditor) to refund the money levied under the second execution, in an action for money had and received. *Sawle* v. *Paynter*, 1 D. & R. 307; 24 R. R. 659. And see *Cooper* v. *Wrench*, 1 D. & R. 482.

First Writ fraudulently executed.]—In an action against a sheriff for a false return of nulla bona to a fi. fa., the sheriff proved that he had seized all the goods of the debtor under a fi. fa. in another suit before the plaintiffs' writ was delivered to him. The plaintiffs in answer proved that the judgment upon which the first execution was sued out was entered upon a warrant of attorney fraudulently executed by the debtor in order to defeat their execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff on the first day of the next term was served with a rule to return the fi. fa. under which he had first levied. He did not give any notice to the plaintiffs by whom the second fi. fa. had been sued out, that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiffs at whose suit the first fi. fa. had been sued out:—Held, that this was misconduct in the sheriff, which rendered him liable to the plaintiffs in the second execution. *Warmoll* v. *Young*, 5 B. & C. 660; 8 D. & R. 452; 4 L. J. (O.S.) K. B. 293.

Where a fi. fa. has been fraudulently executed, a subsequent fi. fa. at the suit of another, which is executed afterwards, will stand and be preferred, and the fact of fraudulent execution is matter for a jury. *Bradley* v. *Wyndham*, 1 Wils. 44.

D. FIERI FACIAS.

1. The Writ itself.

Form of—Must agree with Judgment.]—A writ of execution must agree in the mandatory part of it with the judgment. *Cobbold* v. *Chilver*, 4 Scott (N.R.) 678; 1 D. (N.S.) 726; 4 Man. & G. 62; 11 L. J., C. P. 173; 6 Jur. 346.

The writ of fi. fa., sued out under a decree or order of court, by virtue of the 3 & 4 Vict. c. 105, s. 27, must correspond with the decree or order: therefore, where a separate fi. fa. against one issued on a joint order for payment of costs against several, the court set aside the writ as irregular, but without costs, and paid back the money levied, on the party undertaking not to bring an action in respect of the seizure and sale by the sheriff. *Moneypenny* v. *De Massy*, 1 Ir. Ch. R. 597.

A fi. fa., whereby the sheriff is directed to levy a sum different in amount from that mentioned in the judgment, although smaller, is irregular; unless the reason of the variance is shewn on the face of the writ. *Webber* v. *Hutchins*, 8 M. & W. 319; 1 D. (N.S.) 95; 10 L. J., Ex. 354.

The incipitur is not itself the judgment, but merely instructions for entering the judgment. Where, therefore, in the judgment roll, the sum stated to be recovered agrees with the sum for which the fi. fa. issues, the fi. fa. cannot be set aside, because it is for a less sum than is mentioned in the incipitur. *King* v. *Birch*, 3 Q. B. 425; 2 G. & D. 513; 11 L. J., Q. B. 183.

In an action of debt, the aggregate amount claimed in the declaration was 1,500*l.*; the plaintiff signed judgment by default, and the entry in the master's book denoted no sum as that for which judgment was entered; a fi. fa. having been issued for 514*l.*, the defendant obtained a summons to set aside the writ, on the ground that the judgment must be taken to be for 1,500*l.*, and that there was, consequently, a variance. The first summons was not attended, and, pending a second summons, the plaintiff made up and carried in the roll, taking judgment for 514*l.* only, and remitting 986*l.* The fi. fa. was, notwithstanding, set aside by an order of a judge, on the ground of the variance:—Held, that the order must be rescinded, for that, when it was made, there was a regular judgment authorising the writ. *Phillips* v. *Birch*, 2 D. (N.S.) 97; 5 Scott (N.R.) 178; 4 Man. & G. 403; 11 L. J., C. P. 297.

Form of the writ of fi. fa. to recover a defendant's costs where a plaintiff has given notice of discontinuance of the action under Ord. XXIII., and has made default in payment of the defendant's costs of the action. *Bolton* v. *Bolton*, 3 Ch. D. 276.

Indorsement of.]—A defendant, an attorney for P., obtained judgment in an action against W. F., and thereupon caused a fi. fa. to issue against his goods, and delivered the writ to the sheriff. The writ was indorsed, "The defendant is a ——, and resides at Redcar, in your baili-

wick." W. F., in fact, lived at Coatham, a village adjoining Redcar, at which latter place his son, of the same name, was living. The writ was handed by the sheriff to the officer, who went to Redcar, and took possession of the goods of the son, who subsequently brought an action against the sheriff and recovered damages. The defendant believed that the son was the person against whom the judgment had been obtained, and the sheriff and his officers had no knowledge of the person intended by the writ, except that which they derived from the indorsement upon it. In an action by the sheriff to recover damages from the defendant, on the ground of his having required him to seize the goods of W. F., of Redcar:—Held, that the action was not maintainable, as the indorsement upon the writ was nothing more than a statement by the defendant, for the purpose of affording information to the sheriff, leaving him to his discretion as to how he would act. *Childers* v. *Wooler*, 2 El. & El. 287; 29 L. J., Q. B. 129; 6 Jur. (N.S.) 444; 2 L. T. 49; 8 W. R. 321.

A. lodged with the sheriff a fi. fa., in the indorsement of which the execution debtor was described as of a place at which he carried on business in partnership with others:—Held, that by the indorsement A. had directed the sheriff to levy on the goods at that place. *Lane* v. *Sterne*, 10 W. R. 555.

Liability of Execution Creditor—Misdescription in Writ.]—It is the duty of an execution creditor to fill up the indorsement form attached to a writ of fieri facias. And where his solicitor makes a mistake in filling up the indorsement which misleads the sheriff, the execution creditor is liable to the person damnified by the sheriff's act. *Lee* v. *Rumilly*, 55 J. P. 519—C. A.

When there is no inaccuracy in filling up the indorsement of a writ of fieri facias, the execution creditor is not liable. The holder of a bill of sale over the goods of the judgment debtor has therefore no cause of action against the execution creditor when the indorsement states the true address of the judgment debtor. *Condy* v. *Blaiberg*, 55 J. P. 580—C. A.

—— **To whom directed.**]—A writ of fi. fa. directed in the first instance to the bailiff of the Isle of Ely, out of King's Bench, is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. *Grant* v. *Bagge*, 3 East, 128; 6 R. R. 569.

—— **Sum ordered to be paid not specific.**]—By a judge's order, a judgment irregularly signed was set aside with costs to be taxed. They were taxed at 6*l.* 5*s.* and not paid. The rule of court recited the order verbatim, and ordered the payment of the costs of making the order a rule of court, which were afterwards taxed. A fi. fa. was sued out, directing the sheriff to levy 9*l.* 6*s.* 8*d.* as the sum which had been ordered to be paid by the rule of court, together with interest at 4*l.* per cent. (pursuing the form No. 8, appended to R. G., H. T. 2 Vict.):—Held, that the fi. fa. and the levy thereunder were irregular, the form (No. 8) being applicable only to cases where the payment of a specific sum of money is ordered. *Badman* v. *Pugh*, 5 Man. & G. 381; 2 D. (N.S.) 907; 6 Scott (N.R.) 150; 12 L. J., C. P. 126.

Amendment of.]—An irregular fi. fa. cannot be amended to the prejudice of the intervening rights of assignees. *Brooks* v. *Hodson*, 7 Man. & G. 529; 8 Scott (N.R.) 223.

If, after fi. fa., executed, other effects are discovered, another fi. fa. may issue, or a ca. sa. *Hopkins* v. *Adcock*, Dick. 443.

After ca. sa. executed, fi. fa. cannot issue; but after fi. fa. ca. sa. may. *Ib.*

Service of a decree or an order directing payment of money or costs is not requisite as a preliminary to issuing a writ of fi. fa. when a day certain was fixed for payment. *Land Credit Co. of Ireland* v. *Fermoy (Lord)*, *Munster, Ex parte*, 39 L. J., Ch. 477; L. R. 5 Ch. 323; 22 L. T. 394; 18 W. R. 393.

Where an order for payment of a sum of money is made against several persons, process can be issued separately against one of them, though the order is not in terms joint and several. *Ib.*

Leave to Issue.]—When a change had taken place by death in the parties entitled to execution on a judgment, the executors of the party who obtained the judgment obtained leave to issue execution on an ex parte application. *Mercer* v. *Lawrence*, 26 W. R. 506.

In a chancery suit a receiver was appointed on the defendant undertaking to give judgment in an action commenced against him by the same plaintiff, to be dealt with as the court shall direct. Before the cause came on for hearing the defendant advertised for sale his furniture, which was his only property:—Held, that there was nothing to prevent the court from allowing execution to issue before the hearing of the cause, and that under the circumstances leave should be given to the plaintiff to issue execution. *Hodges* v. *Fincham*, 1 Ch. D. 9; 33 L. T. 711; 24 W. R. 36.

Irregularity.]—An order dated 19th November, ordered A. to pay to B. a sum of money "on or before the 1st of December next, or within four days, after service of this order." The order was not passed and entered till the 2nd December, and was never served on A. After a month from the time of entering the order, B. sued out a writ of fi. fa. against the goods of A. for the amount:—Held, that A. was not in default, and that the writ was irregular. *Adkins* v. *Bliss*, 2 De G. & J. 286; 27 L. J., Ch. 486; 4 Jur. (N.S.) 1162; 6 W. R. 453.

A petition for the winding-up of a company was presented at one o'clock in the day. At four o'clock in the same day execution was levied on part of the company's property, in pursuance of a writ issued before the time when the petition was presented:—Held, that the execution was void. *London and Devon Biscuit Co., In re*, 40 L. J., Ch. 574; L. R. 12 Eq. 190; 24 L. T. 650; 19 W. R. 943.

S., as solicitor for a shareholder, presented a petition for the winding-up of a company, which was dismissed with costs. K., the solicitor of the company, made a demand for these costs upon S., who had received a cheque for the amount, but through a misunderstanding between the solicitors, as to the authority to receive the costs, payment was not made until after a writ of fi. fa. had been issued and executed for the amount. On a motion by S.'s client to set aside the writ, as issued contrary to good faith; or in the alternative that K. might be ordered to pay the costs of the execution, and of the motion: the court refused to set the writ aside, but considering that it ought not to have been issued,

ordered K. to pay the costs of the execution and motion. *Hollington, Ex parte, Commonwealth Land, Building, Estate and Auction Co., In re*, 43 L. J., Ch. 99; 29 L. T. 502; 22 W. R. 106.

2. TIME OF OPERATION.

From what Time Goods become bound.]—Goods taken under a fi. fa. are bound from the date of the teste of the writ, except as against purchasers in market overt. *Ranken* v. *Harwood*, 10 Jur. 794.

Therefore, where the debtor died in the interval between the issuing and the execution of the writ, the creditor's title to the goods taken will be paramount to that of the executor. *Ib.*

The goods are bound from the delivery of the writ to the sheriff. *Hutchinson* v. *Johnston*, 1 Term Rep. 732; 1 R. R. 380.

Though a fi. fa. binds the goods as against the defendant, yet the property is not divested out of him till execution executed. *Payne* v. *Drew*, 4 East, 523; 1 Smith, 170.

Although the goods of a debtor are bound from the delivery of a writ of execution to the sheriff, yet the property in them is not changed by it, and is still in the debtor, and he may sell them, subject to the rights of the execution creditor, to which they will be liable in the hands of a purchaser, unless the sale took place in market overt. *Samuel* v. *Duke*, 3 M. & W. 622; 6 D. P. C. 536; 1 H. & H. 127; 7 L. J., Ex. 177.

A delivery of a fi. fa. to the sheriff's deputy in London is equivalent to a delivery to the sheriff in the country. *Woodland* v. *Fuller*, 3 P. & D. 570; 11 A. & E. 859; 9 L. J., Q. B. 181; 4 Jur. 743.

A., expecting an execution, executed a deed assigning all his property to trustees, for the benefit of his creditors, after paying expenses, with a power to the trustees to retain money to pay the costs of an action which had been brought by B. against A. This deed was executed at 9 a.m. on the 25th February. A fi. fa. was delivered to a sheriff's officer on the 24th, and by him delivered to the under-sheriff at 10 a.m. on the 25th:—Held, that the deed was good, notwithstanding the proviso to retain, and that the goods could not be taken under the fi. fa. *Bowen* v. *Bramidge*, 6 Car. & P. 140.

Invalidation by Notice.]—The Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 1, held not to apply where the writ was delivered to the sheriff before the passing of the act. *Williams* v. *Smith*, 4 H. & N. 559; 28 L. J., Ex. 286; 5 Jur. (N.S.) 1107; 7 W. R. 503—Ex. Ch.

F. issued a fi. fa. against the defendant, and lodged it with the sheriff on the 3rd August. The warrant to seize under the writ was delivered to a bailiff, but no seizure was proved. On the 6th August the defendant assigned his interest in a term of years to W. & Co., who had notice of the writ. On the 12th August the sheriff sold the term to the plaintiff, and executed a deed of assignment on the 4th September:—Held, that the plaintiff was not entitled to recover in ejectment. *O'Brien* v. *Murray*, 17 Ir. C. L. R. 46.

A plaintiff on the 23rd of May recovered judgment in an action against B., and on the same day placed a fi. fa. in the hands of the agent of the sheriff of Yorkshire, in London. A warrant was sent down by post, and the next morning, about nine o'clock, was in the hands of the officer of the sheriff at H., at which place B. had a warehouse containing certain property. The officer went to the warehouse, but finding the door locked did not break in or make the seizure. At a little before 10 o'clock, B. executed a deed of assignment of his goods and effects to trustees for the benefit of his creditors: B., and also his attorney, who prepared the deed, knew of the writ being in the hands of the sheriff before the deed was executed; but the trustees did not know it. The deed having been executed, notice was given to the officer, and he, by the direction of the attorney, seized the goods on behalf of the creditors. The sheriff having made a return on nulla bona, an action was brought against him by the plaintiff:—Held, that B. and his attorney, having knowledge of the writ being in the hands of the sheriff, the trustees must be taken to have notice of it also; and therefore that, under 19 & 20 Vict. c. 97, s. 1, they could not set up their title against that of the plaintiff under the writ. *Hobson* v. *Thellusson*, 8 B. & S. 476; 36 L. J., Q. B. 302; L. R. 2 Q. B. 642; 16 L. T. 837; 15 W. R. 1037.

3. LIABILITY OF EXECUTION CREDITOR.

For Trespass.]—B. sued out execution against A. After a seizure, and before sale, the execution was set aside by rule of court, of which the sheriff received notice from A. before the sale, and by the terms of the rule A. was to bring no action for the seizure. The sheriff having proceeded to a sale, on the ground that he had received no notice of the rule from B.:—Held, that as the execution was illegally sued out, B. was a wrongdoer, and that having set the sheriff in motion by a writ illegally issued, he was answerable for the acts of the sheriff in executing such writ; and consequently, that he was liable in trespass brought by A. for seizing and selling his goods under the execution. *Perkins* v. *Plympton*, 5 M. & P. 731; 7 Bing. 676; 9 L. J. (O.S.) C. P. 223.

Under an Interpleader Order.]—Where goods seized by the sheriff under a fi. fa. are claimed and subsequently sold under an interpleader order (which does not restrain any action except against the sheriff), the execution creditor is not liable to the claimant (who, having succeeded in the interpleader issue, sues the execution creditor in trespass) for damages sustained subsequently to the order. *Walker* v. *Olding*, 1 H. & C. 621; 32 L. J., Ex. 142; 9 Jur. (N.S.) 53; 7 L. T. 633; 11 W. R. 186.

An execution creditor does not, by becoming a party to an interpleader issue, ratify or adopt the act of the sheriff, so as to render himself liable for the seizure of the goods, which are the subject of the interpleader issue. *Woollen* v. *Wright*, 1 H. & C. 554; 31 L. J., Ex. 513; 7 L. T. 73; 10 W. R. 715—Ex. Ch.

Direction to seize—What is.]—Where, under process of execution from a county court, some goods of a stranger had been taken, the mere fact that the execution creditor told the bailiff that goods would be claimed by a third party, but that such claim was not to be regarded, was held not to amount to a direction to take all the goods, or any which were not liable to be seized so as to make the execution creditor personally liable. *Cronshaw* v. *Chapman*, 7 H. & N. 911; 31 L. J., Ex. 277; 5 L. T. 54; 10 W. R. 323.

Implied Authority of Solicitor.]—Whether a seizure of particular goods under a fi. fa. was

directed by the execution creditor, so as to make him liable for the act of the sheriff, is a question of fact. It is not within the scope of the implied authority of the solicitor of a judgment creditor issuing a fi. fa., to direct the sheriff to seize particular goods. *Jarmain* v. *Hooper* (6 Man. & G. 827) distinguished. *Smith* v. *Keal*, 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76—C. A. Affirming 51 L. J., Q. B. 487; 46 J. P. 615.

To Action for Failure to withdraw Sheriff after Composition—Malice.]—In the absence of malice, no action will lie against a judgment creditor for not withdrawing the sheriff from possession after the judgment creditor has become bound by a composition of the debt. According to the statement of claim, A., having recovered a judgment against B., issued a writ of fi. fa., under which the sheriff entered into possession of B.'s goods. B. filed a petition of insolvency, and A. proved for the amount of his judgment against B.'s estate. Resolutions for a composition were passed and registered. The sheriff refused to withdraw from possession without A.'s instructions, which were not given by A. No malice was alleged as against A.:—Held, on demurrer, that, in the absence of malice, A.'s failure to instruct the sheriff to retire gave B. no right of action against A. *Phillips* v. *General Omnibus Co.*, 50 L. J., Q. B. 112.

4. Seizure and Sale by Sheriff.

Seizure—What is.]—Where a sheriff's officer executed a fi. fa. by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, and saying, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away without leaving any person in possession, and after the fi. fa. was returnable, but not continued, the landlord distrained the goods for rent:—Held, that the sheriff could not maintain trespass against him. *Blades* v. *Arundale*, 1 M. & S. 711; 14 R. R. 555.

It is the duty of a sheriff, in executing a fi. fa., to possess himself of all the goods of the debtor within his bailiwick, or sufficient to satisfy the execution. *Pitcher* v. *King*, D. & M. 584; 5 Q. B. 758; 13 L. J., Q. B. 162; 8 Jur. 401.

Such a seizure by a sheriff of a debtor's goods under an execution as would have been good before the Mercantile Law Amendment Act, 1856, is an actual seizure within s. 1; and the expression "actual seizure" means no more than seizure. *Gladstone* v. *Padwick*, 40 L. J., Ex. 154; L. R. 6 Ex. 203; 25 L. T. 96; 19 W. R. 1064.

Where premises, consisting of a mansion-house, offices, gardens, farm and farmhouse, are in the same county, and in one and the same occupation as an entirety, a seizure by a sheriff at the mansion-house, of part of the effects liable to the execution in the name of the whole, is an actual seizure within the statute of everything on the premises liable to the execution, whatever the extent of the premises, and however dispersed the effects may be. *Ib.*

An execution debtor was possessed of a mansion-house and grounds and also of a farm, which, with the exception of two outlying fields, adjoined the grounds and formed part of one block with them. The farm was in his occupation, although the accounts were kept distinctly. The farmhouse was a mile distant from the mansion-house in a direct line. On the 19th of May, a fi. fa. was executed at the mansion-house by the under-sheriff, who informed the persons in charge there, including the steward of the estate, that all the goods on the estate were seized; and a man was left in possession. No act of seizure was done at the farmhouse or upon the farm on that day, the under-sheriff intending what he had done to be a seizure of the whole; but on the following day a man was put in possession at the farmhouse. The goods on the farm were claimed by assignees under a bill of sale, made for an antecedent debt, and for the purpose of giving it a preference over the execution, and which was executed on the evening of the 19th, after the seizure at the mansion-house was completed. At the time of the execution of the bill of sale, it was known to the solicitor of the assignees that the judgment creditor had threatened to seize, and that a fi. fa. on the judgment had been executed in another county; and it was expected by him, but not known, that a writ had been delivered to the sheriff of the county in which the goods lay:—Held, that what was done on the 19th of May amounted to an "actual seizure" of the goods on the farm and at the farmhouse within 19 & 20 Vict. c. 97, s. 1. *Ib.*

—— **Of Ships.**]—A defendant in an execution, being a registered proprietor of shares in a ship, a fi. fa. was delivered to the sheriff; and the solicitor for the creditor, by the direction of the sheriff, procured the certificate of registry from the ship, and delivered it to the sheriff, who retained it. The sheriff was registered at the custom-house, under the Merchant Shipping Act, as the owner of the shares, which were afterwards sold by him and transferred to the purchaser by a bill of sale, which was also registered:—Held, that the seizure was effectual, although the sheriff did not go on board the ship, and that the property in the shares was regularly transferred by the bill of sale. *Harley* v. *Harley*, 11 Ir. Ch. R. 451.

—— **Wrongful — Restraining Sale under Fi. fa.**]—On the 20th of August the sheriff, under a fi. fa. against A., took possession of B.'s furniture in A.'s house. Both before and after seizure B. gave formal notice to the sheriff that the furniture was his, and on the 23rd issued the writ in this action against the sheriff for an injunction and damages. On the 25th of August the sheriff issued an interpleader summons, under which an issue was directed and an order made for the sheriff withdrawing from possession on payment of 100*l.* into court. The sheriff accordingly withdrew from possession on the 1st of September. B.'s title was afterwards admitted by the judgment creditor, and the 100*l.* paid out of court to B. B. now brought this action to trial against the sheriff for damages and costs:—Held, that the sheriff had not exceeded the scope of his duty in retaining possession till ordered to withdraw under the interpleader order, and that the action must be dismissed, but without costs, on the ground that the sheriff might have applied to the judge under the interpleader order to dispose of the matters in question between him and the plaintiff. *Aylwin* v. *Evans*, 52 L. J., Ch. 105; 47 L. T. 568.

—— **Goods not belonging to Ostensible Owner.**]—M. being owner of goods, procured H. to assign

them by a bill of sale to R. to secure an advance of money. R. took the goods bonâ fide, and upon the assurance of M. that the goods belonged to H. The goods were afterwards seized under a fi. fa. as the goods of M. On the trial of an interpleader issue between R. and the execution creditor, the jury found that there had been no actual transfer of the goods from M. to H.:—Held, that R. had acquired no title to the goods as against the execution creditor. *Ib.*

—— **When imperfect.**]—A seizure by sheriff's officers is imperfect where neither the warrant is produced nor the seizure in any way made public. *Jones, Ex parte, Williams, In re*, 42 L. T. 157.

Seizure without Sale—No satisfaction of Debt—Subsequent Seizure and Sale—Rights of Purchaser.]—Where special bailiffs seized and impounded cattle, under a civil-bill execution, and the execution creditor caused the cattle to be returned, on a promise by the execution debtor to pay portion of the debt:—Held, that such seizure and abandonment was no satisfaction of the debt, so as to prevent a subsequent seizure and sale operating to pass the property in the cattle to the purchaser from the sheriff; and that such purchaser was entitled to recover damages in trover and conversion against another creditor who seized the same cattle on the execution debtor's lands, where they had been placed by the execution creditor after the second sale, under an agreement. *Lansdowne* v. *Connor*, 24 L. R., Ir. 50.

Direction to Sheriff to levy on particular Goods—Liability of Execution Creditor for wrongful Seizure by Sheriff.]—The defendant having recovered judgment in an action against one G. M. M., his solicitor indorsed on a writ of fieri facias, directing the sheriff to levy the amount of the judgment upon the goods of G. M. M., a statement that the execution debtor resided at a certain address, which, however, was not the address of such execution debtor, but that of his father, G. M. The sheriff seized the goods of G. M. the father. In an action brought by G. M. against the defendant, the execution creditor, in respect of such seizure, the jury found that the sheriff seized the goods of the plaintiff instead of those of G. M. M. the son, because he was misled by the direction he received from the solicitor of the defendant:—Held, that upon such finding, the defendant was liable in respect of the wrongful seizure of the goods. *Jarmain* v. *Hooper* (6 Man. & G. 827), and *Childers* v. *Wooler*, (2 El. & El. 287), considered. *Morris* v. *Salberg*, 58 L. J., Q. B. 275; 22 Q. B. D. 614; 61 L. T. 283; 37 W. R. 469; 53 J. P. 772—C. A.

Apparent Possession.]—Goods formally seized by the sheriff under an execution remain in the apparent possession of the debtor within the meaning of the Bills of Sale Act. *Mutton, Ex parte, Cole, In re*, 41 L. J., Bk. 57; L. R. 14 Eq. 178; 26 L. T. 916; 20 W. R. 882.

Sale—Sheriff cannot sell before Seizure.]—The sheriff cannot make a valid contract for sale of the goods of a judgment debtor against whom he holds a writ of fi. fa. until he has actually seized the goods. *Hall, Ex parte, Townsend, In re*, 14 Ch. D. 132; 42 L. T. 162; 28 W. R. 556—C. A.

—— **Money realised by.**]—Money realised by a sale under a fi. fa. may be attached in the hands of the sheriff. *O'Neill* v. *Cunningham*, Ir. R. 6 C. L. 503.

—— **Debtor may sell when Sheriff in Possession.**]—Possession of goods by a sheriff under a fieri facias does not prevent the debtor from making an effectual sale of the goods by delivery to a purchaser while the sheriff is in possession. *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243; 47 L. J., C. P. 409; 38 L. T. 698—C. A.

—— **Expenses of advertising under Bankruptcy Act, 1861.**]—A sheriff is not entitled to deduct the expenses of advertising a sale by public auction of an execution debtor's effects, seized under a fi. fa., although the debt or damages exceed 50*l.*; and s. 74 of Bankruptcy Act, 1861 (repealed), held to render it imperative on the sheriff in such case to advertise and sell by auction. *Braithwaite* v. *Marriott*, 1 H. & C. 591; 32 L. J., Ex. 24; 9 Jur. (N.S.) 26; 7 L. T. 363; 11 W. R. 93.

—— **Authority of Sheriff's Officer.**]—When a bill of sale of goods taken under a fi. fa. is made by an officer of the sheriff, the court will presume that he was duly authorised to make it. *Robinson* v. *Collingwood*, 17 C. B. (N.S.) 777.

—— **Validity of.**]—A sheriff having received a fi. fa. and issued a warrant to his bailiff, the latter seized the goods of the debtor, valued them, made out an inventory or a sold-note, and delivered one article in the name of the whole to the purchaser:—Held, that the sale was valid, although there was no public auction or bill of sale from the sheriff. *Hernaman* v. *Bowker*, 11 Ex. 760; 25 L. J., Ex. 69; 4 W. R. 261.

—— **To Execution Creditor.**]—The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor. *Villars, Ex parte, Rogers, In re*, 43 L. J., Bk. 76; L. R. 9 Ch. 439; 30 L. T. 348; 22 W. R. 603.

A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. *Stratford* v. *Twynam*, Jacob, 418; 23 R. R. 107.

—— **On different Days.**]—If the sheriff sells goods seized under the same writ on different days, all the sales will be considered as one transaction. *Ib.*

Sheriff cannot be estopped.]—A sheriff who seizes the goods of a debtor under a fi. fa. is not bound by an estoppel, which might have prevented the debtor himself from claiming the goods. *Richards* v. *Johnson*, 4 H. & N. 660; 28 L. J., Ex. 322; 5 Jur. (N.S.) 520.

Where Process may be executed.]—Hampton Court Palace is a royal palace, but not a royal residence, and therefore is not exempt from execution within it of civil process. *Att.-Gen.* v. *Dakin*, 39 L. J., Ex. 113; L. R. 4 H. L. 338; 23 L. T. 1; 18 W. R. 1111.

Issue of Concurrent Writs — Validity of Seizure.]—Judgment creditors, through their solicitors, issued concurrently two writs of fi. fa. for the amount of the judgment debt and costs,

one directed to the sheriff of the City and the other to the sheriff of the county of London. Possession was taken under both writs: the execution in the City was paid off. The creditors and their solicitors had not acted maliciously or without reasonable cause, in levying the executions:—Held, that neither the issue of, nor the seizure under, the two writs of fi. fa. was illegal. *Lee* v. *Dangar*, 61 L. J., Q. B. 780; [1892] 2 Q. B. 337; 66 L. T. 548; 40 W. R. 469; 56 J. P. 678—C. A.

Forcible Entry—Building other than a Dwelling-house.]—In levying execution under a writ of fieri facias the sheriff is entitled to break open the outer door of premises occupied by the judgment debtor not being his dwelling-house, or within the curtilage of his dwelling-house. *Hodder* v. *Williams*, 65 L. J., Q. B. 70; [1895] 2 Q. B. 663; 14 R. 757; 73 L. T. 394; 44 W. R. 98—C. A.

Breaking Outer Door—Dwelling-house—Shop—Forcible Entry.]—The rule that it is not lawful for a sheriff in executing a writ of fieri facias to break open the outer door of a house, is limited to the case of a dwelling-house, and does not extend to the case of a shop which is only used as a place of business. *Penton* v. *Browne*, (1 Keb. 698; Sid. 186) followed. *Hodder* v. *Williams*, 65 L. J., Q. B. 70; [1895] 2 Q. B. 663; 14 R. 747; 73 L. T. 394; 44 W. R. 98—C. A.

5. What Property Seizable, and What Not.

a. Fixtures and Machinery.

Fixtures.]—Under a fi. fa. the sheriff cannot take fixtures in a house whereof the freehold is in the debtor. *Place* v. *Fagg*, 4 M. & Ry. 277. S. P., *Wynne* v. *Ingleby*, 1 D. & R. 247; 5 B. & A. 625; 24 R. R. 503.

Where a sheriff takes a lease and fixtures in execution, he may sell the fixtures separately, if he cannot find a purchaser for the whole. *Barnard* v. *Leigh*, 1 Stark. 43.

Rails and other chattels which by the terms of a contract when placed on the land became the absolute property of the company, the contractor to have no property therein, except the right of using them on the land for the purpose of the works, except on completion of the line, as a condition precedent, the plant was to be given to the contractor as part consideration, or if used by the company to be paid for, are not liable to be taken in execution for the company's debts. *Beeston* v. *Marriott*, 4 Giff. 436; 9 Jur. (N.S.) 960; 8 L. T. 690; 11 W. R. 896.

—— **Portable Engine and Boiler.**]—A portable engine and boiler brought on to colliery premises to be used in sinking a new shaft, and, for the purpose of steadying the machinery, bolted to wooden framework, and then the frame embedded in a layer of wet mortar laid upon a brick foundation, pass to the mortgagee of the realty as affixed to the freehold, and cannot be seized by the judgment creditors of the mortgagor. *Cross* v. *Barnes*, 46 L. J., Q. B. 479; 36 L. T. 693.

Railway Rolling Stock and Plant.]—The rolling stock and plant of a railway company whose railway has once been opened for traffic are, by s. 4 of the Railway Companies Act, 1867, protected from being taken in execution, even where the traffic on the railway has ceased in consequence of the railway being in need of extensive repairs, and there is no probability that the traffic will be resumed. *Midland Waggon Co.* v. *Potteries, Shrewsbury and North Wales Ry.*, 43 L. T. 511; 29 W. R. 78.

A reservation in a fee-farm grant of mines, and the right to the grantor, his servants, horses, and carriages, to enter and carry away the minerals, enables the owner of the mines to lay down and maintain a railway over the surface of the lands granted, where such railway is reasonably necessary for working the mines. Rails laid down by a lessee of the mines under such reservation, not permanently attached to the lands, and capable of removal without substantial injury to the rails themselves or the soil, may be taken in execution under a fi. fa. against the lessee. *Antrim (Earl)* v. *Dobbs*, 30 L. R., Ir. 424.

Mill Machinery.]—Where mill machinery and a mill were demised to a tenant for a term, and he severed the machinery from the mill without the consent of his landlord, and it was afterwards seized by the sheriff under a fi. fa., and sold by him:—Held, that no property passed to the buyer under such sale. *Farrant* v. *Thompson*, 5 B. & Ald. 826; 2 D. & R. 1; 24 R. R. 571.

b. Real Property and Chattels Real.

Freehold Interest.]—A lease for three lives, or thirty-one years, contained a clause of forfeiture if any writ of execution should issue by virtue of which it should be liable to be taken in execution or sold. Under a fieri facias issued against the lessee, the sheriff sold and conveyed his interest under the lease, "if any," to the plaintiff, who, before he bid at the auction, knew it was a freehold lease, and was aware of the clause of forfeiture; the purchaser having got possession, and having been evicted:—Held, that he could not recover the purchase-money in an action against the sheriff for money had and received. *Griffin* v. *Caddell*, Ir. R. 9 C. L. 488.

Under a fi. fa. the sheriff, without any actual or formal seizure of the execution debtor's lands or crops, advertised them for sale, and conveyed them to the plaintiff by a deed reciting that the sheriff had caused the interest in the lands and crops to be seized. It turned out that the execution debtor's interest in the lands was a freehold, so that the purchaser could not get possession:—Held, that the purchaser was not entitled to recover the purchase-money from the sheriff in an action for money had and received as for a consideration that had wholly failed. *Murphy* v. *Sandes*, Ir. R. 10 C. L. 309.

Interest in Licensed Premises—Assignment of Licence.]—Under a writ of fi. fa. against G., certain chattels and his interest in licensed premises were seized, advertised for sale, and sold on the 31st January, 1885, by the sheriff. No reference to the licence was made either in the advertisements, conditions of sale, or deed of assignment, which was dated the 10th February, 1885, except that in the latter the premises were described as "licensed," as occupied by G. as a licensed publican, and the deed did not purport to assign the licence. The sheriff was not possessed of the licence, but it was subsequently

indorsed and delivered by G. to the purchaser. On the 4th April, 1885, G. was adjudicated a bankrupt. The purchaser, however, obtained an ad interim transfer of the licence on the 14th April, and an absolute transfer at the October Sessions. In August the hearing of a charge and discharge, raising a question as to the property in the licence, was adjourned by consent to November, on the terms that the position of the parties should be considered at the hearing as if unaltered:—Held, that the licence did not pass under the sheriff's assignment; that the subsequent indorsement, delivery, and transfer of it by G. to the purchaser were void as against the assignees in bankruptcy of G., and that the licence formed part of the estate and effects of G. in the bankruptcy matter; but having regard to the proceedings at the licensing sessions, the court declined, for the time being, to make any order for the transfer of the licence to the assignee in bankruptcy, or to award damages against the purchaser for withholding the licence. *Gilmer, In re*, 17 L. R., Ir. 1.

Mortgaged Irish Land.]—The interest of a judgment debtor in lands against which a judgment has been registered as a mortgage, under 13 & 14 Vict. c. 29 (Irish), cannot be taken in execution under a fi. fa. *Gerrard, In re*, 14 Ir. Ch. R. 466.

Leasehold Property.]—Where a sheriff had taken a lease of premises in execution under a fi. fa., and sold the term to the execution creditor without any assignment in writing:—Held, that the estate remained in the debtor, who might recover it from the execution creditor in ejectment. *Doe* d. *Hughes* v. *Jones*, 1 D. (N.S.) 352; 9 M. & W. 372; 12 L. J., Ex. 265; 6 Jur. 302.

The legal interest in chattels real, seized and sold under a fi. fa., is not vested in the sheriff, in the interval between the seizure and completion of the sale to a purchaser. *Playfair* v. *Musgrove*, 3 D. & L. 72; 14 M. & W. 239; 15 L. J., Ex. 26; 9 Jur. 783.

Therefore, where a lease is taken in execution by the sheriff, the interest in it remains in the execution debtor, until actual assignment to the purchaser. *Ib.*

A sheriff who, under a fi. fa., takes in execution a lease for years, has no right to remain on the premises for the purpose of executing an assignment and putting the purchaser in possession. *Ib.*

If he should do so, he is liable in trespass at the suit of the execution debtor, if in possession, although the premises have been sold and transferred. *Ib.*

The sheriff under a fi. fa. seized a lease, and sold the term before the writ was returnable, but did not execute the assignment to the vendee till a subsequent period:—Held, that this was a valid assignment. *Doe* d. *Stevens* v. *Donston*, 1 B. & Ald. 230; 19 R. R. 306.

An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it. *Sparrow* v. *Bristol (Earl)*, 1 Marsh. 10.

Where a tenant entered under an agreement for a lease and paid the stipulated rent:—Held, that a tenancy from year to year was created, which the sheriff might sell under a fi. fa. *Doe* d. *Westmoreland* v. *Smith*, 1 M. & Ry. 137.

A., being possessed of a leasehold house, deposited the lease with B. as a security for a debt. C. afterwards obtained a judgment against A. and sued out a fi. fa. The sheriff sold some of A.'s goods, but not the house, and returned the writ; whilst the writ was in the sheriff's hand, D., with A.'s consent, paid the debt due to B., and had the lease deposited with him, as a security for the amount, and for other sums due to him from A.:—Held, that C., having allowed the writ to be returned without requiring the sheriff to sell the house, had no priority over D. *Williams* v. *Craddock*, 4 Sim. 313.

A leasehold estate is affected by an elegit or fi. fa., from the time it is lodged in the sheriff's hands, and if the debtor afterwards makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession notwithstanding such assignment. *Burden* v. *Kennedy*, 3 Atk. 739.

Judgment de bonis testatoris—Executor de son tort—Chattels real of a Deceased—In the Hands of the Defendant.]—Under a writ of fi. fa. founded on a judgment de bonis testatoris against an executor de son tort, the sheriff is authorised to seize and sell the deceased's chattels real in the possession of the defendant. *Doherty* v. *Nelson*, [1895] 2 Ir. R. 90.

Leasehold, Effect of Seizure of on Tenant.]—A sheriff cannot turn a tenant out of possession when he has taken a term under an execution against the landlord. *Rumball* v. *Murray*, 3 Term Rep. 298. And see *Miller* v. *Parnell*, 2 Marsh. 78; 6 Taunt. 670.

—— **Assignment of, by Sheriff.**]—Where an assignment by deed of a lease of premises taken in execution was made in the name and executed under the seal of office of the sheriff, by his under-sheriff:—Held, that such assignment might be proved without shewing the appointment of the under-sheriff, or that he had power by deed to execute instruments in the name of the sheriff. *Doe* d. *James* v. *Brawn*, 5 B. & Ald. 243; 24 R. R. 347.

The sheriff's assignment of a term is sufficient, without an actual seizure of the lease. *Coleman* v. *Rawlinson*, 1 F. & F. 330.

—— **Equitable Interest in.**]—An equitable estate in leaseholds cannot be delivered in execution under a fi. fa. *Newcastle (Duke), In re, Padwick, Ex parte*, 39 L. J., Ch. 68; 8 L. R. Eq. 700; 21 L. T. 343; 18 W. R. 8.

A mere equitable interest in a term of years cannot be taken in execution under a fi. fa. *Scott* v. *Scholey*, 8 East. 467; 9 R. R. 487. S. P., *Metcalf* v. *Scholey*, 2 Bos. & P. (N.R.) 461; *Lyster* v. *Dollond*, 1 Ves. jun. 431; 3 Bro. C. C. 478.

But a creditor issuing execution on a judgment, and finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity, without the aid of the 1 & 2 Vict. c. 110; and where, after such execution, the leasehold estate of the debtor has been sold, the execution creditor has a lien on the proceeds of the sale. *Gore* v. *Bowser*, 3 Sm. & G. 1.

Outstanding Term to attend the Inheritance.]—Semble, that by 29 Car. 2, c. 3, an outstanding

term, vested in a trustee upon trust to attend the inheritance, is liable to be seized under a fi. fa. against the cestui que trust, the owner of the inheritance. *Doe* d. *Phillips* v. *Evans*, 1 C. & M. 450; 3 Tyr. 339; 2 L. J., Ex. 179.

Sale of Term of Years mortgaged.]—On an execution being placed in a sheriff's hands to sell a term of years in certain lands over which the plaintiffs held a mortgage, the plaintiffs and the defendant, the solicitor of the execution creditor, agreed in consideration that the plaintiffs as such mortgagees would consent to a sale of their interest in the lands by the defendant through the sheriff, undertook to have the sale carried out subject to and guarded by such conditions that the plaintiffs' mortgage debt should in the first instance be paid out of the proceeds of the sale. The sale was not so carried out, and the present action was brought against the defendant for breach of contract. On demurrer to the statement of claim on the ground that the consideration for the undertaking of the defendant was illegal:—Held, that the demurrer must be allowed, inasmuch as the sale by the sheriff being the act of an officer of a court of justice in the discharge of his duty, he would by selling the property, subject to the conditions which the plaintiffs stipulated for, be acting in violation of his duty on two grounds; first, that the sale of the judgment debtor's interest being an equity of redemption only was not authorised by the writ of fieri facias under which the sheriff acted; and, secondly, that the proceeds of the sale were to be paid to a person other than the execution creditor. *Moher* v. *O'Grady*, 41 L. T. 562.

Held, further, however, that while the writ was in the sheriff's hands unexecuted, the mortgagees, the execution creditor, and the mortgagor might together have made an effectual sale of the term, and applied the proceeds of such sale as agreed between them, and might have made such sale through an agent of their own. *Ib.*

c. Money and Securities for Money.

Money and Bank Notes—13 Eliz. c. 5.]—Money and bank notes being liable, under the Judgments Act, 1838 (1 & 2 Vict. c. 110), s. 12, to be attached by creditors, are goods and chattels within 13 Eliz. c. 5; and therefore a voluntary purchase and settlement of stock by a person in insolvent circumstances out of moneys belonging to him would be held fraudulent and void as against creditors. *Barrack* v. *M'Culloch*, 3 Kay & J. 110; 26 L. J., Ch. 105; 3 Jur. (N.S.) 180; 5 W. R. 38.

—— **In Sheriff's Hands.**]—A party privileged from arrest, having been taken on a ca. sa. by the sheriff of G., paid the money to the sheriff, and obtained a judge's order to have it refunded. When the town agent was about to do so, the money was claimed by the sheriff of M. under a fi. fa. directed to him:—Held, that the money could not be taken under the fi. fa. *Masters* v. *Stanley*, 8 D. P. C. 169; 4 Jur. 28.

The surplus of the proceeds of property sold under a fi. fa. remaining in the hands of the sheriff, after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a fi. fa. at the suit of a third party, against the defendant in the former suits. *Harrison* v. *Paynter*, 6 M. & W. 387; 8 D. P. C. 349; 9 L. J., Ex. 169; 4 Jur. 488.

Where a sheriff who had seized and sold certain goods under a fi. fa. kept the money in his hands in consequence of a suit in equity between the parties respecting the amount due to the plaintiff:—Held, that the writ must be considered as wholly executed, and ought not, on the sheriff's going out of office, to be transferred to his successor, under the repealed 3 & 4 Will. 4, c. 99, s. 7. *Ib.*

The 1 & 2 Vict. c. 110, s. 12, authorising money to be taken in execution, applies only to moneys set apart and ear-marked, and which are the property specifically of the party against whose effects the fieri facias issues. *Wood* v. *Wood*, 3 G. & D. 532; 4 Q. B. 397; 12 L. J., Q. B. 141; 7 Jur. 325.

Money, therefore, levied under a fi. fa. and in the hands of the sheriff for an execution creditor, cannot be seized under a fi. fa. against such execution creditor. *Ib.*

After verdict, and before judgment had been entered up, the defendant sold his leaseholds by auction:—Held, that under the 1 & 2 Vict. c. 110, the plaintiff could not levy execution on the purchase money. *Brown* v. *Perrott*, 4 Beav. 585.

A fi. fa. having been issued to the sheriff to levy 97*l.* 10*s.*, the defendant, not knowing the exact amount, sent a person with a banker's bill for 55*l.* 5*s.* and 40*l.* in country notes to the officer to whom the warrant had been delivered. These sums were tendered to the officer. Upon his stating the amount he was to levy, the person went away, in order to obtain the difference, leaving the bill and country notes on the table. The officer seized both the bill and the notes under the execution, while the person was so absent upon this errand, and upon his return with the balance demanded poundage. He subsequently seized some sheep for this, when it was paid under protest:—Held, that money was not liable to seizure, and that the court would interfere summarily to compel the sheriff to refund the sum extorted as poundage. *Bell* v. *Hutchison*, 8 Jur. 895.

By 1 & 2 Vict. c. 110, s. 12, money seized under a fi. fa. is exactly in the same position as money the proceeds of goods seized. *Collingridge* v. *Paxton*, 11 C. B. 683; 2 L., M. & P. 654; 21 L. J., C. P. 39; 16 Jur. 18.

Therefore, where the sheriff seized bank notes and coin under a fi. fa. at the suit of A., against whom he held an unexecuted fi. fa. at the suit of B., he was not justified in paying the amount over to B. as money belonging to A. *Ib.*

An execution by a fi. fa. founded on a judgment upon a warrant of attorney, may be apportioned so as to entitle the plaintiff to the proceeds of any money actually in the hands of the sheriff, though before the writ is completely satisfied, a vesting order under the Insolvent Act was made, which prevented any further execution of the writ in favour of such judgment creditor under 1 & 2 Vict. c. 110, s. 61. *Squire* v. *Huetson*, 4 P. & D. 633; 1 Q. B. 308; 10 L. J., Q. B. 116; 5 Jur. 840.

In such a case, the plaintiff becomes entitled to money seized by the sheriff in specie, as much as if it was money realised for goods seized and sold under the writ. *Ib.*

—— **Deposited in Court.**]—The 1 & 2 Vict. c. 110, s. 12, gives no power to seize money in execution while in the hands of a third person as trustee for the debtor; and therefore money deposited in court in one action, pursuant to

43 Geo. 3, c. 46, s. 2, and 7 & 8 Geo. 4, c. 71, s. 2, cannot be paid out to an execution creditor in a second action in satisfaction of his claim. *France* v. *Campbell*, 6 Jur. 105.

—— **In Hands of Auctioneer.**]—After verdict, and before judgment had been entered up, the defendant sold his leaseholds by auction:—Held, that under 1 & 2 Vict. c. 110, s. 12, the plaintiff could not levy execution on the purchase-money in the hands of the auctioneer. *Brown* v. *Perrott*, 4 Beav. 585.

Cheque—Drawn but not delivered.]—A cheque of the accountant-general in favour of A., but not delivered out, is not his property, so as to be liable to be seized by the sheriff. *Courtoy* v. *Vincent*, 15 Beav. 486; 21 L. J., Ch. 291.

—— **Delivered to Debtor's Solicitor, and by him returned.**]—A judgment having been entered up against a party to whom a sum standing to the credit of the cause had been ordered to be paid, and the accountant-general having drawn a cheque for the sum, and delivered it to the attorney of the debtor, who subsequently returned it to the accountant-general, the court, on the petition of the judgment creditor, gave the sheriff liberty to take the cheque under a fi. fa. *Watts* v. *Jefferyes*, 3 Mac. & G. 422; 15 Jur. 435.

Policy of Insurance.]—A policy of insurance, effected by the debtor on his own life, and on which annual premiums are payable, is not a security for money which the sheriff is empowered to seize and sell under a fieri facias by 3 & 4 Vict. c. 105, s. 20, or the 16 & 17 Vict. c. 113 (Common Law Procedure (Ireland) Act, 1853). *Alleyne* v. *Darcy* (5 Ir. Ch. R. 55) followed in preference to *Stokoe* v. *Cowan* (29 Beav. 637). *Sargent's Policy*, 7 L. R., Ir. 66.

d. Goods.

i. *Of Debtor.*

In Pledge or Mortgage.]—Under an execution against the goods of A., the sheriff cannot seize goods which he has deposited with another person as security for a debt. *Rogers* v. *Kennay*, 9 Q. B. 592; 15 L. J., Q. B. 381; 11 Jur. 14.

Property held by way of lien cannot be taken in execution under a fi. fa., either at common law or under 1 & 2 Vict. c. 110, s. 12. *Legg* v. *Evans*, 6 M. & W. 36; 8 D. P. C. 177; 9 L. J., Ex. 102; 4 Jur. 197.

Whether Goods those of Apparent Owner or Intestate — Business carried on.]—After the death in May, 1880, of A., a shopkeeper, his daughter B. carried on the business. Judgment was obtained against B. personally, and a fi. fa. was issued thereon and delivered to the sheriff in March, 1881. At this time B. was in possession of shop goods of considerable value, some of which had been the property of A. in his lifetime, and the rest were purchased out of the proceeds of sale of other goods of A. In an action for a false return against the sheriff, who had returned nulla bona, he claimed to have a verdict entered for him on the ground that the goods were not the goods of B. No evidence was given of any testamentary disposition by A.:—Held, that in the absence of any proof that the trading was carried on by B. as personal representative of A., the onus of which lay on the sheriff, the goods purchased by her after A.'s death could not be held to be the assets of A. *Kelly* v. *Browne*, 12 L. R., Ir. 348. Affirmed in C. A.

ii. *Of other Persons in Debtor's Possession.*

With Right of Purchase.]—The plaintiff let to D. a house and the furniture: they entered into a written contract whereby the plaintiff agreed to sell the house and furniture to D., the purchase-money to be paid on the completion of a good title by the plaintiff. Before the completion of a good title the contract was rescinded by consent:—Held, that, under this contract, the furniture never vested in D. as his property, and, therefore, could not be taken under a fi. fa. against him. *Lanyon* v. *Toogood*, 13 M. & W. 27; 13 L. J., Ex. 273.

Purchased at Public Auction for Debtor's Benefit.]—Where goods are bonâ fide sold by public auction, and the seller after such sale is allowed to continue in possession, they cannot be taken in execution by one of the seller's creditors, who was present at the sale, as the change of possession was notorious, and there being a good and legal consideration to support it. *Woodham* v. *Baldock*, 3 Moore, 11; Gow, 35.

Where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession of his house and goods, and notice of such assignment was advertised in the newspapers, and the goods were afterwards sold by the trustees at public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession:—Held, that such purchase by the plaintiff would protect the goods against a judgment afterwards obtained, and execution levied by a creditor of the husband, who had notice of the assignment at the time; although the plaintiff permitted his mother to continue in possession: and therefore that he was entitled to recover them from the sheriff. *Leonard* v. *Baker*, 1 M. & S. 251.

Of Assignee of Debtor.]—Where a sheriff being in possession under a fi. fa., the defendant executed a deed of assignment for a valuable consideration, on which the execution was withdrawn, and the assignee continued to manage the property, but allowed the defendant to continue in possession, and the same property was afterwards seized under an execution, at the suit of another creditor:—Held, that it was protected by the assignment, although the defendant had continued in the visible possession. *Jezeph* v. *Ingram*, 1 Moore, 189.

—— **Under Bill of Sale.**—Where the bonâ fide assignee of a bill of sale executed by the sheriff under a fi. fa. against the goods of A. allowed the latter to remain in the possession and enjoyment of the goods until another execution was put in, and the same effects were again seized:—Held, that the first execution being notorious, the assignee of the bill of sale might maintain trespass against the sheriff, and that an absolute change of possession was not necessary to give effect to the bill of sale against creditors. *Latimer* v. *Batsen*, 7 D. & R. 106; 4 B. & C. 652: 4 L. J. (o.s.) K. B. 25.

Trover for various articles of household furniture, which the defendants had taken in execution under a judgment against C., and

which the plaintiff claimed to be entitled to under a bill of sale from the same person. The plaintiff proved the execution of the bill of sale for a valuable consideration, and the seizing of the goods. The defendants' case was, that the bill of sale was fraudulent and void, there having been no change of possession; but they were not prepared to prove the judgment under which they had taken the goods in execution:—Held, that without this they could not impeach the title transferred by the bill of sale, and the plaintiff had a verdict. *Steel* v. *Brown*, 1 Camp. 512; 1 Taunt. 381; 9 R. R. 795.

See also BILLS OF SALE.

On Hire.]—If a party has goods on hire for a term, and the sheriff seizes them under an execution against such party, the owner of the goods may maintain an action against the sheriff, if he sells the entire property of such goods; but to support the action he must shew, that, as soon as the goods were seized, he apprised the sheriff that the goods were lent for a term only, in order that the sheriff might know that he had only a right to sell the qualified property that the hirer had in the goods. *Dean* v. *Whittaker*, 1 Car. & P. 347.

An action by the owner of goods, let for an unexpired term, against the sheriff, for taking them under an execution against the party who hired them, is not maintainable if it appears that the sheriff has not sold; and it is in such a case the duty of the party letting to give notice to the sheriff of the limited nature of the hirer's interest. *Duffil* v. *Spottiswoode*, 3 Car. & P. 435.

A. having let his house ready furnished to B., cannot maintain an action against the sheriff for taking the furniture under an execution against B., though notice was given that the goods belonged to A. *Ward* v. *Macauley*, 4 Term Rep. 489.

Where goods lent on hire have been wrongfully taken in execution by the sheriff, under a fi. fa., the owner cannot maintain trover against him, he not having the right of possession as well as the right of property at the time of the sale. *Pain* v. *Middlesex* (*Sheriff*), R. & M. 99.

—— **Pawnbroker's Business — Unredeemed Pledges — Property in Articles pawned.**]—A receiver was appointed in an action in the Queen's Bench Division, to receive the profits and other moneys receivable from a pawnbroker's business carried on by the defendant. Subsequently to the appointment of the receiver, but before he perfected his security, a writ of fi. fa. was issued to the sheriff to recover a sum of money ordered to be paid by the defendant in an action in the Chancery Division, in pursuance whereof the sheriff took possession of certain goods and chattels in the possession of the defendant, including various articles pawned with her and not yet redeemed. The receiver perfected his security, and claimed the redeemable pledges in the defendant's house:—Held, that the defendant, as pawnbroker, had a qualified property in the articles pawned with her and not yet redeemed, which was not intercepted by the appointment of a receiver; and that therefore the sheriff was entitled to hold such articles on behalf of the execution creditor, and to receive money paid to redeem the same. *Rollason, In re, Rollason* v. *Rollason*, 56 L. J., Ch. 768; 34 Ch. D. 495; 56 L. T. 303; 35 W. R. 607.

In Hands of Employé of Contractors, and falsely represented to belong to Debtor.]—A declaration in an action against A. and B. alleged that the plaintiff was employed by the contractors of some proposed buildings to cart and convey away the earth dug out of the excavations and sites of the buildings with the horses and cart of the plaintiff; that an action was depending in the Queen's Bench, wherein B. was the plaintiff, and C. the defendant, in which action C. allowed judgment to go by default, and a fi. fa. issued against the goods of C., directed to A., as sheriff, to be put in execution by him as such sheriff; yet he, as sheriff, by and with the aid, counsel, and assistance of B., by him wrongfully and maliciously given, seized, took, and carried away, in execution of the writ, the goods of the plaintiff, under the pretence that the same belonged to C., and afterwards sold the goods as an execution under the writ against the goods of C. By means of the premises, and for want of the use of the goods, the plaintiff was unable to carry on his employment and business, and thereby lost great gains:—Held, that the declaration shewed no cause of action against B. *Sedman* v. *Walker*, 1 Ex. 589.

In Hands of Executor.]—Goods of a testator, in the hands of his executor, cannot be seized under a fi. fa. against the executor in his own right. *Farr* v. *Newman*, 4 Term Rep. 621; 2 R. R. 479.

The goods of a testator in the possession of his executor were taken, and sold under a fi. fa., on a judgment against the executor for a debt of his own, and with his consent; the property passed by such execution, notwithstanding the plaintiff in the action against the executor knew they were assets. *Whale* v. *Booth*, 4 Dougl. 36, n.; 4 Term Rep. 625, n.; 2 R. R. 483, n.

Where the goods of a testator, which had long remained in the hands of his executor, but consistently with the trusts of the will, were seized by the sheriff under a fi. fa., on a judgment against the executor in his own right, the sheriff may be liable to an action; and if the defendant in the execution disputes the seizure, on the ground that the goods were held by him as executor in trust for others, and not in his own right, that is a claim by a person "not being the party against whom the process issued," which will entitle the sheriff to an interpleader rule under the repealed 1 & 2 Will. 4, c. 58, s. 6. *Fenwick* v. *Laycock*, 1 G. & D. 532; 2 Q. B. 108; 11 L. J., Q. B. 146; 6 Jur. 346.

—— **In Hands of Agent of Executor.**]—When an executor before probate by his agent takes the goods and carries on the business of the deceased, and judgment is recovered against the agent as executor, and a fi. fa. issues thereunder directing the sheriff to levy on the goods of the deceased in his hands as executor of the deceased to be administered, the sheriff is not justified, as against the executor, in seizing goods of the deceased in such agent's hands. *Sykes* v. *Sykes*, 39 L. J., C. P. 179; L. R. 5 C. P. 113; 22 L. T. 236; 18 W. R. 551.

In Hands of Executrix who subsequently Marries.]—If an executrix uses the goods of her testator as her own, and afterwards marries, and then treats them as the goods of her husband she will not be allowed to object to their being

taken in execution for her husband's debt. *Quick* v. *Staines*, 1 Bos. & P. 293; 2 Esp. 57; 4 R. R. 881.

Chattels devised as heirlooms to a certain house, are removed by the tenant for life of that house to another, and are there taken in execution for a debt of the tenant for life. On a question whether these chattels were liable to be so taken, it was held they were. But this was so held under the particular words of the testator's will. *Foley* v. *Burnell*, 4 Bro. P. C. 319. Affirming 1 Bro. C. C. 274.

In Hands of Administrator.]—Goods of an intestate taken possession of, and used by an administrator in the house of the intestate, for three months after the death of the intestate, cannot be taken in execution for the administrator's own debt. *Gaskell* v. *Marshall*, 1 M. & Rob. 132.

In Trust Settlement.]—One being indebted, by settlement before marriage, in consideration of the marriage, and of his wife's portion, which was supposed to be more than the amount of his debts at that time, conveyed all his real estate, and likewise his household goods (his real estate alone not being thought an adequate settlement), in trust for himself for his life, remainder to his wife for life, remainder to his first and other sons in strict settlement. The lady being a ward of chancery, the settlement was approved of by the Master, and the goods enumerated in a schedule. A., after the marriage, continued in possession of the goods; after which a creditor, at the time of the settlement, having obtained judgment, took them in execution:—Held, that the settlement was good against creditors, and the trustees entitled to the possession of the goods. *Cadogan* v. *Kennet*, Cowp. 432.

A. executed a deed by which he conveyed chattels to B., in trust, as to one moiety for certain scheduled creditors, as to the other for A.'s own benefit; C., a creditor not in the schedule, sued A. and recovered, and took out execution against the chattels in the hands of B. B. sued the sheriff's officer and recovered at law. Bill for an injunction on the ground that the deed was void against creditors for the moiety. The court refused the injunction, for there can be no execution against goods in the hands of a trustee. *Caillaud* v. *Estwick*, 2 Anstr. 381.

Goods having been taken in execution under a fi. fa. against W., the trustee of Mrs. W.'s settlement claimed them as separate estate of the wife. The sheriff thereupon took out an interpleader summons in the Common Pleas Division, upon which an order was made that upon the trustee paying 115*l.* into court within a limited time the sheriff should withdraw, but in default of such payment being made, should sell and pay the proceeds into court, and that the parties should proceed to the trial of an issue as to the title to the goods. The money was not paid into court by the trustee within the time, and the sheriff advertised the goods for sale. Mrs. W. thereupon commenced an action in the Chancery Division to have the trusts of the settlement carried into execution, a new trustee appointed, and, in the meantime, for the appointment of a receiver. An injunction to restrain the sheriff from selling the goods or remaining in possession of them was granted by the vice-chancellor:—Held, on appeal, that this order was a restraining by injunction a proceeding pending in the Common Pleas Division, and was inconsistent with the Judicature Act, 1873, s. 24, sub-s. 5, and must be discharged. *Wright* v. *Redgrave*, 10 Ch. D. 24; 40 L. T. 206; 27 W. R. 562—C. A.

Husband and Wife.]—Where, in an action upon a bond given by the wife while sole, both husband and wife were outlawed, her separate goods are property liable to be taken in execution, although the outlawry is set aside as to him. *Briscoe* v. *Kennedy*, 2 Wils. 127.

In an action against a sheriff for taking the goods of B. under a fi. fa.:—Held, that A. having assumed his name, and passed for his wife, and permitted him to appear to be the owner of the furniture of the house in which they both lived, such furniture being her property is not liable to be taken in execution against B. *Edwards* v. *Bridges*, 2 Stark. 396; 20 R. R. 702.

Where, by a settlement executed before marriage, personal property was conveyed to trustees, for the sole and separate use of the wife, the trustees having, in pursuance of the trust, paid over a portion of it to her, with which she purchased some wearing apparel:—Held, that the property in the wearing apparel vested in the husband, and that it might be taken under an execution issued against him. *Carne* v. *Bryce*, 7 M. & W. 183; 8 D. P. C. 884; 10 L. J., Ex. 28; 4 Jur. 1115.

Where a sheriff, under a fi. fa. against A., seized and sold the furniture in his house, where he lived with a woman to whom he had been married, and to whom the goods belonged before marriage:—Held, that the woman, having afterwards discovered that the marriage was void, might maintain trover against the sheriff, and recover the value of the goods, although it exceeded the price for which they were sold. *Glasspoole* v. *Young*, 9 B. & C. 696; 7 L. J. (o.s.) K. B. 305.

In Hands of Tenant.]—Injunction to restrain sheriff from executing fi. fa. on goods, &c., of landlord, in possession of plaintiff, his tenant, refused. *Garstin* v. *Asplin*, 1 Madd. 150.

In Hands of Servant.]—The plaintiff having purchased a public-house, for which he could not himself obtain a licence, because he resided in another tavern, put B., an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to B.:—Held, that the sheriff was not entitled to take, under an execution against B., the plaintiff's liquors and chattels in the house committed to B.'s custody. *Dawson* v. *Wood*, 3 Taunt. 256.

Mortgagee of Ship.]—If A. lends money on the security of a ship, and takes possession before execution executed at the suit of B., the vessel cannot be seized under B.'s execution. *Ladbrooke* v. *Crickett*, 2 Term Rep. 649; 1 R. R. 571.

Execution Debtor holding Goods under Void Deed.]—Where a person against whom a fi. fa. was taken out was in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable thenceforth, the sheriff was warranted in returning nulla bona, if it appeared that the memorial of such annuity was not registered according to 17 Geo. 3, c. 26, s. 1, for in that

case the deed was absolutely void. *Crossley* v. *Arkwright*, 2 Term Rep. 603.

Belonging to Person with whom Debtor lodged.]—A sheriff cannot seize under a fi. fa. against A. a horse belonging to B., with whom he lodged, although the only evidence of ownership was, that the horse had belonged to her husband, and that after his death she had kept it, but had not administered. *Oughton* v. *Seppings*, 1 B. & Ad. 241; 8 L. J. (O.S.) K. B. 394.

In Colonial Warehouse.]—Goods, arriving at Quebec, were taken to the customs' examining warehouse, according to the regulations of the port. The goods were entered by the officer in charge, as consigned to M. & S. The goods remained subject to the lien for freight, and to the charges for customs' duties and storage. Till these several claims were discharged, the officer in charge was bound not to part with the goods. Subsequently M. & S. obtained an advance from Y. & Co. on the security of these goods, and gave to them a request note, signed by M. & S., and directed to the officer in charge, requesting him to hold the goods "subject to the order" of Y. & Co., "they paying the duty and storage charge before removal." This note was sent to the officer in charge, who accepted it, and made a corresponding entry in his book. Afterwards the goods, while still lying at the customs' warehouse, were seized by a judgment creditor of M. & S.:—Held, that the seizure was bad, there having been a valid constructive delivery and transfer of the goods to Y. & Co. as pledgees. *Young* v. *Lambert*, 6 Moore, P. C. (N.S.) 406; L. R. 3 P. C. 142; 22 L. T. 499; 18 W. R. 497.

e. Partnership Property.

See Partnership Act, 1890, s. 23, and tit. PARTNERSHIP.

Before this act a judgment creditor of any partner might take in execution against that partner his share in the personal property of the partnership. *Johnson* v. *Evans*, 7 Man. & G. 240; 1 D. & L. 935; 13 L. J., C. P. 117.

But not his interest in the good will or the book debts or in anything else not seizable under a fi. fa. *Helmore* v. *Smith* (1), 35 Ch. D. 436; 56 L. T. 535; 36 W. R. 3—C. A.

f. Growing Crops.

Right of Sheriff to—As against Landlord.]—Growing crops of a tenant having been seized under a fi. fa., a writ of habere facias possessionem was subsequently delivered to the sheriff in an ejectment, at the suit of the landlord, founded on a demise made long before the issuing of the fi. fa.:—Held, that the sheriff was not bound to sell the growing crops under the fi. fa., as they could not be legally considered as belonging to the tenant, the latter being a trespasser from the day of the demise laid in the declaration of ejectment. *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88; 24 R. R. 295.

—— **As against Vendee of Debtor.**]—The vendee of a growing crop of grass, who is in possession of the field for the purpose of making it into hay, may maintain trespass against a sheriff, if, when cut, the close is entered, and part of the grass carried away by a person who has purchased the grass of the bailiff of the sheriff, who had seized and sold it under a fi. fa. against the original vendor, where the person actually entering claims under the sale of the sheriff's bailiff, and carries of the crop by his authority. *Tompkinson* v. *Russell*, 9 Price, 287; 6 East, 602.

After growing crops had been seized and taken possession of under bill of sale, but before sale, a fi. fa. on the judgment of another creditor of the vendor was delivered to the sheriff, who seized and sold the crops, and paid the proceeds to the execution creditor. The debtor, becoming insolvent, petitioned the Insolvent Debtors' Court for protection, but his assignees withdrew from contesting the right of the vendee of the bill of sale:—Held, that such vendee was entitled to the proceeds of the crops as against the execution creditor, and that it would have made no difference in this respect if the assignees had not withdrawn. *Congreve* v. *Evetts*, 10 Ex. 298; 23 L. J., Ex. 273; 18 Jur. 655.

g. Effect of Bankruptcy.

Sale of Goods by Private Contract—Application Ex parte.]—Under s. 145 of the Bankruptcy Act, 1883, the court has a discretion to order goods taken in execution by the sheriff to be sold by private contract instead of by public auction, notwithstanding that the application for leave to sell by private contract is made by the execution creditor ex parte, and in the absence of all the other creditors of the execution debtor. *Hunt* v. *Fensham*, 12 Q. B. D. 162; 32 W. R. 316.

Sale by Sheriff by Private Contract—Execution for more than £20—Validity.]—A sale of the goods of a debtor by the sheriff by private contract instead of by public auction is not void under s. 145 of the Bankruptcy Act, 1883, and cannot be set aside at the instance of a subsequent judgment creditor. *Crawshaw* v. *Harrison*, 63 L. J., Q. B. 94; [1894] 1 Q. B. 79; 10 R. 608; 69 L. T. 860; 1 Manson, 407.

Protected Transaction—Charging Order.]—A charging order, on a debtor's interest in a sum of money, is not a "contract, dealing or transaction" within the protection of s. 49 of the Bankruptcy Act, 1883. *Pillers, Ex parte, Curtoys, In re* (17 Ch. D. 653), approved and followed. *O'Shea, In re, Courage* v. *O'Shea*, 64 L. J., Ch. 263; [1895] 1 Ch. 325; 12 R. 70; 71 L. T. 827; 43 W. R. 232; 2 Manson, 4—C. A.

Execution—Liability of Sheriff to Creditor—Money paid in order to avoid Sale.]—A sheriff who has seized the goods of an execution debtor, but who has left the premises where the goods are upon receiving the written admission of the debtor that he is in possession and is at liberty to enter at any time, and who holds the key of the premises, is no longer in possession of the goods under the execution, and payment to him of the debt in order to obtain the key is neither money paid "under an execution" nor "in order to avoid sale," within s. 1, sub-s. 2, of the Bankruptcy Act, 1890. Therefore, where the high bailiff of a county court, after such payment to him, received notice of a bankruptcy petition, and paid over to the official receiver the sum he had received:—Held, in an action by the execution creditor against the bailiff to recover the amount of the debt, that the bailiff was liable. *Bower* v. *Hett*, 64 L. J., Q. B. 772; [1895] 2 Q. B. 337; 14 R. 710; 73 L. T. 176; 44 W. R. 4—C. A. *And see* BANKRUPTCY.

6. Landlord's Claim for Rent.

Position of Landlord after Seizure by Sheriff—Landlord and Tenant Act, 1709, 8 Anne, c. 14 (c. 18 in Revised Statutes).]—The above act makes it unlawful to remove goods taken in execution, without paying one year's arrear of rent to the landlord, but it does not invalidate the execution itself. *Wharton* v. *Naylor*, 6 D. & L. 136; 12 Q. B. 673; 17 L. J., Q. B. 278; 12 Jur. 894.

Goods therefore, so taken, are in custodiâ legis, and cannot be distrained on by the landlord for the year's rent; and they are equally in custodiâ legis for this purpose, whether they are in the hands of the sheriff or of his vendee, provided they are incapable of removal. *Ib.*

The landlord of premises, on which goods have been seized under an extent in aid, is not entitled to call on the sheriff to pay a year's rent due before the teste of the writ. *Rex* v. *De Caux*, 2 Price, 17.

To what Tenancies, 8 Anne, c. 14, applies.]—The 8 Anne, c. 14, s. 1, only applies to subsisting tenancies; and the sheriff is not liable for removing goods taken in execution without first paying to the landlord a year's rent, where the tenancy has determined before the seizure, though within six months of it. *Cox* v. *Leigh*, 43 L. J., Q. B. 123; L. R. 9 Q. B. 333; 30 L. T. 494; 22 W. R. 730.

The 8 Anne, c. 14, s. 1, is not limited to the case of an original demise of entire premises, but applies to a sub-lessee, and to goods taken in execution in apartments being part and parcel of the messuage. *Thurgood* v. *Richardson*, 5 M. & P. 270; 7 Bing. 428; 4 Car. & P. 481; 9 L. J. (O.S.) C. P. 121.

—— **Does not apply, unless Creditor Claims adversely to Landlord.**]—The statute applies only to cases where the judgment creditor claims adversely to the landlord, and not where the execution is sued out at the instance of the landlord himself. *Taylor* v. *Lanyon*, 4 M. & P. 316; 6 Bing. 536; 8 L. J. (O.S.) C. P. 180; 31 R. R. 485.

For what Rent Landlord can claim.]—The sheriff is not bound to allow to the landlord a year's rent, where, under the circumstances, it must be taken to have ceased at the time of the execution. *Hodgson* v. *Gascoigne*, 5 B. & Ald. 88.

The landlord of premises, upon which the goods of his tenant are taken in execution, can only claim from the party issuing the execution the rent due at the time of taking the goods, and not that which accrues after the taking, and during the continuance of the sheriff in possession. *Hoskins* v. *Knight*, 1 M. & S. 245; 14 R. R. 424.

As against an execution creditor, a landlord is entitled to a full year's rent, although he has been used to remit some portion of it to his tenant. *Williams* v. *Lewsey*, 8 Bing. 28; 1 M. & Scott, 92; 1 L. J., C. P. 13.

A sheriff who takes corn in the blade under a fi. fa., and sells it before the rent is due, is not liable to account to the landlord of the defendant for rent accruing subsequently to the levy and sale, although he has given notice, and though the corn be not removed from the premises until long afterwards. *Gwilliam* v. *Barker*, 1 Price, 274.

Where goods seized under an extent had been kept by the sheriff's officer on the premises, pending a reference of the prosecutor's claim, during which a sum of money accrued due to the landlord for rent; the court refused to interfere in his behalf, to order the rent to be paid to him out of the produce of the sale, because he might bring an action for use and occupation against the tenant, or an action against the officer. *Rex* v. *Hill*, 6 Price, 19; 20 R. R. 615.

In order to maintain the action, it must appear that the premises were held at a rent certain. *Riseley* v. *Ryle*, 11 M. & W. 16; 12 L. J., Ex. 322.

By a memorandum signed 31st January, 1840, by B. and J., J. agreed to become the tenant of a farm G. at the customary time of entry, under the following conditions, viz. that 260*l.* annual rent, should be paid at the usual time for the house, premises and lands, as agreed upon; and B. agreed to lay out in improvements and alterations of the farm-house and new sheds a sum not exceeding 200*l.*, with the understanding that spars for rafters should be found from the estate; cartage for all materials, except stones for walls, to be done or found by J. It was proved, that the usual time of entry on the neighbouring farms was on the 12th May; and that the rents of the estate of which the farm of G. was a part were reserved payable at Michaelmas. The audit day being in January, J. entered on the farm in the spring of 1840, and continued in possession until 1842. In May, 1843, he was in arrear for rent to the extent of 160*l.*, and, on being pressed by his landlord, executed a warrant of attorney for 420*l.*, the amount of the arrears, and of the year's rent; the understanding being, that a fi. fa. was to be delivered to the sheriff upon a judgment to be entered up; but that it was not to be executed unless the writs of other creditors were sent to the sheriff. In October, 1842, J. was again applied to for another year's rent, at which time he paid a portion of it, promising to pay the residue before Christmas. In November, the sheriff, who had received writs from other persons against the property of J., executed the fi. fa.:—Held, that these facts warranted the jury in finding that a year's rent became due at Michaelmas. *Gore* v. *Lloyd*, 12 M. & W. 463; 13 L. J., Ex. 366.

—— **How set out in Sheriff's Return.**]—A landlord is entitled, as against the execution creditor, only to rent due at the time of the seizure. But, if the sheriff returns that he has paid so much for rent due for the premises, the court will intend that the payment was for rent due at the time of the seizure; and it is no objection to the return, that it does not expressly state that the rent was due at the time of the seizure. *Reynolds* v. *Barford*, 7 Man. & G. 449; 8 Scott (N.R.) 233; 2 D. & L. 327; 13 L. J., C. P. 177.

—— **When payable in Advance.**]—A claim may be supported by a landlord in an action against a sheriff for removing goods seized under a fi. fa. for forehand rent, or rent stipulated by the lease to be paid in advance, as being rent due at the time of the seizure within the statute of Anne. *Harrison* v. *Barry*, 7 Price, 600; 21 R. R. 781.

A. being indebted to B., and C. being his surety, A. conveyed certain premises by way of mortgage to C. to indemnify him, and attorned as tenant to C., at a rent of 50*l.* a year, payable in advance. The goods of A. having been seized under a fi. fa.:—Held, that by 8 Anne, c. 14, s. 1, C. was entitled to payment of this rent as against

the execution creditor. *Yates* v. *Ratledge*, 5 H. & N. 249; 29 L. J., Ex. 117.

—— **Improper Sale of Goods by Sheriff.**]—Where the owner of a cotton factory on the 15th November, 1815, demised the same, together with its machinery, for seven years and two months, reserving for the first year and two months a rent of 1,600*l.*, payable on the day after the date of the indenture, and for the rest of the term a yearly rent of 350*l.*, payable in advance; and the indenture contained a clause of entry and distress in case of nonpayment of rent; a covenant to use the machinery upon the premises only, and not elsewhere; and a proviso, that when and as soon as the rents by the lease reserved to be payable for the first year and two months of the term should have been paid and discharged, and all other covenants, clauses and agreements therein contained, on the lessees' part and behalf, having also been fulfilled and performed, the lessees should become absolutely entitled to the machinery comprised in a certain schedule, as their own goods and chattels, absolutely for ever. But the agreement was, that the tenants should purchase the machinery from the landlord for 2,500*l.*, of which 1,250*l.* were to be paid down before the execution of the lease, and the remaining 1,250*l.* to be paid with the first year's rent; and the latter sum was inserted in the lease as an increased rent for the first year and two months; and the tenants committed acts of bankruptcy prior to the 28th of June, 1821, upon which a commission issued on the 14th July, and the assignment was executed on the 8th September following; and the sheriff had levied an execution at the suit of a creditor, on the 28th June, under which his bailiff took possession; and notice of the bankruptcy and commission was given to the bailiff in August; and all the preceding rents had been paid, and the landlord required the sheriff to pay him the rent in arrear, being less than a year's rent, before the goods should be removed; but the sheriff, notwithstanding, on the 19th, 20th and 21st September, sold all the machinery and effects on the premises, out of which he paid the execution creditor his debt, and retained the amount of the rent due:—Held, in an action on 8 Anne, c. 14, brought by the landlord against the sheriff, that the machinery was the absolute property of the tenants; that the landlord had a right to distrain on it; that he had been disappointed of his rent by the sheriff's acts, and was therefore entitled to recover against him the rent in arrear; although the sheriff might have been also liable to an action at the suit of the assignees. *Duck* v. *Braddyll*, M'Clel. 217; 13 Price, 455.

—— **What Deductions can be made from.**]—In an agreement for assigning a lease for a sum of money to be paid on or before a distant day, the lessee agreed to make some alterations on the premises which his assignee was to occupy, paying, until the completion of the assignment, at the rate of 100*l.* per year in half-yearly payments. The lessee afterwards agreed to allow 12*l.* for some of the alterations he ought to have made; the rest was never completed, and the assignee paid in advance 10*l.*:—Held, that the sheriff levying on the goods of the assignee under a fi. fa., was bound to pay over to the lessee half a year's rent due; and that the 12*l.* and 10*l.* were in part payment of rent, as they were intended to be allowed out of the first payment due by the assignee to the lessee. *Saunders* v. *Musgrave*, 6 B. & C. 524; 9 D. & R. 549; 5 L. J. (o.s.) K. B. 192.

Notice—To be given to Sheriff.]—Semble, that a sheriff is not bound to find out what rent is due to a landlord, and pay it him, unless the landlord gives him notice. *Smith* v. *Russell*, 3 Taunt. 400; 12 R. R. 674.

A notice to a sheriff, stating that the rent was due to S. and the mortgagees of his estate, and signed by a person who was not the receiver appointed by the mortgage deed, is sufficient. *Colyer* v. *Speer*, 4 Moore, 473; 2 Br. & B. 67.

Notice of Landlord's Claim for Rent.]—There is no legal obligation upon a sheriff to give an execution creditor notice of a landlord's claim for rent. *Davidson* v. *Allen*, 20 L. R., Ir. 16. —Q. B. D.

—— **Within what Time.**]—Under 8 Anne, c. 14, the sheriff is bound to retain one year's rent out of the proceeds of a tenant's goods taken in execution, provided he has notice of the landlord's claim, at any time while the goods or the proceeds remain in his hands; and the court ordered such rent to be paid to the landlord out of the proceeds, though notice was not given to the sheriff until after the removal of the goods from the premises. *Arnitt* v. *Garnett*, 3 B. & Ald. 440; 22 R. R. 453.

Goods having been taken in execution, the landlord, after the sale, but before the removal of the goods, gave notice to the sheriff that rent was due to him:—Held, that an order on the sheriff to pay the rent out of the proceeds in his hands was properly made. *Yates* v. *Ratledge*, 5 H. & N. 249; 29 L. J., Ex. 117.

—— **Sheriff aware that Rent is due.**]—If a sheriff, knowing that rent is due to the landlord, proceeds to sell the tenant's goods under a fi. fa., without retaining a year's rent, he is liable to the landlord for it, although no specific notice has been given him by the landlord that such rent is due to him. *Andrews* v. *Dixon*, 3 B. & Ald. 645; 22 R. R. 518.

Duty of Sheriff as to.]—It is the duty of the sheriff to levy for the rent in the first instance, and then for the execution; and he must retain a sufficient sum to satisfy such rent, before he removes any of the goods from off the premises. *Colyer* v. *Speer*, 4 Moore, 473; 2 Br. & B. 67.

The sheriff is not bound to levy under a fi. fa. whatever the value of the goods may be, unless the execution creditor (having notice) first satisfies the landlord's rent. *Cocker* v. *Musgrove*, 9 Q. B. 223; 15 L. J., Q. B. 365; 10 Jur. 922.

Where the sheriff seized the goods of A. under an execution against the goods of B., and after the making of an interpleader order, and before the trial of the issue, paid the landlord a quarter's rent out of the proceeds of the goods:—Held, that the sheriff was bound to pay over the amount of the quarter's rent, as well as the rest of the proceeds of the sale, to A., after the decision of the issue in his favour. *White* v. *Binstead*, 13 C. B. 304; 22 L. J., C. P. 115; 17 Jur. 394.

Where a sheriff has realised the amount of an execution on a fi. fa. he cannot justify the retention of the money on the ground that the landlord has made a claim to the whole of it for rent,

which claim he has not yet been enabled to prove the truth of; and upon a return to the writ setting forth such facts an attachment will issue. *Hall* v. *Badden*, 7 L. T. 721; 11 W. R. 344.

Where the sheriff executes a fi. fa., and he receives notice of a year's rent being due, and the goods on the premises are not sufficient to satisfy a year's rent, he must withdraw; and, if he sells, the court will not stay proceedings in an action against him on 8 Anne, c. 14, s. 1, on paying over the proceeds of the sale. *Foster* v. *Hilton*, 1 D. P. C. 35.

Bankruptcy of Execution Debtor—Power of Sheriff to deduct from Proceeds of Sale.]—Where a sheriff, having seized and sold the goods of a trader under a writ of fi. fa., in respect of a judgment for a sum exceeding 20*l.*, paid one quarter's rent due to the landlord of the trader's premises, in obedience to a demand made at the time of sale, and within fourteen days from the date of sale received notice of the trader's having been adjudicated a bankrupt on foot of the levy:—Held, that the sheriff was entitled to deduct from the produce of the sale the amount of rent so paid by him. *M'Carthy, In re*, 7 L. R., Ir. 473—C. A.

Action against Sheriff for removing Goods before Satisfying.]—In an action against a sheriff for removing goods without paying a year's rent due to the landlord, it is no ground for arresting the judgment, that the declaration does not shew upon whose goods the levy was made, if it appears they were on the demised premises. *Forster* v. *Cookson*, 1 G. & D. 58; 1 Q. B. 419; 10 L. J., Q. B. 167; 5 Jur. 1083.

8 Anne, c. 14, s. 1, does not apply, unless the goods are actually removed from the premises. *White* v. *Binstead*, 13 C. B. 304; 22 L. J., C. P. 115; 17 Jur. 394.

A landlord having distrained for rent, was induced to withdraw the distress by the tenant's assurance (which was false) that a particular debt had been satisfied. The creditor having proceeded to judgment and execution, the tenant's goods were seized by the sheriff:—Held, that the landlord was entitled to a year's rent under 8 Anne, c. 14, s. 1. *Wollaston* v. *Stafford*, 15 C. B. 278.

In an action by a landlord against the sheriff, the court refused to allow the proceeds of the sale to be paid into court with the costs of the action, though it was sworn that the sale was regularly conducted. *Groombridge* v. *Fletcher*, 2 D. P. C. 353.

A sheriff is not liable to the landlord in an action under 8 Anne, c. 14, s. 1, unless there is an actual removal of the goods from the premises; the mere execution of a bill of sale not being equivalent to a removal. *Smallman* v. *Pollard*, 7 Scott (N.R.) 911; 1 D. & L. 901; 6 Man. & G. 1001; 13 L. J., C. P. 116; 8 Jur. 246.

An action for money had and received cannot be maintained by a landlord, to recover the amount of a year's rent against the sheriff, who has sold his tenant's goods under an execution. *Green* v. *Austin*, 3 Camp. 260.

A sheriff seized goods upon lands leased to a tenant, sold the same for less than a year's rent, and permitted them to be removed without paying the landlord the year's rent, which was due. The latter brought an action against the sheriff for such a removal, and the court refused, on payment into court of the sum which the goods produced, to stay the proceedings until the plaintiff undertook to pay the costs of the suit in the event of his not recovering more than the sum paid into court. *Calvert* v. *Joliffe*, 2 B. & Ad. 418; 9 L. J. (O.S.) K. B. 240.

When Sheriff's Officer has given Undertaking to pay.]—If, on goods of a tenant being taken in execution, the agent of the landlord takes from the sheriff's officers an undertaking for a year's rent, and then consents to the goods being sold, the landlord cannot afterwards maintain an action against the sheriff for not paying a year's rent on making the levy; although the rent is not paid according to the undertaking, and although the undertaking should be void under the Statute of Frauds, for not stating any consideration. *Rothery* v. *Wood*, 3 Camp. 24.

—— After Notice.]—A sheriff who seizes goods under a fi. fa., and, after notice that rent is due to the landlord, removes the goods without such rent having been first paid, is liable for such removal under 8 Anne, c. 14, s. 1, to an action by the landlord. *Riseley* v. *Ryle*, 11 M. & W. 16; 12 L. J., Ex. 322.

Where the landlord has a claim for rent, and gives notice in proper time, the sheriff ought to pay him, otherwise the court will make the sheriff pay the costs of appearing. *Clarke* v. *Lord*, 2 D. P. C. 55.

If the sheriff levies on and removes goods which are not the property of the judgment debtor, and has notice of rent due before removal, he is liable to the landlord under 8 Anne, c. 14, s. 1, although he has paid over the whole proceeds of the levy to the owner of the goods. *Forster* v. *Cookson*, 1 G. & D. 58; 1 Q. B. 419; 10 L. J., Q. B. 167; 5 Jur. 1083.

In an action under 8 Anne, c. 14, s. 1, against the sheriff for removing goods taken in execution without paying the landlord a year's rent, the measure of damages is primâ facie the amount of rent due, but it is competent to the sheriff to prove in mitigation of damages that the value of the goods removed was less than the amount of rent due. *Thomas* v. *Mirehouse*, 56 L. J., Q. B. 653; 19 Q. B. D. 563; 36 W. R. 104.

In 1881 the plaintiff carried a resolution under the arrangement sections of the Bankruptcy (Ireland) Act, 1857, for a composition with his creditors, it being required by the resolution that the plaintiff's estate and effects should vest in the official assignees and one H., as a security for the creditors, upon trust, in default in payment of the composition, to apply to realise the estate. Afterwards, and before the composition had been carried out or the plaintiff had obtained any certificate, the plaintiff by lease, dated the 13th April, 1883, demised certain premises to T. Goods of T. in these premises were seized under a fi. fa. and a quarter's rent then due under the lease was claimed from the sheriff by the plaintiff, and by the official assignees and H. The sheriff paid the official assignees and H., and sold the goods. In an action by the plaintiff against the sheriff for allowing the goods to be removed without satisfying the plaintiff, the above facts being stated in the pleadings:—Held, that the plaintiff was entitled to maintain the action. *Doran* v. *Moore*, 16 L. R., Ir. 181.

Bill given by Execution Debtor and Third Party for Arrears.]—In an action against a

sheriff for abandoning a seizure, it appeared that after seizure the sheriff learned that a year's rent was due to the landlord, and withdrew, without giving notice to the execution creditor that the rent was due; that a bill of exchange, still current, accepted by a third party, had been given to the landlord for a sum equal to a year's rent, and that the value of the goods seized was less than a year's rent. The only evidence given as to the bill of exchange was that of the landlord's agent, who deposed that he took it as a collateral security for the rent, and that there was no contract binding him not to sue. No question as to any such contract was asked by the plaintiff to be submitted to the jury:—Held, that the currency of the bill did not exonerate the sheriff from responsibility to the landlord, under the statute of 9 Anne, c. 8, s. 1; and that there is no legal obligation upon a sheriff to give the execution creditor notice of a landlord's claim for rent. *Davidson* v. *Allen*, 20 L. R., Ir. 16.

Goods in Custodiâ Legis.]—On the 11th of March the sheriff seized under a fi. fa. for an amount exceeding 20*l.* goods and chattels of a tenant upon premises held upon lease, the rent of which accrued due on the usual quarter days. On the 17th of March the goods were sold by the sheriff by private sale, and the sheriff went out of possession. On the 23rd of March a bankruptcy petition founded on the seizure and sale was presented against the tenant, upon which he was on the 5th of May adjudicated bankrupt. On the 10th of April the purchaser from the sheriff removed the goods. On the 15th of April the landlord gave notice to the sheriff requiring payment, under 8 Anne, c. 14, of two quarters' rent, due on the 25th December and the 25th of March preceding. The sheriff paid the proceeds of the sale to the trustee of the bankrupt's estate:—Held, that the landlord was not entitled to payment by the trustee in bankruptcy of the rents, as he might have distrained between the 17th of March and the 10th of April; and that he was not entitled to payment of the quarter's rent due on the 25th of March, as the rent was not due at the time the goods were seized. *Pollen Trustees, Ex parte, Davis, In re*, 55 L. J., Q. B. 217; 54 L. T. 304; 34 W. R. 442; 3 Morrell, 27.

The purchaser from the sheriff is bound to remove the goods within a reasonable time. If he leaves the goods on the demised premises for his own convenience the landlord can distrain on them. *Ib.*

—— **Proof of Amount of Rent due.**]—In an action against a sheriff for removing goods taken in execution without paying the landlord a year's rent, it is not necessary to prove that a year's rent is due; it is sufficient to prove the occupation by the tenant; and it lies on the defendant to shew that the rent has all been paid. *Harrison* v. *Barry*, 7 Price, 690; 21 R. R. 781.

In an action against a sheriff, for negligence in not levying under a fi. fa., the defence was that he had withdrawn on notice from the landlord that rent was due. At the trial the landlord stated that rent was due; but, on cross-examination, it appeared that the execution debtor held under a lease, which was not produced:—Held, that the fact of rent being due could not be proved without production of the lease, and that the plaintiff was entitled to a verdict. *Augustin* v. *Challis*, 1 Ex. 279; 17 L. J., Ex. 73.

In an action by a landlord against a sheriff, for removing under an execution the goods of his tenant, without securing payment of a year's rent under 8 Anne, c. 14, the tenant was called to prove the rent due, but objected to as interested, and released by the landlord:—Held, that the release could not be pleaded in bar of the action, puis darrein continuance, nor did it reduce the landlord to the necessity of taking a verdict against the sheriff for nominal damages only. 8 Anne, c. 14, s. 1, applies to goods in apartments being parcel of a messuage. *Thurgood* v. *Richardson*, 4 Car. & P. 481.

—— **Brought by Trustees.**]—The trustees of outstanding satisfied terms, assigned in trust to attend the inheritance, may sue the sheriff for not retaining a year's rent due to the landlord, after notice so to do, in an execution against the tenant. *Colyer* v. *Speer*, 4 Moore, 473; 2 Br. & B. 67.

When Sheriff is entitled to an Interpleader.]—Where an execution has been levied, and a landlord makes a claim upon the sheriff for rent, which the execution creditor has not expressly disputed, although the claim may be disputable, whether as regards the amount of rent due, or as regards the liability of the property which has been seized to distress, the sheriff is not entitled to an interpleader, at all events unless the landlord claims any part of the property. *Bateman* v. *Farnsworth*, 29 L. J., Ex. 365; 2 L. T. 390.

Forfeiture of Right of Action against Sheriff by Execution Creditor directing Sheriff to withdraw Execution.]—If the attorney for an execution creditor, on being informed of a claim by the landlord for rent, directs the sheriff's officer to withdraw the execution, and he does so, and the plaintiff issues a ca. sa. for the debt, such execution creditor cannot bring an action against the sheriff for falsely returning to the fi. fa. that so much rent was due, and he will not be entitled to recover though he shews that the supposed landlord had not a right to the rent claimed; and that the attorney, at the time he directed the officer to withdraw the execution, did not know what the landlord's title was. *Stuart* v. *Whittaker*, 2 Car. & P. 100; R. & M. 310.

7. Husbandry Provisions.

Sale of Farming Stock Act, 1816, 56 Geo. 3, c. 50.]—56 Geo. 3, c. 50, although passed for the purpose of general good and public benefit, in promoting good husbandry, does not extend to bind the crown; therefore, sales of goods seized under prerogative process are not within it, and the sheriff must sell unconditionally; nor can the sheriff sell crops as subject to tithe; he must sell without any qualification. *Rex* v. *Osborne*, 6 Price, 94; 20 R. R. 619.

56 Geo. 3, c. 50, s. 11, is not confined to sales of farming stock and crops on land let to farm by the sheriff under an execution, but applies to an ordinary sale by the tenant himself, and a purchaser from the tenant is bound by the terms of the lease under which the tenant holds. *Willmott* v. *Rose*, 3 El. & Bl. 563; 2 C. L. R. 677; 23 L. J., Q. B. 281; 18 Jur. 518; 2 W. R. 378.

E. ELEGIT.

1. GENERALLY.

Not necessary preliminary to Equitable Execution.]—Since the Judicature Act, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment debtor's equitable interest in land, previously to sue out an elegit. *Evans, Ex parte, Watkins, In re*, 49 L. J., Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127—C. A.

Goods.]—Bankruptcy Act, 1883, s. 146, which deprived the plaintiff of his right to the delivery of goods under elegit, not retrospective. *Hough* v. *Windus*, 53 L. J., Q. B. 165; 12 Q. B. D. 224; 50 L. T. 312; 32 W. R. 452; 1 Morrell, 1—C. A.

Delivery in Execution.]—The return of the sheriff to an elegit constitutes actual delivery of the land in execution within the 27 & 28 Vict. c. 112. *Champneys* v. *Burland*, 23 L. T. 584; 19 W. R. 148.

Priority of.]—A judgment creditor of a railway company, who had obtained an elegit, was restrained from taking possession of the lands and chattels belonging to the company as against prior mortgagees to whom were assigned the undertaking, calls on shareholders, and tolls. *Legg* v. *Mathieson*, 2 Giff. 71; 29 L. J., Ch. 385; 6 Jur. (N.S.) 1010; 2 L. T. 112.

A judgment debtor, after a fi. fa. had been partially executed against his goods and chattels, gave a second charge on mortgaged leasehold property to another creditor. The judgment had been duly registered, but no further steps had been taken to obtain delivery of or to bind the land. The mortgagees sold the property, and after satisfying their debt there remained a balance in their hands, to attach which balance a garnishee summons was taken out by the judgment creditor:—Held, that the holder of the charge on the mortgaged property was entitled to satisfy his claim out of this balance, in priority to the judgment creditor. *Backhouse* v. *Siddle*, 38 L. T. 487.

Issue of for Part of Sum recovered by Judgment.]—An elegit cannot be sued out for part only of the sum recovered by a judgment, unless it shews on the face of it that the residue of the judgment has been satisfied or otherwise disposed of. *Sherwood* v. *Clark*, 15 M. & W. 764.

For Costs.]—A defendant in a suit having been condemned in costs, and having neglected to pay them, and having no personal property, but having real property:—Held, that the court had power to issue a writ of elegit. *Heath* v. *Heath*, 29 L. T. 931; 22 W. R. 266.

2. WRIT, AND REGISTRATION.

Form of Writ.]—On the 4th February, 1840, judgment was signed against the defendants in an action of debt, at the suit of A., B. and C., assignees of D., a bankrupt. C. (who was the official assignee under the fiat) died in February, 1848. On the 4th April, 1849, an elegit was sued out at the suit of A., B. and C., without any sci. fa. or suggestion of the death of C., or of the appointment of his successor, who was stated in the affidavit to have been duly appointed the official assignee of the estate and effects of D. on C.'s death:—Held, that the elegit was regular in thus following the judgment; and that the affidavit was essentially defective in not shewing in precise terms that the appointment of the new assignee took place before the issuing of the elegit. *Rolt* v. *Gravesend Corporation*, 7 C. B. 777.

Registration of Writ.]—The registration of the writ prior to the date of the return of the sheriff is not in disaccordance with the terms of the Judgments Act, 1864, 27 & 28 Vict. c. 112, s. 3. *Champneys* v. *Burland*, 23 L. T. 584; 19 W. R. 148.

Alteration in Date of Return of.]—The court will not alter the return of an elegit to a later day; at all events, not at the instance of the sheriff, without the consent of the plaintiff. *Hildyard* v. *Baker*, 1 C. & M. 611; 9 D. P. C. 16; 2 L. J., Ex. 218.

3. PROPERTY EXTENDIBLE.

Leaseholds.]—Notwithstanding the provisions of s. 146 of the Bankruptcy Act, 1883, a writ of elegit still extends to leaseholds. *Richardson* v. *Webb*, 1 Morrell, 40.

Lands of Tenant in Tail—Exoneration.]—Lands to which a testator was believed to be entitled in fee simple, but of which he was in fact tenant in tail under a settlement, were in his lifetime delivered in execution under a writ of elegit, to judgment creditors. The testator devised these lands to W., who survived the testator and died intestate, leaving H. his heir-at-law. H. was tenant in tail in possession of these lands under the limitations of the settlement:—Held, that the charge created by the judgment, though enforceable against the estate tail of H., was not so enforceable in exoneration of the testator's personal estate. *Anthony, In re, Anthony* v. *Anthony*, 62 L. J., Ch. 1004; [1893] 3 Ch. 498; 3 R. 671; 69 L. T. 300; 41 W. R. 667.

Advowson.]—An advowson descending to an heir is real assets, and (as it seems) extendible in an elegit. *Robinson* v. *Tonge*, 3 P. W. 401.

Estate in Remainder of Infant, producing no present Income.]—A plaintiff, who had recovered judgment with damages in an action in tort against an infant, sued out an elegit against his land on the judgment. The infant's only interest in land was a remainder in fee expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seised of the reversion of the land in fee-simple, and that it was of the annual value of 12*l.*, and that he had delivered the premises to the creditor. The creditor then presented a petition under 27 & 28 Vict. c. 112, s. 4, for a sale of the infant's interest in the land:—Held, first, that the sheriff had no power to seize an estate in remainder belonging to an infant, and therefore the judgment creditor had acquired no charge on the infant's interest. *South, In re*, 43 L. J., Ch. 441; L. R. 9 Ch. 369; 30 L. T. 347; 22 W. R. 460.

Held, secondly, that the sheriff having erroneously returned that the infant was seised of a reversion producing a present income, a petition

for sale of the infant's interest, which was a bare remainder, was inconsistent with the return, and could not be supported. *Ib.*

—— **Trust Property.**]—A judgment affects the legal estate of a party from the time it is signed; but it affects only such trust property as the debtor is possessed of at the time execution is sued out, so that such trust property cannot be taken under an elegit sued out after a conveyance of it, grounded on a judgment signed before such a conveyance. *Harris* v. *Pugh*, 4 Bing. 335; 12 Moore, 577; 5 L. J. (O.S.) C. P. 189.

Mansion-house excepted from Leasing Power of Tenant for Life.]—A mansion-house excepted from the leasing power of a tenant for life, is subject to execution at the suit of his creditors during his life. *Davis* v. *Marlborough (Duke)*, 2 Swans. 122.

Estates granted by Crown.]—Estates granted by the crown for the maintenance of dignities, with reversion in the crown, have the usual incidents, and may be taken in execution. *Ib.*

Property of Corporation.]—Property acquired by a corporation after the Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, cannot be extended under an elegit by a creditor of the corporation in respect of a debt contracted before the passing of the act. *Arnold* v. *Rigge*, 13 C. B. 745; 1 C. L. R. 309; 22 L. J., C. P. 235; 17 Jur. 896; 1 W. R. 389.

Land which had been conveyed to a local board of health, for the purposes of the Public Health Acts, was used as a reservoir for the supply of water to the district of the local board. A judgment having been obtained against the local board in the name of their clerk:—Held, that the land was liable to be taken under an elegit. *Worral Waterworks Co.* v. *Lloyd*, L. R. 1 C. P. 719.

Equitable Interests.]—Equitable interests in land are within the Judgments Act, 1864, 27 & 28 Vict. c. 112, s. 1. *Hatton* v. *Haywood*, 43 L. J., Ch. 372; L. R. 9 Ch. 229; 30 L. T. 279; 22 W. R. 356.

Therefore, if a judgment creditor who has sued out an elegit is unable to obtain delivery by the sheriff of his debtor's lands by reason of the legal estate being outstanding, he must apply to the Court of Chancery to remove the impediment, and the order of the court will be a delivery in execution within the statute. *Ib.*

A judgment creditor sued out an elegit against his debtor, who had no other interest in land than an equity of redemption, and the sheriff accordingly returned nil. Soon afterwards the debtor became bankrupt. The creditor then filed a bill asking for a declaration that he had a charge on the debtor's equity of redemption at the time of the bankruptcy:—Held, that the creditor had no charge on the land. *Ib.*

A judgment creditor of a railway company, who had obtained an elegit, was restrained from taking possession of the lands and chattels belonging to the company as against prior mortgagees to whom were assigned the undertaking, calls on shareholders, and tolls. *Legg* v. *Mathieson*, 2 Giff. 71; 29 L. J., Ch. 385; 2 L. T. 112; 6 Jur. (N.S.) 1010. And see *Ames* v. *Birkenhead Docks Trustees*, 20 Beav. 332; 24 L. J., Ch. 540; 1 Jur. (N.S.) 529; 3 W. R. 381.

4. Position of Execution Creditor.

a. Generally.

Right of Eviction.]—In an action on a lease the defendant pleaded that, before the lease, P. impleaded the plaintiffs, and had judgment of elegit of the lands; that the plaintiffs were found by the inquisition to be seised of the premises, which were leased to B. for seven years, subject to two mortgages; that the sheriff delivered the premises to P., to hold until the damages should be fully levied; that before any rent became due, P., by virtue of the delivery to him, ejected, expelled, and put out the defendant therefrom. The plaintiffs traversed the eviction in the words of the plea. It was proved at the trial that P. demanded rent of the defendant, and threatened, if he did not pay, to turn him out, whereupon the defendant paid P. three quarters of a year's rent, and attorned to him without the plaintiff's knowledge:—Held, that P. having merely a reversion expectant on the determination of the mortgage terms, had no title to evict the defendant; that the attornment was immaterial, and the plaintiffs were entitled to succeed on that issue—the expulsion, as pleaded, not having been established by the evidence. *Poole Corporation* v. *Whitt*, 15 M. & W. 571; 16 L. J., Ex. 229.

Distress.]—A tenant by elegit has a right to distrain without attornment. *Lloyd* v. *Davies*, 2 Ex. 103; 18 L. J., Ex. 80.

Action for Rent.]—By an inquisition taken on an elegit against C., it was found that, at the time of the judgment, he was seised of lands in the occupation of B. In point of fact, these lands were vested in trustees in trust for C., and for raising a sum of money for F., but the trustees permitted C. to receive the rents:—Held, that the tenant by elegit could not sue B. for the rent. *Harris* v. *Booker*, 4 Bing. 96; 12 Moore, 283; 5 L. J. (O.S.) C. P. 92.

Evidence.]—In an action by a plaintiff claiming under an elegit for use and occupation, an examined copy of the judgment roll, containing the award of the elegit and return of the inquisition, is evidence of his title, without proving a copy of the elegit and of the inquisition. *Ramsbottom* v. *Buckhurst*, 2 M. & S. 565; 15 R. R. 352.

—— **Before Inquisition.**]—Where rent became due after the delivery of an elegit to the sheriff, but before the inquisition was taken thereon:—Held, that the execution creditor was not entitled to the rent. *Sharp* v. *Key*, 8 M. & W. 379; 9 D. P. C. 770; 10 L. J., Ex. 304.

Execution Creditor not bound by Scheme of Debenture-holders.]—A scheme made under the Railway Companies Act, 1867, and confirmed by the Court of Chancery, provided that unpaid vendors of land and other mortgagees of a railway company should take debenture stock in satisfaction of their claims. Before the scheme was made a judgment creditor of the company, over whom the unpaid vendors and mortgagees had priority, had sued out a writ of elegit, and the sheriff had made a return that the company was possessed of the lands used for the purposes of the railway. The lands were in the possession

of another company, by whom the railway was worked under an agreement:—Held, that the scheme did not operate, upon the principle of *Mocatta* v. *Murgatroyd* (1 P. Wms. 393), to give the elegit creditor priority over the holders of debenture stock who had taken such stock under the scheme in satisfaction of their mortgages, and that the elegit creditor, not being bound by the scheme, was entitled to no other rights than those which he had before the scheme was made. *Stevens* v. *Mid-Hants Ry., London Financial Association* v. *Stevens*, 42 L. J., Ch. 694; L. R. 8 Ch. 1064; 29 L. T. 318; 21 W. R. 858.

Inquisition—Evidence of.]—Upon an inquisition on a writ of elegit, proof of possession or receipt of the rent of the land by the party, is primâ facie evidence of title. *Barnes* v. *Harding*, 1 C. B. (N.S.) 568; 5 W. R. 570.

Where a jury, notwithstanding such evidence, found that the party had no lands, the court set aside the finding, and directed the sheriff to take a new inquisition. *Ib.*

—— **Description of Land in.**]—In inquisition on elegit taken since the Judgments Act, 1838, 1 & 2 Vict. c. 110, s. 11, it is not necessary to set out the land by metes and bounds: it is sufficient to describe it in such a manner as would be sufficient to identify it in a conveyance. *Doe* d. *Roberts* v. *Barry* or *Parry*, 2 D. & L. 430; 13 M. & W. 356; 14 L. J., Ex. 20; 8 Jur. 963. S. P., *Sherwood* v. *Clark*, 15 M. & W. 764.

When more than one Writ issued by same Creditor.]—Where lands are extended under an elegit, there is no interest in them left in the debtor which can be extended under a subsequent writ. *Carter* v. *Hughes*, 2 H. & N. 714; 27 L. J., Ex. 225; 6 W. R. 212.

A creditor issued three elegits on three several judgments, and extended the lands of the debtor; he afterwards took a conveyance of part of them. On a question whether the tenancy by elegit had been wholly extinguished and the judgment satisfied, the creditor insisted that it had not been shewn that the writs had been duly returned, and that no evidence had been given to shew in respect of which elegit the lands conveyed had been extended:—Held, that the onus of proof was on the creditor, he being bound to make out that he was a subsisting incumbrancer; and, secondly, that as it was his duty to have caused a proper return to be made and filed, he could not take advantage of his own omission. *Hele* v. *Bexley* (*Lord*), 17 Beav. 14; 22 L. J., Ch. 1007.

A creditor issued three elegits under three judgments, and the sheriff, by virtue of the first two, extended the whole of a leasehold estate, and returned nil to the third. The first two judgments being adjudged to have been satisfied at the time:—Held, that the creditor had acquired no right under his elegits. *Ib.*

A tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt:—Held, that his tenancy by elegit on the rest of the lands was extinguished, and that his judgment was satisfied. *Ib.*

A., being entitled to three annuities secured by covenant and judgment, received for twenty years part of the rents of the grantor's estates under elegits issued on satisfied judgments:—Held, that he was not accountable for his receipts to a party having a charge on the estate who had taken no proceedings to obtain possession. *Ib.*

Held that certain orders appointing a receiver, and restraining the surviving trustee from paying the annuities to D., were properly made; also that the defects in the sheriff's return to the elegit were immaterial, as no return was necessary, and that the serving out an elegit was sufficient to ground the equity; and further that one elegit is sufficient, although the rent be payable out of lands in three counties. *Dillon* v. *Plaskett* (*Lord*), 2 Bli. (N.S.) 241.

Lands of Contributory.]—A contributory was indebted to a company for calls, and an order was made for the payment of them. An elegit was afterwards duly sued out under the 27 & 28 Vict. c. 112, and lands belonging to the contributory were delivered in execution to the official liquidator of the company. The official liquidator afterwards presented a petition for an order for the sale of the lands, and payment out of the proceeds of such sale of the calls due from the contributory, and for other relief:—Held, that there must be an inquiry what interest the contributory had in the lands when they were delivered in execution to the official liquidator of the company, and what other parties (if any) were interested in the lands. *Leeds Banking Co., Ex parte, Kirby, In re*, 14 L. T. 615.

Seizure under, constitutes Judgment Creditor a secured Creditor.]—Under a writ of elegit the sheriff is entitled to seize the debtor's goods at once, before the holding of the inquisition, and from the time of the seizure the creditor becomes a secured creditor within the meaning of s. 16, sub-s. 5, of the repealed Bankruptcy Act, 1869. Sect. 87 has no application to a seizure of goods under an elegit. *Abbott, Ex parte, Gourlay, In re*, 50 L. J., Ch. 80; 15 Ch. D. 447; 43 L. T. 417; 29 W. R. 143—C. A.

Notwithstanding 1 & 2 Vict. c. 110, s. 11, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. *Whitworth* v. *Gaugain*, 1 Ph. 728; 15 L. J., Ch. 433; 10 Jur. 531.

—— **Defeated by Power of Appointment.**]—In 1822, an estate was conveyed to such uses as A. should, by deed, appoint, and in the meantime to the use of himself for life. In 1826, a judgment was obtained against him, and in 1827 he mortgaged this estate, and appointed the use to C. D. for 500 years. After the execution of this deed, the judgment creditor issued an elegit:—Held, that his lien upon the land was defeated by the execution of the power. *Doe* d. *Wigan* v. *Jones*, 10 B. & C. 459; 8 L. J. (O.S.) K. B. 214.

—— **Costs of.**]—An execution creditor in possession of the debtor's lands by virtue of a writ of elegit is not entitled to an order to ascertain and tax the costs of the proceedings by the writ, and of the inquisition, and add them to the judgment debt in the action and to the plaintiff's security under the writ. *Mahon* v. *Miles*, 45 L. T. 540; 30 W. R. 123.

Rights of Creditor in Possession.]—If judgment creditor has sued out elegit, and is in

possession, court cannot put him upon level with other judgment creditors. *Rowe* v. *Bant*, Dick. 151.

Bill lies for creditor by elegit to set aside a fraudulent conveyance, whether he could recover at law or not. *Bennet* v. *Musgrove*, 2 Ves. 51.

An elegit creditor in possession made a lease of the extended lands for twenty-one years, provided his estate should last so long. Before the debt was paid off or the years had expired, the lands were sold under a decree in a creditor's suit, and so conveyed to a purchaser. The conveyance was executed by the administrator of the elegit creditor:—Held, that the lease in equity was at an end, and, semble, the court would enjoin the lessee from enforcing his legal title under it. *Williams* v. *Morris*, 13 Ir. Eq. R. 147.

A leasehold estate is affected by an elegit or fi. fa. from the time it is lodged in the sheriff's hands, and if the debtor afterwards makes an assignment of it, the judgment creditor may proceed at law to sell the term, and the vendee will be entitled to the possession, notwithstanding such assignment. *Burden* v. *Kennedy*, 3 Atk. 739.

Notwithstanding 1 & 2 Vict. c. 110, s. 11, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land under an elegit without notice of the mortgage. *Whitworth* v. *Gaugain*, 1 Ph. 728; 15 L. J., Ch. 433; 10 Jur. 531.

Redemption and Foreclosure.]—On a bill filed against mortgagees and mortgagor, who was also a judgment debtor, by a judgment creditor who had issued a writ of elegit against the goods and hereditaments of the judgment debtor, but the execution of which, in consequence of the mortgages, could not be proceeded with, for accounts, redemption and foreclosure, the ordinary redemption and foreclosure decree was made, notwithstanding the 27 & 28 Vict. c. 112. *Beckett* v. *Buckley*, L. R. 17 Eq. 435; 22 W. R. 294.

Redemption by Tenant by Elegit—Right of Mortgagee to tack.]—A mortgagee, although without notice of any writ of elegit having been issued, is not entitled to tack a subsequent charge to his first mortgage on redemption by the tenant by elegit. *Champneys* v. *Burland*, ante, col. 1160.

b. Account.

Account of Rent and Profits.]—Where lands had been taken possession of under an elegit, the court ordered it to be referred to the master to take an account of the rents and profits received, and if upon inquiry it appeared that the debt had been satisfied, possession to be restored to the debtor. *Price* v. *Varney*, 5 D. & R. 612; 3 B. & C. 733; 3 L. J. (o.s.) K. B. 107.

If the debtor comes into equity for relief, the court will give it him, by obliging the creditor to account for the whole he has received; but as he who comes for equity must do equity, they will direct the debtor to pay interest to the creditor, though it should exceed the principal. *Godfrey* v. *Watson*, 3 Atk. 517.

Elegit creditor in possession, not to account for rents permitted to be received by the inheritor, before notice of proceedings by another creditor. *Holton* v. *Lloyd*, 1 Moll. 30.

Bill filed by a judgment creditor against the heir and assignee of the conusor (the latter having been discharged as an insolvent shortly prior to his death) and also against an elegit creditor of the conusor who had been in possession for many years:—Held, that the plaintiff was only entitled to an account for wilful default against the elegit creditor from the time of the filing of the bill. *M'Donnell* v. *Walsh*, 2 Dr. & War. 252; 1 Con. & L. 388.

A judgment debtor having called upon an elegit creditor in possession to account before the officer of a court of law, and having had the officer's report confirmed, he is bound thereby, and cannot afterwards have the same accounts taken in a court of equity. *Irwin* v. *Gee*, 1 Hay. & J. 283.

It was asserted to be a general rule, that until a judgment has been revived against the heir and terre-tenants of the conusor, and an elegit has issued, a court of equity will not entertain a bill to levy the debt; but courts of equity (in Ireland), for more than a century, have entertained bills in the first instance, after the death of the conusor, for an account of the real and personal estate, and of the sum due for principal, interest, and costs on the foot of the judgment; plainly because this course tends to expedite the payment of the debt, and to preserve the estate from accumulated costs, and also to save a multiplicity of suits by directing an account of the real and personal estates of the debtor, and by applying, in the first instance, the fund properly applicable to the payment of the debt. *Barnwall* v. *Barnwall*, 3 Ridgw. P. C. 61.

Judgment creditor in possession under an elegit, buying up other judgments, cannot apply the rents to discharge the interests of all the securities in the first instance. The rents must go to pay interest on the first judgment, then to discharge the principal, and so on in order of the judgments. *Skirrett* v. *Athy*, 1 Ball & B. 430.

After an estate has been held under an extent for a long time, and has gone through several hands, whether upon a bill to redeem, the defendants shall account otherwise than at the extended value. *Poole* v. *Guise*, 1 Vern. 468.

When a mortgage is made in trust that mortgagee should continue in possession till by perception of the rents and profits he should be satisfied the principal and interest, mortgagor may come into court of equity for an account of the profits received; as in an elegit the conusor has a right to see if the conusee on the extended value has received a satisfaction for his whole debt, and to have surplus paid to him. *Yates* v. *Hambley*, 2 Atk. 362.

Where a mortgagee takes an estate subject to a perpetual account, he will not be relieved from his own contract. *Ib.*

Where tenant by elegit has received rents and profits beyond the debt, though he shall account to the debtor, yet he shall not pay costs. In such case, appeal may be for the costs only, where defendant decreed to pay them. *Owen* v. *Griffith*, Ambl. 520; 1 Ves. 249.

An elegit creditor in possession is bound to account for wilful default upon the application of the debtor himself. *O'Brien* v. *Mahon*, 2 Dr. & War. 306; 1 Con. & L. 390, n.

A subsequent elegit creditor has no right to call a prior elegit creditor to account, until the former has by an inquisition got a

specific right to the debtor's lands. *Shaw* v. *Murtagh*, Hayes, 586.

And such subsequent creditor cannot invalidate any dealings which may previously have been had between the debtor and prior creditor. *Ib.*

A creditor in possession, under an elegit, of lands belonging to his debtor, sued out for the sale of the property under 1 & 2 Vict. c. 110, s. 11, is bound to account as a mortgagee in possession. *Bull* v. *Faulkner*, 1 De G. 685 ; 17 L. J., Ch. 23 ; 12 Jur. 33.

A. D., being entitled to three annuities secured by covenant and judgment, received for twenty years part of the rents of the grantor's estates under elegits issued on satisfied judgments :—Held, that he was not accountable for his receipts to a party having a charge on the estate who had taken no proceedings to obtain possession. *Hele* v. *Bexley* (*Lord*), 17 Beav. 14 ; 22 L. J., Ch. 1007.

c. Determination of Tenancy by Elegit.

An elegit creditor in possession made a lease of the extended lands for twenty-one years, provided his estate should last so long. Before the debt was paid off or the years had expired, the lands were sold under a decree in a creditor's suit, and so conveyed to a purchaser. The conveyance was executed by the administrator of the elegit creditor :—Held, that though the estate by elegit was merged by the conveyance as between the creditor and the purchaser, it had continuance as between the purchaser and lessee to support the lease which still existed at law ; but—Held, also, that the lease in equity was at an end, and, semble, the court would enjoin the lessee from enforcing his legal title under it. *Williams* v. *Morris*, 13 Ir. Eq. R. 147.

Nature of estate of elegit and modes by which it may be determined. *Ib.*

Judgment creditor having sued out an elegit, and having obtained possession, and continued in receipt of the issues of a moiety of the lands, until the death of his debtor, and being then evicted :—Held, that his judgment was not extinguished, and that he was entitled to come into equity after the death of the conusor for satisfaction of so much as remained unpaid. Whether, if he was not evicted, but elected to abandon his elegit, he would be so entitled, quære. The Lord Chancellor expressed an opinion that equity would not hold a creditor disentitled to participate in the ordinary and regular distribution of assets, because during the lifetime of his debtor he had gone as far as he could go to obtain payment. *Leahy* v. *Dancer*, 1 Moll. 313.

A tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt :—Held, that his tenancy by elegit on the rest of the lands was extinguished, and that his judgment was satisfied. *Hele* v. *Bexley* (*Lord*), 17 Beav. 14 ; 22 L. J., Ch. 1007.

5. DISCHARGE OF WRIT.

Elegit—Application to Discharge—Action against Local Authority.]—The plaintiff having recovered a judgment for costs against the defendants, issued a writ of elegit against the defendants' lands. The defendants moved to discharge it on the ground that execution ought not to issue against their lands to satisfy a debt which they could not legally pay. The sheriff had made no return to the writ and there was no evidence as to whether the defendants had any lands that could lawfully be applied in payment of the debt :—Held, that the application was premature. *Jersey* (*Earl*) v. *Uxbridge Sanitary Authority* (No. 1), 55 J. P. 165.

—— **Application to set aside—Staying Proceedings.**]—Where a writ of elegit and inquisition are quite regular, a motion to set them aside is wrong in form ; but the court may in the exercise of its discretion under s. 24 (5) of the Judicature Act, 1873, order all further proceedings under the writ and inquisition to be stayed. *Jersey* (*Earl*) v. *Uxbridge Sanitary Authority* (No. 2), 60 L. J., Ch. 833 ; [1891] 3 Ch. 183 ; 64 L. T. 858.

F. WRIT OF POSSESSION.

When Issued.]—Where, in an ejectment, after defence taken, the plaintiff obtains a verdict for possession, mesne rates and costs, execution cannot issue until the judgment is complete, and the plaintiff is therefore not entitled to a writ of possession until the costs are taxed and added to the judgment, or are waived by him. *Beasley* v. *Chapman*, 6 L. R., Ir. 393.

Renewal of Writ.]—When, after writ of possession executed, the defendant forcibly retook possession, the Queen's Bench Division made an order renewing the writ. *Staepoole* v. *Walsh*, 6 L. R., Ir. 444.

Judgment for.]—A judgment for foreclosure absolute is not a judgment for the recovery of the possession of land within the meaning of Ord. XLII. r. 3, of Rules of Court, 1875. *Wood* v. *Wheater*, 52 L. J., Ch. 144 ; 22 Ch. D. 281 ; 47 L. T. 440 ; 31 W. R. 117.

Instead of Writ of Assistance.]—Under Ord. XLVIII., a writ of possession is now substituted for the writ of assistance, whether between parties or as against strangers to the action. *Hall* v. *Hall*, 47 L. J., Ch. 680.

G. LEVARI FACIAS BY THE CROWN.

When Issued.]—Where a defendant, convicted of a misdemeanour, is sentenced to be imprisoned for a certain term, and to pay a fine, and to be further imprisoned till the fine is paid, a levari facias may issue to levy the fine on his goods, chattels, and lands, even before the expiration of the term for which the defendant is sentenced to be imprisoned. *Rex* v. *Woolf*, 2 B. & Ald. 609 ; 21 R. R. 412.

The sheriff is bound ex officio to levy the fine imposed upon a defendant on his conviction for a misdemeanour ; at all events, the writ of levari facias is regular when it has been adopted on the part of the crown. *Ib.*

Priority of.]—Where a sheriff seized goods of a debtor under a fi. fa. delivered to him by a judgment creditor, and executed a bill of sale of them to the creditor, and gave him possession ; a levari facias issued by the crown, on a judgment entered up for penalties incurred by the debtor for frauds on the revenue, under a verdict obtained on an information filed before the subject creditor's judgment, comes too late ; for the

property in the goods becomes, by a bill of sale, completely altered; and in such a case the sheriff might well return nulla bona: if, however, any of the goods included in the bill of sale have been chargeable with the duties of excise in arrear, on a breach of the revenue laws, on which the information was founded, the crown will be entitled to a verdict for the value of such goods, notwithstanding the sale; and the return of nulla bona will not be a good return as to them. *Att.-Gen.* v. *Ford*, 8 Price, 364, n.

Default in Payment of Land-Tax—Setting aside Writ.]— Where a party has been returned in the schedule of the collector of land-tax for a particular parish, under 48 Geo. 3, c. 141, as in default for a sum assessed upon him for land-tax in that parish, and the schedule having been duly certified to the court, a writ of levari facias has issued, under which such sum has been levied on his goods, and paid into the receipt of the exchequer, the court cannot afterwards set aside the writ, on the ground that the party has been assessed in the wrong parish. *Glatton Land-tax, In re*, 4 M. & W. 570; 8 L. J., Ex. 113.

H. SEQUESTRATION.

1. GENERALLY.

Foundation of Process.] — Sequestration is neither in form nor substance an execution; it is founded on default of performance of the decree of the court, and gives no right in the funds levied to the party at whose instance it is sued out. *Brune* v. *Robinson*, 7 Ir. Eq. R. 188.

Performance of a Duty—Death of Contemnor—Revivor.]—A trustee having failed to comply with an order directing him to pay money into court, a writ of sequestration was issued against his estate and effects, and subsequently the sequestrators were authorised to sell certain chattels in their possession belonging to the trustee. Before any sale was effected the trustee died, and a creditor's action was brought, in which the usual judgment was made and a receiver appointed. The trustee's estate was insolvent, and the receiver and the administrator of the deceased trustee commenced an action against the sequestrators to restrain them from selling the chattels and moved for an injunction:—Held, on the authority of *Hyde* v. *Greenhill* (1 Dick. 106), that sequestration to compel the performance of a duty is not determined by the death of the person against whose estate and effects sequestration has been issued; and proceedings may therefore be continued against his legal personal representative. *Pratt* v. *Inman*, 59 L. J., Ch. 274; 43 Ch. D. 175; 61 L. T. 760; 38 W. R. 200.

In Rem.]—The writ of sequestration is in rem, and not in personam. *Tatham* v. *Parker*, 1 Sm. & G. 506; 1 Eq. R. 257; 22 L. J., Ch. 903; 17 Jur. 929; 1 W. R. 491.

Application.]—Chancery has jurisdiction in case of sequestration of titles during a vacancy, by reason of general jurisdiction of court in matters of trust. *Birch* v. *Bygrave*, 6 Madd. 158.

All decrees in chancery, as well for personal as for real things, shall be executed by sequestration. *Beddingfield* v. *Zouch*, 2 Freem. 168; *Hide* v. *Petit*, 1 Ch. Ca. 91; 2 Freem. 125, 168.

A sequestration will be granted in chancery or exchequer for a personal duty; for the court hath authority to see its decrees executed. *Guarers* v. *Fountaine*, 2 Freem. 99, 125, 168; 1 Ch. Ca. 91.

During the construction of a railway an injunction was granted against the company, restraining them from further interfering with a particular road, and from so constructing their works as to obstruct, impede, or render less secure the same road, or so as to hinder or prevent the passage of carriages along the same. The company then laid their permanent rails over the road on a level, and by the direction of the commissioners of railways, erected gates across the road, for security of passengers, and, with the sanction of the same commissioners, opened the line for public traffic; whereupon the court ordered a sequestration to issue for breach of the injunction, and refused to suspend the issuing of process until an appeal against the order could be heard. *Att.-Gen.* v. *G. N. Ry.*, 15 Jur. 387.

Sequestration will issue against defendant for contempt, in not putting in examination to interrogatories before master. *Lupton* v. *Hescott*, 1 Sim. & S. 274.

Sequestration issued for contempt in not producing papers. *Trigg* v. *Trigg*, and *Detillin* v. *Gale*, *Ib.*, n. *Trigg* v. *Trigg*, Dick. 325.

Sequestration nisi granted for not returning papers according to order. *Hassenclever, In re*, 1 Bro. C. C. 434.

Whether a writ of sequestration can be properly issued to enforce a simple judgment for a debt, or to enforce an order upon a judgment debtor's summons, quære. *Nelson, Ex parte, Hoare, In re*, 49 L. J., Bk. 44; 14 Ch. D. 41; 42 L. T. 389; 28 W. R. 554.

—— **Payment of Costs.**]—On a motion the court gave leave in its discretion, under the Rules of Court of April, 1880, to issue a sequestration for the payment of costs. *Snow* v. *Bolton*, 50 L. J., Ch. 743; 17 Ch. D. 433; 44 L. T. 571; 29 W. R. 583.

Leave of Court.] — Under Judicature Act, Ord. XLII. rr. 2 and 20, and Ord. XLVII., a writ of sequestration against the estate and effects of a receiver or other person for disobedience of an order of the court may be issued without the leave of the court. *Sprunt* v. *Pugh*, 7 Ch. D. 567; 26 W. R. 473.

Scotch Acts.]—The Scotch Acts of Sequestration, many of which passed since the union, support the general principle, passing all the property of a bankrupt to the assignees. *Cridland, Ex parte*, 3 Ves. & B. 100; 13 R. R. 152.

Defendant in Ireland.]—The Court of Chancery in England may grant a sequestration against the defendant in Ireland, but it must be after a sequestration taken out here, and nulla bona returned. *Fryer* v. *Bernard*, 2 P. W. 261; Sel. Ch. Ca. 5.

2. THE WRIT.

Issue of.]—Judgment having been obtained against a beneficed clergyman in the county of Brecon, a writ of sequestration was issued against him on the 17th August, at which time no fi. fa. had been issued. On the 9th October a fi. fa. against him was returned, by the sheriff of

Bristol, nulla bona, but not that he was a beneficed clerk. The rule to set aside the writ was moved for on the 22nd November :—Held, that the writ was irregular, and that the application to set it aside was made in sufficient time. *Bromage* v. *Vaughan*, 7 Ex. 223 ; 21 L. J., Ex. 111.

Effect of Death of Bishop.]—On the death of a bishop, to whom a writ of sequestration has been directed, no fresh writ of sequestration need issue. *Phelps* v. *St. John*, 3 C. L. R. 478 ; 10 Ex. 895 ; 24 L. J., Ex. 171.

Attachment.]—Attachment against defendant for non-payment of money, and sequestration against the defendant's property for the same cause : both may be kept up, this court allowing the double execution, subject however to its discretion. *Crone* v. *O'Dell*, 2 Moll. 344.

Where a defendant is out of the jurisdiction, and has been served by substitution, a sequestration will be issued without a writ of attachment. *East of England Bank, In re*, 10 Jur. (N.S.) 1093 ; 11 L. T. 410 ; 13 W. R. 128.

A writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person. *Sykes* v. *Dyson*, L. R. 9 Eq. 228.

Form of Writ.]—On the application of a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that a writ of sequestration should issue against the estate and effects of the wife :—Held, first, that as the wife knew of the order for delivery up of the children, and evaded service of it, personal service of the order upon her was not necessary to give the court jurisdiction to issue the writ of sequestration ; secondly, that the general form of the writ of sequestration against "the estate and effects" of the wife, without any express limitation therein to separate property of the wife not subject to a restraint on anticipation, was right, but that the writ would only operate on her separate property which was not so subject. *Hyde* v. *Hyde*, 57 L. J., P. 89 ; 13 P. D. 166 ; 59 L. T. 529 ; 36 W. R. 708—C. A.

Indorsement on Writ.]—The court refused to permit a sequestrator to indorse interest upon his writ of sequestrari facias, which issued before the Judgments Act, 1838, 1 & 2 Vict. c. 110, which by s. 17 gives creditors interest upon their judgment debts, as by so doing subsequent sequestrators would be prejudiced by having satisfaction of their judgments postponed. *Watkins* v. *Turpley*, 2 B. C. Rep. 158 ; 5 D. & L. 226 ; 17 L. J., Q. B. 47 ; 11 Jur. 1017.

Disobedient Corporation.] — Where a clear breach of an injunction has been committed by a corporate body, the court will direct the issue of a sequestration, although it is stated and deposed to that the real and personal property of the corporate body is vested in and held by that body under the provisions of acts of parliament, and were necessary for carrying out their duties under such acts. *Spokes* v. *Banbury Local Board*, 35 L. J., Ch 105. Affirmed, 11 Jur. (N.S.) 1010 ; 13 L. T. 453 ; 14 W. R. 169—L.JJ.

The court had granted an injunction restraining the defendants from polluting with sewage a pool belonging to the plaintiff, but suspended the order for three months to allow them to comply with it. They had moved the court for a further extension of time, but had been refused. As they had taken no steps to obey the order, the plaintiff soon after the expiration of the three months served them with notice of motion under Ord. XLII. r. 31, for leave to issue sequestration against the property of the corporation. Before, however, this notice was served they remedied the nuisance, so the motion now came on merely as a question of costs. The defendants submitted the following technical objections under the Rules of the Supreme Court, 1883 : (1) No memorandum had been indorsed upon the copy of the judgment served on them, as required by Ord. XLI. r. 5. (2) No copies of the affidavits intended to be used had been served with the notice of motion, as required by Ord. LII. r. 4. (3) There was no case for sequestration at all, but if there were the plaintiff was entitled to, and ought to have issued his writ under Ord. XLIII. r. 6, without moving for leave. (4) Application for leave, if necessary, ought to have been by summons in chambers, in accordance with *Snow* v. *Bolton* (17 Ch. D. 434) :—Held, that the defendants had been guilty of wilful disobedience to the order of the court ; and (1) that Ord. XLI. r. 5, had no application to a prohibitive order like the present one ; (2) that copies of affidavits need only be served with the notice of motion in cases where the liberty of the subject was involved, as in attachment ; (3) that Ord. XLIII. r. 6, applied to something to be done in a limited time, and not to something which had been ordered (as in the present case) not to be done at all ; and (4) that, under the circumstances of the case, the plaintiff was right to move the court in the first instance instead of proceeding by summons in chambers. *Selous* v. *Croydon Rural Sanitary Authority*, 53 L. T. 209.

Personal Service of Order.] — A husband obtained a decree for restitution of conjugal rights, which was not complied with, and the court afterwards made an order giving the petitioner the custody of the only child of the marriage. A copy of the order for custody was left at the house where the respondent was residing, but the respondent had not given up the child to the petitioner. The court, being satisfied that the order as to the custody of the child had come to the knowledge of the respondent, ordered a writ of sequestration to issue against her for non-compliance with the order, without a previous writ of attachment, and ordered the respondent to pay the costs of the motion. *Allen* v. *Allen*, 54 L. J., P. 77 ; 10 P. D. 187 ; 33 W. R. 826.

Operation, from what Time.]—A sequestration binds from the time of awarding the commission, and not from the time of executing it only. *Burdett* v. *Rockley*, 1 Vern. 58.

Lands when bound from the institution of the suits ; when not bound till sequestration. *Crofts* v. *Oldfield*, 3 Swan. 278.

If sequestration is executed, a judgment credi-

tor, though prior, can only claim to be examined pro interesse suo; if not executed he may take execution. *Angel* v. *Smith*, 9 Ves. 336; 7 R. R. 214.

—— **Order for Payment of Money within limited Time — Want of Jurisdiction.**]— The plaintiffs, having recovered judgment against the defendant, a married woman, obtained from a master at chambers an order directing her to pay the amount recovered within ten days from the service of the order, and, in default of such payment, giving the plaintiffs leave to issue a writ of sequestration against her separate property:— Held, that the master had no jurisdiction to make such an order. *Hulbert and Crowe* v. *Cathcart*, 63 L. J., Q. B. 121; [1894] 1 Q. B. 224; 70 L. T. 558.

Taxed Costs—Solicitor—Four-day Order.]— The effect of Ord. XLIII. r. 7, is to alter the old chancery common practice under which payment of costs, where no time was fixed, was enforced by subpœna, upon proof of service of which and of non-payment a writ of sequestration might issue as of course, and to substitute for the subpœna the leave of the court or a judge to issue a writ of sequestration, no four-day order being necessary. *Lumley, In re, Cathcart, Ex parte*, 63 L. J., Ch. 435; [1894] 2 Ch. 271; 7 R. 179; 70 L. T. 780; 42 W. R. 401—C. A.

Satisfaction of—Entered on Record.]—A judgment on a warrant of attorney was for 1,800*l.*; the defeasance provided, that on the death of the defendant, and full payment of the arrears of the annuity, satisfaction should be entered on the record. A second judgment having been signed by a different creditor, who sued out a sequestrari facias thereupon, it appeared that, at that time, the former creditor had, by sequestrations, levied more than 1,800*l.* for arrears of his annuity, and there were arrears still due. The court ordered that satisfaction should be entered on the roll of the former judgment, as of the date when judgment was signed by the second creditor; and that the sums levied since should be paid over to him. But they refused to order payment to this creditor of the surplus over 1,800*l.*, levied before the signing of his judgment. *Cottle* v. *Warrington*, 2 N. & M. 227; 5 B. & Ad. 447.

3. What Persons and Property Liable, and what not.

a. What Persons.

Sequestration ordered against the heir for a personal duty, decreed against the father. *Witham* v. *Bland*, 3 Swan. 267.

Effect of sequestration against the heir. *Coulston* v. *Gardiner*, 3 Swan. 283.

A decree and sequestration for a personal duty against one who dies; this shall not be revived against his heir or real estate, though it were for money payable on the behalf of a charity. *University College* v. *Foxcroft*, 2 Ch. Rep. 244; 1 Vern. 166.

After a decree upon sequestration, the heir of the party is bound. But if only process of sequestration issues against the party, and he dies before the decree, the heir is not bound. *Maxwell* v. *Kelsy*, 2 Moll. 320.

A sequestration may issue against an infant. *Anon.*, 2 Ch. Ca. 163.

The court will issue a sequestration against a board of health for disobeying an order of court, if it has any property on which the sequestration can operate. *Spokes* v. *Banbury Local Board*, 35 L. J., Ch. 105. Affirmed, 11 Jur. (N.S.) 1010; 13 L. T. 453; 14 W. R. 169.

It is immaterial that the order is made for the protection of an individual, and has been disobeyed in the interest of a large body of persons. *Ib.*

On appeal, the superior court will not suspend the execution of the writ; any application for such purpose must be made to the court below. *Ib.*

The course against an M.P. for non-payment of money is, first, to move for a sequestration nisi upon notice. *Crawley* v. *Clarke*, 3 Bro. C. C. 373. S. P., *Rashleigh* v. *Buller*, Dick. 152.

Sequestration against an infant lord for not appearing. *Anon.*, 2 Ch. Ca. 163.

Where order nisi for sequestration is obtained against privileged person, he is not in contempt, unless he neglects to obey the order nisi. *Smallbrooke* v. *Donegal (Lord)*, 3 Anstr. 647.

The court has no jurisdiction to order, upon motion, a person not a party to the cause to pay into court the arrears of an annuity granted by him to a defendant, against whom a sequestration had issued for want of a sufficient answer, unless the grantor has by his conduct waived the objection to the jurisdiction; but he may notwithstanding, and without applying for the leave of court, obtain from the grantee a release of the annuity. *Johnson* v. *Chippindale*, 2 Sim. 55; 29 R. R. 58.

A sequestration having issued for non-payment of money into court, an individual in possession of a sum claimed by the party against whom the sequestration issued, and by a stranger, was ordered to pay that sum into court. *Francklyn* v. *Colhoun*, *Francklyn* v. *Thornhill*, *Rucker* v. *Pinney*, 3 Swan. 276; 19 R. R. 204.

b. What Property Liable, and what not.

Copyhold.] — Whether copyhold lands are subject to sequestration, quære. *Carmarthen (Marquis)* v. *Hawson*, 3 Swan. 294.

A sequestration on a decree runs against copyhold lands, though it cannot be revived against the customary heir. *Whitehead* v. *Harrison*, 1 Barnard. 431.

Freehold.]—A sequestration covers the personal estate, and the court will direct a sale for a duty; it also covers the rents and profits of the real estate, but not the land. *Hyde* v. *Greenhill*, Dick. 107. And see *Athol* v. *Derby (Earl)*, 1 Ch. Ca. 222.

Tithe.]—Sequestrators appointed by the Court of Chancery have no right to seize the tithes of an ecclesiastical benefice. *Ward* v. *Hayes*, 1 Hog. 107.

Rent Charge.]—Order made for payment to sequestrators, by a party out of whose estate the same was issuing, of a rent-charge payable to the person whose estate was sequestered. *Wilson* v. *Metcalfe*, 1 Beav. 260, 270; 8 L. J., Ch. 331; 3 Jur. 601.

A defendant, against whom a sequestration had issued, was entitled to a rent-charge issuing out of the estate of A. B., with power of distress; the rent-charge being in arrear was claimed both by

the sequestrators and the defendant; A. B. offered to pay the arrears to the sequestrators on being indemnified; but no protection having been afforded her, she paid over the arrears to the defendant, who threatened to distrain:—Held, that A. B. was entitled to protection, and that an application ought to have been made to the court for an order for her to pay; and that, under the circumstances, she was not liable to repay the amount to the sequestrators. *Ib.*

Chose in Action.]—Choses in action are subject to the process of sequestration. In a clear and simple case, a sequestration may be made effective in respect to choses in action by an order only, or a voluntary payment may be protected; in other cases, it may be necessary to resort to an action or suit under the direction of the court. *Ib.*

Dividends.]—Dividends of bank stock, being choses in action, cannot be sequestered. *M'Carthy* v. *Goold*, 1 Ball & B. 387.

Pension.]—Judgment having been obtained against a county court judge for a large sum, a judge's order, under the Debtors Act, 1869, s. 5, was made for payment of the judgment debt by quarterly instalments of 50*l.* each on days named. Default being made in the payment of these instalments, and there being no other means of enforcing obedience to the order, writs of sequestration were issued under Ord. XLVII. The debtor having resigned his office, a pension of 1,000*l.* per annum was granted to him under the repealed County Courts Act, 1852, 15 & 16 Vict. c. 54, s. 15, out of the consolidated fund:—Held, that this pension, being a reward for past services only, was liable to seizure under the writs of sequestration; and the court, at the instance of the judgment creditor, made an order to restrain the debtor from receiving the quarterly payments, and empowering the sequestrators to receive the same, to the extent of the moneys due and payable under the judge's order. *Willcock* v. *Terrell*, 3 Ex. D. 323; 39 L. T. 84—C. A.

In order to enforce the payment of alimony and costs, the court will authorise sequestrators to receive portions of a civil service pension. *Sansom* v. *Sansom*, 48 L. J., P. 25; 4 P. D. 69; 39 L. T. 642; 27 W. R. 692.

The pension of an officer in the Indian army is not liable to sequestration for payment of costs and permanent alimony. *Birch* v. *Birch*, 52 L. J., P. 88; 8 P. D. 163; 32 W. R. 96.

Sequestrators directed to receive a pension to A. and his assigns, payable at the treasury in the hands of the assignee. *Ib.* See *Davis* v. *Marlborough* (*Duke*), 1 Swan. 74; 2 Wils. 120.

A salary to an equerry to one of the royal family is not a subject of sequestration. *Fenton* v. *Lowther*, 1 Cox, 315.

Future Profits.]—A writ of sequestration attaches the future profits only, and does not affect the arrears which have accrued before the writ issued. *Egan* v. *Heenan*, Fl. & K. 39; 3 Ir. Eq. R. 50.

Settled Land.]—The decree declared that the estate therein mentioned was divisible into three parts, and that the younger children of A., B. and O. were severally entitled to a third. O. was largely indebted to the estate, and a sequestration issued and continued against him until his death; by means of which certain sums were brought in from time to time, and allocated according to the rights of the parties. Two of O.'s younger children died before any of the funds were allocated, and the master's report found that certain sums (being their shares of the fund then in the bank) were payable to their personal representatives. O. became entitled as executor and sole legatee of one of his deceased children, and as administrator and sole next of kin of the other, to both their shares, but made no claim, there being a sequestration against him. He died, owing a large balance to the fund, and the proportion of that balance to which his younger children should have been entitled exceeded the amount of the aforesaid shares. T., another of O.'s younger children, having become legal personal representative of his deceased father and brothers now applied for the aforesaid shares, after payment of the costs due to their solicitor:—Held, that when O. became entitled to this money it was attached for the purposes of the decree by the sequestration against him, and should not now be paid out to his representative. *Crone* v. *O'Dell*, 3 Ir. Eq. R. 12.

Rent.]—Arrear of rent claimed by sequestrators, and a promissory note, which had been given for the same arrear of rent put in suit by the defendant. Order obtained upon motion by the tenant in the cause without form, and to lodge in court expense of bill of interpleader. *S. C.*, 2 Moll. 348.

Married Woman's Separate Estate.]—Sequestration may be awarded against the separate estate of a married woman for costs given against her. *Keogh* v. *Catheart*, 11 Ir. Eq. R. 280.

Dividend already accrued on a fund in court to which a married woman was entitled for life for her separate use, without power of anticipation, ordered to be paid to the sequestrators of her property on their petition. *Claydon* v. *Finch*, 42 L. J., Ch. 416; L. R. 15 Eq. 266; 28 L. T. 101.

In a suit for restitution of conjugal rights against a wife, there being no defence, the usual order was made that she should return to her husband's house within a certain number of days, and certify to the court that she had done so, and, on the court being satisfied that she had a considerable separate estate, it further ordered that she pay the costs of the proceedings. She was abroad and did not obey the order to return to her husband at all, or to pay the costs until after a long delay. The court ordered a writ of sequestration to issue against her estate in the first instance, without attachment. *Miller* v. *Miller*, 39 L. J., Mat. 38; L. R. 2 P. 54; 22 L. T. 418; 18 W. R. 585.

—— **Without Anticipation defeats Sequestration.**]—By marriage settlement in 1856, property was settled to the separate use of the wife for life, without power of anticipation, with remainders over. In 1866, the wife left her husband, and he instituted a suit against her in the Divorce Court for restitution of conjugal rights. Judgment was given against the wife with costs. The wife withdrew from the jurisdiction, and declined to obey the judgment. In 1870, the husband procured from the Divorce Court a writ of sequestration against the separate property of the wife for the costs of the suit. In October, 1869, dividends and interest on the settled property fell due, and were received by one of the

trustees, who retained them in his hands. In December, 1869, a hostile suit was instituted by the wife against the trustee to compel the payment of the dividends and interest, and for the removal of the trustee, but not asking for the general administration of the fund. The trustee admitted that he had in his hands the greater part of the entire fund. A few days after his answer the trustee filed a bill in the Rolls Court for the administration of the trusts of the settlement. On motion by the wife in the first of the two suits, that the trustee might be ordered to pay into court the entire sum admitted by him to be in his hands:—Held, that, regard being had principally to the restraint on anticipation contained in the settlement, the money ought to be paid into court, notwithstanding the writ of sequestration, and notwithstanding that the wife's bill had not prayed the general administration of the trust fund. *Miller* v. *Miller*, 18 W. R. 750.

Property of Personal Representative.]—A writ of sequestration issued against the property of a personal representative, who was in default for non-compliance with an order for payment of money, without attachment of his person. *Sykes* v. *Dyson*, 39 L. J., Ch. 288; L. R. 9 Eq. 228; 21 L. T. 696.

An order was made on summons in an administration action directing payment to sequestrators, appointed by the Probate and Divorce Division, of income of a beneficiary under the trust being administered. *Slade, In re, Slade* v. *Hulme*. 50 L. J., Ch. 729; 18 Ch. D., 653; 45 L. T. 276; 30 W. R. 28.

Property of Third Person.]—Where the goods of a third person are seized by sequestrators, an order to examine pro interesse suo will be made; and if the goods taken are found to belong to the party so applying, a reference to ascertain his damages will be granted. *Copeland* v. *Mape*, 2 Ball & B. 387.

A sum of money in the hands of the banker of a party against whom a sequestration had issued, sequestered. Proceeding for ascertaining the interest of a third person. *Pelham* (*Lord*) v. *Newcastle* (*Duke*), 3 Swan. 290.

Where a sequestrator obtains possession of property, as belonging to the party against whom the process issued, and such property is claimed by a third person, the mode of trying the right is in the discretion of the court.

Moneys in Bankers' Hands—Payment into Court.]—Where bankers had in their hands money belonging to a person against whom sequestration had issued, it was ordered (the bankers admitting the sum in their hands) that it should be paid into court, and the costs of the plaintiff and the bankers, and the remuneration of the sequestrators paid out of it. *Miller* v. *Huddlestone*, 52 L. J., Ch. 208; 22 Ch. D. 231; 47 L. T. 570; 31 W. R. 138.

An executor had deposited at his bankers' money, being part of the estate, and an order had been made that the executor should pay the money into court, and sequestration had issued against him:—Held, that an adverse order to pay the money in could not be made against the bankers, not being parties to the suit, but on their submission to the jurisdiction a directory order was made. *Manton* v. *Manton*, 40 L. J., Ch. 93.

Deposit on Appeal.]—When a deposit on an appeal had been ordered to be returned to the appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the appellant. *Conn* v. *Garland*, L. R. 9 Ch. 101; 22 W. R. 175.

c. Priorities.

A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a subsequent creditor, having obtained a second sequestration, is entitled to an account in equity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor: nor are prior incumbrancers who have not obtained sequestration, necessary parties to the suit. *Cuddington* v. *Withy*, 2 Swan. 174; 19 R. R. 52. *And see* ECCLESIASTICAL LAW.

Sequestration not defeated by a voluntary conveyance, pendente lite. *Witham* v. *Bland*, 3 Swan. 276.

Sequestration defeated by revocation and new limitation of uses. *Ib.* 277.

A sequestration prevails against a prior conveyance designed to defeat it, not against prior conveyances for valuable consideration, or bonâ fide. *Coulston* v. *Gardiner*, 3 Swan. 279.

Proceedings under a sequestration for non-performance of a decree, after an assignment by the defendant for valuable consideration. *Bird* v. *Littlehales*, 3 Swan. 299.

A conveyance established against a sequestration, and the sequestrators who had obtained possession, ordered to account to the alienee for rents and profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed from the subsequent rents, the balance of payments for interest, taxes, and repairs. *Hamblyn* or *Amblyn* v. *Ley*, 3 Swan. 301.

Lease of lands in Ireland, made after the lessor's estate has been put under sequestration for contempt of Court of Exchequer in that kingdom was held good, the lessee having no notice of such sequestration. *Vicars* v. *Colclough*, 5 Bro. P. C. 31.

After a decree for a personal duty, a sequestration issues, and then the defendant marries and dies. If the sequestration shall take place of the wife's dower, quære. *Burdett* v. *Rockley*, 1 Vern. 118.

Under sequestration, landlord is entitled to be paid arrears of rent without reference to master. *Dixon* v. *Smith*, 1 Swan. 457.

Sequestrators took possession of certain mortgaged premises; mortgagees, on petition, obtained order to have rents and profits of premises in hands of sequestrators applied towards payment of mortgage money, and possession of premises delivered up to them. *Walker* v. *Bell*, 2 Madd. 21; 17 R. R. 174.

A sequestration having issued against the defendant for non-performance of a decree for payment of money to the plaintiff, the sequestrators seized the rents and profits of his lands. The plaintiff and a prior incumbrancer both applied for the funds in the sequestrator's hands:—Held, that the prior incumbrancer was entitled to them. *Burne* v. *Robinson*, 7 Ir. Eq. R. 188.

Rents in the hands of sequestrators, ordered to be paid to mortgagees, who had been prevented

by the sequestration from taking possession, and whose title was found under examination pro interesse suo. *Tatham* v. *Parker*, 1 Sm. & G. 506; 22 L. J., Ch. 903; 17 Jur. 929.

The title of a person claiming under a writ of sequestration issued by the Court of Chancery prevails over that of a mortgagee under a mortgage for value made in order to avoid the effect of the writ, and with full knowledge on the part of the mortgagee of all the circumstances. *Ward* v. *Booth*, 41 L. J., Ch. 729; L. R. 14 Eq. 195; 27 L. T. 364; 20 W. R. 880.

In a suit of *W.* v. *C.*, a writ of sequestration issued against C. was irregularly discharged without the knowledge of W., and at the instance of M., acting on behalf of C. W. afterwards filed a bill to enforce a later writ against property to which C. had become entitled subsequently to the discharge of the writ, and which was claimed by M. under a mortgage by C. After filing the bill, W., for the first time, became aware of the existence of the order discharging the writ, and procured such order to be itself discharged, and amended his bill, relying on the first writ:—Held, that he had sufficient title at the time of filing the bill to enable him to maintain the suit. *Ib.*

4. Powers and Liabilities of Sequestrator.

Generally.]—Proceedings against a sequestrator for abuse of his power. *Pelham* (*Lord*) v. *Harley* (*Lord*), 3 Swan. 291.

Sequestrators forcibly dispossessed, restored by injunction. *Pelham* (*Lord*) v. *Newcastle* (*Duke*), 3 Swan. 289.

Power of sequestrators to open boxes, &c. *Ib.*

It is contempt to disturb sequestrators in possession. *Angel* v. *Smith*, 9 Ves. 336; 7 R. R. 214.

The possession of a receiver or sequestrator is not to be disturbed without leave of the court. *Brooks* v. *Greathed*, 1 Jac. & Walk. 178.

It appears that the commissioners have authority to break open doors in discharge of their office, by comparison with the proceeding under a commission of rebellion. *Lowten* v. *Colchester Corporation*, 2 Mer. 395; 16 R. R. 187.

Reference granted to inquire whether it will be for the benefit of all parties that sequestrators make defence in the name of the proper person to an ejectment brought against the lands under sequestration. *Crone* v. *O'Dell*, 2 Moll. 389.

Sequestrators, in case of contempt for want of answer, cannot remove defendant's goods. *Desbrow* v. *Crommie*, Bunb. 272.

Sequestrators having, by virtue of an order power to sell timber, they sell timber to the value of 7,000*l.*, and pay over but 2,000*l.* to the plaintiff, for whose benefit the sequestration was taken out. Plaintiff not chargeable with more than the 2,000*l.* *Dacres* v. *Chute*, 1 Vern. 160.

A conveyance established against a sequestration, and the sequestrators who had obtained possession ordered to account to the alienee for rents and profits. Another conveyance rescinded, but the alienee declared entitled to be reimbursed, out of the subsequent rents, the balance of payments for interest, taxes, and repairs. *Hamblyn* or *Amblyn* v. *Ley*, 3 Swan. 301.

Attornment to Sequestrator.]—A sequestration to compel answer may be executed, but no order will be made for the tenants to attorn till the commission is returned. *Rowley* v. *Ridley*, 3 Swan. 306; Dick. 622; 19 R. R. 206.

Tenants ordered to attorn to sequestrators under sequestration for duty. *Wood* v. *Adams*, Dick. 576.

Leases.]—Under a sequestration for non-payment of money, the sequestrators may, on a motion with notice (not on a motion of course), be empowered to let real estate. *Neale* v. *Bealing*, 3 Swan. 304.

Notice is necessary of a motion for sequestrators to set and let. *Neal* v. ——, Ridgw. 193.

Land and house in possession of sequestrators belonging to defendant, in contempt for non-payment of money into court, ordered to be let. *Dunkley* v. *Scribnor*, 2 Madd. 443; 17 R. R. 237.

Sale.]—Notice should be given to the defendant of an application that sequestrators do sell the goods under the writ. *Ridgway* v. *Davis*, 2 Jones, 507.

Bill for an account taken pro confesso against surviving executor and devisee in trust, and leasehold estates taken under a sequestration for want of answer, the court would not order the sequestrators to sell, but directed them to apply the profits. *Shaw* v. *Wright*, 3 Ves. 22.

The court will sell perishable commodities, rents paid in kind, or the natural produce of a farm under a sequestration. *Ib.* 23.

Court will not order perishable goods, taken under a sequestration for want of an answer, to be sold before decree. *Wilcocks* v. *Wilcocks*, 2 Ambl. 421.

Estate ordered to be sold for debts; money raised under sequestration, paid into court, though contempt cleared. —— v. *Bennett*, 1 Ves. J. 89.

Sequestrator ordered to sell the goods where the party is in contempt for non-payment of money. *Caril* v. *Smith*, 3 Bro. C. C. 362.

An order to sell goods under a sequestration for not obeying the order of the court was made on motion ex parte, the party having gone out of the jurisdiction. *Rush, In re*, L. R. 10 Eq. 442; 22 L. T. 116; 18 W. R. 417.

Motion to sell furniture under sequestration for not performing decree, must be on notice. *Mitchell* v. *Draper*, 9 Ves. 208.

A sequestration having issued against a defendant who was entitled to a reversionary interest in stock standing in the name of the accountant-general in another cause, the court gave the sequestrators liberty to sell that interest. *Cowper* v. *Taylor*, 16 Sim. 314.

Fees.]—The court will not order a sequestrator his fees who has made no return of goods sequestered, and many years before application delivered them over without making a demand; but if the plaintiff seeks an account of goods sequestered, the sequestrator may set off his fees at any time, if he has from time to time made returns of what he has seized under the sequestration. *Hawkins* v. *Crook*, 3 Atk. 594.

Where costs are payable to the sequestrators, the application to the court must be in their names, not that of the solicitor, though the money be actually due to the solicitor. *Crone* v. *O'Dell*, 2 Moll. 355.

Costs.]—When a deposit on an appeal had been ordered to be returned to the appellant,

and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the appellant. *Conn* v. *Garland*, L. R. 9 Ch. 101; 22 W. R. 175.

Costs of a sequestration as between solicitor and client will not be taxed. *Hunt, Ex parte, Shapland, In re*, 23 W. R. 40.

Discharge.]—Sequestration for non-production of deeds, discharged on payment of costs, the party having been examined, and denied knowledge of them. *Pelham* (*Lord*) v. *Newcastle* (*Duke*), 3 Swan. 293.

A sequestration must be returned before a motion can be made to discharge it. *Anon.*, Bunb. 31.

Appointment of a receiver in the place of the sequestrators, discharges the sequestration, *Shaw* v. *Wright*, 3 Ves. 23.

A. was ordered to pay a sum of money into court, and the order was duly registered. He was committed for not obeying the order, and a writ of sequestration issued against his estate, A. afterwards obtained his discharge under the Insolvent Debtors Act. Upon a petition presented by A.'s assignees to discharge the sequestration:—Held, that A.'s discharge under the Insolvent Debtors Act did not discharge the sequestration, which was not an order of contempt, but the consequence of such an order, and was a proceeding in rem after the process of contempt in personam had been exhausted. *Tatham* v. *Parker*, 1 Sm. & G. 506; 1 Eq. R. 257; 22 L. J., Ch. 903; 17 Jur. 929; 1 W. R. 491.

An order was made in a suit in the court of Kindersley, Vice-Chancellor, declaring K., a party to the suit, entitled to money. An order was made in a suit at the Rolls, directing a party to that suit to pay money. Sequestrators were appointed in the suit at the Rolls against K.'s estate. The plaintiffs in the suit at the Rolls were also the defendants in the suit before the Vice-Chancellor; they and the sequestrators presented a petition in the suit before the Vice-Chancellor, praying payment to them of K.'s money in that suit, or the transfer of it to the credit of the other cause:—Held, that the petition must be amended, by being entitled in both suits, and must then be presented to the lords justices, but that K. must, in the meantime, be enjoined from receiving the money which had been ordered to be paid to her. *Knight* v. *Knight*, 25 L. J., Ch. 848; 4 W. R. 771.

Where an injunction has been issued, and an order of sequestration made to enforce it, the Court of Appeal will not suspend the order, but will leave the parties to make any application for the purpose to the court below. *Spokes* v. *Banbury Local Board*, 11 Jur. (N.S.) 1010; 13 L. T. 453; 14 W. R. 169. Affirming, 35 L. J., Ch. 105.

A solicitor who had been conducting a suit, but who was not then acting for the plaintiff, accepted a sum of money on his behalf, and allowed an order of sequestration previously granted against the defendant to be discharged. On the application of the plaintiff, the order of discharge thus obtained was set aside. *Ward* v. *Cornwall*, 19 W. R. 1075.

5. Sequestration of Ecclesiastical Benefice.

See Ecclesiastical Law.

6. Other Matters.

Sequestration of Benefice — Suspension of Clergyman subsequent to Issue of Writ.]—A sequestration issued on a judgment against a beneficed cleryman, it was published, and the sequestrator entered into receipt of the profits. Subsequently the clergyman was suspended from the exercise of his office, and from receiving the fruits of his benefice for eighteen months. The bishop issued a sequestration on this sentence to a different sequestrator, which was published, the judgment debt for which the first sequestration had issued being unsatisfied. On a rule calling upon the bishop to shew cause why he should not pay the party at whose suit the first sequestration issued the profits of the benefice received:—Held, that the suspension for the time of its endurance operated in respect of perception of the profits, as a motion would have done, not only against the clerk, but against his creditors, and the rule was discharged as to the profits received after the second sequestration was published. *Fisher* v. *Cresswell* or *Bunter*, 14 Q. B. 825; 19 L. J., Q. B. 357; 14 Jur. 692. *And see* Ecclesiastical Law.

Second Writ.]—No new sequestration to be granted till first returned. *Yarroth* v. *Seys*, Bunb. 62.

Waiver of Irregularity.]—The irregularity of a sequestration is waived, if the party against whom it is issued gives the sequestrators directions how to deal with his property. *Const* v. *Barr*, 2 Russ. 161.

Costs.]—When a deposit on an appeal had been ordered to be returned to the appellant, and before it was paid to him sequestration was issued against him for non-payment of costs previously due, the deposit was ordered to be paid to the sequestrators instead of the appellant. *Conn* v. *Garland*, L. R. 9 Ch. 101; 22 W. R. 175.

Costs of a sequestration as between solicitor and client will not be taxed. *Shapland, In re, Hunt, Ex parte*, 23 W. R. 40.

Restraining in Winding-up.]—The arrest of a ship in a cause of wages, after the company to which the ship belonged was ordered to be wound up, is a sequestration within the meaning of the Companies Act, 1862. s. 163, and consequently void. *Australia Direct Steam Navigation Co., In re, Baker, Ex parte*, 44 L. J., Ch. 676; L. R. 20 Eq. 325.

Selling Goods under Sequestration.]—An order to sell goods under a sequestration for not obeying the order of the court was made on motion ex parte, the party having gone out of the jurisdiction. *Rush, In re*, 22 L. T. 116; 18 W. R. 417.

Enforcing.]—A writ of sequestration having been issued to enforce an order for the payment of costs, the sequestrator demanded possession of the property, which was in the hands of parties holding under the person whose estate had been sequestrated, and was refused possession. The court declined to enforce the sequestration by an attachment against those parties, but granted a writ of assistance to the sheriff for that purpose. *Bayley* v. *Bayley*, 4 Sw. & Tr. 222; 29 L. J., P. 72.

For Payment of Costs—Application.]—Where an application is made in an action which is transferred, for hearing only, to a judge who does not sit in chambers, it is properly made to such judge in court; otherwise in chambers. *Snow* v. *Bolton*, 50 L. J., Ch. 743; 17 Ch. D. 433; 44 L. T. 571; 29 W. R. 553.

Payment ordered to Sequestrators appointed by another Division.]—An order was made on summons in an administration action directing payment to sequestrators, appointed by the Probate and Divorce Division, of income of a beneficiary under the trust being administered. *Slade, In re, Slade* v. *Hulme*, 50 L. J., Ch. 729; 18 Ch. D. 653; 45 L. T. 276; 30 W. R. 28.

Sequestration in Colonial Court—Jurisdiction of Court of Bankruptcy.]—Before issuing a sequestration against real estate of a bankrupt situate in a colony, for the purpose of compelling his appearance in an action in the colonial court to realise a mortgage given by him of other real estate in the colony, the leave of the Court of Bankruptcy ought to be obtained. *Rogers, Ex parte, Bousted, In re*, 16 Ch. D. 665; 44 L. T. 357—C. A.

—— **Issued without Leave—Undertaking.**]—But where such a sequestration had been issued without leave, and an appearance had been entered in the colonial action:—Held, that it was sufficient that the plaintiffs in the action should undertake not to use the sequestration for any other purpose. *Ib.*

Costs, Taxation of.]—Costs of sequestration, on discharge, taxed as between party and party, and not as between solicitor and client. *Shapland, In re, Hunt, Ex parte*, 23 W. R. 40.

I. CHARGING STOCKS, FUNDS, AND SHARES.

1. Jurisdiction to Charge.

Charging Order—Worthless Shares—Discretion.]—A judge at chambers has a discretion as to whether he will make absolute an order nisi charging shares; and therefore when such an order is refused on the ground that the shares in question are worthless, the court will not review his decision. *Wicks* v. *Shanks*, 4 R. 117; 67 L. T. 609—C. A.

Writ of Execution not Issued.]—A charging order cannot be made unless there be an existing writ of execution issued and leviable. When therefore a writ of fi. fa. had been issued, the debt partly levied, and the writ returned, the court declined to grant an order, charging the defendant's interest in money, in court, until the plaintiff issued a new writ of fi. fa. *Donohoe* v. *Mullarkey*, 18 L. R., Ir. 425.

Writ to Enforce—Service out of Jurisdiction.]—This was a motion for leave to issue for service out of the jurisdiction a writ in an action seeking to enforce a charging order obtained by the plaintiff, a judgment creditor, upon certain shares belonging to the defendant, the judgment debtor. The Judgment Act, 1838 (1 & 2 Vict. c. 110), s. 14, which by virtue of Ord. XLVI. r. 1, regulates the effect of a charging order, provides that "such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor." Ord. XL. r. 1, provides that service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the court or a judge whenever (e) "the action is founded on any breach, or alleged breach, within the jurisdiction, of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction":—Held, that, assuming that the case could be treated as one of contract at all, it would only be a contract that the shares should be charged, and of such a contract there had not been any breach within the jurisdiction. *Moritz* v. *Stephan*, 58 L. T. 850; 36 W. R. 779.

To what Judge application to be Made.]—An application for a charging order under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, upon a fund in court need not be made to the judge in whose court the suit or matter is, in which the fund is standing. Nor is it material that the order is entitled as in a revived cause, although made before the order of revivor on the defendant. *Hastings* (*Marquis*) v. *Beavan*, 4 De G. F. & J. 316; 31 L. J., Ch. 546; 5 L. T. 734; 10 W. R. 206.

Charging Order on Property preserved in favour of Solicitor—To what Judge Application made if Action Tried in District Registry.]—Upon a petition by a solicitor for a charging order under s. 28 of the Solicitors Act, 1860, on property preserved in an action marked "Chancery Division, Liverpool District Registry, Hall, V.-C.," which had been tried by a judge and jury at Liverpool:—Held, that the judge who had dealt with the substantial part of the case was the only judge who could deal with the application. *Owen* v. *Henshaw*, 47 L. J., Ch. 267; 7 Ch. D. 385; 26 W. R. 188. *And see* Solicitor.

2. What are Companies within Judgment Act, 1838, 1 & 2 Vict. c. 110.

Banking.]—A banking co-partnership which made returns to the stamp-office pursuant to 7 Geo. 4, c. 46, is a public company not incorporated within the meaning of the above statute. *Macintyre* v. *Connell*, 1 Sim. (N.S.) 225; 20 L. J., Ch. 284; 15 Jur. 529. See *Graham* v. *Connell*, 1 L. M. & P. 438; 19 L. J., Ex. 361.

Mining.]—It is doubtful whether a mining company, conducted on the cost-book principle, is a public company within the statute, and whether the interest of a registered proprietor in certain shares in a company can be charged by a judge's order made under that section, if the shares have been sold previously to such order, but no notice of the sale has been given to the purser of the mine, and the shares are still remaining in the name of the judgment debtor. In such a case, therefore, the court confirmed a judge's order for charging the debtor's interest in such shares, as the court would not decide such matter on a summary application, from which there was no appeal. *Nicholls* v. *Rosewarne*, 6 C. B. (N.S.) 480; 28 L. J., C. P. 273; 5 Jur. (N.S.) 1266; 7 W. R. 612.

3. ORDER CHARGING STOCKS, &c.

When Granted.]—A decree declaring a plaintiff entitled to one-fifth of the proceeds of sale of chattels, and directing an account to be taken of what was due, and payment of such amount together with the costs of the action to him, does not entitle him to a charging order under the Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 18), or to a stop order against funds in court in another suit belonging to the same defendant. *Widgery* v. *Tepper*, 6 Ch. D. 364; 37 L. T. 297; 25 W. R. 872—C. A.

Upon judgment in an action declaring that the defendant is liable to pay to the plaintiff a certain sum, and decreeing payment to be made on or before that day three months, the plaintiff is at once entitled, under 1 & 2 Vict. c. 110, s. 14, to obtain a charging order upon stock and shares standing in the name of the defendant. *Bagnall* v. *Carlton*, 47 L. J., Ch. 51; 6 Ch. D. 130; 36 L. T. 730; 26 W. R. 71.

A charging order will not be made against government stock, standing in the name of a judgment debtor, upon a judgment de bonis testatoris obtained against the debtor as administratrix. *Hewat* v. *Davenport*, 21 W. R. 78.

A registered owner of shares in a company deposited the certificates with E. as a security for money advanced. He afterwards borrowed a further sum from an insurance office, and executed to C., one of his sureties on that occasion, with the consent of E., who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. The money not having been paid to the insurance office, they claimed it from E. and C., when C. requested the insurance office to transfer the shares into his name, which they refused to do, on the ground that they had been previously served with an order nisi to charge the shares:—Held, that the shares were properly charged as shares standing in the owner's name "in his own right." *Fuller* v. *Earle*, 7 Ex. 796; 21 L. J., Ex 314.

A charging order will be made absolute, notwithstanding proceedings against the trustees of the fund by creditors, and there is no other fund for payment of costs. *Smith* v. *Youde*, 2 F. & F. 376.

Part of Stock.]—Possibility of charging, under 1 & 2 Vict. c. 110, a part only of a sum of stock standing in the name of a debtor. *Stanley* v. *Bond*, 8 Beav. 50; 14 L. J., Ch. 51.

Pension.]—The East India Company granted to a person a pension, in consideration of his distressed state and the services of his father:—Held, that this could not be charged with a judgment debt by an order. *Morris* v. *Manesty*, 7 Q. B. 674; 14 L. J., Q. B. 285; 9 Jur. 1034.

The order directed that the pension should stand charged, unless cause was shewn at chambers in six calendar months. The court rescinded the order on motion by the East India Company and by an assignee of the pension within the six months. *Ib.*

Annuity.]—A judge having made an order, charging an annuity payable out of the Suitors' Fund, by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, the court considering it doubtful whether or not the order was valid, refused to set it aside, as, by so doing, they would deprive the party of the right of appeal *Witham* v. *Lynch*, 1 Ex. 391; 17 L. J., Ex. 13.

A judgment debtor was entitled as sole executor and legatee under the will of D., to the arrears of a government annuity granted for the life of D. He also was entitled, as such executor and legatee, to a government annuity in the name of D., but granted for his own life:—Held, that under 1 & 2 Vict. c. 110, s. 14, neither the arrears nor the annuity were chargeable. *Taylor* v. *Turnbull*, 4 H. & N. 495.

When Interest is Contingent or Uncertain.]—The contingent reversionary life interest of a judgment debtor in the surplus (if any) of stock standing in the name of trustees, and assigned by him to another set of trustees, on trust to sell it and pay his debts, to a named amount, with a resulting trust, as to the surplus after such payment (subject to the present life interest of another person therein) in favour of the debtor, is chargeable under the enactments, notwithstanding the doubtful nature of the interest and the uncertainty as to its extent. *Baker* v. *Tynte*, 2 El. & El. 897; 29 L. J., Q. B. 233; 6 Jur. (N.S.) 1192.

A debtor, being possessed of shares in a company, transferred them to B. as a security for a debt. Subsequently he assigned them (subject to B.'s debt) to trustees to repay a loan which had been made to him by his brother, and to apply the surplus for the benefit, at the trustees' discretion, of his wife, his children, or himself. There were other trusts for the benefit of his wife and children, and an ultimate trust, on his wife's decease, and in case no child attained the age of twenty-one, or being a daughter married before that age, to the debtor and his assigns:—Held, that he had an interest in the shares capable of being charged under the above statutes. *Cragg* v. *Taylor*, 36 L. J., Ex. 63; L. R. 2 Ex. 131; 15 L. T. 584.

Stock Vested in Trustees—Interest Determinable on Alienation—Chargeable Interest.]—An order was made under 1 & 2 Vict. c. 110, s. 14, and 3 & 4 Vict. c. 82, charging a judgment debtor's interest in the dividends on certain bank stock. It appeared that by the terms of a will certain property, including this stock, was bequeathed to trustees on trust as to one moiety thereof for the testatrix's niece, and as to the other moiety in trust to pay the income thereof to her nephew, the judgment debtor, for life, or until he should attempt to alien or charge the same. And upon his interest determining, there were limitations over in favour of his wife for life, and after her death in favour of his children, with an ultimate remainder in the event of the failure of the preceding trusts to the judgment debtor absolutely. At the time when the charging order was made, there was a dividend on the stock accrued due, but which the trustees had not yet received from the bank:—Held, that the fact that the stock stood in the name of the trustees in trust for another, besides the judgment debtor, did not prevent it being stock "standing in the name of any person in trust for him," within the words of 1 & 2 Vict. c. 110, s. 14. *South-Western Loan Co.* v. *Robertson*, 51 L. J., Q. B. 79; 8 Q. B. D. 17; 46 L. T. 427; 30 W. R. 102.

Held, also, that the accrued dividend and the ultimate remainder to the judgment debtor, after failure of the preceding trusts, constituted a

sufficient chargeable interest, whatever might have been the case with regard to the interest determinable on alienation, if that had stood alone; and that the order was therefore rightly made, the trustees being responsible upon its being made for the due application of the fund according to the legal effect of the order, whatever it might be. *Ib.*

Where Debtor has no Beneficial Interest.]—In an action under 1 & 2 Vict. c. 110, s. 15, against a company for permitting the transfer of shares after notice of a charging order nisi, and before the making of it absolute, it is a good answer to shew that the judgment debtor in whose name the shares stood had no beneficial interest in them. *Gill* v. *Continental Union Gas Co.*, 41 L. J., Ex. 176; L. R. 7 Ex. 332; 27 L. T. 428; 21 W. R. 111.

The Companies Act of 1862, s. 30, enacts that no notice of any trust shall be entered on the register of a company incorporated under the act; and therefore the court will not set aside an order made, charging shares in a limited company standing in the name of the judgment debtor, although he is owner of the shares as trustee only, and has no beneficial interest whatever therein. *Cragg* v. *Taylor*, 4 H. & C. 158; 35 L. J., Ex. 92; L. R. 1 Ex. 148; 12 Jur. (N.S.) 320; 13 L. T. 756; 14 W. R. 399.

Where bank stock, vested in trustees, is conveyed by will in terms which leave it doubtful whether any beneficial interest is conveyed to a party against whom final judgment has been obtained, a judge may make an order charging the stock conditionally. *Fowler* v. *Churchill*, 2 D. (N.S.) 562; 11 M. & W. 57; 12 L. J., Ex. 230; 7 Jur. 156.

Stock of a company standing in the name of a trustee is not affected by a charging order under 1 & 2 Vict. c. 110, s. 14, obtained by a judgment creditor of the trustee in respect of the trustee's own debt. *Blakely Ordnance Co., In re, Coates' Case*, 46 L. J., Ch. 367; 35 L. T. 617; 25 W. R. 111.

Limit on Beneficial Interest.]—A creditor who has obtained a charging order on shares is only entitled to the beneficial interest in the shares which the judgment debtor actually has at the time of the order. *Gray* v. *Stone*, 3 R. 692; 69 L. T. 282.

Residuary Estate—Produce of—Interest in.]—A testatrix gave her whole estate and effects, which included stock and shares, to trustees, on trust to pay debts and legacies, and as to the residue of her estate and effects, upon trust for the defendant and two other persons; and she directed her trustees to pay the legacies so soon after her decease as her means could be judiciously converted into cash, and in any case not later than twelve months after her decease. A charging order having been made upon the stock and shares, to the extent of the defendant's interest therein, in favour of a judgment creditor:—Held, that he having no interest in the stock and shares, but only an interest in their produce after performance of the prior trusts, they could not be charged with his judgment debt under 1 & 2 Vict. c. 110, s. 14, or under 3 & 4 Vict. c. 82, s. 1. *Dixon* v. *Wrench*, 38 L. J., Ex. 113; L. R. 4 Ex. 154; 20 L. T. 492; 17 W. R. 591.

Debtor's Shares "Standing in his Name, in his own Right" — Director's Qualification Shares.]—By 1 & 2 Vict. c. 110, s. 14, the shares of a debtor, against whom judgment has been recovered, "standing in his name, in his own right," may be charged with payment of the judgment debt. The articles of association of a company provided that the qualification of a director should be the "holding in his own right" 300 shares; and certain shareholders of the company, in order to qualify a person as managing director, and with the knowledge and assent of the directors, transferred the requisite number of shares into his name on the register of the company, the transferors themselves retaining the beneficial ownership of the shares. Judgment having been recovered against the transferee by the plaintiff:—Held, that the shares were not held by the judgment debtor "in his own right," so as to entitle the plaintiff to a charging order upon them under 1 & 2 Vict. c. 110, s. 14. *Pulbrook* v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) discussed. *Cooper* v. *Griffin*, 61 L. J., Q. B. 563; [1892] 1 Q. B. 740; 66 L. T. 660; 40 W. R. 420—C. A.

Shares standing in the name of a judgment debtor in the books of a company cannot be made the subject of a charging order if he is not the beneficial owner of them, but is merely registered as owner for the purpose of qualifying as a director of the company. *Pulbrook* v. *Richmond Consolidated Mining Co.* (9 Ch. D. 610) and *Cooper* v. *Griffin* ([1892] 1 Q. B. 740) followed. *Howard* v. *Sadler*, [1893] 1 Q. B. 1; 5 R. 45; 68 L. T. 120; 41 W. R. 126.

C. transferred 1,000*l.* stock of a company into the name of his son without any consideration, and merely to qualify him as a director of that company; to be transferred to C. on request; which was ultimately done. C. received the dividends on the stock. The son was a contributory to the B. company, to whom he owed 3,000*l.* The official liquidator of that company gave notice to the company of his intention to move for an injunction to restrain the son as owner of the stock, and that company from dealing with it. Thereupon the official liquidator of the B. company was informed of the true facts as to the ownership of the stock. The official liquidator of the B. company immediately afterwards obtained a charging order against the 1,000*l.* stock in the company:—Held, that that order must be discharged, not only on the ground of the notice, but also because the stock was not standing in the name of the son of C. "in his own right." *Blakely Ordnance Co., In re, Coates's Case*, 46 L. J., Ch. 367; 35 L. T. 617; 25 W. R. 111.

Married Woman—Property Settled to Separate Use without Power of Anticipation.]—A wife having property settled to her separate use, with restraint upon anticipation, concurred in a fraudulent mortgage of such property, concealing the restraint upon anticipation. The mortgagee obtained a judgment against her for the amount lent, and a charging order to charge her next accruing dividend:—Held, that such charging order must be discharged; for in no case and by no device could the restraint upon anticipation be evaded. *Stanley* v. *Stanley*, 47 L. J., Ch. 256; 7 Ch. D. 589; 37 L. T. 777; 26 W. R. 310.

The mortgagee, having discovered the fraud, obtained from the married woman a warrant of attorney; entered up judgment thereon, and afterwards obtained a charging order on a dividend due to her the very day it accrued due:—

Held, that this was a mere device to make her future income a security for the mortgage debt, and an attempt to do indirectly what could not be done directly; and that, therefore, the charging order must be discharged. *Ib.*

When a married woman was entitled, during the joint lives of herself and her husband, to the interest of certain stock, to her sole and separate use, without power of anticipation, and there were certain limitations over as to the principal, in favour of herself and her husband, the court, upon petition by a judgment creditor, made an order, under 3 & 4 Vict. c. 105, charging the judgment upon the stock, without prejudice to the wife's right of receiving the interest during her coverture. *Carter* v. *Mahon*, Fl. & K. 342; 4 Ir. Eq. R. 305.

Declaration of Charge—Debtor's Reversionary Interest in Personalty—Sale—Jurisdiction.]—The court has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary interest in personalty in favour of a judgment creditor who has obtained an order appointing himself receiver of such property. *Flegg* v. *Prentis*, 61 L. J., Ch. 705; [1892] 2 Ch. 428; 67 L. T. 107.

Estate in Remainder.]—A judgment creditor is not entitled to a charge on his debtor's estate in remainder, inasmuch as it cannot be actually or constructively delivered in execution. *Hood-Barrs* v. *Cutheart*, 64 L. J., Ch. 461; [1895] 2 Ch. 411; 13 R. 489; 72 L. T. 583; 43 W. R. 586.

For Costs.]—When a plaintiff's bill has been dismissed with costs, an order nisi charging railway shares belonging to the plaintiff with the amount of the defendant's costs, when taxed, will be made before taxation upon the application of the defendant. *Burns* v. *Irving*, 46 L. J., Ch. 423; 3 Ch. D. 291; 34 L. T. 752; 25 W. R. 66.

Courts of equity will carry into execution their orders and decrees for costs by charging the government stock of the debtor, under the provisions of the statute 1 & 2 Vict. c. 110; and for that purpose it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute. *Blake* v. *White*, 3 Y. & Coll. 434; 3 Jur. 749.

Parties interested in a fund standing in the name of the accountant-general in one suit were ordered to pay the defendants in another suit their costs. These being taxed, and a minute having been left with the senior master of the Common Pleas, the court on petition made a charging order on the fund for such costs, and granted an interim stop order. *Wells* v. *Gibbs*, 22 Beav. 204.

Under 1 & 2 Vict. c. 110, s. 18, an order for payment of costs operates only as against purchasers, mortgagees, and creditors obtained by a subsequent purchaser without notice. *Ib.*

Jurisdiction — Order Charging Cash — Stop Order.]—A charging order may be made by a judge of the Queen's Bench Division upon cash standing to the credit of the debtor in the Chancery Division in the name of the paymaster-general. Such an order may be made ex parte, and in order to give effect to it it is not necessary to obtain a stop order or to obtain the appointment of a receiver; but notice given to the paymaster-general will be sufficient to secure priority. *Brereton* v. *Edwards*, 21 Q. B. D. 488; 60 L. T. 5; 37 W. R. 47—C. A. Affirming on other grounds 52 J. P. 647.

Fund in Court.]—When a judgment has been recovered against a person interested in a fund in the Chancery Division, a stop order will be granted to the judgment creditor on such fund, without a preliminary charging order having been obtained in the division of the High Court in which the judgment was recovered. *Hopewell* v. *Barnes*, 1 Ch. D. 630; 33 L. T. 777; 24 W. R. 629.

A plaintiff has such an interest in money lodged in the name of the master of the court to the credit of the cause that the money so lodged may be the subject of a charging order. *Adams* v. *Gillem*, Ir. R. 9 C. L. 148.

A decree declaring a plaintiff entitled to one-fifth of the proceeds of sale of chattels, and directing an account to be taken of what was due, and payment of such amount together with the costs of the action to him, does not entitle him to a charging order under 1 & 2 Vict. c. 110, s. 18, or to a stop order against funds in court in another suit belonging to the same defendant. *Widgery* v. *Tepper*, 6 Ch. D. 364; 37 L. T. 297; 25 W. R. 872—C. A.

The court refused, on petition, to order a fund in court charged, under 1 & 2 Vict. c. 110, s. 14, with a judgment by a party to a suit, and to which the judgment debtor was entitled, to be paid over without his consent. *Whitfield* v. *Prickett*, 13 Sim. 259; 12 L. J., Ch. 84.

The effect of a charging order made by a judge in favour of a judgment creditor under 1 & 2 Vict. c. 110, does not depend upon the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment; and the 14th section of that act, and the proviso in the 1st section of 3 & 4 Vict. c. 82, must be read as meaning that the judgment creditor is to have the same remedies, and the order of the judge the same effect, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor. *Leavesley, In re*, 60 L. J., Ch. 385; [1891] 2 Ch. 1; 64 L. T. 269; 39 W. R. 276—C. A.

A. was entitled to a portion of a fund standing in the name of the accountant-general. B., a judgment creditor of A., had obtained an assignment from him of his interest in this fund. Subsequently to this assignment C., also a creditor of A., obtained a judge's charging order, which was made absolute. B. obtained a stop order subsequently to C.'s charging order being made absolute, and subsequently to B.'s stop order C. obtained a stop order also:—Held, upon petition, that B. was entitled to an order for payment to him of the fund, the effect of the charging order being merely to restrain the transfer during the interval between its being obtained nisi and made absolute, and not giving priority over the assignment when made absolute, the prior stop order having been obtained by such assignee. *Wells* v. *Gibbs*, 2 W. R. 365; 2 Eq. R. 441.

Pending a suit for the administration of a testator's estate, in which a decree had been made directing preliminary inquiries, a cestui que trust of a share of the proceeds of the residuary reality and personalty assigned his share by way of security, and the assignee immediately gave notice to the trustees of the will. Afterwards

the real estates were sold, and the proceeds paid into court to the credit of the cause generally. A creditor who had entered up a judgment against the cestui que trust subsequently to the assignment obtained an order charging the fund in court, with respect to which the assignee had not obtained a stop order or taken any other proceeding :—Held, that the judgment creditor did not thereby acquire a priority over him. *Beaveliff* v. *Dorrington*, 4 De G. & Sm. 122 ; 19 L. J., Ch. 331 ; 14 Jur. 1101.

—— **Lunatic Debtor.**]—On an application at chambers, by the judgment creditor of a debtor found lunatic by inquisition, for a charging order on funds standing in the books of the paymaster-general of the Chancery Division to the credit of the debtor, who was described in such books as "a person of unsound mind," the judge ordered that "so much of the defendant's interest in the fund so standing as aforesaid should stand charged with the payment of the . . . amount due on the judgment as the Lords Justices sitting in Lunacy might deem applicable to payment of the judgment debt" :—Held, that the acts gave the judge no power to make an order providing that the amount to be charged should be determined by the Lords Justices, and that the creditor was entitled to an unconditional order on a specified amount of the fund. *Horne* v. *Pountain*, 58 L. J., Q. B. 413 ; 23 Q. B. D. 264 ; 61 L. T. 510 ; 38 W. R. 240 ; 54 J. P. 37.

—— **Priority over Mortgage.**]—A judgment creditor cannot, by obtaining a charging order on a fund in court, acquire priority over a previous mortgagee of the fund who has obtained no order. *Bell. In re, Carter* v. *Stadden*, 54 L. T. 370 ; 34 W. R. 363.

—— **Not actually in Court.**]—A judgment creditor may obtain a stop order upon a fund in court to the credit of an action in the Chancery Division, without any charging order obtained in the division where the judgment was recovered. Stop order granted upon a fund of a specified amount not actually in court, but to be paid in to the credit of an action under an order of the court. *Shaw* v. *Hudson*, 48 L. J., Ch. 689.

Entitling Application.]—An application for a charging order needs not to be entitled in the particular matter to the credit of which the fund is standing, the order being valid if entitled in the matter of the acts which confer the jurisdiction. *Hastings* (*Marquis*) v. *Bearan*, 4 De G. F. & J. 316 ; 31 L. J., Ch. 546 ; 5 L. T. 734 ; 10 W. R. 206.

Such an order properly entitled will not be rendered void by being also entitled in a matter in which it was not necessary to entitle it at all. *Ib.*

Petition to make Charges Effectual.] — A judgment creditor had obtained a judge's order under the 1 & 2 Vict. c. 110, s. 14, charging the annuity payable to his debtor out of a fund in a cause in this court. The judgment creditor is entitled to a decree upon a claim against the debtor, to charge the annuity with the judgment debt ; but in order to make these charges effectual, a petition (which is of course) to be presented in the cause is necessary ; and the claim was ordered to stand over, and ultimately one order was made on the claim and petition. *Reece* v. *Taylor*, 5 De G. & Sm. 480 ; 21 L. J., Ch. 463.

Priorities Generally.]—An order under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, charging the stock standing in the name of the accountant-general, affects only the interest of the debtor, and does not interfere with the rights of prior incumbrancers. *Hulkes* v. *Day*, 10 Sim. 41 ; 10 L. J., Ch. 21 ; 4 Jur. 1125.

If a person beneficially entitled to stock standing in the names of trustees has a judgment recovered against him, and the judgment creditor obtains a charging order under the 1 & 2 Vict. c. 110, s. 14, a mortgagee of the fund claiming under a mortgage (whereof no notice was given to the trustee) made subsequently to the judgment, but before the charging order, has priority over the judgment creditor. *Scott* v. *Hastings* (*Lord*), 4 Kay & J. 633 ; 5 Jur. (N.S.) 450 ; 6 W. R. 862.

A fortiori, such mortgagee has priority when the order is only an order nisi under the 1 & 2 Vict. c. 110, s. 14. *Ib.*

In such a case, the rule in *Dearle* v. *Hall* (3 Russ. 1) does not apply in favour of the judgment creditor. *Ib.*

The 14th section of the 1 & 2 Vict. c. 110, gives to a charging order absolute upon stock held in trust for the judgment debtor, the same effect as a charge under his hand ; and the object of the 15th section is only to prevent any new charge being effected after the charging order nisi has been obtained, and before it is made absolute. When the charging order is made absolute, the 15th section has performed its functions. But if the judgment debtor has assigned the stock before the date of the order nisi the assign might obtain a stop order before the order nisi was made absolute, notwithstanding the 15th section ; for the real charge under a charging order is only acquired when it is made absolute. *Warburton* v. *Hill*, 1 Kay, 470 ; 23 L. J., Ch. 633 ; 2 Eq. R. 365 ; 2 W. R. 365.

If a person, having notice of a previous assignment of a trust fund, take an assignment to himself of the same fund, he cannot obtain priority over the previous assign, whether the trustee had notice or not ; and therefore, if a judgment creditor, at the time of making his charging order absolute, have similar notice, he is likewise unable to obtain priority. *Ib.*

Where the fund is standing in the name of the accountant-general of the Court of Chancery, the practice of the office is to enter a memorandum of every charging order left at the office ; but such notice is not treated as any restraint nor as equivalent to a stop order. No entry is made of the notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the court. The trustees who have paid the fund into court, are the trustees of it until the court has in some way dealt with it, and then the court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop order afterwards obtained in the division of the High Court in which the judgment was recovered. *Hopewell* v. *Barnes*, 33 L. T. 777 ; 24 W. R. 629.

The order made by a court of law under ss. 132, 133, 134 and 135 of the Common Law Procedure Amendment Act (Ir.) 1853, to attach

stock standing to the credit of a debtor in a cause in the Court of Chancery, does not per se operate as a seizure or a charge on the stock. Semble, the lodging of such an order with the acccountant-general without obtaining an order of the Court of Chancery does not charge the stock. Semble also, that a conditional order does not attach the fund under the Common Law Procedure Act. A conditional order to charge funds in chancery was obtained under the Common Law Procedure Act on the 30th of June, made absolute on the 8th of August, and lodged with the accountant-general on the 14th of November. A conditional order to charge the same fund was obtained in chancery by another creditor, under 3 & 4 Vict. c. 105, on the 1st of August, lodged with the accountant-general on the 7th of August, and made absolute on the 13th of November :—Held, that the creditor who had obtained the order in chancery was entitled to the fund in priority to the other creditor. *French* v. *Balfe*, 6 Ir. Ch. R. 63.

4. Reviewing or Rescinding Order.

Jurisdiction.]—The court has power to review, by way of appeal, an order absolute to charge stock made by a judge. *Fowler* v. *Churchill*, 2 D. (N.S.) 562 ; 11 M. & W. 57 ; 12 L. J., Ex. 230 ; 7 Jur. 156.

The court has no jurisdiction to entertain an appeal against an order nisi for a distringas upon stock made by a judge. *Baldwin* v. *Timbrell*, 6 Jur. 488.

An application under 1 & 2 Vict. c. 110, s. 15, that a charging order, made under ss. 14, 15, should be discharged, cannot be entertained after the order has been made absolute. *Jeffryes* v. *Reynolds*, 52 L. J., Q. B. 55 ; 48 L. T. 358.

A charging order having been made upon shares standing in the name of a judgment debtor, the father of the debtor applied, after the order had been made absolute, that it might be discharged, on the ground that the shares were in fact his :—Held, that there was no power to entertain the application, "such order" meaning the order nisi, and not the order absolute. *Ib.*

The court has no power to entertain an application under s. 15 of 1 & 2 Vict. 110, that a charging order, made under ss. 14 and 15 of that act, should be rescinded or varied, after such order has been made absolute. *Jeffryes* v. *Reynolds* (52 L. J., Q. B. 55) approved. *Drew* v. *Lewis* or *Willis*, 60 L. J., Q. B. 264 ; [1891] 1 Q. B. 450 ; 64 L. T. 760 ; 39 W. R. 310 ; 55 J. P. 373—C. A.

Where a charging order has been obtained upon a judgment which has since been set aside, the charging order must be set aside at the instance of the judgment debtor. *Drew* v. *Willis*, [1891]1 Q. B. 450) distinguished. *Brain* v. *Herrick*, 10 R. 171.

—— **Summons to Discharge Order — Jurisdiction of Master.**] — A master having once granted a charging order nisi upon shares in a public company upon an ex parte application under 1 & 2 Vict. c. 110, ss. 14, 15, is functus officio, and, except by consent, has no jurisdiction to discharge it. *Mitchell* v. *De Vesey*, 67 L. T. 53.

—— **On what Ground.**]—A party held shares in the Union Bank of London, and judgment having been obtained in an action against him, a judge made an order, charging such shares with the judgment. On application to set aside such order, it appeared that the bank consisted of a number of shareholders, and was carried on pursuant to the terms of a deed, by which it was provided that the shares should not be transferred, except by the consent of the directors, and also that if any order or decree was made against any proprietor by which his shares became charged, they were to be forfeited to the company. The company was not registered under 7 & 8 Vict. c. 110, but was entitled to sue and be sued by a public officer, under 7 & 8 Vict. c. 113, s. 47, and 7 Geo. 4, c. 46 :—Held, that it being doubtful whether the company was a public company or not, the order ought not to be set aside. *Graham* v. *Connell*, 1 L. M. & P. 438 ; 19 L. J., Ex. 361.

The court refused to discharge an order to charge stock standing in the names of trustees for the defendant. The stock had been transferred into the names of the trustees by a deed of settlement, made pursuant to an order of the Court of Chancery. *Rogers* v. *Holloway*, 5 Man. & G. 292 ; 6 Scott (N.R.) 274 ; 12 L. J., C. P. 182 ; 7 Jur. 932.

It is not a good objection to an order for charging stock, that it requires cause to be shewn on a day specified, although the statute directs that it shall require cause to be shewn "within a time to be mentioned in such order." *Robinson* v. *Burbidge*, 1 L. M. & P. 94 ; 9 C. B. 289 ; 19 L. J., C. P. 242.

Nor that such order purports to be made in pursuance of the 1 & 2 Vict. c. 110, alone, and not also of the 3 & 4 Vict. c. 82. *Ib.*

A judgment was entered in the master's book as in a cause of "*A.* v. *B.*" The plaintiff obtained an order to charge stock of the defendant standing in the name of the accountant-general, which order was entitled "*A.* v. *C.* sued as *B.*" A rule to rescind it having been obtained, on the ground that it did not follow the judgment in its title, the plaintiff produced the judgment paper, which was entitled in the same way as the order :—Held, that the order was properly entitled. *Ib.*

The words "C. sued as" appeared to have been interlined :—Held, that such interlineation must be presumed to have been made before the judgment paper was sealed. *Ib.*

When an order had been made charging shares in a mining company on the cost-book principle, which, at the date of the order, stood in the name of the judgment debtor, but which he had previously assigned to another person for a valuable consideration, notice of the assignment not having been given to the purser of the company until after the order had been served upon him, the court confirmed the order, there being no appeal from their decision in case they set it aside ; but without deciding whether such company is within the statute, or whether such shares are liable to be charged by a judge's order. *Nicholls* v. *Rosewarne*, 6 C. B. (N.S.) 480; 28 L. J., C. P. 273 ; 5 Jur. (N.S.) 1266.

Evidence—Interest of Debtor in Stock.]—A testator constituted railway stock an auxiliary fund to secure the jointure of his widow, and without specfically bequeathing the stock he made the defendant his residuary legatee ; subsequently the Court of Chancery, upon the consent of the defendant as executor, ordered a transfer of the stock to the trustees of the testator's settlements, and that the dividends

should be paid to the defendant; a charging order, at the instance of a judgment creditor, having been made upon the defendant's interest in the stock:—Held, that the order of the Court of Chancery was evidence against the defendant that the testator's debts had been paid and the estate administered, and that the defendant had such an interest in the stock as could be attached by a charging order. *McDonogh* v. *Davies*, Ir. R. 9 C. L. 300.

Suppression of Material Fact—Discharge on Ground of.]—The plaintiff entered judgment in 1872, and in 1874 the defendant executed a mortgage to secure it, with interest at 5 per cent. The mortgage was not mentioned in the plaintiff's affidavit:—Held, that there had been a suppression of a material fact, and that the charging order must be discharged. *Ib.*

5. Operation of Charging Order.

Generally.]—A charging order under 1 & 2 Vict. c. 110, ss. 14, 15, has no greater effect than an instrument of charge executed by the judgment debtor would have had. *Onslow's Trust, In re*, 44 L. J., Ch. 628; L. R. 20 Eq. 677.

Therefore, where D., after the passing of the Infants Relief Act, 1874, obtained judgment by default against O. for a debt which was in fact for money lent by him to O. during his infancy, and D. subsequently obtained a charging order upon a fund in court belonging to O:—Held, that, inasmuch as the debt on which the judgment and charging order were founded was void, the charging order was inoperative. *Ib.*

If shares are sold, a charging order obtained against the seller subsequently to the sale, but before the transfer, will not prevent the company from registering the buyer as owner. *Gill* v. *Continental Union Gas Co.*, 41 L. J., Ex. 176; L. R. 7 Ex. 332; 27 L. T. 428; 21 W. R. 111.

Payment of Dividends by Bank.]—A., being possessed of 12,058*l.* 6*s.* 8*d.* new 3*l.* 10*s.* per cent. stock, bequeathed to C. an interest in 5,000*l.*, parcel thereof. A judgment having been obtained against C., the judgment creditor obtained a judge's order, charging this latter sum with the judgment debt, which, upon cause shewn, was made absolute as to so much of the dividends as were payable to C. for her own use. These orders having been served upon the Bank of England, the bank refused in consequence to pay the dividends upon the stock to the executors under A.'s will, and they brought an action against the bank to recover those dividends; and the bank applied for a stay of proceedings on payment of a portion of the dividends:—Held, that there was no ground or necessity for the application, the bank being bound to pay the dividends to the legal owners, the executors, who were answerable for their proper application. *Churchill* v. *Bank of England*, 11 M. & W. 323. *S. C.*, nom. *Fowler* v. *Churchill*, 2 D. (N.S.) 767; 12 L. J., Ex. 230; 7 Jur. 538, n. S. P., *Bristed* v. *Wilkins*, 3 Hare, 235.

That the meaning of s. 14, of 1 & 2 Vict. c. 110, is to give the judgment creditor the same right under the charging order as against prior incumbrances as he would have under a valid and effectual charge made at the same moment by the debtor himself. *Watts* v. *Porter*, 3 El. & Bl. 743; 2 C. L. R. 1553; 23 L. J., Q. B. 345; 1 Jur. (N.S.) 133.

Therefore, where stock standing in the names of trustees, in trust for A., was charged by A. as security for money lent to him by B., but no notice of this charge was given to the trustees, and subsequently C., a judgment creditor of A., obtained a charging order of this stock, of which he gave express notice to the trustees, C.'s charge, created by the order, took priority of that to B., whose title had never been perfected by notice to the trustees. *Ib.*

Held (by Erle, J., dissentiente), that the effect of the statute is only to give the judgment creditor with a charging order the same right as he would have under a lawful charge made by the debtor; and therefore, under the circumstances, C. was not entitled to the stock as against B. *Ib.*

Making Absolute on Death of Judgment Debtor.]—An order charging stock under 1 & 2 Vict. c. 110, ss. 14, 15, cannot be made absolute where it appears that the judgment debtor was dead when the order nisi was obtained. *Finney* v. *Hinde*, 48 L. J., Q. B. 275; 4 Q. B. D. 102; 40 L. T. 193; 27 W. R. 413.

Made ex parte.]—A charging order made ex parte under 3 & 4 Vict. c. 105. s. 24, is conditional only, and the court has power to direct service of it out of the jurisdiction. *Gethin, In re, Nixon, Ex parte*, Ir. R. 9 Eq. 512.

Right of Assignee of Stock of Debtor, where Assignment before Order nisi.]—1 & 2 Vict. 110, s. 14, gives, to a charging order absolute upon stock held in trust for a judgment debtor, the same effect as a charge under his hand; and the object of s. 15 is only to prevent any new charge being effected after the charging order nisi has been obtained, and before it is made absolute. When the charging order is made absolute, the 15th section has performed its functions. But if the judgment debtor has assigned the stock before the date of the order nisi, the assignee may obtain a stop order before the order nisi has been made absolute, notwithstanding the 15th section; for the real charge under a charging order is only acquired when it is made absolute. *Warburton* v. *Hill*, Kay, 470; 23 L. J., Ch. 633; 2 Eq. R. 441; 2 W. R. 365.

Six Months' Limit.]—The proviso contained in 1 & 2 Vict. c 110, s. 14, that no proceeding shall be taken to have the benefit of the charge created under that section until after the expiration of six calendar months from the date of the charging order, does not prevent the creditor from obtaining a stop order to restrain the debtor from receiving dividends of stock accruing within the six months. *Watts* v. *Jefferyes*, 3 Mac. & G. 372; 20 L. J., Ch. 659; 15 Jur. 783.

The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realising the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished pro tanto, by stopping payment to the debtor of part of his security. *Ib.*

Semble, a judgment creditor, who has obtained an order charging the interest of his debtor in government stock, may, in a proper case, sustain a suit for the intermediate protection of the interest which he has so acquired, notwithstand-

ing the six months prescribed by the statute 1 & 2 Vict. c. 110, s. 14, have not expired. *Bristed* v. *Wilkins*, 3 Hare, 235.

The proviso contained in the 14th section of 1 & 2 Vict. c. 110, that no proceeding shall be taken to have the benefit of the charge created under that section until after the expiration of six calendar months from the date of the charging order, does not prevent the creditor from obtaining a stop order to restrain the debtor from receiving dividends of stock accruing within the six months. *Watts* v. *Jefferyes*, 3 Macn. & G. 372; 20 L. J., Ch. 659; 15 Jur. 783.

The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realising the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished pro tanto, by stopping payment to the debtor of part of his security. *Ib.*

Where a charging order had been obtained by a judgment creditor, upon funds reported to his debtor in the cause, the court will, after the expiration of the six months from the date of the order, direct the funds to be transferred to the creditor upon motion, without a bill being filed. *Burke* v. *Burke*, 7 Ir. Eq. R. 174.

Time.]—Upon judgment in an action declaring that the defendant is liable to pay to the plaintiff a certain sum, and decreeing payment to be made on or before that day three months, the plaintiff is at once entitled, under 1 & 2 Vict. c. 110, s. 14, to obtain a charging order upon stock and shares standing in the name of the defendant. *Bagnall* v. *Carlton*, 47 L. J., Ch. 51; 6 Ch. D. 130; 36 L. T., 730; 26 W. R. 71.

Not an Execution against Goods of Debtor.]—An order nisi charging shares under 1 & 2 Vict. c. 110, s. 14, is not an execution against the goods of a debtor within s. 45 of the Bankruptcy Act, 1883. *Hutchinson, Ex parte*, or *Plowden, Ex parte. Hutchinson, In re*, 55 L. J., Q. B. 582; 16 Q. B. D. 515; 54 L. T. 302; 34 W. R. 475; 3 Morrell, 19.

Date from which Charging Order takes effect.]—A charging order nisi, when it is afterwards made absolute, takes effect from the date of the order nisi. *Ib.* S. P., *Haly* v. *Barry*, 37 L. J., Ch. 723; L. R. 3 Ch. 452; 18 L. T. 491; 16 W. R. 654.

Order—Two Parts—Execution as to One.]—An order of court providing that one party should pay to the other party a certain sum, and that one party should deliver a conveyance to the other, consists of two separate and distinct parts, and on failure to pay the sum of money execution will issue. *Robinson* v. *Galland*, 60 L. T. 697; 37 W. R. 396.

Service of Notice on Legatee—Effect of.]—Service of a notice under Ord. XLVI. r. 4, as to stock or shares comprised in a legacy by the legatee or his solicitor, is not an acceptance of the legacy so as to bring the legatee under the liabilities attaching to the stock or shares, or estop him from subsequently disclaiming the legacy. *Hobbs* v. *Wayet*, 56 L. J., Ch. 819; 36 Ch. D. 256; 57 L. T. 225: 36 W. R. 73.

Order for Sale—No Jurisdiction to make.]—The plaintiff, having recovered judgment in an action, obtained an order absolute under Ord. XLVI., charging shares of the defendant in a company with the payment of the judgment debt and interest, and then applied to the court for an order for sale of the shares:—Held, that s. 24 of the Judicature Act, 1873, did not give the court jurisdiction to order the sale. *Leggott* v. *Western*, 53 L. J., Q. B. 316; 12 Q. B. D. 287; 32 W. R. 460.

6. Other Matters.

Service of Order.]—Service of a charging order nisi upon the solicitor, and upon the brother, and at the last address of the person sought to be charged, is sufficient without an order for substituted service. *Paragon and Spero Mining Co., In re*, 8 Jur. (N.S.) 11; 10 W. R. 76.

Costs.]—After decree taken pro confesso in the cause against the defendant, an order was made in March, 1844, on petition in the cause, and in the matter of the act of parliament, 1 & 2 Vict. c. 110, that a large sum of stock, standing in the defendant's name, should stand charged with payment of a sum of 299*l.* (being the plaintiff's costs of the suit), and interest thereon, unless the defendant (who was out of the jurisdiction of the court) should shew good cause to the contrary, on the 2nd November then next; and the Bank of England was in the meantime restrained from permitting the transfer of the stock:—Held, that the defendant must pay the plaintiff his costs of the order, charging the stock with the sum of 299*l.* and interest, and of the subsequent application to shew cause against the order being made absolute, notwithstanding the 299*l.* and interest had been paid previously to the 2nd November. *Stanley* v. *Bond*, 14 L. J., Ch. 51.

The costs of obtaining the charging order on stock, under 1 & 2 Vict. c. 110, where the amount with interest was paid before the order made absolute, as well as of a motion to try the defendant's liablity for costs of obtaining the order, which failed, ordered to be paid by the defendant. *Stanley* v. *Bond*, 8 Beav. 50.

Debtors (Ireland) Act.]—Sects. 23 & 24 of the Debtors (Ireland) Act, 1840 (3 & 4 Vict. c. 105), are to be read in connection, and therefore the charging order under the statute is first a conditional order ex parte to be made absolute, which last is the order contemplated by the 23rd section. *Dunscombe, In re*, 9 Ir. Eq. R. 4.

A charging order made ex parte under 3 & 4 Vict. c. 105, s. 24, is conditional only, and the court has power to direct service of it out of the jurisdiction. *Gethin, In re, Nixon, Ex parte*, Ir. R. 10 Eq. 512.

To obtain a charging order under the 3 & 4 Vict. c. 105, s. 23, it is not necessary that the judgment should be revived. Therefore the court granted an order, on the petition of husband and wife on a judgment obtained by the wife dum sola, without its having been revived. *Irwin* v. *Nesbit*, 13 Ir. Eq. R. 125

Defeasibility of Property by Charging Order.]—Property was settled on A. until bankruptcy, or until, by any act or default of A., or by any

other ways, it should become vested in or the property of any other person. A creditor of A. obtained a judgment against him, and a charge, under 1 & 2 Vict. c. 110, s. 14, on the fund:—Held, that his interest had thereby determined. *Montefiore* v. *Behrens*, 35 Beav. 95.

J. EQUITABLE EXECUTION.

1. GENERALLY.

No Previous Elegit.]—Since the coming into operation of the Judicature Act, 1873, it is not necessary for a judgment creditor, who seeks to obtain equitable execution of the judgment debtor's equitable interest in land, previously to sue out an elegit. *Evans, Ex parte, Watkins, In re*, 49 L. J., Bk. 7; 13 Ch. D. 252; 41 L. T. 565; 28 W. R. 127—C. A.

The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional upon the receiver's giving security, operates as an immediate delivery of the land in execution. When the security is afterwards given the order relates back to the date when it was made. *Ib.*

A judgment creditor became the transferee of a legal mortgage of leaseholds belonging to the judgment debtor. He then commenced an action in the Chancery Division, claiming an account and payment of what was due to him on both mortgage and judgment; or a sale of the property and payment out of the proceeds; and the appointment of a receiver. On the same day he obtained ex parte an order extending over eight days, appointing an interim receiver of the rents, without security. On the eighth day he obtained, on notice, an order absolute for the appointment of the same person to be receiver of the rents, upon his giving security. On the same day the debtor filed a liquidation petition, and a receiver of his property was appointed by the Court of Bankruptcy. It did not appear which receiver was appointed first. The receiver in the action never gave security. The creditor had not sued out an elegit:—Held, that the appointment of the receiver in the action was such a delivery in execution by lawful authority of the mortgaged lands, within the meaning of s. 1 of the Judgments Act, 1864 (27 & 28 Vict. c. 112), as to render the judgment creditor a secured creditor, within the meaning of s. 16, sub-s. 5, of the Bankruptcy Act, 1869, and that he was entitled to hold the lands as a security for his judgment debt as well as for his mortgage debt. *Ib.*

—— **After Elegit Returned.**]—A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver:—Held, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A.

Equitable interests in land are within the Judgments Act, 1864 (27 & 28 Vict. c. 112, s. 1). *Hatton* v. *Haywood*, 43 L. J., Ch. 372; L. R. 9 Ch. 229; 30 L. T. 279; 22 W. R. 356.

Equity of redemption of a term cannot be taken in execution. *Lyster* v. *Dolland*, 1 Ves. J. 431; 3 Bro. C. C. 478.

Semble, that the Judgments Act, 1864 (27 & 28 Vict. c. 112, s. 1), does not apply to an equity of redemption, inasmuch as such an interest in land cannot be delivered in execution. *Thornton Finch*, 4 Giff. 515; 34 L. J., Ch. 466.

Lands have "been actually delivered in execution" within the meaning of ss. 1, 4 of the Judgments Act, 1864, when sequestrators are in receipt of rents and profits. *Rush, In re*, 39 L. J., Ch. 759; L. R. 10 Eq. 442.

The return of the sheriff to an elegit constitutes actual delivery in execution within the Judgments Act, 1864. *Champneys* v. *Burland*, 23 L. T. 584; 19 W. R. 148.

Order for Sale.]—The Court of Chancery has no jurisdiction under the Judgments Act, 1864 (27 & 28 Vict. c. 112, s. 4), to order a sale, except of property actually delivered in execution. *Newcastle (Duke), In re, Padwick, Ex parte*, 39 L. J., Ch. 68; L. R. 8 Eq. 700; 21 L. T. 343; 18 W. R. 8.

A judgment creditor having taken out a fi. fa. against his debtor, who had an equitable life interest in a leasehold house, the sheriff took possession under the writ, and sold a portion of the effects of the debtor. The creditor presented a petition under 27 & 28 Vict. c. 112, s. 4, for an order for the sale of the interest in the house:—Held, that, as the creditor had no charge on the house under 1 & 2 Vict. c. 110, s. 13, and as an equitable leasehold interest could not be "actually delivered in execution," no order could be made on the petition. *Ib.*

A. being seised in fee of lands, subject to a charge for marriage portions, gave judgments for the amount of the charges upon the occasions of the marriages. Subsequently, on his own marriage, he executed a voluntary settlement reciting those charges and settling the lands on himself for life, remainders over in strict settlement. He afterwards executed two separate mortgages of the lands, and still later, on the marriage of his son, executed articles of agreement, reciting the voluntary settlement and the mortgages. During his life some of the incumbrances were paid out of his life estate, and after his death a judgment creditor, whose debt was later in date than the mortgaged dates and secured by judgment on his life estate, sought that so much of the mortgaged debts as had been paid out of his life estate as should be necessary to satisfy the demands of creditors whose demands affected the life estate alone, should be raised by sale of part of the inheritance in exoneration of the life estate:—Held, that he was not entitled to the relief sought, since courts of equity will not, where there has been a voluntary settlement, interfere to disturb that settlement in favour of a person whose claim is derived only through the settlor. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; 23 L. T. 636; 19 W. R. 49.

An owner in fee of an estate in fee-simple, in 1802, charged it with two judgment debts in favour of B. and M. In 1809 he made a voluntary settlement of the estate, reciting the charges. Afterwards, in 1818 and 1819, he mortgaged the estate to H. and N. by separate mortgages. In 1822 another judgment debt was recovered against him, the title to which vested in D.:—Held, that D.'s judgment debt affected only the interest that the owner had in the estate, i.e. the residue of

the life estate after satisfaction of the incumbrances; the judgment creditor standing in the position of an assignee of the life interest of the owner. *Ib.*

Form of decree in a suit instituted by a judgment creditor who had obtained a charge on the lands of his debtor, under the Judgments Acts, 1838 (1 & 2 Vict. c. 110). Whether the debtor is entitled to an immediate sale, quære. *Carlon* v. *Farlar*, 8 Beav. 525.

In a suit by a judgment creditor against his debtor to give effect to a charge, under 1 & 2 Vict. c. 110, on the interest of the debtor in an estate of which he was mortgagee, which was vested in trustees for sale to satisfy incumbrances and pay the surplus to the mortgagor, a sale of the estates was directed; and the purchase-money proving insufficient to satisfy the charges thereon, the plaintiff was held entitled to be paid his debt and costs in priority to the costs of the mortgagor or mortgagee of the estate, or any other of the defendants, except the trustees for sale. *Clare* v. *Wood*, 4 Hare, 81.

"Equitable Execution"—Nature of.]—The appointment of a receiver of the interest of a judgment debtor in real estate, though sometimes inaccurately called "equitable execution," is not a mere form of execution, but it is relief, producing the same benefit as execution properly so called, but obtainable and obtainable only, by means of an order of the court in that behalf, based on the fact that execution, properly so called, cannot be had. *Shephard, In re, Atkins* v. *Shephard*, 59 L. J., Ch. 83; 43 Ch. D. 131; 62 L. T. 337; 38 W. R. 133—C. A.

Previous Issue and Registration of Writs of Execution.]—Land is not affected by a registered judgment against the owner, executed in part by a writ of fi. fa., unless it has been actually delivered in execution. *Backhouse* v. *Siddle*, 38 L. T. 487.

Where such land is out on mortgage at the time of the judgment, an order of the Chancery Division for sale or appraisal should be obtained in order to bind the land by the judgment. *Ib.*

A judgment debtor, after a fi. fa. had been partially executed against his goods and chattels, gave a second charge on mortgaged leasehold property to another creditor. The judgment had been duly registered, but no further steps had been taken to obtain delivery of or to bind the land. The mortgagees sold the property, and after satisfying their debt there remained a balance in their hands, to attach which balance a garnishee summons was taken out by the judgment creditor:—Held, that the holder of the charge on the mortgaged property was entitled to satisfy his claim out of this balance, in priority to the judgment creditor. *Ib.*

The Law of Property Amendment Act, 1860 (23 & 24 Vict. c. 38, s. 1), applies to lands in which the judgment debtor has an equitable interest. *Wallis* v. *Morris*, 10 Jur. (N.S.) 741; 10 L. T. 709; 12 W. R. 997.

A judgment will not affect an equity of redemption as against a purchaser, unless a writ of execution is issued before completion of the purchase. *Ib.*

The mere registration of a judgment upon which no writ of execution has issued, constitutes no lien upon the debtor's land. The Judgments Act, 1864 (27 & 28 Vict. c. 112), has in effect repealed s. 13 of the Judgments Act, 1838 (1 & 2 Vict. c. 110). *Bailey's Trusts, In re*, 38 L. J., Ch. 237; 20 L. T. 168; 17 W. R. 393.

Since the Judgments Act, 1864, a judgment creditor is not entitled to redeem, unless he issues execution and gets the return to the writ before the expiration of the six months allowed for redemption. *Mildred* v. *Austin*, L. R. 8 Eq. 220; 20 L. T. 939; 17 W. R. 638.

Semble, that s. 3 of the Judgments Act, 1864, does not apply to an equity of redemption, inasmuch as such an interest in land cannot be delivered in execution. *Thornton* v. *Finch*, 4 Giff. 515; 34 L. J., Ch. 466.

A registered judgment is of no effect on the priority of an incumbrancer on land, unless execution is issued thereon. *Thomas* v. *Cross*, 2 Drew & Sm. 423; 34 L. J., Ch. 580; 11 Jur. (N.S.) 384; 12 L. T. 293; 13 W. R. 647.

Non-retrospective Operation of Judgments Act, 1864.]—The Judgments Act, 1864, applies only to future judgments. *Isle of Wight Ferry Co., In re*, 34 L. J., Ch. 194; 11 Jur. (N.S.) 279; 12 L. T. 263.

Railway Co.'s Land.]—A writ of execution having been sued out on a judgment debt against a railway company, upon petition, the court ordered inquiries and a sale of the company's lands in default of payment of this debt. *Hull and Hornsea Ry., In re*, 35 L. J., Ch. 838; L. R. 2 Eq. 262; 14 L. T. 855; 14 W. R. 758.

An order will be made for the sale of lands of a railway company under an elegit as a debtor, within 27 & 28 Vict. c. 112, s. 4. *Bishop Waltham Ry. In re*, 14 W. R. 1008.

But the court will not, under 27 & 28 Vict., c. 112, s. 4, make an order for sale of property of a debtor, if it is not apparent that his interest in that property is of a saleable nature, but will direct an inquiry as to the nature of his interest in the property. *S. C.*, 2 L. R., Ch. 382; 15 W. R. 96.

A judgment creditor who has caused a writ of elegit to be issued, is not entitled to apply to the court upon petition in a summary way for a sale of his debtor's lands under 27 & 28 Vict. c. 112, s. 4, where his debtor's lands have been already extended and delivered to another judgment creditor under a prior elegit, although he is not prevented by the act from filing a bill to assert his equitable rights. *Cowbridge Ry. In re*, 37 L. J., Ch. 306; L. R. 5 Eq. 413; 18 L. T. 102; 16 W. R. 506.

A contributory was indebted to a company for calls, and an order was made for the payment of them. An elegit was afterwards duly sued out under 27 & 28 Vict. c. 112, and lands belonging to the contributory were delivered in execution to the official liquidator of the company. The official liquidator afterwards presented a petition for an order for the sale of the lands, and payment out of the proceeds of such sale of the calls due from the contributory, and for other relief:—Held, that there must be an inquiry what interest the contributory had in the lands when they were delivered in execution to the official liquidator of the company, and what other parties (if any) were interested in the lands. *Leeds Banking Co. Ex parte, Kirby, In re*, 14 L. T. 615.

A railway company being indebted to the contractor for its original line in 5,734*l.*, obtained

an act of parliament for the making of an extension line, which act authorised the raising of 85,000*l.* by shares to be called extension shares, and of 28,000*l.* by mortgage, and enacted that the works thereby authorised should for financial purposes form a separate undertaking, and that the capital and new shares should constitute a separate capital, and that the money to be raised by mortgage should be applied only to the purposes authorised by the act. The contractor having obtained judgment for the amount due to him, extended certain surplus lands acquired under the extension act, and afterwards petitioned the Court of Chancery for a sale:—Held, that the judgment creditor was entitled to his order for sale; for that, whatever might be equities of the shareholders inter se, that could not affect the rights of the creditor to have the lands sold to pay the debt due to him. *Ogilvie, In re*, 41 L. J., Ch. 336; L. R. 7 Ch. 174; 25 L. T. 860; 20 W. R. 226.

A defendant in an administration suit failed to comply with an order (which had been registered) directing him to pay two sums of money into court to the credit of the cause. Sequestrators, under a writ issued by the plaintiff, having entered into possession of the defendant's real estate, a petition was presented by the plaintiff, under 27 & 28 Vict. c. 112, praying that such real estate might be sold, and the proceeds applied in payment of the moneys due from the defendant:—Held, that the plaintiff was not a creditor to whom the real estate of his debtor had been delivered in execution, and the petition was dismissed accordingly. *Johnson* v. *Burgess*, 42 L. J., Ch. 400; L. R. 15 Eq. 398; 28 L. T. 188; 21 W. R. 453.

—— **Form of Order.**]—Form of order where, upon the petition of a judgment creditor, a sale of land of a debtor under 27 & 28 Vict. c. 112, s. 4, was directed in addition to the usual inquiries. *Howson* v. *Trant*, 42 L. J., Ch. 808; 21 W. R. 781.

Joint Judgment.]—A joint judgment was entered against father and son upon their joint and several bond; the son was an infant at the time of the execution of the bond and the entry of the judgment, and survived his father:—Held, that the amount of the judgment could not be raised out of the father's assets. *Henry* v. *Archibald*, Ir. R. 5 Eq. 558.

Attachment of Land Abroad.]—When a company has in this country been ordered to be wound up, judgment creditors who are in this country, and have proved under the winding-up, will not be allowed to attach property in India belonging to the company. *Oriental Inland Steam Co., In re, Scinde Ry., Ex parte*, 43 L. J., Ch. 699; L. R. 9 Ch. 557; 31 L. T. 5; 22 W. R. 810.

Death of Debtor—Interest in Real Estate—Heir not served.]—After the death of a judgment debtor the court has no jurisdiction on the ex parte application of the judgment creditor, to make an order appointing a receiver of the interest of the deceased judgment debtor in real estate, for the purpose of satisfying the judgment debt, when the person on whom the real estate has devolved is not a party to the proceedings. *Ib.*

Sale of Debtor's Interest in Land—Form of Order—Contingent equitable Interest.]—Where one person is entitled to land in the event of his surviving another person, an annuity to be raised out of the rents and profits of such land can be sold under the provisions of the Judgments Act, 1864 (27 & 28 Vict. c. 112). No order for payment should be contained in the order for sale made upon a petition under the said act, and the inquiry as to liens, charges and incumbrances should contain a direction to the chief clerk to distinguish which, if any, of the same liens, charges and incumbrances have been created by the means prior, and which, if any, subsequent to the date of the lands and property being delivered in execution, and which, if any, have arisen under or by virtue of any judgment, statute, or recognizance; and the order for sale should direct the sale of the lands and property free from all liens, charges, or incumbrances which have been created by any means subsequent to the delivery in execution, or which have arisen (whether before or after the delivery in execution) under or by virtue of any judgment, statute, or recognizance, and also free from the incumbrances of such of the other incumbrancers as shall consent to the said sale, but subject to the incumbrances of the said other incumbrancers as shall not consent. *Cooper, In re*, 60 L. T. 95; 37 W. R. 330.

Equity of Redemption.]—A creditor, who had recovered judgment in an action in the Chancery Division for payment of a sum of money, sued out an elegit against his debtor, whose only interest in land was an equity of redemption in fee. The creditor then commenced an action in the Chancery Division, claiming to have it declared that he was entitled to a charge on the land, and to have such charges enforced by sale, foreclosure, delivery in execution, or otherwise as the court might direct, and asking for a receiver. The plaintiff then moved for a receiver in the new action:—Held, that the 27 & 28 Vict. c. 112, s. 1, did not take away the old right which a judgment creditor had before 1 & 2 Vict. c. 110, to take proceedings in equity to obtain the benefit of a judgment which there were legal impediments to his enforcing at law, and that the plaintiff was not obliged to wait till the trial, but might obtain a receiver on an interlocutory application in the new action. *Anglo-Italian Bank* v. *Davies*, 47 L. J., Ch. 833; 9 Ch. D. 275; 39 L. T. 244; 27 W. R. 3—C. A.

Semble, that it is now unnecessary to bring such an action, as the relief can be given on motion in the action in which the judgment was recovered, under the Judicature Act, 1873, s. 25, sub-s. 8, and Ord. XLII. r. 1. *Ib.*

Dispensing with Inquiries.]—Upon a petition by a judgment creditor who had obtained equitable execution by the appointment of a receiver, an order was made, without directing inquiries, for the immediate sale of the debtor's interest in land which was subject to a legal mortgage, there being evidence that the mortgagee (who consented to the sale) had not received any notice of any incumbrance on the land; that searches had been made by the petitioner's solicitor, who had found that no execution or other process affecting the land had been registered, except the order appointing the receiver, and that no bankruptcy petition had been presented or receiving order made against the

debtor. *Bithray, In re*, 59 L. J., Ch. 66; 61 L. T. 383; 38 W. R. 60.

Creditor appointed Receiver—Time limited.]—Judgment creditor appointed receiver, by way of equitable execution over the accruing gales of a net head-rent for a limited number of years, estimated as sufficient to satisfy the judgment. *Orr* v. *Grierson*, 28 L. R., Ir. 20—C. A.

Order for Sale of Debtor's Interest—Petition instead of Originating Summons — Costs.]—Where under the Judgment Law Amendment Act, 1864 (the procedure under which has been altered by Ord. LV. r. 9B of the Rules of the Supreme Court), an application has been made by a judgment creditor by petition instead of by originating summons for the sale of the debtor's interest in certain houses in respect of which a receiver has been appointed, the court has power under Ord. LXX. r. 1 to allow the petition, but the petitioner, if successful, will only be entitled to the costs of an originating summons. *Martin and Varlow, In re*, 13 R. 189; 43 W. R. 247.

2. LIMIT OF ONE YEAR, UNDER S. 13 OF JUDGMENTS ACT, 1838, 1 & 2 VICT. C. 110.

After twelve months a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration. *Derbyshire and Staffordshire Ry.* v. *Bainbridge*, 15 Beav. 146.

The court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title; and therefore, where the plaintiff had obtained judgment, but had not sued out an elegit, it was held, that he was not entitled to the aid of the court, as against the freehold estate of the debtor; that he did not, under the Judgments Act, 1838 (1 & 2 Vict. c. 110, s. 13), become entitled to such aid until the expiration of one year from the time of entering up his judgment; and that this, being an objection that the plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the court to relieve against fraud in respect to the freehold estate. *Smith* v. *Hurst*, 10 Hare, 30; 22 L. J., Ch. 289; 17 Jur. 30.

The rule, that no judgment creditor is to proceed in equity until one year after the judgment has been entered up, does not extend to a bill by a tenant by elegit to redeem a mortgage. *Barnes* v. *Thrupp*, 3 Jur. (N.S.) 1242.

The plaintiff was mortgagee of premises, the equity of redemption in which belonged to J. H. G., against whom, in May, 1857, an adjudication in bankruptcy was made, and assignees of the estate and effects duly appointed. B. G., in December, 1856, and L., in February, 1857, entered up judgments duly recovered against the bankrupt. On a bill filed by the plaintiff for foreclosure, B. G., by answer, disclaimed all right and interest in the premises. L., by answer, after stating that his judgment remained unsatisfied, stated that he did not claim to be entitled to any charge on the mortgaged premises, being advised that under the 1 & 2 Vict. c. 110, such judgment was unavailable, by reason of the bankruptcy of J. H. G., and that he was an unnecessary party to the suit. He did not, however, disclaim all right and interest in the premises:—Held, that though by the 1 & 2 Vict. c. 110, s. 13, a judgment creditor is not entitled to proceed in equity to obtain the benefit of his charge until after the expiration of one year from the time of entering up his judgment, yet it seems that there is nothing to prevent him from taking proceedings to make his charge available at the end of one year. *Harrison* v. *Pennel*, 4 Jur. (N.S.) 682; 6 W. R. 712.

Where a judgment is not entered up one year before the bankruptcy of the person against whom judgment is entered up, it will not operate to give the judgment creditor any preference; and therefore, although L. was deprived of his right to a preference, he was not deprived of his right to a charge, of which he would at the end of one year be entitled to claim the benefit, and consequently he was properly made a party to the suit; but that, as he had not sufficiently disclaimed by his answer, he was entitled to his costs. *Ib.*

The court refused to stay a mortgagee's suit after decree in another creditor's suit, in which the plaintiff was a puisne judgment creditor who filed his bill within a year of the entry of his judgment, and whose right to a sale of the estate depended on setting aside a settlement puisne to the mortgage, under which no tenant in tail was in esse. *Foster* v. *Ker*, 12 Ir. Eq. R. 51.

A bill filed by a judgment creditor before the expiration of twelve months from the date of the judgment, to foreclose a fee-simple estate of the judgment debtor, cannot be supported, unless he has issued an elegit. *Godfrey* v. *Tucker*, 33 Beav. 280; 9 Jur. (N.S.) 1188; 12 W. R. 33.

1 & 2 Vict. c. 110, s. 13, declares that a judgment shall not be enforced for a given period; but a court of equity will in the meantime restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected, until the charge can be enforced. *Yescombe* v. *Landor*, 28 Beav. 80; 28 L. J., Ch. 876; 5 Jur. (N.S.) 780; 7 W. R. 534.

A judgment creditor of a tenant for life of real estate sued out an elegit, but was unable to obtain payment of his demand, as the estates were vested in trustees. Upon a bill by the judgment creditor, asking for the aid of the court to obtain satisfaction of his demand:—Held, that he was entitled to an injunction to restrain the trustees from paying the rent and profits of the estates to the tenant for life, until the creditor was in a position to obtain the benefit of the judgment. *Ib.*

A judgment creditor having sued out an elegit against his debtor, filed a bill, within the year, to enforce the judgment against the equitable interest of the debtor in certain leasehold estates. A demurrer to the bill overruled. *Partridge* v. *Foster*, 34 Beav. 1; 10 Jur. (N.S.) 741; 10 L. T. 808; 12 W. R. 1127.

A judgment creditor who has sued out an elegit without effect is entitled (independently of 1 & 2 Vict. c. 110) to equitable relief, though the year from entering up the judgment has not expired. *Ib.*

The court will, within the twelve months, interfere and protect the property charged by a judgment, from destruction. *Ib.*

3. WHAT PROPERTY LIABLE, AND WHAT NOT.

Estate in Remainder—Infant.]—A plaintiff, who had recovered judgment with damages in an action in tort against an infant, sued out an

elegit against his land on the judgment. The infant's only interest in the land was a remainder in fee expectant on the death of a tenant for life, which produced no present income to the infant. The sheriff returned that the infant was seised of the reversion of the land in fee simple, and that it was of the annual value of 12*l.*, and that he had delivered the premises to the creditor. The creditor then presented a petition under 27 & 28 Vict. c. 112, s. 4, for the sale of the infant's interest in the land:—Held, first, that the sheriff had no power to seize an estate in remainder belonging to an infant, and therefore the judgment creditor had acquired no charge on the infant's interest. *South, In re*, 43 L. J., Ch. 441; L. R. 9 Ch. 369; 30 L. T. 347; 22 W. R. 460.

Unsatisfied Term—Fraudulent Conversion of Legal into Equitable Estate.]—Semble, an equitable execution can be maintained only where there is an unsatisfied term, or where a person has converted his legal into an equitable estate, for the purpose of defeating his creditors. *Kirby* v. *Dillon*, 2 L. J. (o.s.) Ch. 140.

Rents and Profits of Land — Earnings of Business.]—Although a judgment creditor is entitled to have a receiver appointed, by way of equitable execution, of land in which the judgment debtor has only an equitable interest, he is not entitled to take through such receiver the earnings of a business carried on by the judgment debtor upon the land. *Cudogan* v. *Lyric Theatre*, 63 L. J., Ch. 775; [1894] 3 Ch. 338; 7 R. 594; 71 L. T. 8—C. A.

Equitable Reversionary Interest in Personalty —Land held "in trust for" Judgment Debtor.]—A reversionary interest in the proceeds of land which trustees are directed to sell is not land held "in trust for" the beneficiary, within the meaning of s. 11 of the Judgments Act, 1838 (1 & 2 Vict. c. 110). An equitable reversionary interest in personalty cannot be taken in execution under an elegit; and consequently, notwithstanding that there may for the present be nothing to receive, the court has jurisdiction to appoint, and will in a proper case appoint, by way of equitable relief, a receiver of such an interest. *Fuggle* v. *Bland* (11 Q. B. D. 711), and *Macnicoll* v. *Parnell* (35 W. R. 773) followed. *Tyrrell* v. *Painton*, 64 L. J., P. 33; [1895] 1 Q. B. 202; 11 R. 589; 71 L. T. 687; 43 W. R. 163—C. A.

Marriage Settlement—Life Interests of Husband and Wife in use of Furniture—Judgment Creditor of Husband and Wife.]—Under a marriage settlement certain furniture and effects were vested in trustees upon trust to permit the wife to use the same during her life for her sole and separate use, and after her death to permit her husband to use the same during his life, and the settlement contained a power, under certain conditions, to sell the furniture and invest the proceeds, and that the trustees should stand possessed of the annual income therefrom in trust for such persons as the husband and wife should during their joint lives jointly appoint, or as the survivor should appoint, and in default of such appointment for the wife for her life for her sole and separate use, and so that she should not have power to anticipate the same, with other trusts over in favour of the children. Upon an application by a judgment creditor of the husband and wife for the appointment of a receiver of the several interests of the husband and wife under the settlement:—Held, that having regard to the terms of the settlement, the court had no power to appoint a receiver of the interests of the husband and wife under the settlement. *Whitaker* v. *Cohen*, 69 L. T. 451.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate, capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid:—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 31 W. R. 899—C. A.

Fund in Discretion of Trustees.]—An order was made, in an action in a county court, appointing a receiver to receive the interest of a sum of money in the hands of trustees, and ordering the trustees to pay a specific amount out of the interest to the receiver half-yearly until the judgment in the action should be satisfied. The trustees were trustees of a will, by which they were directed to set apart and invest the sum in question, and were authorised, at their absolute discretion, from time to time, and at such time or times as they should think proper, to pay or apply the whole or any part of the income to or for the benefit of the judgment debtor in such a manner in all respects as they should think proper. The trustees applied for a prohibition:—Held, that, as it depended on the discretion of the trustees whether anything should be paid to the judgment debtor, the receiver could not be entitled to receive the interest in their hands, and that an order for payment could not be made against the trustees, who were strangers to the action, and therefore the county court judge had exceeded his jurisdiction, and the proper remedy was by prohibition. *Reg.* v. *Lincolnshire County Court Judge*, 57 L. J., Q. B. 136; 20 Q. B. D. 167; 58 L. T. 54; 36 W. R. 174.

A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order, it appeared that the August instalment had been paid:—Held, that the money could not be attached, but semble, that the proper course for the judgment creditor to adopt was to apply for the appointment of a receiver under the practice in the Chancery Division. *Webb* v. *Stenton*, 52 L. J., Q. B. 584; 11 Q. B. D. 518; 49 L. T. 432—C. A.

Future Payments of Annuity.]—The Probate and Divorce Division ordered a husband, against whom it granted a divorce, to pay alimony. The divorced wife brought an action in the Chancery Division against her late husband and the trustees of a post-nuptial settlement made by him during the continuance of a former marriage, to enforce payment of arrears, and recurring payments of

alimony, by the appointment of a receiver of his life interest under such settlement:—Held, that she was entitled to the appointment of a receiver, and that the court would not take into consideration the injury done to the children of the former marriage, by depriving their father of his power to consent to their advancement out of the settlement funds. *Oliver* v. *Lowther*, 42 L. T. 47; 28 W. R. 381.

Future Salary or Earnings.]—The court has no jurisdiction to appoint a receiver by way of equitable execution of the future salary or earnings of a judgment debtor. *Holmes* v. *Millage*, 62 L. J., Q. B. 380; [1893] 1 Q. B. 551; 4 R. 332; 68 L. T. 205; 41 W. R. 354; 57 J. P. 551—C. A.

Pension.]—The pension of an officer of her majesty's forces, being by s. 141 of the Army Act, 1881, made inalienable by the voluntary act of the person entitled to it, cannot be taken in execution, even though such pension be given solely in respect of past services, and the officer cannot again be called upon to serve:—Held, that an order appointing a receiver of such pension was bad. *Birch* v. *Birch* (8 P. D. 163) approved; *Dent* v. *Dent* (L. R. 1 P. 366) distinguished. *Lucas* v. *Harris*, 56 L. J., Q. B. 15; 18 Q. B. D. 127; 55 L. T. 658; 35 W. R. 112; 51 J. P. 261—C. A.

The court can appoint a receiver by way of equitable execution over a civil service pension, payable monthly to the defendant, and by order direct the receiver to receive the whole of the said monthly instalments, and retain thereout a certain amount per month, and apply the same in discharge of the judgment debt and costs, and pay the balance to the defendant. *Molony* v. *Cruise*, 30 L. R., Ir. 99.

Deposit Receipt in Joint Names—Absence of Remedy.]—The appointment of a receiver by way of equitable execution is the proper mode of attaching a deposit receipt held in the joint names of the judgment debtor and another, even though the whole beneficial interest in the fund be in the judgment debtor. A judgment creditor will not be debarred from his right to equitable relief upon the ground of the existence of a remedy at common law, unless a fruitful remedy be shewn to exist. *O'Donovan* v. *Goggin*, 30 L. R., Ir. 579.

Judgment Debtor's Money in Bailee's Hands.]—There is no need to appoint a receiver to receive a sum of money due to a judgment debtor, where the money is in the bailee's hands, and can be seized by the sheriff under a fieri facias. *Morris* v. *Taylor*, 32 L. R., Ir. 14—C. A.

Deceased Plaintiff—Application by Plaintiff's Executors for Receiver and Injunction—No Order to continue Proceedings.]—The executors of a deceased plaintiff whose judgment remains unsatisfied cannot (where no order has been made for the proceedings to be continued in their names) apply under Ord. XLII. rr. 8 and 23 for a receiver of a sum due to the defendant under a will, and for an injunction to restrain him from dealing therewith. *Norburn* v. *Norburn*, 63 L. J., Q. B. 341; [1894] 1 Q. B. 448; 10 R. 10; 70 L. L. 411; 42 W. R. 127.

Share of Assets of Intestate, to whom no Administration taken out.]—A judgment debtor was entitled, as one of the next of kin of a deceased intestate, to whom no administration had been taken out, to a share of the personal estate of the deceased:—Held, that the judgment creditor was entitled to have a receiver appointed over the share. *Mullane* v. *Ahern*, 28 L. R., Ir. 105.

Legacy.]—A judgment debt being unsatisfied for want of goods of the defendant, who was entitled, expectant on the death of a tenant for life, to a legacy of much larger amount than the debt:—Held, that a receiver should be appointed by way of equitable execution to receive a sufficient portion of the legacy when it should become receivable. *Macnicoll* v. *Parnell*, 35 W. R. 773.

The defendants, executors of a testatrix, obtained a judgment for their costs against the plaintiff, who was entitled to a legacy under the will which was the subject of the action. The judgment was unsatisfied, and in an affidavit filed on behalf of the defendants it was stated that, except through this legacy, they had no means of obtaining payment of their demand:—Held, that a receiver by way of equitable execution could be appointed over the legacy. *M'Nulty, In re, M'Kenna* v. *Harley*, 31 L. R., Ir. 391.

4. Sale or Foreclosure.

The relief to which a judgment creditor is entitled under the Judgments Act, 1888 (1 & 2 Vict. c. 110), is a foreclosure and not a sale. *Jones* v. *Bailey*, 17 Beav. 582.

A judgment creditor ranking after a first mortgagee but prior in rate to a further charge and to other judgments, held entitled to a foreclosure though all the other parties insisted on a sale. *Messer* v. *Boyle*, 21 Beav. 559.

A judgment creditor within a year after entering up judgment, without previously issuing an elegit, filed a bill against a prior mortgagee from the judgment debtor, and the judgment debtor seeking to redeem the former and foreclose the latter:—Held, that the suit was not maintainable. *Godfrey* v. *Tucker*, 33 Beav. 280; 33 L. J., Ch. 559; 9 Jur. (N.S.) 1188; 9 L. T. 359; 12 W. R. 33.

The judgment creditor afterwards got in the mortgage, and amended his bill, asking for an account and payment of principal and interest due both on the judgment debt and mortgage, or, otherwise, for foreclosure:—Held, that he could not sustain the bill by this new title to sue, and that it must be dismissed with costs. *Ib.*

A judgment creditor having registered his judgment under 1 & 2 Vict. c. 110, is not entitled to a decree for foreclosure, but only to one for sale. Form of such a decree. *Footner* v. *Sturgis*, 5 De G. & Sm. 736; 21 L. J., Ch. 741.

Judgment creditors who have not issued execution have no lien on the land of the debtor sufficient to satisfy their being made parties to a suit for foreclosure. *Cork (Earl)* v. *Russell*, 20 W. R. 164.

A plaintiff in a foreclosure suit had made parties as defendants certain judgment creditors who had not taken the steps necessary to obtain a charge on the land under the Judgments Act, 1864 (27 & 28 Vict. c. 112). One of these, immediately on being served with a copy of the bill, wrote a letter saying he claimed no interest.

The others disclaimed by answer:—Held, that they were not necessary parties. *S. C.*, 41 L. J., Ch. 226; L. R. 13 Eq. 210; 26 L. T. 230.

A judgment creditor who had in 1872 sued out an elegit, to which a return of nil has been made by the sheriff, the legal estate in the debtor's lands being vested in a mortgagee, may, on a bill filed against the debtor and the prior incumbrancers, obtain a decree for a sale and receiver of the rents of an equity of redemption of the debtor, subject to the rights of prior incumbrancers. He cannot obtain a declaration that he has a charge or a decree for foreclosure. *Wells* v. *Kilpin*, 44 L. J., Ch. 184; L. R. 18, Ex. 298; 22 W. R. 675.

On a bill filed against mortgagees and mortgagor, who was also a judgment debtor, by a judgment creditor who had issued a writ of elegit against the goods and hereditaments of the judgment debtor, but the execution of which, in consequence of the mortgages, could not be proceeded with, for accounts, redemption, and foreclosure, the ordinary redemption and foreclosure decree was made, notwithstanding the 27 & 28 Vict. c. 112. *Beckett* v. *Buckley*, L. R. 17 Eq. 435; 22 W. R. 294.

After Decree.]—A. and B., in 1838, filed their bill for the administration of an estate, of the residue of which they were each entitled to one-third. In 1840 they changed their solicitor in the cause, and appointed F. as such solicitor, who so continued until 1843, when they again changed their solicitor. F. then brought his action against A. (B. having gone out of the jurisdiction) for the amount of his bill of costs, and in June, 1844, he recovered and entered up judgment in such action. In June, 1845, F. filed his bill for foreclosure under 1 & 2 Vict. c. 110, as against A.'s third part of the property, the subject of the first suit. In July, 1846, F. obtained the common decree for foreclosure against A. and (default being made) on the 23rd March, 1847, the order for foreclosure was made absolute. The order absolute was then enrolled; A. had no property except that which she was entitled to in the first suit, but the value of the property to which she was entitled in that suit was three or four times the amount of F.'s judgment debt and costs. The master had made his report in the first suit, and the cause stood for hearing on further directions and on exceptions, when, on an application in June, 1847, the court enlarged the time appointed by the master for the payment of the debt and costs, notwithstanding the order absolute, and notwithstanding its enrolment. *Ford* v. *Wastell*, 6 Hare, 229; 16 L. J., Ch. 372; 11 Jur. 537.

5. Appointment of Receiver.

Receiver—When Appointed.]—A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under an elegit, is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston* v. *Cowbridge Ry.* 41 L. J., Ch. 152.

A judgment creditor who has sued out an elegit but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties. *Wells* v. *Kilpin*, 44 L. J., Ch. 184; L. R. 18 Eq. 298; 22 W. R. 675.

A judgment creditor who has issued an elegit and obtained a return from the sheriff, although unable to sell the lands of his debtor before the expiration of one year under 1 & 2 Vict. c. 110. s. 13, is nevertheless entitled to a receiver of the rents at once. *Tillett* v. *Pearson*, 43 L. J., Ch. 93; 22 W. R. 209.

Plaintiff in an action which had been followed by a cross action, obtained an order in both actions that his costs of the cross action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the defendant's address, so as to serve the subpœna for costs. He then moved the court for a receiver, under s. 25, sub-s. 8, of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:—Held, that the principle of *Anglo-Italian Bank* v. *Davies* (supra, col. 1204) applied, and that the plaintiff was entitled to a receiver. *Bryant* v. *Bull*, 48 L. J., Ch. 325; 10 Ch. D. 153; 39 L. T. 470; 27 W. R. 246.

Over another Receiver.]—A receiver will not be appointed over the possession of another receiver; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one; and a defendant who appears on the motion, and makes the objection, may get the costs of his appearance, though in contempt. *Valle* v. *O'Reilly*, 1 Hog. 199.

Ex parte Application for—Jurisdiction.]—There is jurisdiction to appoint a receiver by way of equitable execution upon an ex parte application; and that jurisdiction is properly exercised in cases where there is danger that the defendant's interest in the property would have ceased to exist before the order was made if the application were on notice. *Minter* v. *Kent, Sussex and General Land Society*, 14 R. 236; 72 L. T. 186; 59 J. P. 102—C. A.

An order appointing a receiver by way of equitable execution ought not to be made on an ex parte application. *Potts, In re, Taylor, Ex parte*, 62 L. J., Q. B. 392; [1893] 1 Q. B. 648; 4 R. 305; 69 L. T. 74; 41 W. R. 337; 10 Morrell, 2—C. A.

Service of Summons out of Jurisdiction.]—The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers, calling on the defendant to show cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—Held, that there was no jurisdiction to grant such leave. *Weldon* v. *Gounod*, 15 Q. B. D. 622.

Evidence of Property.]—Where a plaintiff obtained judgment and issued execution, and the sheriff returned nulla bona, the court will

not appoint a receiver on the ground that since the return, the defendant has been found to be possessed of a patent the value of which did not appear from the evidence before the court. *Smith* v. *Carter*, 52 J. P. 615.

Form of Order—Security.]—Where a judgment creditor, in an action for equitable execution, obtained the appointment of a receiver for the purpose of creating a charge upon the debtor's property, subject to prior incumbrances, but not for the purpose of entering into possession or receiving the rents and profits, the receiver was not required to give security, the plaintiff and the receiver undertaking not to act without the leave of the court. *Hewett* v. *Murray*, 54 L. J., Ch. 572; 52 L. T. 380. See also *McGarry* v. *White*, infra.

When Trustee out of the Jurisdiction.]—An order had been made for the payment of money into court by the defendant in an action for breach of trust. The defendant was out of the jurisdiction of the court at the time, and there was slight prospect of his returning within it. The plaintiff accordingly moved to enforce the order by the appointment of a receiver of the interest payable to the defendant on some shares owned by him in a certain syndicate:—Held, that the court would enforce its order for the payment of money on a defendant out of its jurisdiction by the appointment of a receiver of property belonging to him within its jurisdiction. *Coney, In re, Coney* v. *Bennett*, 54 L. J., Ch. 1130; 29 Ch. D. 993; 52 L. T. 961; 33 W. R. 701.

Married Woman—Separate Estate.]—In an action against a married woman alleged to be possessed of separate estate, no defence was delivered, and the master found that she was entitled to separate property vested in trustees and subject to certain charges. The plaintiff was appointed receiver without security of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without remuneration. *M'Garry* v. *White*, 16 L. R. Ir. 322.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid:—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899—C. A.

Beneficed Clergyman.]—A judgment, entered up in 1845, against a beneficed clergyman, for a debt was fully registered:—Held, that under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. *Hawkins* v. *Gathercole*, 1 Sim. (N.S.) 63; 20 L. J., Ch. 59; 14 Jur. 1103.

Railway Company's Undertaking.]—The court, after appointing a receiver of property comprised in the general undertaking of a railway company, refused to allow a judgment creditor and mortgagee of a particular undertaking to sell the lands of the company comprised in his security. *Gardiner* v. *L. C. & D. Ry., Grissell, Ex parte*, 15 L. T. 311.

Garnishee Proceedings not Applicable.]—Since the Judicature Acts the court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable. *Westhead* v. *Riley*, 53 L. J., Ch. 1153; 25 Ch. D. 413; 49 L. T. 776; 32 W. R. 273.

Receiver instead of Sequestration.]—An order was made against the defendants in an action who were defaulting trustees, for the payment of money into court. The defendants having failed to comply with such order, an application, was made by the plaintiffs that a writ of attachment might issue against them. At the defendant's instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that the plaintiffs, in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver:—Held, that, although under r. 4 of Ord. XLII. of the Rules of the Supreme Court, 1883, sequestration was the appropriate remedy, yet under s. 25, sub-s. 8 of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley, In re, Whiteley* v. *Learoyd*, 56 L. T. 846.

"Just or Convenient"—Judicature Act, 1873, s. 25, sub-s. 8—Jurisdiction.]—Sect. 25, sub-s. 8 of the Judicature Act, 1873, which empowers the court to appoint a receiver where "just or convenient," does not confer an arbitrary and unregulated discretion. The court can under that sub-section appoint a receiver by way of equitable execution only in cases where the Court of Chancery would have so acted before the Judicature Act, 1873. *Harris* v. *Beauchamp*, 63 L. J., Q. B. 480; [1894] 1 Q. B. 801; 9 R. 653; 70 L. T. 636; 42 W. R. 451—C. A.

Semble, the court would make such an order where it was established that a judgment debtor threatened and intended fraudulently, and for the purpose of delaying and defeating his creditors, to make away with his property. *Ib.*

A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an executor. The judgment debtor at the time of her death was possessed of certain furniture and chattels, and was carrying on a business. The judgment remaining unsatisfied, the judgment

The others disclaimed by answer:—Held, that they were not necessary parties. *S. C.*, 41 L. J., Ch. 226; L. R. 13 Eq. 210; 26 L. T. 230.

A judgment creditor who had in 1872 sued out an elegit, to which a return of nil has been made by the sheriff, the legal estate in the debtor's lands being vested in a mortgagee, may, on a bill filed against the debtor and the prior incumbrancers, obtain a decree for a sale and receiver of the rents of an equity of redemption of the debtor, subject to the rights of prior incumbrancers. He cannot obtain a declaration that he has a charge or a decree for foreclosure. *Wells* v. *Kilpin*, 44 L. J., Ch. 184; L. R. 18, Ex. 298; 22 W. R. 675.

On a bill filed against mortgagees and mortgagor, who was also a judgment debtor, by a judgment creditor who had issued a writ of elegit against the goods and hereditaments of the judgment debtor, but the execution of which, in consequence of the mortgages, could not be proceeded with, for accounts, redemption, and foreclosure, the ordinary redemption and foreclosure decree was made, notwithstanding the 27 & 28 Vict. c. 112. *Beckett* v. *Buckley*, L. R. 17 Eq. 435; 22 W. R. 294.

After Decree.]—A. and B., in 1838, filed their bill for the administration of an estate, of the residue of which they were each entitled to one-third. In 1840 they changed their solicitor in the cause, and appointed F. as such solicitor, who so continued until 1843, when they again changed their solicitor. F. then brought his action against A. (B. having gone out of the jurisdiction) for the amount of his bill of costs, and in June, 1844, he recovered and entered up judgment in such action. In June, 1845, F. filed his bill for foreclosure under 1 & 2 Vict. c. 110, as against A.'s third part of the property, the subject of the first suit. In July, 1846, F. obtained the common decree for foreclosure against A. and (default being made) on the 23rd March, 1847, the order for foreclosure was made absolute. The order absolute was then enrolled; A. had no property except that which she was entitled to in the first suit, but the value of the property to which she was entitled in that suit was three or four times the amount of F.'s judgment debt and costs. The master had made his report in the first suit, and the cause stood for hearing on further directions and on exceptions, when, on an application in June, 1847, the court enlarged the time appointed by the master for the payment of the debt and costs, notwithstanding the order absolute, and notwithstanding its enrolment. *Ford* v. *Wastell*, 6 Hare, 229; 16 L. J., Ch. 372; 11 Jur. 537.

5. Appointment of Receiver.

Receiver—When Appointed.]—A judgment creditor of a railway company to whom the company's land (including the line) has been delivered under an elegit, is entitled to a receiver of the tolls and earnings, and is not accountable as a mortgagee in possession if he has not obtained beneficial possession. *Kingston* v. *Cowbridge Ry.* 41 L. J., Ch. 152.

A judgment creditor who has sued out an elegit but is unable to obtain delivery by the sheriff of the debtor's lands by reason of the legal estate being outstanding and the existence of prior incumbrances, is not bound to redeem such prior incumbrances, but may obtain a decree for the appointment of a receiver and a sale in a suit to which the debtor and subsequent incumbrancers only are parties. *Wells* v. *Kilpin*, 44 L. J., Ch. 184; L. R. 18 Eq. 298; 22 W. R. 675.

A judgment creditor who has issued an elegit and obtained a return from the sheriff, although unable to sell the lands of his debtor before the expiration of one year under 1 & 2 Vict. c. 110. s. 13, is nevertheless entitled to a receiver of the rents at once. *Tillett* v. *Pearson*, 43 L. J., Ch. 93; 22 W. R. 209.

Plaintiff in an action which had been followed by a cross action, obtained an order in both actions that his costs of the cross action should be paid by the defendant in the action, a married woman, entitled for life, for her separate use, to the dividends of a sum of stock, standing in the names of trustees, who were not parties to either action. Plaintiff had endeavoured to obtain a sequestration, but failed from not being able to find the defendant's address, so as to serve the subpœna for costs. He then moved the court for a receiver, under s. 25, sub-s. 8, of the Judicature Act, 1873. After service of the notice of motion, but before the motion was heard, the defendant made an affidavit, in which her address was set forth:—Held, that the principle of *Anglo-Italian Bank* v. *Davies* (supra, col. 1204) applied, and that the plaintiff was entitled to a receiver. *Bryant* v. *Bull*, 48 L. J., Ch. 325; 10 Ch. D. 153; 39 L. T. 470; 27 W. R. 246.

Over another Receiver.]—A receiver will not be appointed over the possession of another receiver; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one; and a defendant who appears on the motion, and makes the objection, may get the costs of his appearance, though in contempt. *Valle* v. *O'Reilly*, 1 Hog. 199.

Ex parte Application for—Jurisdiction.]—There is jurisdiction to appoint a receiver by way of equitable execution upon an ex parte application; and that jurisdiction is properly exercised in cases where there is danger that the defendant's interest in the property would have ceased to exist before the order was made if the application were on notice. *Minter* v. *Kent, Sussex and General Land Society*, 14 R. 236; 72 L. T. 186; 59 J. P. 102—C. A.

An order appointing a receiver by way of equitable execution ought not to be made on an ex parte application. *Potts, In re, Taylor, Ex parte*, 62 L. J., Q. B. 392; [1893] 1 Q. B. 648; 4 R. 305; 69 L. T. 74; 41 W. R. 337; 10 Morrell, 2—C. A.

Service of Summons out of Jurisdiction.]—The plaintiff having obtained judgment against the defendant, a foreigner resident out of the jurisdiction, a summons was issued by leave of a judge at chambers, calling on the defendant to show cause why a receiver should not be appointed. On an application for leave to serve this summons on the defendant out of the jurisdiction:—Held, that there was no jurisdiction to grant such leave. *Weldon* v. *Gounod*, 15 Q. B. D. 622.

Evidence of Property.]—Where a plaintiff obtained judgment and issued execution, and the sheriff returned nulla bona, the court will

not appoint a receiver on the ground that since the return, the defendant has been found to be possessed of a patent the value of which did not appear from the evidence before the court. *Smith* v. *Carter*, 52 J. P. 615.

Form of Order—Security.]—Where a judgment creditor, in an action for equitable execution, obtained the appointment of a receiver for the purpose of creating a charge upon the debtor's property, subject to prior incumbrances, but not for the purpose of entering into possession or receiving the rents and profits, the receiver was not required to give security, the plaintiff and the receiver undertaking not to act without the leave of the court. *Hewett* v. *Murray*, 54 L. J., Ch. 572; 52 L. T. 380. See also *McGarry* v. *White*, infra.

When Trustee out of the Jurisdiction.]—An order had been made for the payment of money into court by the defendant in an action for breach of trust. The defendant was out of the jurisdiction of the court at the time, and there was slight prospect of his returning within it. The plaintiff accordingly moved to enforce the order by the appointment of a receiver of the interest payable to the defendant on some shares owned by him in a certain syndicate:—Held, that the court would enforce its order for the payment of money on a defendant out of its jurisdiction by the appointment of a receiver of property belonging to him within its jurisdiction. *Coney, In re, Coney* v. *Bennett*, 54 L. J., Ch. 1130; 29 Ch. D. 993; 52 L. T. 961; 33 W. R. 701.

Married Woman—Separate Estate.]—In an action against a married woman alleged to be possessed of separate estate, no defence was delivered, and the master found that she was entitled to separate property vested in trustees and subject to certain charges. The plaintiff was appointed receiver without security of the residue of the income of the separate estate, after payment of the prior charges, the plaintiff undertaking to act without remuneration. *M'Garry* v. *White*, 16 L. R. Ir. 322.

M., a married woman, by her next friend, applied to tax the bill of costs of her solicitor, incurred in a suit relating to her separate estate. After the taxing-master's certificate had been filed, an order was made on the application of the solicitor, directing an inquiry of what M.'s separate estate consisted at the date of the filing of the certificate capable of being reached by the judgment and execution of the court, and appointing a person to receive it until the amount found due on taxation was paid:—Held, that this order was proper, and that it was not necessary to take separate proceedings by action to enforce the demand against the separate estate. *Peace and Waller, In re*, 24 Ch. D. 405; 49 L. T. 637; 31 W. R. 899—C. A.

Beneficed Clergyman.]—A judgment, entered up in 1845, against a beneficed clergyman, for a debt was fully registered:—Held, that under the 1 & 2 Vict. c. 110, s. 13, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed. *Hawkins* v. *Gathercole*, 1 Sim. (N.S.) 63; 20 L. J., Ch. 59; 14 Jur. 1103.

Railway Company's Undertaking.]—The court, after appointing a receiver of property comprised in the general undertaking of a railway company, refused to allow a judgment creditor and mortgagee of a particular undertaking to sell the lands of the company comprised in his security. *Gardiner* v. *L. C. & D. Ry., Grissell, Ex parte*, 15 L. T. 311.

Garnishee Proceedings not Applicable.]—Since the Judicature Acts the court can grant equitable execution by the appointment of a receiver at the instance of a judgment creditor against debts and sums of money payable to the judgment debtor to which garnishee proceedings are not applicable. *Westhead* v. *Riley*, 53 L. J., Ch. 1153; 25 Ch. D. 413; 49 L. T. 776; 32 W. R. 273.

Receiver instead of Sequestration.]—An order was made against the defendants in an action who were defaulting trustees, for the payment of money into court. The defendants having failed to comply with such order, an application, was made by the plaintiffs that a writ of attachment might issue against them. At the defendant's instance, however, the court made an order allowing payment by weekly instalments. L., one of the defendants, had made an affidavit on that occasion stating that all the property he possessed was the furniture in his house. It subsequently transpired that L. had executed bills of sale affecting the furniture; but that the plaintiffs, in other proceedings, had successfully disputed the validity of such bills of sale. An application was accordingly made on behalf of the plaintiffs for the appointment of a receiver of the furniture by way of equitable execution. For the defendant L. it was contended that the legal and proper remedy of the plaintiffs was by sequestration, and that the court had no jurisdiction to appoint a receiver:—Held, that, although under r. 4 of Ord. XLII. of the Rules of the Supreme Court, 1883, sequestration was the appropriate remedy, yet under s. 25, sub-s. 8 of the Judicature Act, 1873, the court had jurisdiction to appoint a receiver if it appeared just or convenient so to do; and that, in the present case, it was just and convenient to appoint a receiver, and that an order must be made accordingly. *Whiteley, In re, Whiteley* v. *Learoyd*, 56 L. T. 846.

"Just or Convenient"—Judicature Act, 1873, s. 25, sub-s. 8—Jurisdiction.]—Sect. 25, sub-s. 8 of the Judicature Act, 1873, which empowers the court to appoint a receiver where "just or convenient," does not confer an arbitrary and unregulated discretion. The court can under that sub-section appoint a receiver by way of equitable execution only in cases where the Court of Chancery would have so acted before the Judicature Act, 1873. *Harris* v. *Beauchamp*, 63 L. J., Q. B. 480; [1894] 1 Q. B. 801; 9 R. 653; 70 L. T. 636; 42 W. R. 451—C. A.

Semble, the court would make such an order where it was established that a judgment debtor threatened and intended fraudulently, and for the purpose of delaying and defeating his creditors, to make away with his property. *Ib.*

A judgment having been obtained in an action to recover money due, the judgment debtor died, leaving a will by which she appointed an executor. The judgment debtor at the time of her death was possessed of certain furniture and chattels, and was carrying on a business. The judgment remaining unsatisfied, the judgment

creditors obtained an order at chambers appointing a certain person receiver of the furniture and chattels and of the business, and to get in and receive the debts due to such business, and directing him to pay the balance which should appear due on his accounts in or towards satisfaction of the judgment:—Held, that in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by fieri facias, or attachment of debts, and there being no special circumstances showing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly made and ought to be rescinded. *Whittaker* v. *Whittaker* (7 P. D. 15) discussed. *Manchester and Liverpool District Banking Co.* v. *Parkinson*, 58 L. J., Q. B. 262; 22 Q. B. D. 173; 37 W. R. 264—C. A.

—— **"Interlocutory Order."**]—The words "interlocutory order" in s. 25, sub-s. 8, of the Judicature Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after. *Smith* v. *Cowell*, 50 L. J., Q. B. 38; 6 Q. B. D. 75; 43 L. T. 528; 29 W. R. 227—C. A.

—— **By Motion after Final Judgment.**]—So long as the final judgment in an action remains unsatisfied, the action is a "cause or matter pending" within the meaning of s. 24, sub-s. 7, of the Judicature Act, 1873, and consequently, in an action by a creditor against a debtor in which the plaintiff has obtained final judgment, the court has power, under that sub-section, in order to satisfy the judgment, to grant equitable execution against the defendant by appointing a receiver upon motion in that action, although the writ may not have been indorsed with a claim for a receiver; it being unnecessary in such case to bring another action for the purpose. *Salt* v. *Cooper*, 50 L. J., Ch. 529; 16 Ch. D. 544; 43 L. T. 682; 29 W. R. 553—C. A.

6. Control of Receiver by Court.

Improper Conduct of Receiver—Application to what Court.]—A receiver was appointed in an action in the Queen's Bench Division under an order directing him to collect the rents of certain specified property (including property in which S. was in possession as mortgagee), such order to be without prejudice to the rights of any incumbrancer who might be in or enter into possession. The receiver gave notice to the tenants of the mortgaged property to pay the rents to him, who informed him that they had already been served with a notice from S. The receiver not withdrawing the notice, S. brought an action in the Chancery Division, asking for an injunction to restrain the receiver from receiving the rents:—Held, that although the receiver's conduct was improper, and in violation of the rights of S., S. was not justified in instituting a fresh action in the Chancery Division; and that, whatever might have been the course previous to the Judicature Act, such a proceeding since that act was irregular, the proper course being to apply in the action and to the court in and by which the receiver was appointed. *Searle* v. *Choat*, 53 L. J., Ch. 506; 25 Ch. D. 723; 32 W. R. 397—C. A.

Trustee and Receiver—Soliciting Customers after Removal.]—D. was trustee of the business of S. & Co. under the will of the testator in the action. He was appointed receiver and manager of the business by the court, and was subsequently removed; his beneficial interest had passed to his trustee in bankruptcy. D. entered the employment of another firm and solicited the customers of S. & Co.:—Held, that he had not committed a contempt of court. *Gent, In re, Gent-Davis* v. *Harris*, 40 W. R. 267.

Interference with Receiver.]—Judgment was entered up against a railway company at the suit of a creditor. In a suit by creditors against the company a receiver was, by the consent of all parties, appointed over the property of a company. Afterwards the judgment creditor issued a writ of fieri facias against the company, under which the sheriff levied execution. A motion was made by the plaintiff for the committal of the sheriff for contempt of court, in having interfered with the receiver, but the execution creditor was not served with notice:—Held, that he must be served. *Russell* v. *East Anglian Ry.*, 14 Jur. 967.

Property in the possession of a receiver appointed by the court, in a suit, was in two instances seized by the sheriff under writs of fieri facias issued by judgment creditors of the defendant. On motions in the suit to commit the sheriff:—Held, that he was not warranted in making the seizures, and that he could not justify the seizures by questioning the propriety of the order under which the receiver was appointed; and on the submission of the sheriff an order was made in each case for him to withdraw from possession and to pay the costs, the court considering this order as sufficient under the circumstances for the maintenance of its jurisdiction. The court at the same time protected the sheriff against proceedings by the judgment creditor, in one of the cases where the judgment creditor had been served with notice and appeared on the motion, but refused to make this addition to the order in the other case, where the judgment creditor had not been served and was not present. *S. C.*, 3 Macn. & G. 104; 6 Rail. Cas. 501; 20 L. J., Ch. 257; 14 Jur. 1033.

When the sheriff entered, a receiver, appointed by the court, was in possession of the partnership premises and effects. The sheriff took out an interpleader summons against the receiver and partnership creditor. Ordered, that the sheriff and creditor must pay the costs consequent on the contempt, and also of the summons, without prejudice to any question which might arise as between themselves. *Lane* v. *Sterne*, 3 Giff. 629; 9 Jur. (N.S.) 320; 10 W. R. 555.

After an order for, but before the actual appointment of, a receiver in a suit for dissolution of partnership, the sheriff had taken possession of part of the partnership property under a fieri facias, and afterwards refused to quit possession when the receiver was appointed; a motion to commit the sheriff for contempt was refused with costs. *Defries* v. *Creed*, 34 L. J., Ch. 607; 11 Jur. (N.S.) 360; 12 L. T. 262; 13 W. R. 632.

Power to order Sale of Goods.]—The court has no power to order a sale of the goods of a judgment debtor which have been taken in equitable execution by the appointment of a

judgment creditor as receiver. *Flegg* v. *Prentis* ([1892] 2 Ch. 428) followed. *De Peyrecave* v. *Nicholson*, 10 R. 532; 71 L. T. 255; 42 W. R. 702.

Receiver's Accounts—Payments to Solicitor for Creditors—Authority of Solicitor.]—A receiver appointed under any order made by way of equitable execution, directing that moneys received by him shall be paid to the judgment creditor, must make his payments to the judgment creditor direct. The solicitor in the action has no authority as such to receive the payments on behalf of his client. If payment is made to the solicitor, and the money is misappropriated, the receiver cannot credit himself with the amount in his accounts. *Ind, Coope & Co.* v. *Kidd*, 63 L. J., Q. B. 726; 10 R. 528; 71 L. T. 203.

Receiver appointed in Partnership Action—Subsequent Judgment against Firm.]—Where a plaintiff had obtained an order for dissolution of partnership and accounts, and a receiver was appointed, a creditor, who had obtained a judgment in the Queen's Bench Division of the High Court of Justice for 48*l.* 13*s.* 8*d.* and 8*l.* costs, took out a summons in chambers for leave to issue execution against the assets of the firm in the hands of the receiver, and this application was refused. On the motion to discharge the order: the court refused to decide that the applicant would be entitled to any preferential payments in the administration of the partnership assets, but gave him a charge for his judgment debt, with 4 per cent. interest and costs, and costs of the motion, on all the moneys then in the hands of the receiver, or to come into his hands, he undertaking to deal with it according to the order of the court, the court intending to preserve to the applicant such legal rights as he would have had in case the sheriff had seized under an execution and sold on that day. *Kewney* v. *Attrill*, 56 L. J., Ch. 448; 34 Ch. D. 345; 55 L. T. 805; 33 W. R. 191.

7. Effect of Order for Receiver.

Date from which Order takes Effect.]—The defendants recovered judgment against a French company for the price of certain copper delivered to the company. Certain other copper belonging to the company was in the hands of third persons, who had a lien on it for work and labour done. The defendants obtained an order appointing a receiver to receive this copper. Notice of this order was served on the third persons. Subsequently to the making of the receivership order, a decree of judicial liquidation was pronounced in France against the French company, and the plaintiffs were appointed judicial liquidators. An application made by the plaintiffs for the receivership order to be discharged was dismissed, and the order varied by a direction that the receiver was not to pay out anything received under the order without the direction of the court. The copper having been sold, an issue was directed to determine whether the plaintiffs or the defendants were entitled to the balance, after payment of the lien of the proceeds of the sale:—Held, that as the time when the receivership order was obtained was the date from which it took effect, the defendants were entitled to the balance. *Levasseur* v. *Mason and Barry*, 60 L. J., Q. B. 659; [1891] 2 Q. B. 73; 64 L. T. 761; 39 W. R. 596—C. A.

Forfeiture of Interest under Will.]—Testator, by will made in 1870, devised freehold land to his son for life, and declared that his son should have no power to sell, dispose of, mortgage, charge, or otherwise anticipate his life estate, and in case he should attempt to do so, or in case he should become bankrupt or insolvent, or in case his estate should be "taken in execution by any process of law for the benefit of any creditor," then the devise to him should become void and cease as if he were then actually dead. After the testator's death a creditor of the son obtained judgment against him and was appointed receiver of his interest under the will by way of equitable execution. No elegit was ever sued out, and it was not shewn that there was ever any obstacle to the land being extended, under an elegit:—Held, that the appointment of a receiver worked a forfeiture of the son's life estate. *Blackman* v. *Fysh*, 60 L. J., Ch. 666; 64 L. T. 590; 39 W. R. 520.

No Elegit or Registration—Subsequent Purchaser.]—A judgment debtor had lands in Surrey subject to an equitable mortgage, and his judgment creditor obtained an order for a receiver of these lands. This order was not registered. After the appointment of the receiver the debtor sold the lands to a purchaser for value without notice:—Held, first, that under the circumstances of the case, it was just and convenient for the court to appoint a receiver within the Judicature Act, 1873, s. 25, sub-s. 8; secondly, that as the appointment of the receiver was equivalent to actual delivery of the land in execution, registration of the order appointing the receiver was, under 27 & 28 Vict. c. 112, unnecessary, registration under that act being only necessary when an order for sale is required, and that the purchaser was affected by the order. *Pope, In re*, 55 L. J., Q. B. 522; 17 Q. B. D. 743; 55 L. T. 369; 34 W. R. 693—C. A.

Application to vacate Registration of Charge—Jurisdiction.]—A husband having been ordered to pay various sums of money due upon alimony proceedings in the Probate Division, and having failed to pay the said sums, an action was commenced in the Chancery Division to compel payment thereof, and sequestrators were appointed under two sequestrations. The respondent having assigned his interest in the lands directed to be sold, a sum agreed upon was paid into court in respect of the claims of the petitioner, and the latter gave notice of motion in the Probate Court to obtain the discharge of the sequestrators and to vacate the registration of the writs in the Land Registry:—Held, that the Probate Court had no power or jurisdiction to vacate the registration of the charges, the Lands Charges Registration Act, 1888, which directs their registration, conferring no power or directions as to vacating the same. *Cook* v. *Cook*, 59 L. J., P. 69; 15 P. D. 116; 62 L. T. 667; 38 W. R. 656.

8. Cases Before Judgments Act, 1838.

Sale of moiety of debtor's real estate, decreed for satisfaction of judgment and costs. *Rowe* v. *Bant*, Dick. 150.

In case of judgment recovered against an heir who has a reversion in fee, which is only assets cum acciderit, court will not decree a sale of the

reversion, but the creditor must wait till it falls. *Fortrey* v. *Fortrey*, 2 Vern. 134.

A judgment creditor is not bound to wait till he is paid out of the rents, for the court will accelerate the payment by directing a sale. *Stileman* v. *Ashdown*, 2 Atk. 609.

K. DISCOVERY IN AID OF EXECUTION.

Garnishee Order — Oral Examination of Garnishee.]—A garnishee order is an order for the payment of money, and a judgment creditor, being a person entitled to enforce it, may apply to the court for an order for the oral examination of the garnishee under Ord. XLII. r. 32. *Cowan* v. *Carlill*, 52 L. T. 431 ; 33 W. R. 583.

Examination of Third Parties.]—There is no power under Ord. XLII. r. 32, when a judgment or order has been obtained for the recovery or payment of money, to make an order for the examination of any person other than the debtor liable under such judgment or order, or in the case of a corporation, other than an officer of the defendant corporation. *Irwell* v. *Eden*, 56 L J., Q. B. 446 ; 18 Q. B. D. 588 ; 56 L. T. 620 ; 35 W. R. 511—C. A.

On the application of a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that her mother, sister, and brother-in-law should attend the court to be examined as to her whereabouts :—Held, that the court had no jurisdiction to order the attendance of third parties for examination. *Hyde* v. *Hyde*, 57 L. J., P. 89 ; 13 P. D. 166 ; 59 L. T. 529 ; 36 W. R. 708—C. A.

Court will compel discovery of goods in hands of third persons, in order to subject them to a judgment. *Taylor* v. *Hill*, 1 Eq. Abr. 132.

Examination of Judgment Debtor—Order to Answer Questions—Discretion.]—The plaintiff, having recovered judgment against the defendant, obtained an order for his examination as to debts owing to him. The defendant had before judgment deposited with the plaintiff a debenture bond of a limited company for 1,000*l.* to secure 300*l.* On his examination the judgment debtor declined to answer certain questions as to the validity of the debenture, which the plaintiff desired to have answered for the purposes of an action commenced by him against the company :—Held, that the judgment debtor had a sufficient interest in the debenture to bring the case within Ord. XLII. r. 32 ; but that the granting or refusing the order was a matter of discretion. The appeal was accordingly dismissed. *Watkins* v. *Ross*, 4 R. 365 ; 68 L. T. 423—C. A.

Married Woman, Examination of.]—Where a judgment or order has been obtained in a county court against a married woman for the recovery or payment of money, the judge has power to make an order for her examination as to her separate estate. *Aylesford (Countess)* v. *G. W. Ry.*, [1892] 2 Q. B. 626 ; 41 W. R. 42 ; 57 J. P. 70.

Upon an inquiry under Ord. XLII. r. 42, as to the separate estate of a married woman against whom a judgment has been recovered, there is no power to compel witnesses other than the judgment debtor to attend for examination. *Irwell* v. *Eden* (56 L. J., Q. B. 446 ; 18 Q. B. D. 588) followed. *Bursill* v. *Tanner* (55 L. J., Q. B. 53 ; 16 Q. B. D. 1) distinguished. *Hood-Barrs* v. *Heriot*, 65 L. J., Q. B. 622 ; [1896] 2 Q. B. 338 ; 75 L. T. 15 ; 45 W. R. 1—C. A.

Examination of Witnesses — Judgment Debtor's Expenses.]—Ord. XXXVII. r. 9, does not apply to a judgment debtor against whom an order is made under Ord. XLII. r. 32, for examination in aid of execution ; such a person is not upon the same footing as a witness at the trial of an action and is only entitled to be paid the reasonable expenses of his appearance, and their amount must be ascertained by the master. *Rendell* v. *Grundy*, 64 L. J., Q. B. 135 ; [1895] 1 Q. B. 16 ; 71 L. T. 564 ; 43 W. R. 50 ; 14 R. 19—C. A.

And see ATTACHMENT (OF DEBT).

L. EXECUTION BY ARREST OF PERSON.

See ATTACHMENT (OF PERSON)—CONTEMPT OF COURT—DEBTORS ACT—SHERIFF.

M. STAY AND SETTING ASIDE.

1. STAY.

Generally.] — Injunction to restrain sheriff from executing fi. fa. against furniture, &c., of defendant at law, which, with house, &c., had been let by him to plaintiff, who was in possession, refused. *Garstin* v. *Asplin*, 1 Madd. 150.

Court has no jurisdiction to stay execution on judgment obtained against defendant, till plaintiff shall do any act, however reasonable, to make the defendant a title to the subject-matter of the action ; a rule for that purpose was discharged with costs. *Butts* v. *Bilke*, 4 Price, 291.

The court has no jurisdiction to restrain a plaintiff from taking proceedings to enforce a judgment in his favour on the ground that the action was brought under circumstances amounting to the common-law offence of maintenance. *Elborough* v. *Ayres*, 39 L. J., Ch. 601 ; L. R. 10 Eq. 367 ; 23 L. T. 68 ; 18 W. R. 913.

Rule to Reduce Damages.]—Where a rule nisi for reducing the damages is granted, execution should be stayed only in respect of the amount mentioned in the rule. *Bate* v. *Pane*, 18 L. J., Q. B. 273 ; 13 Jur. 609.

Mode of Stay—Payment by Instalments.]—The power to suspend execution should be exercised by a separate order, and not by a qualification of the judgment. Semble, an order for payment by instalments, and postponement of costs, is not within the discretionary powers as to staying execution conferred by Ord. XLI. r. 15. *Brien* v. *Sullivan*, 14 L. R., Ir. 391.

2. ON WHAT GROUNDS SET ASIDE.

Generally.]—Where judgment has been signed, costs taxed, and execution issued for the amount of debt and costs, without notice of taxation, the court will not set aside the judgment or execution, but will direct a review of the taxation. *Field* v. *Partridge*, 7 Ex. 689 ; 21 L. J., Ex. 269 ; 16 Jur. 413.

Money levied by a regular execution, under a judgment valid on the face of it, cannot be

recovered, in an action for money had and received, on the ground that judgment was signed or execution issued fraudulently for the whole sum named in the judgment, when part had been already paid. *De Medina* v. *Grove*, 10 Q. B. 152 ; 15 L. J., Q. B. 287 ; 10 Jur. 428.

The remedy in case of such fraud is by motion to the court in which the action is brought, to set aside the judgment and execution. *Ib.*

When a party has been improperly made a co-defendant in a cause, and the defence has been conducted in his name without his authority or knowledge, the court will relieve him from execution, when it appears from the circumstances of the attorney that he could have no remedy against him. *Stanhope* v. *Firmin*, 4 Scott, 39. S. P., *Stanhope* v. *Avery*, 5 D. P. C. 357.

For Irregularity — Application must be Prompt.]—If a defendant seeks to set aside an execution levied upon his goods upon the ground that he has never been served with process, and was ignorant of the existence of the action, he must apply promptly. *Jones* v. *Davies*, 1 B. C. Rep. 290.

—— **What constitutes Irregularity.**] — A plaintiff having obtained final judgment in a cause in the exchequer, afterwards proceeded for the same cause of action by a foreign attachment in the Lord Mayor's Court against the defendant's goods ; the defendant surrendered himself into custody in discharge of the attachment ; and on the following day, whilst he was so in custody, the plaintiff issued a ca. sa. under which the defendant was detained :—Held, that the ca. sa. was not irregular ; and that the plaintiff having abandoned his proceedings in the Lord Mayor's Court, and the defendant having in consequence obtained judgment of non pros. thereon, there was no ground for his discharge under the equitable jurisdiction of the court. *Chamberlayne* v. *Green*, 9 M. & W. 790 ; 1 D. (N.S.) 649 ; 11 L. J., Ex. 307 ; 6 Jur. 400.

—— **Cured by Sheriff obtaining Time to Return.**]—An irregularity in signing judgment and issuing execution is cured by the defendant obtaining time for the sheriff to return the writ. *Lewis* v. *Gompertz*, 1 Jur. 984.

For Breach of Faith.]—Pending an action, it was agreed that the proceedings should be stayed, and that no judgment should be signed if a mortgage on the defendants' ship was delivered to the plaintiff within one week, and so long as the amount above mentioned was kept insured. A policy was then effected, which expired on the 23rd of September. On the 22nd the secretary of the defendants wrote to insurance brokers in London, to effect an insurance, but in consequence of some doubt about the stamp, and the absence of the secretary of the insurance company, policies were not issued until the 30th, though dated on the 24th and 27th. They were issued in pursuance of the instructions given on the 22nd, and the slips for the same were delivered on that day, which, according to the practice of insurance companies, are considered honorary engagements. The plaintiff having signed judgment and issued execution, the court refused to interfere, as the defendants had not performed their undertaking, and judgment was not signed against good faith. *Parry* v. *Great Ship Co.*, 4 B. & S. 556 ; 33 L. J., Q. B. 41 ; 10 Jur. (N.S.) 294 ; 9 L. T. 379 ; 12 W. R. 78.

The interest which a bankrupt has in increasing the divisible fund under the fiat is sufficient to entitle him to set aside an execution levied on his goods against good faith. *Pinches* v. *Harvey*, 1 G. & D. 236 ; 1 Q. B. 868 ; 10 L. J., Q. B. 316 ; 6 Jur. 389.

S., as solicitor for a shareholder, presented a petition for the winding-up of a company, which was dismissed with costs. K., the solicitor of the company, made a demand for these costs upon S., who had received a cheque for the amount, but through a misunderstanding between the solicitors as to the authority to receive the costs, payment was not made until after a writ of fi. fa. had been issued and executed for the amount. On a motion by S.'s client to set aside the writ, as issued contrary to good faith ; or in the alternative that K. might be ordered to pay the costs of the execution, and of the motion : the court refused to set the writ aside, but considering that it ought not to have been issued, ordered K. to pay the costs of the execution and motion. *Hollington, Ex parte, Commonwealth Land, Building, Estate and Auction Co., In re*, 29 L. T. 502 ; 22 W. R. 106.

For Excess.]—A writ of execution taken out for too large a sum can in general only be quashed for excess ; but where a ca. sa. was indorsed to levy the penalty of a warrant of attorney where the defeasance only authorised execution for the arrears, the rule was made absolute for setting aside the execution in toto. *Tilby* v. *Best*, 16 East, 163. See *Webber* v. *Hutchins*, 8 M. & W. 319 ; 1 D. (N.S.) 95 ; 10 L. J., Ex. 354.

Pending Indictment of Witnesses for Perjury.]—The court refused to stay execution after verdict and judgment, which was affirmed in error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action. *Warwick* v. *Bruce*, 4 M. & S. 140.

3. Conditions to Setting Aside.

When Court will Impose.]—Where a defendant had been arrested on a ca. sa. at the suit of the plaintiff, but a voluntary escape was permitted by the sheriff, and an action was brought against the sheriff for such escape, in which the plaintiff recovered, but the defendant was subsequently again arrested on a second ca. sa., nominally at the suit of the plaintiff, but which, as it was admitted, was in fact sued out, with a view to the indemnification of the sheriff, the court ordered the writ to be set aside, and the defendant to be discharged out of custody ; and costs not being prayed on his behalf, refused to impose terms on him, that he should bring no action. *Gillott* or *Gillett* v. *Aston*, 2 D. (N.S.) 413 ; 12 L. J., Q. B. 5 ; 7 Jur. 235.

Where a defendant has been taken on a ca. sa. as he was leaving the Insolvent Debtors Court, his petition having been adjourned sine die, without protection, the court refused to discharge him without his undertaking to bring no action against the sheriff. *Andrews* v. *Martin*, 12 C. B. (N.S.) 371 ; 6 L. T. 433.

Held, also, that the fact of his having delayed his application for six months was no objection. *Ib.*

A plaintiff recovered judgment, and took the defendant on a ca. sa. ; W., the attorney of the plaintiff's father, agreed with the defendant that on delivery of certain documents he would

discharge the defendant; the documents were delivered, and W. gave the defendant an order of discharge, directed by the plaintiff to his attorney; the sheriff refused to discharge, as the order was not directed to him:—Held, that the defendant was entitled to his discharge, on condition that no actions were brought against the sheriff or anyone else, and that the plaintiff's attorney's remedies on the judgment should not be prejudiced. *Langley* v. *Headland*, 19 C. B. (N.S.) 42; 34 L. J., C. P. 183; 11 Jur. (N.S.) 431; 12 L. T. 335; 13 W. R. 752.

Application to set aside Condition.]—The defendant's goods having been taken under a fi. fa. after the debt and costs had been paid by another party liable upon the same instrument, he applied to a judge to set aside the execution. The judge made the order, but imposed as a term that the defendant should bring no action; having availed himself of the order so as to get the sheriff to withdraw from possession:—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Wilcox* v. *Odden*, 15 C. B. (N.S.) 837.

A defendant having been arrested on a ca. sa. after the plaintiff had proved his debt under a fiat against him, applied by summons for his discharge and to set aside the ca. sa. The judge made the order, imposing as a term that the defendant should bring no action; having availed himself of the order so as to obtain his discharge:—Held, that the defendant could not afterwards move to set aside so much of it as restrained him from bringing an action. *Hayward* v. *Duff*, 12 C. B. (N.S.) 364; 6 L. T. 433; 10 W. R. 562.

The court will not interfere with the discretion of a judge at chambers, where, upon a summons to set aside an execution for irregularity, with costs, he makes the order as prayed, adding, as a condition, that the defendant bring no action, even though the order has not been drawn up. *Bartlett* v. *Stinton*, 35 L. J., C. P. 238; L. R. 1 C. P. 493; 12 Jur. (N.S.) 342; 14 L. T. 287; 14 W. R. 614.

N. EXPENSES OF EXECUTION.

Meaning of.]—The words "expenses of execution" mean expenses of the specific execution under which the fruits are obtained. *Salisbury (Marquis)* v. *Ray*, infra.

Expenses of Previous Abortive Writ.]—The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 123, which gave the plaintiff in every case of execution a right to levy the expenses of the execution, over and above the sum recovered by the judgment, did not entitle him to take under a ca. sa. the expenses of a previous abortive fi. fa. *Salisbury (Marquis)* v. *Ray*, 8 C. B. (N.S.) 193; 29 L. J., C. P. 225; 6 Jur. (N.S.) 1117; 2 L. T. 286; 8 W. R. 462. S. P., *Earp* v. *Satchell*, 3 G. & D. 346; 4 Q. B. 121; 12 L. J., Q. B. 122; 7 Jur. 172.

Of Irregular Execution.]—Where an irregular execution is set aside, and the sums levied and paid by the defendant are ordered to be repaid, the plaintiff is only bound to repay the money which has been properly paid by the defendant. *Whalley* v. *Barnett*, 2 D. P. C. 33.

Effect of County Courts Act, 1856, s. 30.]—By the repealed County Courts Act (19 & 20 Vict. c. 108), s. 30, where an action of contract is brought in one of the superior courts to recover a sum not exceeding 20*l.*, and the defendant suffers judgment by default, the plaintiff shall recover no costs unless a court or judge otherwise order:—Held, that this section did not deprive the plaintiff of the costs of a writ of execution. *Armitage* v. *Jessop*, L. R. 2 C. P. 12; 12 Jur. (N.S.) 963; 15 L. T. 214; 15 W. R. 130.

J. M. L.

EXECUTOR AND ADMINISTRATOR.

[BY J. F. WALEY.]

[PROBATE, LETTERS OF ADMINISTRATION, AND PRACTICE ON GRANT OF—*See under* WILL.]

I. TITLE OF EXECUTOR OR ADMINISTRATOR.

- *a. Executor.*
  1. Appointment, 1226.
  2. Relation back of Title, 1231.
  3. Joint and Several Authority, 1231.
  4. Survivorship, 1234.
  5. Devolution of Office, 1235.
- *b. Administrator.*
  1. Appointment, 1236.
  2. Relation back of Title, 1238.
  3. Survivorship, 1238.
  4. Other Cases, 1239.

II. RIGHTS, POWERS AND DUTIES.

- *a. Renunciation and Disclaimer*, 1239.
- *b. Possession and Disposition of Body*, 1242.
- *c. Acts done before Probate or Letters of Administration*, 1243.
- *d. Collection and Management of Estate.*
  1. Inventory and Accounts, 1244.
  2. Authority to Receive Money, 1245.
  3. Getting in and Realising Estate, 1246.
  4. Selling or Mortgaging Estate.
     - (a) Alienation of Chattels.
       - i. Sales, 1250.
       - ii. Mortgages or Pledges, 1259.
     - (b) Alienation of Real Estate.
       - i. Sales, 1266.
       - ii. Mortgages, 1274.
     - (c) Liability for Application of Proceeds, 1279.
  5. Other Dealings, 1285.
- *e. Allowances and Payments*, 1288.
- *f. Right of Indemnity*, 1298.
- *g. Right of Retainer*, 1307.
- *h. Right of Set-off*, 1322.
- *i. Respecting Creditors.*
  1. Right of Preference, 1329.
  2. Compromises and Compounding of Debts, 1331.
- *j. Respecting Legacies.*
  1. Right of Assent, 1336.
  2. Interest on, 1338.
  3. Appropriation to Satisfy, 1340.
  4. Other Matters, 1342.
- *k. Authorising Agents*, 1343.
- *l. Investing in Stocks and Funds* — *See* TRUST AND TRUSTEE.

m. In Cases of Landlord and Tenant—*See* LANDLORD AND TENANT.
n. Distress by—*See* DISTRESS.

III. LIABILITIES.
a. Funeral Expenses, 1344.
b. Executorship Expenses, 1347.
c. For Personal Acts and Omissions, 1348.
d. For the Acts of Each Other, 1355.
e. Devastavit, 1362.
f. Interest.
1. Simple Interest, 1367.
2. Compound Interest, 1371.
3. Rate, 1374.
g. For Acts and Defaults of Agents, 1375.

IV. RIGHTS PECULIAR TO EXECUTORS.
a. Legacy to, 1379.
b. Residue, Right to, 1384.

V. CREDITOR APPOINTED EXECUTOR, 1402.

VI. DEBTOR APPOINTED EXECUTOR, 1402.

VII. EXECUTOR DE SON TORT.
a. Constitution of, 1406.
b. Legal Position of, 1411.

VIII. MARRIED WOMAN EXECUTRIX OR ADMINISTRATRIX, 1415.

IX. INFANT EXECUTOR OR ADMINISTRATOR, 1417.

X. ADMINISTRATION.
a. Assets.
1. Legal or Equitable, 1418.
2. What forms Part of Estate, 1422.
b. Order and Contribution.
1. Generally, 1439.
2. Charge or Trust for Payment of Debts, 1450.
3. Exoneration of Personalty.
(a) Apart from Statute, 1467.
(b) Real Estates Charges Acts, 1505.
c. Debts, Liabilities and Priorities.
1. Rights of Creditors, 1516.
2. Debts Generally.
(a) Accrued before Death, 1517.
(b) Accrued since Death, 1525.
3. Joint and Several Debts, 1527.
4. Specialty Debts, 1529.
5. Debts and Liabilities in Respect of Leaseholds, 1537.
6. Calls on Shares, 1544.
7. Crown Debts, 1551.
8. Judgment Debts, 1552.
d. Marshalling, 1560.
e. Carrying on the Trade of the Deceased, 1571.

XI. DISTRIBUTION.
a. According to what Law, 1582.
b. By Statutes of Distribution, 1583.
c. By Customs of London and York, 1593.

XII. REFUNDING.
a. By Legatees.
1. For Creditors, 1594.
2. For Legatees or Next of Kin, 1600.
3. Other Cases, 1603.
4. Interest, 1604.
b. By Executors, 1604.
c. By Creditors, 1605.

XIII. PROCEEDINGS BY OR AGAINST.
a. At Common Law.
1. When Maintainable.
(a) Actions by, 1607.
(b) Actions against, 1614.
b. Other Proceedings.
1. When Maintainable, 1620.
2. Account, 1625.
3. Administration under Direction of Court.
(a) Jurisdiction, 1636.
(b) Practice, 1640.
(c) As to Debts.
i. Generally, 1658.
ii. Insolvent Estate, 1662.
iii. Interest, 1668.
iv. Practice on Proof of, 1672.
v. Evidence, 1675.
4. Sales by the Court, 1677.
5. Payment into Court.
(a) In General, 1686.
(b) On Admission of Assets, 1689.
(c) Misconduct of Executor, 1692.
(d) On Stay of Action by Creditor, 1693.
(e) Under Statutory Powers, 1693.
6. Receiver, 1694.
7. Injunction, Dismissal and Stay of Proceedings, 1704.
c. Parties, 1726.
d. Admission of Assets, 1777.
e. Plea of Plene Administravit, 1788.
f. Other Pleas, 1791.
g. Statute of Limitations, 1796.
h. Judgment and Subsequent Proceedings.
1. At Common Law, 1800.
2. In Equity, 1801.
i. Liability for Costs.
1. At Common Law.
(a) When suing in Representative Character, 1821.
(b) When Defendant, 1824.
2. In Probate Court, 1825.
3. In Equity.
(a) Of Administration Action, 1828.
(b) Of Executor or Administrator, 1855.
(c) Of Creditor, 1875.
(d) Of Heir-at-law, 1885.
(e) Respecting Legacies and Shares of Residue, 1887.
(f) Other Matters, 1895.

I. TITLE OF EXECUTOR OR ADMINISTRATOR.

a. EXECUTOR.

1. Appointment.

What amounts to Appointment.]—Appointment at the end of will of A. and B., to receive and pay the contents before mentioned, makes them executors. *Pickering* v. *Tower*, Ambl. 364; 1 Eden, 142.

A testator gave his property to C. and D. upon various trusts, and among others, upon trust for sale, and empowered C. and D. and the survivor of them, his heirs, executors, &c.,

to give receipts for the purchase-money, and concluded by appointing his wife and C. and D. "trustees and executors" of his will:—Held, that this appointment conferred on his wife only the general powers and duties of executrix, and did not make her a trustee with C. and D. under the specific trusts of the will. *Sidebotham* v. *Watson*, 11 Hare, 170.

A testator directed his debts to be paid, and appointed executors in England, and other executors in Italy, directing the English executors to transmit the residue to the Italian executors, and bequeathing such residue amongst classes of persons alleged to reside in Italy:—Held, that as to the sum to be paid over, being the residue, after payment of debts, the Italian executors must be regarded as simply trustees, and not as executors, holding the fund charged with debts; and that therefore inquiries must be directed to ascertain the persons beneficially entitled. *Weatherby* v. *St. Giorgio*, 2 Hare, 624; 12 L. J., Ch. 412; 7 Jur. 717.

Alternative or Substitutional Appointment of Executors.]—If a man adds in his will, that if his executor should be attainted of felony or treason, another should stand in his room; if the person be attainted in the testator's lifetime the substitution is good. *Carte* v. *Carte*, Ridgw. 210; 3 Atk. 180; Ambl. 28.

Where an appointment of an executor is made in a duly-executed will, and the testator, having expressed his intention of so doing, obliterates the original name and substitutes another, such obliteration and substitution being executed the court will direct the original name to be restored in the probate, if it is satisfied by evidence aliunde what the original name was. *Harris, In goods of*, 1 Sw. & Tr. 536; 29 L. J., P. 79; 2 L. T. 118; 8 W. R. 368. S. P., *Parr, In goods of*, 29 L. J., P. 70; 6 Jur. (N.S.) 56.

A testator appointed his son sole executor, but in the event of his going abroad, or being and remaining abroad for upwards of two calendar months, then he appointed B. his executor. The son, after the death of the testator, went abroad, without taking probate, and there remained. The court granted probate to B., but reserved power to the son to prove the will. *Lane, In goods of*, 33 L. J., P. 185.

A. made a will, and appointed B., C., D. and E. executors; and in case of the death of B., F. to be executor in his place. B., C., D. and E. proved the will; B. and C. died. F. applied to have a double probate granted to him; D. and E. approving such grant:—Held, that F. was entitled to the grant, and that the casualty was not restricted to the death of B. in his lifetime. *Johnson, In goods of*, 1 Sw. & Tr. 17; 27 L. J., P. 9; 6 W. R. 275.

B. made C. his executor and trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. B. died, C. did not take probate, but by will, referring to B.'s will, appointed E. and F. to be succeeding trustees in respect of B.'s will, after his (C.'s) death. F. proved C.'s will, and was called upon, as executor substituted according to the tenor, to take probate of B.'s will:—Held, that in the language of the two wills the distinction between trustee and executor was so marked that F. could not be called upon to take probate of B.'s will. *Moss* v. *Bardswell*, 3 Sw. & Tr. 187; 29 L. J., P. 147; 6 Jur. (N.S.) 589; 2 L. T. 300; 8 W. R. 503.

An appointment of A. as executor, and, "in case of his absence on foreign duty," of B. as executrix, is an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the will arises. Will and probate granted to B. in A.'s absence. *Langford, In goods of*, 37 L. J., P. 20; L. R. 1 P. 458; 17 L. T. 415.

A will contained the following clause: "I appoint J. J. my executor; but should he decline or consider himself incapable of acting, then I appoint E. J. to be executor." J. J. died in the lifetime of the executrix:—Held, that her intention was that E. J. should be executor if J. J. could not or would not act, and that E. J., as substituted executor, was therefore entitled to probate. *Betts, In goods of*, 30 L. J., P. 167.

A will contained this clause: "I appoint my wife sole executrix, and, in default of her, I appoint K. and F. to be executors":—Held, that the substitution of executors was not confined to to the event of the wife's dying without having taken probate, but that it also took effect where she proved the will and died, without having fully administered *Foster, In goods of*, 41 L. J., P. 18; L. R. 2 P. 304; 25 L. T. 763; 20 W. R. 302.

The testatrix, by her will, appointed two persons to be her executors and trustees, conferred upon the surviving trustee or trustees power to appoint new trustees, and directed that every trustee appointed under her will should, by force of his or her appointment to be such trustee, become and be an executor under her will. The persons named in the will renounced, and letters of administration with the will annexed were granted in 1852 to two persons, who died respectively in 1855 and 1870, without having administered the estate. In 1856 the Court of Chancery appointed as trustees of the will two other persons, one of whom died in 1869. The survivor of these two trustees died in 1884, leaving a will by which he appointed his wife his sole executrix, and she, in February, 1895, under the Conveyancing and Law of Property Act, 1881, appointed two persons to be trustees of the will of the testatrix. The court held that these trustees became executors by force of the special clause in the said will, and granted probate thereof to them. *Shaw, In goods of*, 73 L. T. 192.

Falsa Demonstratio.]—A testator appointed as executrix of his will "my wife M. G.":—Held, that this was no falsa demonstratio, though she was not wife of the testator, the pretended marriage being void on the ground of affinity. *Gausden, In goods of*, 2 Sw. & Tr. 362; 31 L. J., P. 53; 8 Jur. (N.S.) 180; 5 L. T. 767.

Void for Uncertainty.]—A brother, by his will, left all his property to his three sisters therein named, or to such of them as were alive at the time of his decease, and appointed "either one of my three sisters my sole executrix." Two of the three sisters had predeceased him, and on his death the surviving sister applied for a grant of probate of the will as executrix. The court rejected the motion, holding the appointment of "either of my three sisters" to be void for uncertainty. *Blackwell, In goods of*, 46 L. J., P. 29; 2 P. D. 72; 36 L. T. 413; 25 W. R. 305.

B., by will, left all his property to his three sons therein named, and appointed "A. as my executor, with any two of my sons." A. proved

the will at the Cape of Good Hope alone, and two of the sons asked for probate of an authentic copy, reserving power to A. The court rejected the motion; holding the appointment of "any two of my sons" to be void for uncertainty. *Baylis, In goods of*, 2 Sw. & Tr. 613; 31 L. J., P. 119; 8 Jur. (N.S.) 546; 7 L. T. 251.

A., in his will, after ordering an arrangement to be made to the satisfaction of his executors, continued, "I appoint J. O'H. and G. B., of the W." and there stopped:—Held, that these persons were not entitled to probate as executors. *Bonham, In goods of*, 8 Jur. (N.S.) 596.

Misdescription or Uncertainty—Admission of Evidence to Explain.]—A testator appointed as one of his executors Francis Courtenay Thorpe, of Hampton, gentleman. There was living a youth of twelve years of age to whom the name and description applied. The court refused to admit evidence to shew that the testator intended the father of the youth, whose name was Francis Corbet Thorpe. *Peel, In goods of*, 39 L. J., P. 36; L. R. 2 P. 46; 22 L. T. 417.

A testator appointed his "said nephew, Joseph Grant, executor" of his will. His wife's nephew of that name had resided with him for many years, and managed his business. There was also living a nephew (a brother's son) of the like name. Both claimed probate of the will:—Held, that parol evidence was admissible to shew the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used the word "nephew" when referring to his wife's nephew. And the evidence shewing that the wife's nephew was the person meant, probate of the will was decreed to him accordingly. *Grant* v. *Grant*, 39 L. J., P. 17; L. R. 2 P. 8; 21 L. T. 645; 18 W. R. 230. S. P. and *S. C.*, 39 L. J., C. P. 272; L. R. 5 C. P. 727; 22 L. T. 829; 18 W. R. 951.

A testator appointed as his executrix "Georgiana Geraldine de Bellin," but there was no person answering to that description. He left a grand-daughter named "Adelaide Geraldine de Bellin," and a grand-daughter (who was only six months old at the date of the execution of the will) named "Georgiana Geraldine Kate de Bellin":—Held, that extrinsic evidence was admissible to shew whom he intended to designate by the description "Georgiana Geraldine de Bellin"; and the evidence shewing that his grand-daughter, Adelaide Geraldine de Bellin, was the person whom he meant, probate of the will was decreed to her accordingly. *O'Reilly, In goods of*, 43 L. J., P. 5; 29 L. T. 546; 22 W. R. 224.

A testator by his will appointed several executors, one of whom was described as "Perceval——, of Brighton, Esq., the father." The testator was intimately acquainted with William Perceval Boxall, of Brighton, who was commonly known as Mr. Perceval Boxall, and had a son named Perceval Gretwick Boxall. It did not appear that any person bearing the surname of Perceval was known to the testator. The court held that extrinsic evidence was admissible to assist it in ascertaining the person designated, and ordered the name of William Perceval Boxall to be included in the probate as one of the executors. *De Rosaz, In goods of*, 46 L. J., P. 6; 2 P. D. 66; 36 L. T. 263; 25 W. R. 352.

A father appointed as his executor his son Forster Charter. He had no son of that name, but two sons named William Forster Charter and Charles Charter. The court, on evidence of the circumstances under which the testator wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him. *Charter* v. *Charter*, 43 L. J., P. 73; L. R. 7 H. L. 364. Affirming 20 W. R. 212.

A testator nominated Joseph W. to be executor, but on affidavit that the person he intended to name was John Gibbon W. the court granted probate to him. *Gaskill, In goods of*, 33 L. T. 578.

The testator appointed as one of his executors his brother-in-law, Edmund O'Kelly. He had no brother-in-law of that name, but he had a brother-in-law named Edward O'Kelly:—Held, that evidence of the circumstances, habits and position of the testator's family was admissible to prove that Edward O'Kelly was the only person to whom the name and description in the will could be applied; and such evidence being satisfactory, it was ordered that probate should be granted to him and the other executors named in the will:—Held, also, that parol evidence of declarations of intention by the testator could not be admitted. *Twohill, In goods of*, 3 L. R., Ir. 21.

Testator, a congregational minister, appointed "William McCormack, of Canonbury," an executor of his will. There was no person answering the description "William McCormack, of Canonbury," but there was a Thomas McCormack, who had been for several years one of the deacons at the testator's chapel, and he had a son named William Abraham McCormack:—Held, that extrinsic evidence was admissible to shew who was intended by the testator to be his executor. *Brake, In goods of*, 50 L. J., P. 48; 6 P. D. 217; 45 L. T. 191; 29 W. R. 744.

Executrix of Property not named in Will.]—A testator by his will, which did not dispose of the residue of his personal estate, nominated and appointed his daughter to be his "executrix for all property whatsoever and wheresoever not named in the will":—Held, that she was not entitled to probate of the will. *Wakeham, In goods of*, 41 L. J., P. 46; L. R. 2 P. 395; 27 L. T. 214; 20 W. R. 685.

By Foreign Court—Effect of.]—Where an executor is appointed by a foreign will, the nature and extent of the office conferred by the appointment are regulated by the law of the testator's domicil, and not by English law, even as to property situate in England. If, by the law of the domicil, the executorship lasts only for a limited period, the court cannot, after that period has expired, grant probate to the executor. *Laneville* v. *Anderson*, 2 Sw. & Tr. 24; 30 L. J., P. 25; 6 Jur. (N.S.) 1260; 3 L. T. 304; 9 W. R. 74.

The court will make a grant to a provisional executor, appointed by the proper court, of the domicil of the deceased, but it will limit it for such time as the appointment by the court of domicil remains unrescinded and in force. *Steigerwald, In goods of*, 10 Jur. (N.S.) 159.

A natural-born British subject died, domiciled in Russia, having acquired large property, both real and personal, in that country; he was also possessed of a considerable sum in English funds. He left a will made in Russia, whilst he was domiciled there, in the Russian language and

form, appointing Russian subjects executors, which will was duly authenticated in the Russian courts. It purported to dispose of all his movable and immovable property; there were no words distinctly excluding any part of his property from its operation, nor was there any allusion to, nor were there any words distinctly describing the money in the English funds:—Held, that the executors being clothed with the authority of the competent court of the testator's domicil were entitled to probate as regards the money in the English funds. *Enohin* v. *Wylie*, 1 Sw. & Tr. 118. And see *S. C.*, 10 H. L. Cas. 1.

Persons who had obtained possession of mortgage money, under colour of being personal representatives constituted by a joint will of husband and wife, and beneficially interested in part under that will, and with the assistance of an executors' court of dealing in St. Croix, which appeared to have had, in fact, under the circumstances of the case, no jurisdiction:—Held, to be trustees of the money for the personal representatives of the husband and wife, who claimed under their respective sole wills. Nature and jurisdiction of executor's court of dealing in St. Croix. *Price* v. *Dewhurst*, 4 Myl. & C. 76; 8 L. J., Ch. 57; 2 Jur. 1006.

See also cases under WILL, sub tit. PROBATE (TO WHOM GRANTED).

2. Relation back of Title.

Generally.]—Where an executor proves a will probate has reference back to the death of the testator, and what was then in the hands of the executor is assets for the payment of the testator's debts. *Ingle* v. *Richards*, 28 Beav. 366; 6 Jur. (N.S.) 117; 8 W. R. 697.

Action against, prior to Grant of Probate—Effect on Testator's Estate.]—Until the person named as executor in the will of a deceased person has intermeddled with the estate or has actually obtained a grant of probate, he does not represent the testator's estate, and a seizure and sale of part of the testator's assets under an execution founded upon a judgment in a suit by a creditor of the deceased against such person is ineffectual to bind the testator's estate. *Mohamadu Mohideen Hadjiar* v. *Pitchey*, 63 L. J., P. C. 90; [1894] A. C. 437; 6 R. 510; 71 L. T. 99—P. C.

3. Joint and Several Authority.

In General.]—One administrator cannot release a debt so as to bind his fellow; otherwise as to an executor, for each entirely represents the testator. But one administrator may bar both by his release, if releasee is accountable to them in their own right, and not as administrators. *Hudson* v. *Hudson*, 1 Atk. 460. And see *Jacomb* v. *Harwood*, 2 Ves. Sen. 267, post.

Signature of one trustee to a bankrupt's certificate, without authority to act for the other, is not sufficient. Secus, of executor who can do any act. *Rigby, Ex parte*, 19 Ves. 463; 2 Rose, 224.

The interest and authority of executors is joint, and cannot be divided into distinct powers; but they may be so appointed that their authority may commence or determine at different times. *Owen* v. *Owen*, 1 Atk. 495.

Chose in Action.]—Assignment of chose in action, part of the assets, and judgment confessed to a creditor by one executor, not available against the dissent of the others, on behalf of the general creditors, though perhaps the court would not interpose against the particular creditor, if the property had actually passed, or to deprive him of any legal advantage. *Lepard* v. *Vernon*, 2 Ves. & B. 51; 13 R. R. 13.

Settling Accounts.]—One of several executors may settle an account with a person accountable to the estate, and in the absence of fraud, the settlement will be binding on the others though dissenting. *Smith* v. *Everett*, 27 Beav. 446; 29 L. J., Ch. 236; 5 Jur. (N.S.) 1332; 7 W. R. 605.

Assigning Leaseholds.]—It is no objection to title, that assignment of term was executed by one executor only, though deed was prepared as an assignment by two, one executor being competent to assign. *Simpson* v. *Gutteridge*, 1 Madd. 609; 16 R. R. 276.

One of two executors erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate:—Held, that the purchaser could not enforce a specific performance of the contract. *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; 1 Jur. (N.S.) 1058; 3 W. R. 605.

Quære, whether he could have done so if the executor had been under no misapprehension. *Ib.*

Mortgaging Leaseholds.]—Each executor has entire control over a testator's personal estate; he may release, pay or transfer without the others; and so as to each administrator, though formerly questioned; one executor may retain in satisfaction of his own debt, if no fraud. A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for better securing of a debt due from the testator to himself, the mortgagees were entitled to satisfaction; and creditors of the testator, under marriage articles, who had no specific lien, were not allowed to pursue the premises thus assigned. *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

One of two executors who has a beneficial interest in property may create a good equitable mortgage of such interest by depositing the title deeds relating thereto and signing a memorandum of deposit, although he makes the deposit without the consent of his co-executor. *Sheffield Union Banking Co., Ex parte, Carter and Justins, In re*, 13 L. T. 477.

Borrowing Money—Advances to One Executor for Executorial Purposes.]—One of two executors, who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, and the banker, with notice of the dispositions under the will, made advances to the executor for payments connected with the executorship, and securities were deposited for repayment of the advances. The co-executor assented to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien

upon the second securities for repayment of his advances:—Held, that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor and in making further advances to him. The repayment was therefore decreed with mortgagee's costs. *Child* v. *Thorley*, 16 Ch. D. 151; 29 W. R. 417.

Proving in Bankruptcy.]—Where the bankrupt and another are executors of a creditor of the bankrupt, the court will permit the other executor to prove the debt, even though a suit is pending in the Ecclesiastical Court, as to the executorship. *Shakeshaft, Ex parte*, 3 Bro. C. C. 198.

Admission—Co-executor—Answer to Interrogatories.]—Semble, one co-executor's answer to interrogatories cannot be used as an admission against his co-executor. *Peek* v. *Ray*, 63 L. J., Ch. 647; [1894] 3 Ch. 282; 7 R. 259; 70 L. T. 769; 42 W. R. 498—C. A.

Forgery—Fraudulent Mortgage by One Executor.]—A son, who was heir-at-law to his father, and who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage money to his own purposes. He handed over the title-deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrices with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title-deeds. The other beneficiaries under the will were made defendants:—Held, that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A.

Per Lindley, L.J.:—The son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

—— Receipt for Money due on Bond to Two Executors.]—A testator gave the residue of his estate to his two executors upon certain trusts. Part of his estate consisted of a bond given by the trustees of a minor who came of age within a year after the death of the testator, and the executors then accepted his bond to them jointly, in the place of the bond given by the trustees. Ten years afterwards a part of the money was paid by the obligor to one of the obligees, who embezzled the money so paid, and gave a receipt purporting to be signed by both the obligees, but, in fact, signed by one only, the signature of the other being a forgery. In a suit by the other executor and cestui que trust under the will against the obligor:—Held, that, though the obligor intended to have the receipt of both obligees, the receipt of one was sufficient to discharge the obligor as the obligees were executors. *Charlton* v. *Durham (Earl)*, L. R. 4 Ch. 433; 20 L. T. 467; 17 W. R. 995. Affirming 38 L. J., Ch. 183.

Debtors to the estate of a testator will not, merely on account of the lapse of time, be held to have notice of the fact that all the debts are paid, and that the executors have become trustees. *Ib.*

Negligence by One of Co-executors of Legal Mortgagee — Legal Title of Co-executors and Legatees, Effect on.]—The acts of one of several executors cannot bind their testator's estate so as to preclude other persons interested in that estate from relying on their legal title, unless the legal owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred on the mortgagor an apparent authority to deal with the mortgaged property as if it were unincumbered. *Ingham, In re, Jones* v. *Ingham*, 62 L. J., Ch. 100; [1893] 1 Ch. 352; 3 R. 126; 68 L. T. 152; 41 W. R. 235.

Statute of Limitations.]—In an action by a payee of a promissory note for 300*l.*, against the surviving executors of William P., the maker, in order to take the case out of the Statute of Limitations, he proved that he had been supplied by Joseph P., the deceased executor, with malt and other articles; and he put in an account between them, signed "Settled, Joseph P.," on one side of which the plaintiff was charged with various quantities of malt; and on the other side had credit for payments, there being, amongst others, the following item:—"To one year's interest, 15*l.*":—Held, that this settlement of account was evidence of payment of the 15*l.* by Joseph P., but not in his representative character. *Scholey* v. *Walton*, 12 M. & W. 510; 13 L. J., Ex. 122.

An acknowledgment of, or promise to pay, a debt of a testator by one of several executors is sufficient to take the case out of the Statute of Limitations. *Tullock* v. *Dunn* (Ry. & M. 416) and *Scholey* v. *Walton* (12 M. & W. 510; 13 L. J., Ex. 122) distinguished. *Macdonald, In re, Dick* v. *Fraser*, 66 L. J., Ch. 630; [1897] 2 Ch. 181; 76 L. T. 713; 45 W. R. 628. *And see* LIABILITY FOR ACTS OF EACH OTHER, III. *d.*, col. 1355, post.

4. Survivorship.

The power of an executor is not determined by the death of one, but the whole survives to the other, and he may assent to the legacy. *Flanders* v. *Clarke*, 3 Atk. 509; 1 Ves. Sen. 9.

Executors divide a part of their testator's property, but lodge a sum in the funds for securing the payment of an annuity: as to this they are joint tenants, and it shall survive upon the death of one to the other. *Balwyn* v. *Johnson*, 3 Bro. C. C. 455.

Where legacy was by order directed to be paid to A. B., and he dies, leaving executors, and one executor dies, on application court will order legacy to be paid to surviving executors, without acquittance from executor of deceased co-executor. *Moodie* v. *Bainbridge*, 6 Madd. 107.

5. Devolution of Office.

In General.]—A. appoints executors, who prove his will in the Prerogative Court; B., the surviving executor, dies, having appointed C. his executor, and C. proves B.'s will in the Consistory Court of Llandaff. C. is the personal representative of A. *Fowler* v. *Richards*, 5 Russ. 39. And see *Jernegan* v. *Baxter*, 5 Sim. 568; and *Jossaume* v. *Abbot*, 15 Sim. 127.

An acting executor of a testator cannot renounce the executorship of other persons of whom his testator was executor. *Brooke* v. *Haymes*, L. R. 6 Eq. 25. And see *Barker* v. *Railton*, 11 L. J., Ch. 372; 6 Jur. 549.

Executors cannot renounce the executorship of the estate of a person to whom their testator was executor. *Delacour, In re*, Ir. R. 9 Eq. 86.

Where, therefore, A. appointed B. and C. his executors, and B. obtained probate, C.'s rights being saved; B. died, having appointed as his executors D. and E., who both obtained probate; C. afterwards renounced probate of A.'s will, and D. and E. disclaimed the executorship of it:—Held, that, notwithstanding the disclaimer of D. and E., they would be the executors of A. *Ib.*

If A. gives legacies, and makes B. and C. executors, and B. makes C. and D. his executors, and dies, and they possess themselves of the estate of A., they may be both charged in equity, though at law the executorship survived to C., and D. is not privy, yet A.'s estate shall be liable in whatsoever hands it may be. Resolved, upon demurrer. *Nicholson* v. *Sherman*, 1 Ch. Ca. 57; 2 Freem. 181.

Probate essential.]—If an executor dies before probate of the will, his executor cannot prove it, but administration cum testamento, &c., must be granted to residuary legatee (if any), or to the next of kin. *Day* v. *Chatfield*, 1 Vern. 200.

——**Action by Executor to prove Will—Death before Probate.**]—A testatrix died, having appointed A. B. sole executor, who commenced proceedings to prove her will in solemn form. After the delivery of the statement of claim in the action, A. B. died, and his will was proved by an executor therein named:—Held, that the executor under the last-mentioned will did not represent the testatrix so as to entitle him to continue the proceedings commenced by his estator. *Wilcocks* v. *Doughty*, 29 L. R., Ir. 17.

Foreign Probate.]—A. died in India. B., one of the executors, proved his will in India. B. died, and C., his executor, proved his will in England. C. is not the personal representative of A. *Twyford* v. *Trail*, 7 Sim. 92.

Married Women.]—B., a married woman, made a will merely executing a power given her by the marriage settlement, but she appointed C. executrix generally. The Ecclesiastical Court granted probate of this will in the general form. B. was the sole executrix of her late husband A. The general probate of the will of B. will transmit to C. the representation of A. without administration de bonis non. *Barr* v. *Carter*, 2 Cox, 429; 2 R. R. 98.

The chain of executorship is not continued by the appointment of an executor by a married woman in a will made under a power. *Hughes, In goods of*, 4 Sw. & Tr. 209.

A husband appointed his wife and two other persons as executrix and executors. The wife re-married and died, having, during her second coverture, made a will in accordance with her power of appointment, and she appointed her husband her sole executor. The husband took out letters of administration with the will annexed. Part of the estate of the original testator remained unadministered, the two other executors having predeceased the wife. The court held that the grant of letters of administration to the second husband, with will of his wife annexed, did not continue the chain of representation to the original testator, and, with the consent of the second husband, granted administration of the unadministered effects of the testator to his daughter as one of he residuary legatees. *Bridger, In goods of*, 47 L. J., P. 46; 26 W. R. 535.

Default of Derivative Executor.]—Where J. C. was executor of R. C., and died, leaving unadministered a portion of R. C.'s assets, which came to C. W. as executor of J. C.:—Held, that the proper assets of J. C. were exonerated, and not liable for the default of C. W. respecting R. C.'s assets. *Oldham* v. *Wilkins*, 1 Ir. Eq. R. 59.

b. Administrator.

1. Appointment.

Who entitled to Grant—20 & 21 Vict. c. 77, s. 73.]—The court has no power under this section to grant general administration to a person who, before the act, would only have been entitled to a grant of administration during the minority of an infant, that section not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration. *Smith, In goods of*, 27 L. J., P. 105.

The court will not make a grant of administration under this section to a party entitled to a grant in another character. *Fairweather, In goods of*, 2 Sw. & Tr. 588; 6 L. T. 788; 10 W. R. 862.

One of the next of kin of a deceased person having applied for letters of administration, he was opposed by others, and contentious proceedings ensued. Ultimately, all parties came to an agreement to suspend the litigation, and to consent to administration being granted to an individual who had no interest in the property of the deceased:—Held, that the court could make such a grant under this section. *Farrell* v. *Brownbill*, 33 L. J., P. 185; 10 Jur. (N.S.) 593.

Administration will not, under this section, be granted to a person other than the one who by law would be entitled to administration, though the latter may be resident abroad, if he has received no notice of the application, unless the court is satisfied by other circumstances, that it is necessary or convenient that the grant should be made. *Cooke, In goods of*, 1 Sw. & Tr. 267; 28 L. J., P. 43.

A mere general statement upon affidavit, that

"it is necessary for the preservation of the personal estate and effects of the deceased that administration should be granted," will not, in the absence of such notice, suffice. *Ib.*

A joint grant of administration to the person by law entitled to administration, and to another, is a grant to a person other than the one entitled within the meaning of this section. *Grundy, In goods of*, 37 L. J., P. 21 ; L. R. 1 P. 459 ; 17 L. T. 451 ; 16 W. R. 406.

The court will not exercise the power conferred on it by this section, by passing over a person entitled to a grant in favour of a creditor when the fact of the insolvency of the intestate is disputed. *Hawke* v. *Wedderburne*, 37 L. J., P. 33 ; L. R. 1 P. 594 ; 18 L. T. 336 ; 16 W. R. 712.

Grant, Effect of Colonial and Indian.] — Colonial letters of administration will enable an administrator to sue in this country, in respect of stock standing in the names of trustees, to a share of which the intestate was entitled. *M'Mahon* v. *Rawlings*, 16 Sim. 429.

Where the widow of an officer who died intestate in India, obtained letters of administration of her husband's effects there, and remitted the proceeds thereof in government bills to her agent in England ; and a creditor of the intestate took out letters of administration of the intestate's effects in this country, and brought an action against the widow's agent for money in his hands as part of such effects :—Held, that the letters of administration in India prevailed over those granted in this country ; and that the action would lie only at the suit of the widow as administratrix. *Currie* v. *Bircham*, 1 D. & R. 35 ; 24 R. R. 634.

Where a defendant, acting under a power of attorney from the plaintiff, took out administration at Bengal to the estate of a deceased debtor by bond to the plaintiff, and received moneys under the administration :—Held, that he could not recover as against the plaintiff, on the ground of a subsequent administration obtained by other creditors in this country. *Farrington* v. *Clarke*, 2 Chit. 429 ; 3 Dougl. 125.

B. died in India, and his will was proved there by two of the executors. One came to England, and a portion of the testator's assets was remitted to him there by his co-executor, who shortly afterwards died. On a bill filed by his executor in England for an account of the moneys so remitted :—Held, that probate or administration ought to have been taken out in this country. *Bond* v. *Graham*, 1 Hare, 482 ; 6 Jur. 620.

A testator at the time of his death was domiciled in New South Wales, and the court of New South Wales granted probate of his will to A. as executrix according to the tenor. A. was not entitled to the grant as executrix according to the tenor, by the law of England ; but the court, under 20 & 21 Vict. c. 77, s. 73, decreed administration, with the will annexed, to A. as the person entitled to administer under the grant of the court of the country of domicil. *Earl, In goods of*, 36 L. J., P. 127; L. R. 1 P. 450; 16 L. T. 799.

—— **Foreign.**]—An Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him pur et simple, which by the Belgian law imposed upon him a personal obligation to pay all the debts of the intestate, independently of the amount of the assets. The intestate's brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate. A creditor of the intestate obtained letters of administration to him in England :—Held, that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. *Beavan* v. *Hastings (Lord)*, 2 Kay & J. 724 ; 2 Jur. (N.S.) 1044 ; 4 W. R. 785.

In 1856 the Prerogative Court granted administration de bonis non, with the will annexed, of a domiciled Portuguese, to Carniero, a substituted executor in the will ; Carniero, in conjunction with the widow, being by the law of Portugal the legal representative. Carniero, in conformity with the Portuguese law, had since renounced his executorship, and Vianna had been, by the administrator of the district, nominated executor for all legal purposes. The court refused to grant administration de bonis non to Vianna, on the ground that there was no authority for an executor who takes such a grant in an English court renouncing, so that there was still a legal personal representative of the deceased in this country. *Veiga, In goods of*, 3 Sw. & Tr. 13 ; 32 L. J., P. 9 ; 7 L. T. 644 ; 11 W. R. 84.

A Sardinian, who had settled in Brazil, died intestate on his voyage from Bahia to Genoa. He had wound up his affairs in Brazil, and intended to resume his domicil of origin at Genoa. An agreement had been come to by the Brazilian and Italian governments, with respect to the administration of his property and the guardianship of his children (some of whom were in Genoa and others in Brazil), by which the Brazilian government gave up to the Italian government all claim to such administration and guardianship. The court revoked a grant of administration which had been made to the representative of the person entitled to it according to the Brazilian law, and made a grant to the person entitled to it according to the Italian law. *Bianchi, In goods of*, 3 Sw. & Tr. 16 ; 8 L. T. 171 ; 11 W. R. 240.

2. Relation Back of Title.

A., having sent goods to Fernando Po for sale, died intestate ; and, after his death, the defendant purchased the goods from the agent of the intestate there, who sold them for the benefit of the intestate's estate ; subsequently to the sale, the plaintiff took out letters of administration to the intestate, and sued the defendant for the price of the goods :—Held, that the action was maintainable ; that the title of administrator, though it does not exist until the grant of administration, relates to the time of the death of the intestate, so as to entitle the administrator to sue for goods sold and delivered ; and that, as the act of the agent was ratified by the plaintiff after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent. *Foster* v. *Bates*, 12 M. & W. 226 ; 1 D. & L. 400 ; 13 L. J., Ex. 88 ; 7 Jur. 1093. And see *Rex* v. *Horsley*, 8 East, 405, 408 ; *and the cases under* PROCEEDINGS AT COMMON LAW—WHEN MAINTAINABLE, XIII. *a.* 1, col. 1607, post.

3. Survivorship.

When administration is granted to two, and one dies, the administration survives to the other, without new letters of administration. *Hudson*

v. *Hudson*, Cas. t. Talb. 127. But see *Jacomb* v. *Harwood*, 2 Ves. Sen. 268.

Administration granted to two: one dies, it survives to the other; but if a letter of attorney is made to two, and one dies, the authority ceases. *Adam* v. *Buckland*, 2 Vern. 514. And see *Eyre* v. *Shaftesbury* (*Countess*), 2 P. W. 121.

4. Other Cases.

Administrator de bonis non—Position of.]—In an action by an administrator de bonis non, the promise may be laid to have been made to the first administrator. *Hirst* v. *Smith*, 7 Term Rep. 182; 4 R. R. 415.

Where a solicitor has acted professionally for a testator and for his executor or administrator, and papers belonging to the estate have come into his possession, and, after the death of the executor or administrator, an administrator de bonis non has been appointed, the administrator de bonis non is not entitled to reclaim from the solicitors the papers in his possession without first paying the costs due to him, not only in respect of work done for the testator, but also in respect of work done for the executor or administrator. *Watson, In re*, 53 L. J., Ch. 305; 50 L. T. 205; 32 W. R. 477.

There is a privity of estate between an executor or administrator and a subsequent administrator de bonis non, and the liabilities of the estate pass, with the benefits of it, to the administrator de bonis non. *Ib. And see cases under* PROCEEDINGS AT COMMON LAW—WHEN MAINTAINABLE, XIII. *a.* 1, col. 1607, post.

Administrator durante minore ætate—Position of.]—An administrator durante minore ætate is an ordinary administrator, and the limit to the administration is the minority of the person, but there is no other limit. *Cope, In re, Cope* v. *Cope*, 50 L. J., Ch. 13; 16 Ch. D. 49; 43 L. T. 566; 29 W. R. 98.

Joint Administrators—Several Authority.]—A release by one administrator will bind his companion. *Willand* v. *Fenn*, 2 Selw. N. P. 767.

II. RIGHTS, POWERS AND DUTIES.

a. RENUNCIATION AND DISCLAIMER.

By 20 & 21 Vict. c. 77, s. 79, *where any person, after the commencement of the act, renounces probate of the will of which he is appointed executor or one of the executors, the right of such person in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his effects shall and may, without further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor.*

And see 21 & 22 Vict. c. 95, s. 16.

Before 20 & 21 Vict. c. 77, s. 79.]—A formal renunciation or refusal of probate by an executor named in a will is absolutely binding and conclusive on him, unless he afterwards comes in and retracts it. *Venables* v. *East India Co.*, 2 Ex. 633; 18 L. J., Ex. 266; 12 Jur. 855.

Probate, Effect of.]—Where personal property is bequeathed to the executors as trustees, the probate of the will is an acceptance of the trusts. *Muckleo* v. *Fuller*, Jac. 198; 23 R. R. 29.

Where the executor is also trustee of the real estate, by acting as executor he is liable in both characters. The taking probate is an acceptance of the whole trust. *Ward* v. *Butler*, 2 Moll. 533.

Where a person appointed an executor under a will proves it, and deals with the estate, he cannot be permitted to say that he acts under a delegated power from the other executors, or in any other character than as executor. *Graham* v. *Keble*, 2 Dow, 24; 14 R. R. 96.

Probate to one of several executors, the right of the other being reserved, enures to the benefit of all; and, upon the death of the executor to whom probate has been granted, the other executor may accept the office: and upon doing so, fully represents his testator without further probate. *Cummins* v. *Cummins*, 3 Jo. & Lat. 64; 8 Ir. Eq. R. 723.

—— **Since 20 & 21 Vict. c. 77, s. 79.**]—An executor cannot renounce after he has taken probate. *Veiga, In goods of*, 3 Sw. & Tr. 13; 32 L. J., P. 9; 7 L. T. 644; 11 W. R. 84.

Acceptance of Office — Intermeddling.]—If an executor administer part of the assets, he shall be charged with the receipts, though he renounced the executorship and paid the money to the other executor who proved the will. *Read* v. *Truelove*, Ambl. 417.

Where one, appointed executor, intermeddled with the estate of the testator, and afterwards renounced:—Held, that he was liable to be sued in equity in the character of executor, by the legatees under the will, one of whom was also executrix, and had proved the will. *Rogers* v. *Frank*, 1 Y. & J. 409; 30 R. R. 813.

A slight act of intermeddling with the assets by the surviving executor, who has not joined in proving the will, will amount to an acceptance of the office of executor, and will preclude him from afterwards refusing to act. *Cummins* v. *Cummins*, 3 J. & L. 64; 8 Ir. Eq. R. 723.

An application by an executor before probate for payment of a debt, though unsuccessful, constitutes a sufficient act of intermeddling to preclude subsequent renunciation. *Stevens, In re, Cooke*, v. *Stevens*, 66 L. J., Ch. 155; [1897] 1 Ch. 422; 76 L. T. 18; 45 W. R. 284.

Executor who has not proved, not considered as acting by assisting a co-executor, who had proved, in writing letters to collect debts. Nor by writing directly to a debtor of the testator, and requiring payment. *Orr* v. *Newton*, 2 Cox, 274; 2 R. R. 44.

Three executors, A., B. and C., were appointed; two, A. and B., proved the will; the third, C., did not prove, but administered part of the assets: A. and B. sold the stock-in-trade to C.:—Held, that he having paid part of the purchase-money into the hands of A., was answerable for his misapplication, and that although as mere purchaser the payment would be a complete discharge, he is liable as executor; having acted in one instance he cannot exclude a particular part of his dealing with the assets, but is completely executor, notwithstanding his intention of not interfering generally, and his own transaction as purchaser is not an exception. *Kilbee* v. *Sneyd*, 2 Moll. 186.

A. owed C. a large sum of money upon two promissory notes. C. appointed A. and B. executors of her will, who upon her death proceeded to obtain probate of the same. Before it was obtained, A. died: having previously, however,

investigated the private papers of the testatrix, and obtained, in his character of executor, from B. her book of accounts:—Held, that such acts were sufficient to shew that A. had accepted the office of executor, although he died before probate; and that where a question arose in chambers as to whether he was, under such circumstances, indebted to the testatrix, the proper course is to adjourn it into court under the 20th Order, 16th October, 1852. *Clarke* v. *Phillips*, *Bayliss* v. *Phillips*, 2 W. R. 331.

—— **Intermeddling as Agent of Acting Executor.**]—A person who was appointed executor and trustee, who did not prove, and received none of the property except as agent to the executor who proved, was held not to have accepted the trust, nor to be responsible for loss occasioned to the estate by improper investments. *Lowry* v. *Fulton*, 9 Sim. 115; 8 L. J., Ch. 314; 3 Jur. 454.

A person named as executor and trustee under a will, did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real estate, and took the conveyance from the widow, who was tenant for life, and heir, to whom the estate must have descended upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent:—Held, that he was not, under the circumstances, chargeable as executor or trustee. A deed of disclaimer is the best evidence of the renunciation of a trust, but the conduct of the party desirous of renouncing a trust may amount to a disclaimer. *Stacey* v. *Elph*, 1 Myl. & K. 195; 2 L. J., Ch. 50.

If one of two persons named trustees and executors disclaims and renounces, and afterwards possesses himself of assets, as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove* v. *Everard*, 1 Russ. & M. 231; Taml. 376.

—— **Intermeddling on behalf of Legatee.**]—Executors, in order to be discharged, must either wholly renounce, or put the administration of the assets into the hands of a court of equity. *Doyle* v. *Blake*, 2 Sch. & Lef. 231; 9 R. R. 76.

A., named executor in a will, acts on behalf of particular legatees, disclaiming an intention of interfering generally; he afterwards renounces formally, in favour of B., who was named a trustee in the same will, who thereupon obtains administration cum testamento annexo. B. possesses himself of the assets, and afterwards dies insolvent. A. is liable as executor, notwithstanding his renunciation, and is answerable for the acts of B., it appearing that he had a control over the assets, and B. being considered as having obtained possession thereof by his means. *Ib.*

—— **Intermeddling as Agent of Testator.**]—The agent of the testator who was named by him a trustee and executor, and did not prove the will, but did not disclaim:—Held, responsible as trustee, and could not protect himself as agent only. *Montgomery* v. *Johnson*, 11 Ir. Eq. R. 476.

—— **Power—Right to exercise—Executor Renouncing.**]—One devises that his executors should sell his land, and leaves two executors, one whereof dies, and the other renounces, and administration was granted to A., who brings a bill against the heir, to compel a sale; whether the renouncing executor in whom the power of sale collateral to the executorship was vested, ought not to be made a party. *Yates* v. *Compton*, 2 P. W. 308. And see *Ford* v. *Ruxton*, 1 Coll. C. C. 403; *Keates* v. *Burton*, 14 Ves. 434; 9 R. R. 315.

A power in a settlement to a party, his executors, &c., to appoint new trustees, may, on the renunciation of one executor, be exercised by the remaining acting ones. *Granville (Earl)* v. *M'Neile*, 7 Hare, 156; 18 L. J., Ch. 164; 13 Jur. 252.

A testator by his will, after appointing three executors, bequeathed the residue of his personalty to such charitable institutions as his executors therein named might select, in such proportions as they might approve of. One executor renounced:—Held, that the renouncing executor could not take part in selecting the charities and distributing the residue among them:—Held also, on the context, that the power could be exercised by the other two executors. *Mainwaring, In re, Crawford* v. *Forshaw*, 60 L. J., Ch. 683; [1891] 2 Ch. 261; 65 L. T. 32; 39 W. R. 484—C. A.

A disclaimer executed by an executor, who with two other executors had a power of sale of copyhold property, but, without joining with them in a sale, reciting that he had, from the testator's decease, declined to act, and had never acted, in the executorship, or the trusts of the will, is a refusal ab initio, there being nothing to impeach the bona fides of the transaction. *Peppercorn* v. *Wayman*, 5 De G. & S. 230; 21 L. J., Ch. 827; 16 Jur. 794.

By Executor of Executor.]—An executor of an executor who has accepted the executorship of the latter testator, cannot renounce the executorship of the former. *Brooke* v. *Haymes*, L. R. 6 Eq. 25.

Executors cannot renounce the executorship of the estate of a person to whom their testator was executor. *Delacour, In goods of*, Ir. R. 9 Eq. 86.

Where, therefore, A. appointed B. and C. his executors, and B. obtained probate, C.'s rights being saved; B. died, having appointed as his executors D. and E., who both obtained probate; C. afterwards renounced probate of A.'s will, and D. and E. disclaimed the executorship of it:—Held, that, notwithstanding the disclaimer of D. and E., they would be the executors of A. *Ib.*

Presumption of, by Lapse of Time.]—After the lapse of sixty years, and in the absence of any evidence to the contrary, the court—having power to draw inferences of fact—presumed that executors who had renounced had also disclaimed an estate in a chattel real bequeathed to them. *M'Kenna* v. *Eager*, Ir. R. 9 C. L. 79.

b. Possession and Disposition of the Body.

There is no property in a dead body, but the executors have a right to the possession of the body, and their duty is to bury it, although there is a direction in the will that some other person should cause the body to be burnt. *Williams* v. *Williams*, 51 L. J., Ch. 385; 20 Ch. D. 659; 46 L. T. 275; 30 W. R. 438; 15 Cox, C. C. 39; 46 J. P. 726.

c. ACTS DONE BEFORE PROBATE OR LETTERS OF ADMINISTRATION.

Generally.]—The right of an executor to the estate of his testator is derived from the will, and he is in possession in point of law from the time of the death, although before probate is granted. *Smith* v. *Milles*, 1 Term Rep. 480.

But the probate is the only evidence which is admissible to prove such right. *Rex* v. *Netherseal*, 4 Term Rep. 258.

Before Probate—What Valid.]—An executor, before probate, may so far act as to get in and receive his testator's estate, or release debts, or even bring actions for them. *Wills* v. *Rich*, 2 Atk. 285.

The interest of an executor arises, not from the probate but the will; therefore, he may release a debt, or assign a term before probate. *Hudson* v. *Hudson*, 1 Atk. 461.

Where an insolvent executor is getting in the assets before probate, the court will restrain him, and direct the money to be paid into the bank. *Smith* v. *Aykwell*, 3 Atk. 566.

An assignment of a trust term by executrix, who died before probate:—Held, to be established by subsequent probate. *Brasier* v. *Hudson*, 8 Sim. 67; 5 L. J., Ch. 296.

—— **Instituting Proceedings.**]—Where an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. *Humphreys* v. *Humphreys*, 3 P. W. 351.

Executor may issue commission before probate. *Paddy, Ex parte*, 3 Madd. 241; Buck. 235.

An executor cannot bring a bill of interpleader till after probate; for till probate he does not stand in the place of the testator, and has not made himself a debtor. *Mitchell* v. *Smart*, 3 Atk. 607.

If an executrix sues in that character, she must produce probate, though she could make out her title as legatee of a lease for years. *Gleeson* v. *Cooke*, 1 Hog, 294.

Executor cannot bring a bill without shewing thereby that he has proved the will in the Spiritual Court; if he does, this is good cause of demurrer. But it is enough to allege he has duly proved the will without saying in what court. *Humphreys* v. *Ingledon*, 1 P. W. 752. *And see further*, PROCEEDINGS BY OR AGAINST, XIII. *a.* 1, col. 1607, post, *b.* 1, col. 1620, post.

Before Letters of Administration—What valid.]—The distribution of an intestate's estate amongst the next of kin before administration granted is not an act for the benefit of the estate, so that a person who subsequently takes out administration will be entitled to recover the property, although it was distributed with his assent. *Morgan* v. *Thomas*, 8 Ex. 302; 22 L. J., Ex. 152; 17 Jur. 283.

—— **Instituting Proceedings.**]—Though administration is not taken out till after the filing of the bill, yet if granted before a cause comes to a hearing in equity, it is sufficient; otherwise at law, because there the defendant may crave oyer of the letters of administration. *Fell* v. *Lutwidge*, 2 Atk. 120.

An objection was taken to a bill by a husband for a legacy due to his late wife, that administration had not been taken out till after bill filed; the objection was overruled, partly because the administration had relation to the time of the death; partly because, before taking out administration, the husband had an equitable interest. *Moses* v. *Levi*, 3 Y. & C. 359.

A husband cannot sue for a wife's choses in action till he has administered. *Grosvenor* v. *Lane*, 2 Atk. 180.

And see further, PROCEEDINGS BY OR AGAINST, XIII. *a.* 1, col. 1607, post, *b.* 1, col. 1620, post.

—— **Other Matters.**]—Payments made by an administrator de son tort, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, will not be allowed. *Layfield* v. *Layfield*, 7 Sim. 172; 4 L. J., Ch. 2.

d. COLLECTION AND MANAGEMENT OF ESTATE.

By the Land Transfer Act, 1897, s. 1 (1): *Where real estate is vested in any person without a right in any other person to take by survivorship, it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.*

Sect. 2 (2). *All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.*

1. Inventory and Accounts.

Duty as to.]—One of the first duties of an executor is to be constantly ready with his accounts; and neglect in this is a ground for charging him with interest. *Pearse* v. *Green*, 1 J. & W. 135; 20 R. R. 258.

It is the bounden duty of an executor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chooses to mix the account with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted. *Freeman* v. *Fairlie*, 3 Mer. 40; 17 R. R. 7.

An executor, dealing with money in his hands, is bound to ear-mark it, but if he cannot answer as to the state of it, the court has no power to act as upon an admission. *Ib.*

A legatee has a clear right to have a satisfactory explanation of the state of the testator's assets, and an inspection of the accounts, but he is not entitled to a copy thereof at the expense of the estate. *Ottley* v. *Gilby*, 8 Beav. 602; 14 L. J., Ch. 177.

—— **Attachment for not filing.**]—An administrator, who is in prison under an attachment for not filing his inventory and accounts, will not be discharged upon filing a sufficient inventory

and account except upon payment of costs. *Marshman* v. *Brooks*, 11 W. R. 549.

2. Authority to receive Money.

Payment to Executors — Discharge by.]—Motion that securities be delivered to the executor to receive the money granted. *Jones* v. *Jones*, 3 Bro. C. C. 80.

A fund was vested in trustees for A. for life, remainder for B. for life, remainder for such persons as A. should by will appoint. A. appointed that certain legacies should be paid out of the fund after B.'s death, and named B. her executor. B. proved the will, and the trustees then handed over the whole fund to B., who spent it, and died insolvent. On a bill by the legatees against the original trustees:—Held, that they were discharged by the payment to A.'s executor. *Hayes* v. *Oatley*, 41 L. J., Ch. 510; L. R. 14 Eq. 1; 26 L. T. 816.

Bankers, the agents of executors, and authorised by them to receive certain assets, remitting the amount to the executors in the course of their duty as agents, and afterwards, the assets when received being applied in payment of the amount of such remittances, are not responsible in respect of a misapplication by the executors, they not being privy to any intention of such misapplication. *Keane* v. *Robarts*, 4 Madd. 332; 20 R. R. 306.

Payment to One of Two Executors—Executor also Agent of Debtor.]—Payment by a debtor, for the express purpose of discharging his debt to an estate, to his own agent, who happens to be, but not to the debtor's knowledge, one of the executors of the estate, is not sufficient to discharge the debtor. *Miller* v. *Douglas*, 56 L. J., Ch. 91; 55 L. T. 583; 35 W. R. 122.

Payment to Third Party by Order of Executor.]—A partner in a mercantile firm by his will directed that the residue of his property should be divided into four shares, and that one share should be invested by his executors, and the dividends paid to J. F. for life; and that after his decease the principal should be divided among his children surviving him equally, and he appointed J. F., C. and P. (a member of the firm) his trustees and executors. C. alone proved the will. The testator's share of the profits of the firm was ascertained, and C. called on P., the principal member of the firm, to pay 1,000*l.* of the trust fund. P. wrote to C. that, pursuant to his directions, it should be lodged in bank; and on the 24th March, 1870, P. lodged a cheque of the firm for 1,000*l.* in bank to the credit of J. F.'s wife (who was under the impression that it was paid to her on account of money due to her by C.), and P. obtained a receipt from C. in the following words:—"Received from Messrs. F. P. & Co. the sum of 1,000*l.*, on account of the late A. J. F. (the testator), said sum having been lodged in the R. bank to the credit of Mrs. J. F. on the 24th of March, 1870, at my request. 1,000*l.*—T. R. C., executor of the late A. J. F.—24/3/'70." P. denied notice of any trust for the children of J. F., or of any intended misapplication of the money:—Held (Palles, C.B., dissenting), that the payment of the 1,000*l.* was a good payment, and that neither P. nor the firm were responsible for it to the children of J. F. *Ferrier* v. *Ferrier*, 11 L. R., Ir. 56—C. A.

A person indebted to a testator's estate who pays a third party by order of the testator's executor, and obtains the executor's receipt, without notice that the payment is wrongfully made, obtains thereby a complete discharge. *Ib.*

3. Getting in and Realising Estate.

Expenses.]—It is the duty of executors to get in property specifically bequeathed at the expense of the general estate. *Perry* v. *Meddowcroft*, 4 Beav. 204.

Arrears of Rent.]—The difficulty of collecting arrears of rent does not excuse executors for not collecting them, without some evidence that in fact they could not have been recovered. *Alexander, In re*, 13 Ir. Ch. R. 137.

Realisation of Estate—Tenant for Life and Remainderman—Debts.]—When a tenant for life is entitled in specie, the rule is, that investments may remain, but debts, as turnpike bonds, must be realised. *Holgate* v. *Jennings*, 24 Beav. 623.

—— **Tenant for Life and Remainderman—Trust for Sale.**]—Real estate being devised in trust to sell at such times or time after testator's death as should seem most advisable, either together or in separate parcels, by auction or private contract, the trustees to stand possessed of the produce of such sale, and the rents and profits accruing in the meantime upon the trusts of the devise:—Held, that the cestuis que trustent were entitled to receive their respective portions of accruing rents, &c., from the end of the year after testator's death. *Noel* v. *Henley*, 7 Price, 242; Daniell, 211; 26 R. R. 660.

—— **Reasonable Discretion.**]—An executor's discretion is not that of an absolute owner; it is limited by the duty of bringing the assets into a proper state of investment within a reasonable time; the onus is upon him to shew that he has acted bonâ fide and has exercised a reasonable discretion. Where the testator's assets were subject to trusts in favour of unborn persons, and consisted in part of shares with unlimited liability, and the executors delayed conversion after the same was demanded by those beneficially interested:—Held, that they were liable for the value of the shares ascertained at a reasonable date from the death of the testator, which in this case was fixed at six months. *Hiddingh* v. *De Villiers*, 56 L. J., P. C. 107; 12 App. Cas. 624; 57 L. T. 885—P. C.

It is not the duty of executors to turn the whole estate into money; their duty is to liquidate it, that is, reduce it into possession, cleared of debts and outgoings, and so left free for enjoyment by the heirs, and to hold any trust fund separate from their own. *Beningfield* v. *Baxter* (12 App. Cas. 167) approved. *Ib.*

The testator, at his death, had cargoes of cotton which he had purchased on speculation, and his executors, in the exercise of due care and discretion (though at one time they might have sold the whole of the cotton in a fluctuating market, at a small profit) kept it until it fell in price, and loss to the assets was thereby sustained:—Held, that the executors had not been guilty of wilful default. *Blount* v. *O'Connor*, 17 L. R., Ir. 620.

The will contained a clause, that the testator's trustees should be at liberty to sell all his ships, houses, and other property, and invest the same as they should think most desirable, but not in

British funds; his trustees to be free from all liability, in investing the money received for the sale of any of his property. The testator had railway and foreign stock, which the trustees did not sell, and which afterwards fell in value, causing a large loss to the assets:—Held, that they were not guilty of wilful default. *Ib.*

A testator bequeathed his personal estate to his executors upon trust to divide it equally among four persons, all of whom were of age. A considerable part of the estate consisted of three foreign railway bonds of very uncertain value. At the time of his death they were worth about 150*l.* each, but their value was declining rapidly, and at the end of a twelvemonth they were worth about 54*l.* each. One of the legatees during the year repeatedly pressed the executors to sell, but the others did not join in doing so, and the executors thought it best to wait for the chance of a rise. Ultimately, fifteen months after the death, they sold two of the bonds for 54*l.* each. The third, which remained unsold, had fallen far below that value:—Held, that, as the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character, they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth. *Marsden* v. *Kent*, 46 L. J., Ch. 497; 5 Ch. D. 598; 37 L. T. 49; 25 W. R. 522—C. A.

An executor, who allowed part of the testator's assets to remain invested in Mexican bonds for a year and eleven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held, under the circumstances, not to be liable for the loss consequent on his not having sold them sooner. *Buxton* v. *Buxton*, 1 Mylne & C. 80.

Where executors have neglected to realise assets which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated: it depends on the particular nature of the property, and the evidence affecting it. *Hughes* v. *Empson*, 22 Beav. 181.

Losses occurred by the non-sale of Crystal Palace shares, which were at a premium at a testator's death, but subsequently fell to a discount. The executors were charged by the certificate with the value at the end of two months, but the court varied the certificate to twelve months. *Ib.*

But executors were allowed to retain for a limited period shares of a banking company, as great benefit to the testator's estate might be derived if retained until a certain date. *Hirst, In re*, 11 L. T. 533; 13 W. R. 225.

—— **Where Executors differ.**]—A difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them on the other, to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand. *Buxton* v. *Buxton*, 1 Myl. & C. 80.

Direction to Convert with all Convenient Speed, or at Prescribed Time.]—Executors, who were directed by the will to call in the testator's personal estate with all convenient speed, continued his trade for some years after his death, and ultimately a considerable loss was sustained. But the court refused to charge them with the loss, as they had acted bonâ fide, and according to the best of their judgment. *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J., Ch. 159.

Where a testator prescribes a time for realising his share in a trading concern in which he is a partner, and his legal personal representative extends that time to the surviving partners, who have notice of the trusts, the transaction is not so entirely vitiated as to make the surviving partners accountable for the subsequent profits. *Chambers* v. *Howell*, 11 Beav. 6; 12 Jur. 905.

Executors were ordered to sell canal shares before the 14th July, 1833. They did not sell them until 1836, and a great loss occurred:—Held, that they were personally liable for the loss. *Davenport* v. *Stafford*, 14 Beav. 319.

A testator entitled to shares in a company with unlimited liability, directed his executors to convert his estate with all convenient speed. P., one of the three executors, died a year and five weeks after the testator. The shares were not converted, and about fifteen years afterwards the company was wound up, and the surviving executors being placed on the list of contributories paid a large sum out of the estate for calls. A bill was filed against the surviving executors, and the executors of P., to make them liable for the loss. P.'s executors did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from the testator's death:—Held, that P.'s estate was liable for all loss occasioned to the testator's estate by the omission to sell the shares within twelve months; and that as P.'s executors had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject. *Grayburn* v. *Clarkson*, 37 L. J., Ch. 550; L. R. 3 Ch. 605; 18 L. T. 494; 16 W. R. 716.

A testator devised and bequeathed his residuary estate to four trustees, whom he also appointed his executors, upon trust to sell the same immediately after his death, or so soon thereafter as the trustees might see fit so to do. The testator was, at the time of his death, entitled to shares in an unlimited company then in high repute. The executors did not convert the shares as directed by the will, and about two years after the testator's death the company suspended payment, the result being a heavy loss to the estate. Upon a bill by some of the cestuis que trustent against the executors to render them personally liable for the loss:—Held, that they ought to have converted the shares within twelve months after the testator's death, and that they were liable for the loss occasioned by their omission to do so. *Sculthorpe* v. *Tipper*, 41 L. J., Ch. 266; L. R. 13 Eq. 232; 26 L. T. 119; 20 W. R. 276.

No distinction was made in the case of one of the executors who did not prove the will, and did not attain twenty-one until more than a year after the testator's death. *Ib.*

Money on Personal Security.] — Executors ought not, without great reason, to permit money to remain upon personal security longer than is absolutely necessary. *Powell* v. *Evans*, 5 Ves. 844.

Executors under the circumstances charged with a loss by neglecting to call in money lent by the testator upon bond. *Id.* 839.

An executor having possessed a promissory note for 400*l.*, part of the assets of the testator, retained the note in his possession without taking any proceedings to recover the amount or the interest for seven years; and at the end of seven years, when the sole residuary legatee came of age, the executor delivered the note to the residuary legatee. The residuary legatee, ten years afterwards, filed the bill against his executor, charging him with breaches of trust in the administration of the estate. The court under such circumstances refused to charge the executor with the amount of the promissory note, or direct an inquiry whether any loss had resulted to the estate by reason of the executor not having taken proceedings to enforce the payment of the amount due on the note. *East* v. *East*, 5 Hare, 348.

In such a case the executor would not be chargeable, unless it should be found that the amount of the note could have been recovered during the seven years between the death of the testator and the time when plaintiff attained his majority; and if it were found that the amount could have been recovered during that time, still the executor would not be chargeable, unless it should be found that it could not have been recovered during the ten years which elapsed after the note had been delivered to the plaintiff. *Ib.*

Executor bound to call in money out upon personal security; therefore to pay into court money due from himself. *Eagleton* v. *Kingston*, 8 Ves. 466.

Executors held personally liable in respect of the loss to the testator's estate of a sum outstanding on personal security, although the security was that of the bond of the testator's solicitor, and the money had been invested in that security by the testator some years before his death, and by his will he directed that his trustees should get in his outstanding personal estate "as soon as conveniently might be" after his decease. *Bullock* v. *Wheatley*, 1 Coll. C. C. 130.

It is the duty of the executor to get in all debts outstanding on mere personal security, notwithstanding the testator had long been satisfied with such security. *Gardner* v. *Gardner*, 1 Jur. 462.

Executors authorised to lend upon personal security, not justified in leaving outstanding debts on such security. *Evans* v. *Flight*, 2 Jur. 818.

Part of a testator's assets consisted of a promissory note. The executor, though requested by the parties interested so to do, neglected to get it in, and about two years afterwards it was lost by the insolvency of the debtor:—Held, that the executor was personally liable. *Caney* v. *Bond*, 6 Beav. 486. *S. C.*, nom. *Carrey* v. *Bond*, 12 L. J., Ch. 484.

A testator died in March, 1878. W. then owed him money on promissory notes. Shortly afterwards the executors applied to W. for payment. W. said he could only pay by selling his real estate (which according to valuation was sufficient to leave a surplus, after payment of mortgaged debts, more than enough to pay the testator's debt). In March, 1879, after further pressure, W. offered the real estate for sale, but withdrew it as an adequate price could not be obtained. W. afterwards obtained further advances from the mortgagees of the property, but no money was paid to the executors. On the 31st January, 1880, their solicitor again pressed for payment, and on the 10th February W. filed a liquidation petition. He alleged that earlier pressure would only have resulted in his petition being immediately filed:—Held, that the executors were not liable for the loss of the money due from W. *Owens, In re, Jones* v. *Owens*, 47 L. T. 61—C. A.

4. Selling or Mortgaging Estate.

(a) *Alienation of Chattels.*

i. Sales.

Power of Disposition.]—In many respects, and for many purposes, third persons may consider executors absolute owners; power of disposition is generally incident to an executor. *Hill* v. *Simpson*, 7 Ves. 166; 6 R. R. 105.

Executors may make a valid assignment of their testator's property in respect of their own debts, or where they apply the consideration of it to their own purposes, if no fraud in the other party, or reasonable ground of suspicion in the transaction. *Tanner* v. *Irie*, 2 Ves. sen. 466. And see *Whale* v. *Booth*, 4 Term Rep. 625, n.; 2 R. R. 483, n.

Lis Pendens.]—A leasehold interest was sold by an executor for payment of a bond debt of the testator. A bill in equity had been filed by a creditor against the executor, to which he appeared. In an action to recover the deposit evidence was given, that according to the rules of equity, an executor so circumstanced could not make a valid sale of part of the assets:—Held, first, that an executor has the power of sale at any time before a decree in the suit. *Neeves* v. *Burrage*, 14 Q. B. 504; 19 L. J., Q. B. 68; 14 Jur. 177.

Held, secondly, that the supposed rule was not a rule of practice merely, and therefore the evidence was inadmissible. *Ib.*

A bill filed by a creditor of a deceased testator for the administration of the estate under the direction of the court, does not of itself control or suspend the executor's right to dispose of the property and make a good title. *Ib.*

The courts of common law take judicial notice of this principle of equity, and evidence to shew a contrary practice is not admissible. *Ib.*

—— **Judgment for Administration.**]—After a judgment for the administration of personal estate in an action not registered as a lis pendens, the executor of the deceased and the residuary legatee, both of whom had full notice of the action, assigned to a bonâ fide purchaser for value, without notice of the action or judgment, a chattel real which was part of the assets of the deceased:—Held, that the assignment was effectual to vest a good title in the purchaser, unaffected by the administration proceedings. *Lonergan* v. *Hoban*, [1896] 1 Ir. R. 401.

Revocation of Grant, Proceedings for.]—As long as a person remains clothed with the character of personal representative by the grant of the Probate Division, he, to the fullest extent, represents the assets and personal estate to which the grant refers. When, therefore, all persons entitled are represented and a compromise is entered into by the persons holding grants

administration, this will bind the assets even though proceedings are instituted to recall the grant of administration. *Smithwick* v. *Hayden*, 23 L. R., Ir. 475.

Sale of Leaseholds—Specific Devise.]—One possessed of a term devises to A., makes B. his executor, and leaves some debts : so if the executor sells the term, the purchaser shall hold it against the devisee ; secus, if sold at an under value, or if the purchaser knew there were no debts, or that the debts were or could be paid without breaking in upon the specific legacy. *Ewer* v. *Corbet*, 2 P. W. 148.

Executor or administrator, where there are debts, may sell the testator's term specifically devised ; and even in suspicious cirrumstances of fraud, after long possession by the purchaser, or the person under whom he takes, the court will not relieve. *Andrew* v. *Wrigley*, 4 Bro. C. C. 125.

By an assignment, by one of several executors, of a leasehold estate, the property of the testatrix, which had been bequeathed to that executor absolutely for his benefit, reciting that the assignor and another executor had proved the will (but not stating the fact that a third executor had also subsequently proved), and reciting that the executors had assented to the bequest to the assignor, it was witnessed, that the assignor in his several capacities of executor and assignee of the testatrix, in consideration of the sum therein mentioned, sold and assigned the premises to the purchaser. The assignor, in his character of executor, was at the time of the assignment indebted to the estate of the testatrix in a sum greater than the value of the property assigned. On a bill by the co-executors, on behalf of the estate of the testatrix to set aside the assignment and recover the title-deeds, it was held, that the assignment by the executor to the purchaser was effectual, and that, whether there had or had not been an assent to the bequest by the other executors, the court would not disturb the sale. *Cole* v. *Miles*, 10 Hare, 179.

—— **Powers of Administrator durante minore ætate.**]—An administrator durante minore ætate has for the time all the powers of an ordinary administrator, including a power to sell the estate if it is necessary in due course of administration, although not necessary for payment of debts. *Thompson and M'Williams' Contract, In re*, [1896] 1 Ir. R. 356—C. A.

A vendor of leasehold property deduced title as administrator durante minore ætate. It did not appear that the sale was necessary for payment of debts. Upon an objection by the purchaser :—Held, that the vendors had not under the circumstances power to sell. *Robinson* v. *Sords, In re*, 3 L. R., Ir. 429.

An administrator durante minore ætate had mortgaged his intestate's share in a general residue, and had eventually sold the equity of redemption to the mortgagees. It was alleged by the statement of claim of the infant next of kin, who had impeached the above transactions, that the mortgages and the sale were to their prejudice, and that the administrator had received and applied the consideration-moneys for his own purposes, but it was not alleged that the sale was made for any other purpose than payment of debts, and on the facts stated it was obvious that there were debts. The mortgagees demurred :—Held, that the mortgages and sale were good. *Cope, In re, Cope* v. *Cope*, 50 L. J., Ch. 13 ; 16 Ch. D. 49 ; 43 L. T. 566 ; 29 W. R. 98.

—— **Title of Administrator with Will annexed.**]—A testator bequeathed his leaseholds to executors and trustees upon trust for his nephews and nieces, with a power of sale. All the trustees who survived him renounced probate, and refused to accept the trusts. Administration with the will annexed was granted to another person who paid all the debts and assented to the bequests. By the decree in a suit for the administration of the testator's estate, a sale of the leaseholds was ordered :—Held, that the administrator alone, without the beneficiaries, could make a title to the leaseholds, and had the same power to sell them as if he had been a trustee of the will. *Wyman* v. *Carter*, 40 L. J., Ch. 559 ; L. R. 12 Eq. 309.

—— **Sale of Leaseholds by Administrator under Grant subsequently Revoked.**]—A grant of letters of administration obtained by suppressing a will containing no appointment of executors is not void ab initio, and accordingly a sale of leaseholds by an administratrix who had obtained a grant of administration under such circumstances to a purchaser who was ignorant of the suppression of the will, was upheld by the court, although the grant was revoked after the sale. *Boxall* v. *Boxall*, 53 L. J., Ch. 838 ; 27 Ch. D. 220 ; 51 L. T. 771 ; 32 W. R. 896.

—— **Sale many Years after Death of Testator.**]—A testator who died in 1847, possessed of certain leaseholds held for a term of years, by his will directed his debts to be paid ; and the residue of his property he bequeathed, after payment of his debts, to his executors in trust for payment of certain annuities. There was no specific bequest of the term of years. The executors after a lapse of thirty-seven years put up the leasehold premises for sale by auction. No necessity for the sale was disclosed on the abstract of title, nor was it alleged that any debts of the testator remained unsatisfied. The purchaser objected that the abstract did not disclose how the vendors, after such a lapse of time, still retained the power to sell :—Held, that a good title to sell had not been shewn by the executors. *Molyneaux and White, In re*, 15 L. R., Ir. 383—C. A.

A testator left all his property to W. B. and M. R. upon trust, in the first place, to pay his debts, and subject thereto in trust for his wife and children in equal shares, and appointed his trustees and M. B. executors. The testator died in April, 1868, and in October, 1885, M. R., who had alone proved the will, put up for sale, as executrix, a portion of the assets, consisting of a house in Dublin, held for a term of years. One of the conditions of sale provided that the purchaser should not require any of the legatees to be parties to the conveyance. C., having purchased the premises, objected to the title, upon the ground that a good title could not be made without the concurrence of the legatees of the leasehold and W. B. :—Held, that the period which had elapsed since the testator's death did not create a presumption of the executrix's assent, and that she had authority to sell. *Ryan and Cavanagh, In re*, 17 L. R., Ir. 42.

The rule intimated in *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 465), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a

presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, does not in general apply to the case of an executor selling leaseholds of his testator. *Whistler and Richardson, In re*, 56 L. J., Ch. 827; 35 Ch. D. 561; 57 L. T. 77; 35 W. R. 662; 51 J. P. 820.

A testator bequeathed leaseholds to his executrix upon trust to pay an annuity, and bequeathed his residuary estate to the executrix. Shortly before twenty years had elapsed from the testator's decease the executrix contracted to sell the leaseholds at a price to be ascertained by a named person. Shortly after the twenty years had elapsed the price was ascertained. It was not shewn that there were debts of the testator remaining unsatisfied, nor did it appear that the executrix had been in possession of the leaseholds as legatee:—Held, that the purchaser was not entitled to require the concurrence of the annuitant in the assignment of the leaseholds. *Ib.*

—— **Presumption that Executor sold in Discharge of his Duties as Executor.**]—The rule laid down by Jessel, M.R., in *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 465), that where an executor is selling real estate, after twenty years have elapsed from the testator's decease, a presumption arises that the debts have been paid, and the purchaser is therefore put upon inquiry, is not applicable to the case of an executor selling leaseholds. *Whistler, In re* (35 Ch. D. 561) followed. *Venn and Furze's Contract, In re*, 63 L. J., Ch. 303; [1894] 2 Ch. 101; 8 R. 220; 70 L. T. 312; 42 W. R. 440.

The duties of an executor in connection with his testator's personal estate not being confined to the payment of debts, where an executor sold a lease which had been granted to him as executor twenty-six years previously, and the conveyance of such lease did not purport to be executed by him as executor, he must be presumed to have been acting in the discharge of his duties as executor, and neither the lapse of time between the grant of the lease to him and its sale by him, nor the form of the conveyance, is sufficient to raise the presumption that he was acting otherwise than as executor. *Ib.*

—— **Mortgaged Term.**]—An executor assigns a mortgaged term of his testator to A., as a satisfaction of a debt due to A. from the executor; this is a good alienation. *Nugent* v. *Gifford*, 1 Atk. 463.

There is no difference in equity between the power of an executor to dispose of equitable and legal assets. *Id.* 464.

—— **Proviso against Alienation.**]—Executors may dispose of a lease for years, as assets, notwithstanding a proviso or covenant that lessee shall not alien. *Seers* v. *Hind*, 1 Ves. J. 295. But see *Sir William More's Case*, Cro. Eliz. 26.

Transfer of Shares or Stock—Sale by Representative of Beneficial Owner.]—The registered owner of a share in a company died in 1859 intestate, and administration to her estate was granted to A. P., her sole next of kin. A. P. died in November, 1859, intestate, and administration to his estate was granted to his widow, E. P. In February, 1860, E. P. passed the residuary account of the original owner's estate shewing no debts. In November, 1860, E. P., described as "administratrix of A. P., administrator of" the original owner, executed a transfer of the share, which was passed by the company:—Held, that the sale was valid and binding in equity. *Clark* v. *South Metropolitan Gas Co.*, 53 L. T. 646—C. A. Affirming 54 L. J., Ch. 259; 33 W. R. 160.

—— **Forged Transfer by one Executor.**]—One of two executors, at various periods, some of which were more than six years before the commencement of the action, forged his co-executor's signature to transfers of stock, which were duly registered. He applied the proceeds of the transfers to his own purposes, but continued to pay the amounts of the dividends to the persons entitled. The other executor, on discovery of the fraud, informed the railway company that the transfers were invalid, and demanded that the stock should be registered in the names of herself and another who had been appointed trustees of the will. The railway company declined to accede to this request, and the present action was brought that the company might be ordered to register the plaintiffs as owners of the stock:—Held, that one of the co-executors could not transfer stock registered in the names of both; that the transfers were not good as to one moiety of the stock, and that the innocent executor had in equity a sufficient interest in the stock to enable her to sue her fraudulent co-executor and the railway company. *Barton* v. *North Staffordshire Ry.*, 57 L. J., Ch. 800; 38 Ch. D. 458; 58 L. T. 549; 36 W. R. 754.

—— **Registered Stock—Bank of England—Right of Executor to Transfer.**]—The Bank of England are not to look beyond the legal title to the trusts of the will, and therefore cannot prevent the executor from selling out or transferring stock into his own name. *Bank of England* v. *Parsons*, 5 Ves. 665.

Demurrer allowed to a bill by the Bank of England for an injunction against the action of an executor, claiming a transfer of stock. Considering the stock as specifically bequeathed (which was doubtful) to trustees in Rome, upon special trusts, if the executor cannot maintain the action upon the nature of the bequest, or as having assented, the injunction is unnecessary; if he can, upon his title to the stock, to be applied as the other property, there is no equity. *Bank of England* v. *Lunn*, 15 Ves. 569.

Where stock is specifically bequeathed, the executor may compel the bank to permit him to transfer it, unless it appears that he has assented to the bequest. *Franklin* v. *Bank of England*, 9 B. & C. 156; 4 Man. & Ry. 11; 7 L. J. (O.S.) K. B. 183; 1 Russ. 575.

Circumstances Invalidating Sales.]—The principle is well established, that where an executor parts with any portion of the assets of his testator, under such circumstances as that the purchaser must be reasonably taken to know that they were sold, not for the benefit of the estate, but for the executor's own benefit, the purchaser is liable as if he was himself, in respect of those assets, the executor. *Walker* v. *Taylor*, 8 Jur. (N.S.) 681; 4 L. T. 845—H. L.

Injunction granted to restrain an executor claiming under a will, and also by gift from testatrix in lifetime, from selling, upon affidavit of undue influence. *Edmunds* v. *Bird*, 1 Ves. & B. 542.

It is no objection to title, that assignment of term was executed by one executor only, though deed was prepared as an assignment by two, one executor being competent to assign. *Simpson* v. *Gutteridge*, 1 Madd. 609; 16 R. R. 276.

A contract for the sale of a leasehold house to the plaintiff by two executors was signed by one of them for himself and his co-executor. The signing executor supposed himself to have the authority of his co-executor for the sale, but, in fact, the co-executor had not given any sufficient authority, and refused to ratify the contract:—Held, that even if specific performance could be decreed of a contract for sale made by one of several executors alone, as to which the court gave no opinion, still it must be refused in this case, as the signing executor never intended to contract alone. *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; 1 Jur. (N.S.) 1058; 3 W. R. 605.

A testatrix having directed that a lease should be sold, and the money divided among five persons, the administrator alleging that he had become entitled to it by an arrangement with the legatees, assigned it over for valuable consideration:—Held, that at his death it remained assets unadministered, and that the purchaser must be directed to convey it to the administratrix de bonis non, though the persons beneficially interested were not all parties to the suit. *Cubbidge* v. *Boatwright*, 1 Russ. 549.

The transfer, by an executor, of the trade of his testator, and of the premises on which it was carried on (which were of small value) to a third party, who afterwards continued the trade for his own benefit:—Held, under the circumstances, not to be necessarily a breach of trust. *Portlock* v. *Gardner*, 1 Hare, 594; 11 L. J., Ch. 313; 6 Jur. 795.

On a bill by a cestui que trust against trustees and executors to make them liable for loss alleged to have been sustained by the sale of the testator's business and stock-in-trade against the will of the plaintiff, to one person instead of another, who, he alleged, would have made a higher offer, the court held that the trustees having acted with due deliberation, and in the honest exercise of their discretion, were not liable, and gave them their costs of the suit. *Selby* v. *Bowie*, 4 Giff. 300; 9 Jur. (N.S.) 432. Affirmed 9 Jur. (N.S.) 425; 8 L. T. 372; 11 W. R. 606—L.JJ.

It is a matter of indifference whether an executor or trustee observes the order of sale enjoined in the will or not, provided that no depreciation takes place in the property whose sale is thus irregularly postponed. *Ollivier* v. *King*, 1 Jur. (N.S.) 1066.

Where the inability of an administrator to purchase an estate with his own money is relied upon as a ground for following that estate as part of the intestate's assets, such inability must be shewn by evidence of facts from which the strongest conclusion can be drawn, and not merely or principally by evidence of the opinions of witnesses, though such witnesses may have been well acquainted with the affairs of the party, and their testimony may be corroborated by circumstances of suspicion. *Wilkins* v. *Stevens*, 1 Y. & C. C. C. 431; 6 Jur. 253.

Demurrer by one of several defendants allowed for want of equity, the bill alleging nothing against him, except that a fictitious sale had been made to him of part of a testator's estate. *Marshall* v. *Gilliard*, 12 Jur. (N.S.) 483.

—— **Fiduciary Relation of Executors and Administrators to Beneficiaries.**]—In selling or subletting the leaseholds of a testator or intestate, an executor or administrator stands to the beneficiaries, or next of kin, in the same relation as a trustee to his cestui que trust. Therefore, for an executor or administrator to grant an underlease with the option of purchase to be exercised by the sub-lessees at a future time, at a price now fixed, is ultra vires, and a breach of trust. Such a transaction cannot be supported as against the beneficiaries or next of kin, however advantageous the transaction may have been to their estate. *Oceanic Steam Navigation Co.* v. *Sutherberry*, 50 L. J., Ch. 308; 16 Ch. D. 236; 43 L. T. 743; 29 W. R. 113.

If a legatee agrees to sell to the executor of the will his legacy for an annuity, the burden will lie on the executor to shew that there was no unfairness in the transaction. *Gray* v. *Warner*, *Biel*, *In re*, 42 L. J., Ch. 556; L. R. 16 Eq. 577; 28 L. T. 835; 21 W. R. 808.

The purchase by an executor of his co-executor's legacy in consideration of a life annuity, set aside on the ground of insufficiency of price. *Ib.*

Sale by administratrix of the testator's property to her own son, under an open contract and for undervalue, set aside. The mere fact of this agreement being made with the son of the administratrix would have been sufficient to vitiate the sale, irrespective of the improvidence of the contract, which imposed no conditions on the intending purchaser, and of the undervalue. *John* v. *Jones*, 34 L. T. 570.

A testator gave all his real and personal property, including a business, to his executors on trust to sell and pay the income to his wife for life, and after her death to the plaintiff, but with full discretion to his executors to postpone the sale of his estate. And he directed that until the sale the net income should be applied in the same way as the income of the proceeds of the sale was to be applied. Shortly after the death of the testator one of the executors purchased the business at a valuation:—Held, by Bacon, V.-C., that the sale must be set aside, and that the executor must account for the profits made since the sale without salary, but with just allowances; and that the amount of the profits must be treated as capital, and that the widow was only entitled to the income of it. *Norrington*, *In re*, *Brindley* v. *Partridge*, 13 Ch. D. 654; 28 W. R. 711; 44 J. P. 474—C. A.

On an appeal the case was compromised, and the purchase was confirmed; but the court expressed an opinion that if the sale had been set aside the widow would have been entitled to the profits as income. *Ib.*

B. was a member of a firm of three partners, and also the surviving member of another firm of two partners, which was the sole or chief creditor of the first firm. B.'s executor purchased the estate of the first firm for his own benefit, with the result that nothing was left for B.'s widow and universal legatee:—Held, in a suit by the widow against the executor, that such sale was voidable; and that a decree be made for a general administration of B.'s estate, declaring that the sale be set aside with certain special directions. *Travis* v. *Milne* (9 Hare, 150) approved. *Beninfield* v. *Baxter*, 56 L. J., P. C. 13; 12 App. Cas. 167; 56 L. T. 127—P. C.

A., B. and C. were executors and B. and C. trustees of a testator who had property in Jamaica. A. proved the will in Jamaica, and

B. and C. in England. Before the estate was wound up and accounts settled, A. purchased from B. and C. a business carried on by the testator in Jamaica :—Held, that the sale to A., being of itself a part of the process of realising the estate, could not be justified as a sale to an executor who had assented to a bequest, and must be set aside at the instance of the beneficiaries. *Harvey, In re, Harvey* v. *Lambert*, 51 L. T. 449.

A sale is not to be avoided merely because, when entered upon, the purchaser has the power to become trustee of the property purchased, as for instance by proving the will which relates thereto, though in point of fact he never does become such. Such a purchaser is under no disability, and in order to avoid such sale it must be shewn that he in fact used his power in such a way as to render it inequitable that the sale should be upheld. *Clark* v. *Clark*, 52 L. J., P. C. 99 ; 9 App. Cas. 733 ; 51 L. T. 750—P. C.

An executor, purchasing assets belonging to the estate of his testator, with the assent of the parties then interested, will not, after a length of time, be answerable for the profit he has made ; but he will when he has purchased with a fraudulent intention. *Whatton* v. *Toone*, 5 Madd. 54.

An executor purchased a share of the residue, and in an administration suit he was ordered to pay the assets into court, minus the amount of the purchased share. Afterwards, in another suit, the purchase was set aside :—Held, that the executor was not entitled, on setting aside the transaction, to a decree for repayment of the consideration money, but that it must be paid into court in the administration suit. *Smedley* v. *Varley*, 23 Beav. 358.

—— **Breach of Trust—Notice.**]—A will contained a direction that no part of the testator's property should be sold or disposed of except the interest in a certain house, for ten years only, if thought advisable on the part of the executors, and he bequeathed the property to his son, who was a minor. The executors sold the whole interest in the house to A., who had notice of some restriction on the executors' power to sell. There were no debts :—Held, in a suit to impeach the sale, that the sale being a breach of trust, the purchaser was bound to prove that the sale was at the full value. *M'Mullen* v. *O'Reilley*, 15 Ir. Ch. R. 251.

Where a term is devised away by will, a purchaser of and from the executor is not bound to see whether it was necessary to sell the term for payment of the debts. *Langley* v. *Oxford* (*Earl*), Ambl. 797.

A purchaser of leasehold premises from an executor need not (in general) see to the application of the purchase-money, nor need there be any recital in such an assignment of the purpose for which it is sold : but if, on the face of the assignment, it appears to have been made in satisfaction of the private debt of the executor, such a sale is fraudulent against the persons interested in the premises under the will, and the Court of Equity will relieve against it ; but such a claim will be barred by a great length of time having run against the parties seeking relief. *Bonney* v. *Ridgard*, 1 Cox, 145.

An executor in trust for an infant residuary legatee, renews a lease, part of the testator's personal estate, in his own name, and, having mortgaged it, assigns the equity of a redemption to a trustee, to sell for payment of his own debts. The trustee sells to one who had notice of the infant's title. Purchase set aside. *Walley* v. *Walley*, 1 Vern. 484.

The commercial correspondents of executors, acting under a power of attorney :—Held, to be responsible to the testator's estate for the amount of the produce of stock, part of such estate sold by them and applied by the direction of the executors in payment of a balance due from the latter, as partners in a commercial concern, to their correspondents, with full knowledge on the part of the correspondents, that the stock was part of the testator's assets. There is no primary liability in respect of breaches of trust, all parties to a breach of trust being equally liable ; and it is no objection to a suit brought by parties seeking relief against a breach of trust, that one of the defendants, against whom no relief is prayed, may have been a party to such breach of trust. *Wilson* v. *Moore*, 1 Myl. & K. 127, 337.

A person having a claim against a testator's estate, prevailed upon the executors to hand over to him part of the testator's assets, under circumstances from which he must have known that in doing so the executors were acting hastily, improvidently and against their duty as executors :—Held, that such person was a proper party to a suit instituted by a legatee against the executors for the administration of the estate, although the bill contained no charge of collusion or insolvency. *Consett* v. *Bell*, 1 Y. & C. C. C. 569 ; 11 L. J., Ch. 401 ; 6 Jur. 869.

A creditor, who had proved his debt against the estate of a deceased person, under an administration decree obtained at the suit of another creditor against the executor, filed a new bill on behalf of himself and all other unsatisfied creditors of the testator against the executor and a person, not a party to the previous suit, who had purchased part of the assets from the executor, the bill charging connivance between the executor and the purchaser, and seeking relief in respect of the purchase-money, no misconduct being alleged against the plaintiff in the previous suit :—Held, that the bill could not be maintained. *Earle* v. *Sidebottom*, 37 L. J., Ch. 503.

—— **Where Administration Fraudulently Obtained.**]—A., who was entitled to a sum of money secured by a trust term in reversion after a life estate, went to Australia, and remained there many years ; during which time, B., representing him to be dead, obtained administration to his estate and effects, and a suit having been instituted in relation to the fund secured by the report, and confirmed by the final decree, that he was dead, B. afterwards sold the charge to a purchaser for value, who took an assignment of the term from the trustee to a trustee for himself ; and A. having come back on the death of the tenant for life, and filed a bill to set aside the sale of the charge :—Held, that, although the administration taken out by B. gave him no title to assign the charge, yet that the court would not interfere to take away from a purchaser for value without notice the benefit of the legal estate which he had obtained by the assignment of the term. *Monckton* v. *Braddell*, Ir. R. 6 Eq. 352.

When a man fraudulently obtained administration to an intestate's estate, and settled the property thus acquired on his marriage, being in debt at the time, an injunction was granted restraining the trustees from dealing with the

capital of the property, but not interfering with their application of the income to the trusts of the settlement. *Gibson* v. *Head*, 17 W. R. 986.

Following Funds.]—If executor, for benefit of testator's estate, should invest part of it in the funds, or transfer money from one stock to another, this is not a conversion, but it may still be followed as much as if it had continued in the same condition at the testator's death. *Waite* v. *Whorwood*, 2 Atk. 159.

ii. Mortgages or Pledges.

Generally.]—Each executor has entire control over a testator's personal estate; he may release, pay or transfer without the others; and so as to each administrator, though formerly questioned: one executor may retain satisfaction of his own debt, if no fraud. A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for better securing of a debt due from the testator to himself, the mortgagees were entitled to satisfaction; and creditors of the testator, under marriage articles, who had no specific lien, were not allowed to pursue the premises thus assigned. *Jacomb* v. *Harwood*, 2 Ves. Sen. 265.

Bankrupt, who had obtained his certificate, being possessed of leasehold premises as executor and residuary legatee, mortgaged them to secure a debt of his own, and afterwards assigned the equity of redemption for valuable consideration; the deed reciting that the assignment was made for the purpose of paying the debts of the testatrix. The assignee took an assignment of the mortgage. The certificate held to have been fraudulently obtained. The lease was claimed by the assignees under the bankruptcy, but it was determined they had no right against the assignee for the valuable consideration. *Bedford* v. *Woodham*, 4 Ves. 40.

Leasehold estates specifically bequeathed to an executor were by him assigned as a security for his own debt. That assignment, no collusion appearing, was established against a creditor. *Taylor* v. *Hawkins*, 8 Ves. 209; 7 R. R. 27.

Pledge by executors of bonds given to the testator, to secure advances of money from time to time, for several years, sustained, the bill being filed, not by specific legatees, but by co-executors, who had not previously acted. *M'Leod* v. *Drummond*, 14 Ves. 353. Affirmed, 17 Ves. 152; 11 R. R. 41.

An executor may pledge specific assets of his testator, but he has no power to pledge generally the credit of the testator's estate. *Farhall* v. *Farhall, London and County Bank, Ex parte*, 41 L. J., Ch. 146; L. R. 7 Ch. 123; 25 L. T. 685; 20 W. R. 157.

An executor or an administrator borrowing money in that character, does not give the lender any claim against the testator's or intestate's estate. The contract simply creates a personal liability on the part of the executor or administrator. *Ib.*

Semble, when part of the testator's property is invested on mortgage, the executor is justified in making such further advances as may be absolutely necessary to secure the first advance. *Collinson* v. *Lister*, 20 Beav. 356.

It would be dangerous to lay down any rule which would prevent the executor from exercising a bonâ fide discretion in such case, or even charge him with a devastavit in case the result should disappoint his expectations. In case of loss, however, the onus lies on him of shewing that he exercised due caution. *Ib.*

On Personal Security.] — Executor cannot lend on personal security. *Morrissey* v. *Foley*, 2 Moll. 346.

Executors cannot lend money on personal security, though words which may imply a discretion so to do are used by the testator. *Wilkes* v. *Steward*, G. Coop. 6; 14 R. R. 211.

Leaseholds—Power of Sale.]—An executor or administrator may not only pledge or mortgage the assets, but may also give to the mortgagee of leaseholds a power of sale and to give valid receipts for the purchase-money. *Russell* v. *Plaice*, 18 Beav. 21; 23 L. J., Ch. 441; 18 Jur. 254; 2 W. R. 243.

In a suit for the specific performance of a contract for the purchase of property sold under a power of sale contained in a mortgage executed by an administratrix:—Held, that there was a good title; and specific performance was decreed. *Ib.*

—— **Mortgage to Building Society.**] — An executor mortgaged three small leasehold houses to a building society. The deed, which was in the form of a building society's mortgage, recited the will and probate, and that the money was wanted for executorship purposes; it incorporated by reference the rules and by-laws of the society, and made the mortgage a security not only for the moneys advanced, but for any moneys at any time due by the executor in respect of any shares held by him in the society. The deed contained also personal covenants by the executor for payment of the mortgage money, &c.:—Held, that the mortgage was a good one, and that a title derived under it might be forced on a purchaser. *Cruickshank* v. *Duffin*, 41 L. J., Ch. 317; L. R. 13 Eq. 555; 26 L. T. 121; 20 W. R. 354.

An executor may create a mortgage of his testator's property, with power of sale. *Ib.*

Though an executor cannot bind his testator's estate in respect of shares taken by the executor for himself in a building society, a mortgage by him of his testator's assets to secure money bonâ fide advanced to him as executor, with interest thereon, even if containing onerous provisions as to consideration and observance of the society's rules, and securing also moneys to become due from the mortgagor as a shareholder, is, as against the estate and the beneficiaries, not void, but good to the extent of the money actually advanced and reasonable interest thereon, but bad beyond. *Thorne* v. *Thorne*, 63 L. J., Ch. 38; [1893] 3 Ch. 196; 69 L. T. 378.

—— **Power of Administrator to Mortgage for Repairs.**]—An administrator has no power to mortgage leaseholds of the intestate under leases not containing repairing covenants, in order to raise money for repairing the property. And such a mortgage will be set aside as against a mortgagee who has notice of the purpose for which the money is raised. *Ricketts* v. *Lewis*, 51 L. J., Ch. 837; 20 Ch. D. 745; 46 L. T. 368; 30 W. R. 609.

Book Debts—Power of Attorney to Collect.]—An executor is absolute owner of his testator's

assets, and may mortgage or sell them, as well to a creditor as to any other person; and a mortgage of the book debts of the testator may contain a power of attorney to collect them. *Vane* v. *Rigden*, 39 L. J., Ch. 797; L. R. 5 Ch. 663; 18 W. R. 1092.

An executor assigned all the book debts, &c., of her testator to the nominal value of 2,000*l.* to a creditor, to secure a debt of 534*l.* due to him from the testator, and also gave him a power of attorney to collect the debts. The property so assigned amounted substantially to the whole of the assets:—Held, that the mortgage was valid. *Ib.*

For Advance to one of Co-executors as such.]—One of two executors, who was himself a residuary legatee, entered an account with a banker in his own name for executorial purposes, and the banker, with notice of the dispositions under the will, made advances to the executor for payments connected with the executorship, and securities were deposited for repayment of the advances. The co-executor assented to the first advance, but upon a second advance being made to the acting executor upon other securities, he withdrew his assent, and objected to the banker being repaid out of the trust property, on the ground that the money had been placed to the separate account of the acting executor. The advances were duly applied to the purposes of the administration. Upon an action being brought by the banker for a lien upon the securities for repayment of his advances:—Held, that the banker was justified in advancing money to the acting executor for executorial purposes, and that the assent of the co-executor in the first instance was a further justification for placing confidence in the acting executor, and in making further advances to him. The repayment was therefore decreed with mortgagee's costs. *Child* v. *Thorley*, 16 Ch. D. 151; 29 W. R. 417.

For Future Payment of Annuity fallen into Arrear—Benefit of Estate.]—D., by his marriage settlement, conveyed leasehold hereditaments (subject to a mortgage) to trustees after his death to raise an annuity for his widow. There being arrears of the annuity, a deed was executed by the widow and the husband's executor, whereby the former agreed to abandon part of the arrears on the remainder being capitalised, and interest thereon and payment for the future being secured by a mortgage of the leaseholds, and by the covenant of the executor to pay ground rent and interest on the mortgage out of the general assets, exclusive of the rents of the leaseholds:—Held, that the widow was entitled to the benefit of the indenture. *Depree* v. *Bedborough*, 10 W. R. 875.

Circumstances Invalidating.] — It is not enough to impeach a mortgage of part of the assets, that it was made to secure a debt originally contracted on the personal security of the executor, and without reference to the assets. *Miles* v. *Durnford*, 2 De G. M. & G. 641; 21 L. J., Ch. 667.

Whoever deals with an executor for the assets of a testator for a purpose perfectly inconsistent with a due administration of those assets, subjects himself to the consequences of a devastavit. *Downes* v. *Power*, 2 Ball & B. 498.

—— **Notice.**]—An agent receiving notes from an executor payable to him as executor, as a security for advances by the principal to the executor on his private account, and not as executor, affects his principal with notice that it is a dealing with an executor for the assets for a purpose foreign to the trusts he was to discharge; the principal is thereby a party to the devastavit, and liable to the consequences thereof, and cannot, therefore, retain the notes against those claiming under the will. *Downes* v. *Power*, 2 Ball & B. 491.

If a lender of money to an executor has at the time of the loan, and before parting with the money, notice that the debtor in borrowing commits a breach of trust, and intends to misapply the money, he acquires no better title against the estate than the executor himself. *Collinson* v. *Lister*, 7 De G. M. & G. 634; 25 L. J., Ch. 38; 2 Jur. (N.S.) 75; 4 W. R. 133.

An executor borrowed money from a banking company, of which he was the local agent, for the purpose of making a further advance to a mortgagor of a ship, on the security of which the testatrix had lent money, on the pretence that such further advance was to pay off a prior charge, but really to assist the mortgagor, and the security proved ultimately wholly insufficiently:—Held, that the company had no claim upon the testatrix's assets, and that a mortgage of a ship made by the executor to the company to secure their advance was invalid. *Ib.*

A., who was a trader in partnership with B., died, leaving by his will to C., his wife, the business premises, of which he was lessee for a term of years, and all other his property whatsoever, to be by her divided amongst his children and grandchildren at her death, or sooner, if she should think fit, and appointed her sole executrix. C., for the purpose of continuing the business with B., entered into a partnership agreement with him, and raised money for the same purpose on the security of the leasehold interest. The lenders had express notice of the purpose for which the money was borrowed, but relied on advances subsequently made to the children and grandchildren out of the profits of the business. The petition referred solely to the securities given by C. in her character of executrix:—Held, that, under such a petition, advances subsequently made could not be relied on; and that the securities being originally void, the money having been lent for an improper purpose, the petition, as framed, should be dismissed. *Johnson, In re*, 15 Ir. Ch. R. 260.

Transfer by executor being a clear misapplication of assets as immediately after the death, and to secure the debt of the executor, with future advances, under circumstances of gross negligence, though not direct fraud, set aside by general legatees. *Hill* v. *Simpson*, 7 Ves. 152; 6 R. R. 105.

A mortgage given by an executor as a security for his own debt on assets of his testator, which have been absolutely bequeathed to him, is not valid, if the mortgagee has notice that debts of the testator remain unpaid. *Hall* v. *Andrews*, 27 L. T. 195; 20 W. R. 799.

A., after becoming surety for B. to a bank, died, leaving a will, by which he appointed B. his executor, and left all his personal and real estate (charged with his debts) to B.'s wife. At A.'s death B. owed the bank a considerable sum. Shortly afterwards B. and his wife mortgaged to the bank real and personal estate forming part

of A.'s assets as a security for the money then owing by B. Subsequently B. became bankrupt. In a suit for the administration of A.'s estate, instituted by a creditor:—Held, that, as the bank had notice that the property comprised in the mortgage had formed part of A.'s assets, all moneys realised under it came from his estate. *Ib.*

C. and his wife were trustees and executors of the will of R., by which the testator devised and bequeathed all his real and personal estate to them in trust for Mrs. C. for life, for her separate use, and, after her decease, for her children. Part of the assets consisted of certain shares in the H. Bank, and shortly after the testator's death C. and his wife invested other portions of the assets upon two mortgages of fee-simple estate, which were made to them jointly; but, beyond shewing that the money had been advanced on a joint account, did not disclose any trust. C. afterwards opened an account with the M. Bank, and, as security for overdrafts, deposited with them the bank shares and the mortgages, these latter being sub-mortgaged to the M. Bank by deed, which was not, however, acknowledged by Mrs. C. as a married woman. To reduce his overdraft, C., at the suggestion of the manager of the M. Bank, authorised the bank to sell the shares, and induced Mrs. C. to join in such sale. They were accordingly sold by the brokers of the bank on account of C. and his wife, "representatives of R.," and in the transfer deeds C. and his wife were described as "executors of R." The M. Bank was also paid the moneys due to them on foot of the mortgages, but not until after receiving express notice of the trusts affecting them. In a suit by C.'s children after his death:—Held (1), that the bank having received the proceeds of sale of the shares, with distinct notice that they constituted part of the testator's assets, even though unaware of the trusts of the will, could not retain the amount in liquidation of C.'s personal indebtedness to themselves, and were accordingly bound to replace the same. (2) That the bank, not having acquired the legal estate in the mortgaged premises, except for the life of C., in consequence of the want of acknowledgment by Mrs. C., they could only set up an equitable title to the mortgages, which, even assuming them to have originally been purchasers for value without notice, could not prevail against the earlier equity in the plaintiffs. *Connolly* v. *Munster Bank*, 19 L. R. Ir. 119.

A testator possessed of leaseholds bequeathed, amongst others, pecuniary legacies to each of his two daughters, and appointed his son residuary legatee and executor. The son, on the testator's death, went into possession of all his assets, including the leaseholds, and paid interest to the daughters on their legacies, the principal sums remaining unpaid and due to the legatees. Many years after the testator's death the testator's son deposited with a bank the leases of the testator's leasehold premises to secure, by way of equitable mortgage, the amount of his (the son's) own overdrawn account, and the evidence shewed that the bank dealt with him as absolute owner. On the petition of the bank the leaseholds were sold, and the daughters claimed to be placed on the schedule as incumbrancers on the leaseholds in respect of their unpaid legacies in priority to the claim of the bank:—Held, that the bank was not entitled in priority to the legatees, but was only entitled to a charge on the executor's beneficial interest in the leaseholds as residuary legatee. *Queale's Estate, In re*, 17 L. R., Ir. 361—C. A.

Equitable Security.]—An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale:—Held, that the lease was in equity part of the testator's estate, and that the equity of the estate, being prior to the equity of the mortgagee, must prevail against it. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183—C. A. Affirming, 29 W. R. 733.

Held, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale. *Ib.*

The rule that if an executor, who is also residuary legatee, sells or mortgages for his own purposes an asset of the testator for valuable consideration to a person who has no notice of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, the purchase or mortgage is valid against any unsatisfied creditor of the testator, applies even though such purchaser or mortgagee has thereby acquired only an equitable interest in the asset, if perfected by giving any necessary notice to the legal owner. This rule, however, does not apply when the executor, or the court administering the estate, still retains sufficient control over the asset to apply it for the benefit of creditors. *Noble* v. *Brett* (27 L. J., Ch. 516; 24 Beav. 499) and *Hooper* v. *Smart* (45 L. J., Ch. 99; 1 Ch. D. 90) distinguished. *Graham* v. *Drummond*, 65 L. J., Ch. 472; [1896] 1 Ch. 968; 74 L. T. 417; 44 W. R. 596.

Lis Pendens.]—A decree was made in a creditors' suit for the administration of the personal estate of a testator, but no receiver was appointed nor an injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed "E. G., executrix of B. G." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. The bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix:—Held, that the bank had a valid security on the picture, for that the doctrine of lis pendens had no application, a decree for administration without an injunction or appointment of a receiver not taking away the power of the executrix to deal with the assets. *Berry* v.

Gibbons, 42 L. J., Ch. 89; L. R. 8 Ch. 747; 29 L. T. 88; 21 W. R. 754.

Fraudulent Mortgage.]—An administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that the sum of 300*l.* was paid as a consideration. The next of kin, not knowing the facts, were induced by misrepresentation to execute the mortgage; and the jury at the trial found that the deed had not been fairly obtained:—Held, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud, nor against the administratrix, who was the widow of the intestate, because the accounts of the estate had not been wound up. *Doe* d. *Woodhead* v. *Fallows*, 2 C. & J. 481; 2 Tyr. 460; 1 L. J., Ex. 177.

Mortgage Deeds Forgeries.]—A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage money to his own purposes. He handed over the title-deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title-deeds. The other beneficiaries under the will were made defendants:—Held, that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648.—C. A.

Semble, the son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

Held also, that the mortgagees must deliver up the title-deeds to the plaintiffs. Since the Judicature Act the Chancery Division has jurisdiction on the application of the legal owner of title-deeds to order them to be delivered up by a purchaser for value without notice. *McLeod* v. *Drummond* (14 Ves. 353; 17 Ves. 152; 11 R. R. 41) distinguished. *Ib.*

After Settlement of Accounts between Next of Kin.]—A., B. and C., as the only next of kin with D., the administrator of their intestate father, signed a memorandum in 1872, authorising D. to borrow, upon mortgage or otherwise, as he might deem best, upon the security of certain house property, held by the intestate under an agreement for a lease to be granted on completion of repairs, such money as D. required for carrying out these matters, and to charge their respective shares with the interest. A lease of the houses was soon afterwards granted to D. as the sole legal personal representative of the intestate, which, with the memorandum, was shortly afterwards deposited by D. as a security for his own debt with E. In 1875, the administration accounts, shewing a balance due to D., was settled between A., B., C. and D. and D. then told A., B. and C. that he had not borrowed any money upon the security of their shares under the memorandum of 1872. In 1877, D., who had previously mortgaged his share of the house property to E., executed a further mortgage to him of the entirety, reciting the authority of 1872. No notice was given by E. to A., B. and C., that he held any charge upon their shares under the memorandum:—Held, that in the absence of any notice by E. to A., B. and C., of a charge to him of their shares by D. under the authority of 1872, the mortgage of 1877, after that authority had been withdrawn by the settlement of accounts, did not effect their shares, and that they were entitled to an assignment from E. of their shares of the property comprised in the lease, which had been mortgaged by D. *Jones* v. *Stöhwasser*, 50 L. J., Ch. 625; 16 Ch. D. 577; 44 L. T. 333; 29 W. R. 497.

(b) *Alienation of Real Estate.*

i. Sales.

With respect to wills coming into operation after 1st January, 1898, see powers conferred by the Land Transfer Act, 1897, vesting the real estate in the personal representative as if it were chattel real.

Power of Sale—Express or Implied.]—Executors have only power to sell real estate where expressly given, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. *Bentham* v. *Wiltshire*, 4 Madd. 44; 20 R. R. 271.

—— **Where Express.**]—A., after directing all his debts to be paid, and bequeathing personal estate to his wife for life, devised a freehold house to her "for her natural life, with liberty to sell it in case a good offer is made, and invest the proceeds of it in the 5*l.* per cent. stock, for her benefit during her life." And in a subsequent part of the will he desired that "at the death of his wife the residue of his estate might be collected, including the proceeds of the house, and, if not previously sold, to be then disposed of to good advantage, to be divided as follows": He appointed his wife, the plaintiff and C., to be executrix and executors of his will. The plaintiff and the widow proved the will. C., the other executor, died in the lifetime of the widow. After the death of the widow, the plaintiff, the surviving executor, entered into a contract with the defendant for the sale of the house:—Held, that, whether there were or were not debts unpaid, and whether it was or was not uncertain whether any debts remained unpaid, the plaintiff had a power to sell and convey the house in fee-simple. *Forbes* v. *Peacock*, 11 M. & W. 630; 12 L. J., Ex. 460.

of A.'s assets as a security for the money then owing by B. Subsequently B. became bankrupt. In a suit for the administration of A.'s estate, instituted by a creditor:—Held, that, as the bank had notice that the property comprised in the mortgage had formed part of A.'s assets, all moneys realised under it came from his estate. *Ib.*

C. and his wife were trustees and executors of the will of R., by which the testator devised and bequeathed all his real and personal estate to them in trust for Mrs. C. for life, for her separate use, and, after her decease, for her children. Part of the assets consisted of certain shares in the H. Bank, and shortly after the testator's death C. and his wife invested other portions of the assets upon two mortgages of fee-simple estate, which were made to them jointly; but, beyond shewing that the money had been advanced on a joint account, did not disclose any trust. C. afterwards opened an account with the M. Bank, and, as security for overdrafts, deposited with them the bank shares and the mortgages, these latter being sub-mortgaged to the M. Bank by deed, which was not, however, acknowledged by Mrs. C. as a married woman. To reduce his overdraft, C., at the suggestion of the manager of the M. Bank, authorised the bank to sell the shares, and induced Mrs. C. to join in such sale. They were accordingly sold by the brokers of the bank on account of C. and his wife, "representatives of R.," and in the transfer deeds C. and his wife were described as "executors of R." The M. Bank was also paid the moneys due to them on foot of the mortgages, but not until after receiving express notice of the trusts affecting them. In a suit by C.'s children after his death:—Held (1), that the bank having received the proceeds of sale of the shares, with distinct notice that they constituted part of the testator's assets, even though unaware of the trusts of the will, could not retain the amount in liquidation of C.'s personal indebtedness to themselves, and were accordingly bound to replace the same. (2) That the bank, not having acquired the legal estate in the mortgaged premises, except for the life of C., in consequence of the want of acknowledgment by Mrs. C., they could only set up an equitable title to the mortgages, which, even assuming them to have originally been purchasers for value without notice, could not prevail against the earlier equity in the plaintiffs. *Connolly* v. *Munster Bank*, 19 L. R. Ir. 119.

A testator possessed of leaseholds bequeathed, amongst others, pecuniary legacies to each of his two daughters, and appointed his son residuary legatee and executor. The son, on the testator's death, went into possession of all his assets, including the leaseholds, and paid interest to the daughters on their legacies, the principal sums remaining unpaid and due to the legatees. Many years after the testator's death the testator's son deposited with a bank the leases of the testator's leasehold premises to secure, by way of equitable mortgage, the amount of his (the son's) own overdrawn account, and the evidence shewed that the bank dealt with him as absolute owner. On the petition of the bank the leaseholds were sold, and the daughters claimed to be placed on the schedule as incumbrancers on the leaseholds in respect of their unpaid legacies in priority to the claim of the bank:—Held, that the bank was not entitled in priority to the legatees, but was only entitled to a charge on the executor's beneficial interest in the leaseholds as residuary legatee. *Queale's Estate, In re*, 17 L. R., Ir. 361—C. A.

Equitable Security.]—An executor, six years after the death of the testator, surrendered a lease belonging to the testator, and took a renewed lease, including additional property and at an increased rent, in his own name. He afterwards deposited the lease as security for money advanced to him, which he applied to his own purposes. The renewed lease contained no mention of the surrender, and the mortgagee did not know that the borrower was an executor, or that he was not the beneficial owner of the lease. He did not, however, make any inquiry into the title. An action was afterwards brought to administer the testator's estate, and a consent order was made for the sale of the leasehold property, without prejudice to any right, the mortgagee giving up the lease to facilitate the sale. He claimed to be paid the amount due to him by the executor out of the proceeds of sale:—Held, that the lease was in equity part of the testator's estate, and that the equity of the estate, being prior to the equity of the mortgagee, must prevail against it. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183—C. A. Affirming, 29 W. R. 733.

Held, also, that the equitable mortgagee was not injured by the order to give up the indenture of lease, and did not thereby acquire any claim upon the proceeds of the sale. *Ib.*

The rule that if an executor, who is also residuary legatee, sells or mortgages for his own purposes an asset of the testator for valuable consideration to a person who has no notice of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, the purchase or mortgage is valid against any unsatisfied creditor of the testator, applies even though such purchaser or mortgagee has thereby acquired only an equitable interest in the asset, if perfected by giving any necessary notice to the legal owner. This rule, however, does not apply when the executor, or the court administering the estate, still retains sufficient control over the asset to apply it for the benefit of creditors. *Noble* v. *Brett* (27 L. J., Ch. 516; 24 Beav. 499) and *Hooper* v. *Smart* (45 L. J., Ch. 99; 1 Ch. D. 90) distinguished. *Graham* v. *Drummond*, 65 L. J., Ch. 472; [1896] 1 Ch. 968; 74 L. T. 417; 44 W. R. 596.

Lis Pendens.]—A decree was made in a creditors' suit for the administration of the personal estate of a testator, but no receiver was appointed nor an injunction granted to restrain the executrix from dealing with the assets. More than two years after the decree, and nearly three years after the death of the testator, his executrix, who was also his sole legatee, opened an account with a bank, headed "E. G., executrix of B. G." In the following year, the account being overdrawn, she deposited with the bank a picture belonging to the testator's estate to secure the balance then due and further advances. The bankers did not know of the suit, and had no notice of any breach of duty on the part of the executrix:—Held, that the bank had a valid security on the picture, for that the doctrine of lis pendens had no application, a decree for administration without an injunction or appointment of a receiver not taking away the power of the executrix to deal with the assets. *Berry* v.

Gibbons, 42 L. J., Ch. 89; L. R. 8 Ch. 747; 29 L. T. 88; 21 W. R. 754.

Fraudulent Mortgage.]—An administratrix, being indebted to an attorney for rent, executed to him a mortgage of leasehold property belonging to her intestate, which falsely recited that the sum of 300*l.* was paid as a consideration. The next of kin, not knowing the facts, were induced by misrepresentation to execute the mortgage; and the jury at the trial found that the deed had not been fairly obtained:—Held, that the mortgagee was not entitled to recover in ejectment against the next of kin, because of the fraud, nor against the administratrix, who was the widow of the intestate, because the accounts of the estate had not been wound up. *Doe* d. *Woodhead* v. *Fallows*, 2 C. & J. 481; 2 Tyr. 460; 1 L. J., Ex. 177.

Mortgage Deeds Forgeries.]—A son who was heir-at-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death, executed mortgages of freehold and leasehold property of the father and applied the mortgage money to his own purposes. He handed over the title-deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrixes with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middlesex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title-deeds. The other beneficiaries under the will were made defendants:—Held, that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. *Cooper, In re, Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648.—C. A.

Semble, the son could have been convicted of forgery by reason of his executing the mortgage deeds. *Ib.*

Held also, that the mortgagees must deliver up the title-deeds to the plaintiffs. Since the Judicature Act the Chancery Division has jurisdiction on the application of the legal owner of title-deeds to order them to be delivered up by a purchaser for value without notice. *McLeod* v. *Drummond* (14 Ves. 353; 17 Ves. 152; 11 R. R. 41) distinguished. *Ib.*

After Settlement of Accounts between Next of Kin.]—A., B. and C., as the only next of kin with D., the administrator of their intestate father, signed a memorandum in 1872, authorising D. to borrow, upon mortgage or otherwise, as he might deem best, upon the security of certain house property, held by the intestate under an agreement for a lease to be granted on completion of repairs, such money as D. required for carrying out these matters, and to charge their respective shares with the interest. A lease of the houses was soon afterwards granted to D. as the sole legal personal representative of the intestate, which, with the memorandum, was shortly afterwards deposited by D. as a security for his own debt with E. In 1875, the administration accounts, shewing a balance due to D., was settled between A., B., C. and D. and D. then told A., B. and C. that he had not borrowed any money upon the security of their shares under the memorandum of 1872. In 1877, D., who had previously mortgaged his share of the house property to E., executed a further mortgage to him of the entirety, reciting the authority of 1872. No notice was given by E. to A., B. and C., that he held any charge upon their shares under the memorandum:—Held, that in the absence of any notice by E. to A., B. and C., of a charge to him of their shares by D. under the authority of 1872, the mortgage of 1877, after that authority had been withdrawn by the settlement of accounts, did not effect their shares, and that they were entitled to an assignment from E. of their shares of the property comprised in the lease, which had been mortgaged by D. *Jones* v. *Stöhwasser*, 50 L. J., Ch. 625; 16 Ch. D. 577; 44 L. T. 333; 29 W. R. 497.

(b) *Alienation of Real Estate.*

i. Sales.

With respect to wills coming into operation after 1st January, 1898, *see powers conferred by the Land Transfer Act*, 1897, *vesting the real estate in the personal representative as if it were chattel real.*

Power of Sale—Express or Implied.]—Executors have only power to sell real estate where expressly given, or necessarily to be implied from the produce being to pass through their hands in the execution of their office. *Bentham* v. *Wiltshire*, 4 Madd. 44; 20 R. R. 271.

—— **Where Express.**]—A., after directing all his debts to be paid, and bequeathing personal estate to his wife for life, devised a freehold house to her "for her natural life, with liberty to sell it in case a good offer is made, and invest the proceeds of it in the 5*l.* per cent. stock, for her benefit during her life." And in a subsequent part of the will he desired that "at the death of his wife the residue of his estate might be collected, including the proceeds of the house, and, if not previously sold, to be then disposed of to good advantage, to be divided as follows": He appointed his wife, the plaintiff and C., to be executrix and executors of his will. The plaintiff and the widow proved the will. C., the other executor, died in the lifetime of the widow. After the death of the widow, the plaintiff, the surviving executor, entered into a contract with the defendant for the sale of the house:—Held, that, whether there were or were not debts unpaid, and whether it was or was not uncertain whether any debts remained unpaid, the plaintiff had a power to sell and convey the house in fee-simple. *Forbes* v. *Peacock*, 11 M. & W. 630; 12 L. J., Ex. 460.

—— **Exercise of Discretion.**]—Where lands are charged by will with the payments of debts and legacies, and the executor has power to raise money for that purpose by the sale or mortgage of all or any of the testator's real estates, this is not a discretion which can be exercised arbitrarily or capriciously by the executor. *Thomas* v. *Att.-Gen.*, 2 Y. & C. 525.

—— **By way of Compromise.**]—A testator, who carried on business in partnership with his brother, by his will dated the 23rd November, 1861, directed payment of his debts, and after bequeathing specific and pecuniary legacies, he devised and bequeathed all his real and leasehold and personal estate to trustees, upon trust for sale and conversion into money, and to hold the proceeds of sale on certain trusts. In 1872, the brother and the testator's widow, who was then the sole trustee and executrix of the will, joined in selling and conveying real estate, of which the brother and the testator had been tenants in common, and which was in fact partnership property, to a limited company who purchased the business. The purchase-money was to be paid partly in cash and partly in fully paid-up shares and debentures of the company. At the same time an arrangement was made for the handing over of the whole purchase-money to the bankers of the partnership, to whom the partnership was largely indebted, and whose debt was secured by mortgages of the partnership property, in satisfaction of the debt due to the bankers, the bankers undertaking to pay the other creditors of the partnership, and handing back to the executrix a sum of cash and some of the debentures, and providing certain other benefits for the brother. The conveyance of the real estate to the company contained a recital that the brother and the widow were entitled to the property in equal undivided moieties, and the widow purported to convey as trustee of her husband's will, but it was not stated in the deed that she was his executrix or that the property was partnership property. On a subsequent sale of the property by the company, the purchaser objected that the sale by the widow was not authorised by the trust for sale, the consideration not being entirely paid in money:—Held, that the arrangement as to the disposition of the purchase-money received from the company amounted to a compromise by the widow with the creditors and with the surviving partner into which it was competent to her as executrix to enter under s. 30 of the act 23 & 24 Vict. c. 145. *West of England and South Wales Bank* v. *Murch*, 52 L. J., Ch. 784; 23 Ch. D. 138; 48 L. T. 417; 31 W. R. 467.

And held on the authority of *Corser* v. *Cartwright* (L. R. 7 H. L. 731), that this being so, and the real estate being partnership property which the widow, as executrix was entitled to sell, and inasmuch as she, as trustee, had the legal estate, and as executrix was the proper person to receive the purchase-money, the sale to the company was a valid one and their title good. *Ib.* *And see now* Trustee Act, 1893, s. 21.

—— **Administrator Durante minore ætate.**]—An administrator durante minore ætate can exercise a power of sale given by a testator to his executor or administrator for the time being. *Monsell* v. *Armstrong*, 41 L. J., Ch. 715; L. R. 14 Eq. 423; 20 W. R. 921.

—— **Administrator cum Testamento Annexo.**]—Where persons have been appointed executors with power to sell real estate for the payment of debts, and they have renounced probate, an administratrix with the will annexed has no power to sell and to give a good title to a purchaser either under the general doctrines of the court or under the statute 22 & 23 Vict. c. 35, s. 16. *Clay and Tetley, In re*, 16 Ch. D. 3; 43 L. T. 402; 29 W. R. 5.

Renunciation of Probate—Powers of Renouncing and Acting Executor.]—A testatrix, seised of house property, held for lives renewable for ever, by her will devised the same to her brother M. B., in trust for the clothing and education of his children, and with complicated directions for his and their benefit. She then proceeded—"Should my brother wish to emigrate with his family, I leave to my executor J. L. full power to raise money on or sell those houses to enable him to do so; J. L. renounced probate of his will:—Held, that he could, notwithstanding, exercise the power of sale. *Madden* v. *Madden*, 23 L. R., Ir. 167.

A power in a will in the following form, viz.: "I direct that A., B. and C., the executors of this my will, or the survivors or survivor of them, or the executors or administrators of such survivor, shall sell my copyhold messuages": is within 21 Hen. 8, c. 4, authorising a sale by A. and B. on C. refusing to act, that act extending to copyholds. *Peppercorn* v. *Wayman*, 5 De G. & S. 230; 21 L. J., Ch. 827; 16 Jur. 794.

A testator by his will directed that his debts should be paid, and that his property (which included real estate) should be sold by his executors. One of the executors alone proved the will, the other renounced probate:—Held, that the acting executor could make a good title to real estate, and that he had power to sell and convey it. *Fisher and Huslett, In re*, 13 L. R., Ir. 546.

When Power Implied.]—A. devises his real and personal estate for payment of debts. The personal estate not being sufficient, the executors may sell the real estate, although no directions are given in the will as to who shall sell, and the money arising from the sale is legal assets in the hands of the executors. *Blatch* v. *Wilder*, 1 Atk. 420.

Executors held to have a power of sale, though others are directed to divide the proceeds. *Daniel* v. *Ustiche*, 2 Jur. 987.

A., the cestui que trust of lands in L., devises several legacies, "all which before-mentioned legacies, not limited to a continued payment, my will is, shall be paid within a year, if my lands in N. can be sold," and gives residue, after debts and legacies paid, to defendant, her executor:—Held, executors had power to sell. *Elton* v. *Harrison*, 2 Swanst. 276.

Testator directs his real and personal property to be sold and divided:—Held, that executors have an implied power to sell real estate. *Tylden* v. *Hyde*, 2 Sim. & S. 238; 25 R. R. 194.

Direction for the sale, in a given event, of an estate devised by the will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication. *Patton* v. *Randall*, 1 Jac. & Walk. 189.

A power of sale not expressly given to any one is not to be implied to the executors because the devisees of the estates are minors. *Ib.*

A testator directs that at a proper time his real estates be sold, and the money divided

between A. and B., but makes no other devise of them. The executor is not entitled to sell them. *Batho* v. *Fulton*, 2 L. J. (O.S.) Ch. 196.

Purchaser decreed to take a title under an obscure will, amounting to a power to sell; the legal estate, not being given, descends to the heir till execution of the power, and then passes to the vendee. *Warneford* v. *Thompson*, 3 Ves. 513.

A proviso in the will of R., that if his personal estate, and house, and lands at W., should not be sufficient to pay his debts, then his executors to raise the same out of the copyhold premises, enables them if the rents are not sufficient, to sell the copyhold lands to satisfy the testator's intention of paying his debts. *Bateman* v. *Bateman*, 1 Atk. 421.

Where a testator has charged his real estate with the payment of a sum of money, he is to be taken to have given an implied power of sale to someone. The donee of the power is to be ascertained from the whole of the will. *Eidsforth* v. *Armstead*, 2 Kay & J. 333; 25 L. J., Ch. 237; 4 W. R. 279.

A testator devised his real estate to the use of A. and B., during the life of C. (a married woman) upon trust for her, with remainder to the use of the right heirs of C., and charged such real estate with the payment of 700*l.* to D., on her attaining twenty-one:—Held, that A. and B., having occasion to sell the estate for the purpose of raising the amount, they had a power of sale during the life of C. *Ib.*

Testator devised all his goods, chattels, estate and effects, of what nature soever and wheresoever, not thereby otherwise disposed of, to his executors upon the trusts after mentioned. He then willed that all his debts, &c., should be paid, and that what remained of his personal effects should be appropriated for the benefit of his family, as his executors should think proper; next he willed that his family should be placed in his farm, subject to the direction and control of his executors, and that, when his youngest son attained twenty-one, it should be sold, and the produce divided amongst his wife and children:—Held, that the legal fee in the farm passed to the executors, and that they were entitled to sell it for payment of the testator's debts. *King* v. *Shrives*, 5 Sim. 461.

A testator, by his will, appointed A., B. and C. to be his executors, in trust to dispose of his property in the following way; he then directed that all his debts should be paid by his executors, and that the residue of his property, real and personal, should be disposed of by them at the time therein mentioned, save and except his estate at M., which he gave to A. for life, and at A.'s death to be disposed of as aforesaid:—Held, that A., B. and C. had a power of sale of the estate at M., and that it was not necessary for them to shew that there were any of the testator's debts left unpaid. *Mather* v. *Norton*, 21 L. J., Ch. 15; 16 Jur. 309.

A general devise and bequest of the testator's real and personal estate to A. for life, and after the decease of A. a devise of certain copyholds to B., and a direction that, on the decease of B., the copyholds should be sold, with a gift of the moneys arising by such sale amongst persons of certain classes who should be living at the death of B., share and share alike:—Held, to create a power of sale of the copyholds, by implication, in the executors of the testator; and that, apart from the power of sale, the executors would not be necessary parties to an administration suit, on the mere ground that the copyhold estate is by statute made assets to be administered in equity for the payment of debts, semble. *Curtis* v. *Fulbrook*, 8 Hare, 25; 19 L. J., Ch. 65; 13 Jur. 1044. But see *S. C.*, corrected on the point of the implied power of sale, 8 Hare, 278. And see *Haydon* v. *Wood*, 8 Hare, 279, n.

Testator, after giving a general direction for payment of his debts, gave and bequeathed all his real and personal estate to his wife for life; and after her decease he directed all his real and personal estate to be sold, and the produce to be divided between the children of certain persons named in the will. And he directed that the purchaser or purchasers of any part of his real or personal estate should not be liable to see to the application of the purchase-money, and that the receipt or receipts of his executor, his heirs, executors and administrators, should be a sufficient discharge or sufficient discharges to the purchasers, and he appointed his wife and A. B. his executrix and executor:—Held, first, that the executrix and executor, or one of them, had an implied power, in case the testator died indebted, to sell the real estate for payment of the debts; secondly, that the executrix and executor having entered into a contract for the sale of parts of the estate, and it being shewn that at the time of the contract there were unsatisfied debts of the testator, the contract was valid; and, thirdly, that the purchaser was not bound to take the title without the concurrence of the heir-at-law. *Gosling* v. *Carter*, 1 Coll. C. C. 644; 14 L. J., Ch. 218; 9 Jur. 324.

A., after commencing his will with the statement that he thereby disposed of "all his worldly state and effects in manner following": directed payment of his debts, &c., out of his personal estate, and that his executors should sell "all his stocks, shares and securities, and such other part of his personal estate as was in its nature salable, and collect and get in all money due and owing to him, and all other his estate, and convert the same into money and stand possessed of the proceeds upon trust to pay debts, funeral and testamentary expenses, and invest the residue upon the trusts therein declared." After the date of his will he became possessed of a freehold house. This house was put up for sale by his executrix, who in the absence of her co-executor (A.'s heir-at-law) in India, had alone proved the will:—Held, in a suit for specific performance against the purchaser, that the executrix had power, under the terms of the will, to sell the house; and that the expression of a contrary opinion by one of the conveyancing counsel of the court was not sufficient to induce the court to render the title unmarketable by refusing specific performance. *Hamilton* v. *Buckmaster*, 36 L. J., Ch. 58; L. R. 3 Eq. 323; 12 Jur. (N.S.) 986; 15 L. T. 177; 15 W. R. 149.

—— **Real Estate Charged with Debts.**]—Whether a mere charge of debts gives to the executor a power of sale by implication, quære. *Robinson* v. *Lowater*, 17 Beav. 592. Affirmed, 5 De G. M. & G. 272; 23 L. J., Ch. 641; 18 Jur. 363; 2 W. R. 394. *Doe* d. *Jones* v. *Hughes* (6 Ex. 223) observed upon. *Ib.*

A general charge of debts on the real estate gives to the executors an implied power of sale. *Wrigley* v. *Sykes*, 20 Beav. 337; 25 L. J., Ch. 458; 2 Jur. (N.S.) 78; 4 W. R. 228. S. P., *Cook* v. *Dawson*, 29 Beav. 123; 30 L. J., Ch. 311; 7 Jur. (N.S.) 130; 3 L. T. 801; 9 W. R. 305.

Affirmed 3 De G. F. & J. 127; 30 L. J., Ch. 359; 4 L. T. 226; 9 W. R. 434. Contra *Doe* v. *Hughes*, 6 Ex. 223; 20 L. J., Ex. 148.

—— **Devise to Trustees of Land Charged with Debts.**]—A testamentary charge of real estates with the payment of debts generally, authorises a trustee to whom, after imposing the charge, the testator has devised the estates upon trust for other persons, to sell or mortgage the estates charged, and exempts the purchaser or mortgagee from liability to see to the application of the purchase- or mortgage-money. *Ball* v. *Harris*, 4 Myl. & C. 264; 8 L. J., Ch. 114; 3 Jur. 140. Affirming 8 Sim. 485; 1 Jur. 706.

A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and, subject thereto, in trust to sell and apply the produce of the sale for the special purposes therein mentioned; and he devised his residuary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will), one of whom was his youngest son, and another one of the trustees of the advowson. The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executor, contracted to sell the advowson, before any vacancy had occurred in the living. In a suit for specific performance by the plaintiffs, the trustees of the advowson, and executors against the purchaser, it was held that the charge being in effect a devise of real estate, in trust to pay debts, a good title could be made by plaintiffs without institution of a suit to ascertain deficiency of personal estate, and that purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of purchase-money. *Shaw* v. *Borrer*, 1 Keen, 559; 5 L. J., Ch. 364. And see also *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 22 L. J., Ch. 130; 16 Jur. 671.

The concurrence of executors having under a will an implied power of sale for payment of debts is not necessary to a conveyance by a devisee in trust for sale under the same will. *Hodkinson* v. *Quinn*, 1 John. & H. 303; 30 L. J., Ch. 118; 7 Jur. (N.S.) 65; 3 L. T. 804; 9 W. R. 197.

Therefore, where a testator devised real estate after his debts, &c., should be first paid thereout to trustees upon trust to sell after the decease of certain tenants for life:—Held, that the implied power of sale given to the executors did not make necessary their concurrence in the exercise by the trustees of their trust for sale. *Ib.*

A testator by his will, dated in 1858, gave all his real and personal estate to trustees upon trust, out of the proceeds of his personal estate, or if and so far as the same should be insufficient then out of the proceeds of his real estate, to pay his debts; and as to a certain house belonging to him, to permit his widow to occupy it during widowhood, and on her second marriage or death to sell the same. The usual decree for administration was made by the court, and the chief clerk found that all the debts had been paid out of the personal estate. By an order subsequently made, on further consideration of the cause, it was ordered (with the consent of the widow, who was still living), that the said house should be sold; and a contract for sale was entered into. The purchaser having objected that a good title could not be made:—Held, that the trustees had no power of sale, and that the objection was valid. *Carlyon* v. *Truscott*, 44 L. J., Ch. 186; L. R. 20 Eq. 348; 32 L. T. 50.

A testator gave all his real and personal estate to trustees, and directed them "out of the proceeds arising from the sale of any estates" to set apart a certain principal sum. As to all the rest, residue and remainder of any estate whatsoever and wheresoever and of what nature or kind soever, after payment of his debts, legacies, funeral expenses and the expenses of proving his will, the testator gave and bequeathed the same to a class of persons in equal shares and proportions:—Held, that a power of sale of the real estates was to be implied from the expressions in the will relating to the payment of debts, which amounted, in the opinion of the court, to a direct charge of the debts, legacies, &c. *Flux* v. *Best*, 31 L. T. 645; 23 W. R. 228.

Held, secondly, that a power of sale was to be implied for the purposes of the division of the residuary estate amongst the persons entitled thereto, the court being of opinion that the will directed the estate to be blended. *Ib.*

—— **Beneficial Devise to Executor of Land subject to Debts.**]—Whatever may be the effect of a general charge of debts as giving to the executors an implied power of sale, this implied power cannot be executed so as to override anything done by a devisee and executor, and to displace an estate which he had absolute power to convey and had in fact conveyed. *Corser* v. *Cartwright*, 45 L. J., Ch. 605; L. R. 7 H. L. 731. Affirming 29 L. T. 596; 21 W. R. 938.

In the case of a mortgage from such a devisee and executor, the circumstance that the solicitor of the mortgagee was also solicitor of the mortgagor, was held not to fix the mortgagee with constructive notice of an intended misapplication of the mortgage-money, the solicitor expressly denying that he knew of or suspected the intended misapplication. *Ib.*

In considering the validity of such a mortgage, it is not material that the mortgage deed does not on the face of it state the intention to apply the mortgage-money in payment of the debts. *Ib.*

A testator directed all his just debts to be paid, and in a subsequent part of his will devised freehold estates subject to the payment of all his just debts to one of his executors. The devisee mortgaged the freehold estates, and applied the mortgage-money for his own purposes, and afterwards became bankrupt. The executors of the will were not parties to the mortgage, but the mortgagee had no notice that the money was to be applied otherwise than for the payment of debts:—Held, that the devise of the freehold estates charged with the payment of debts controlled the prior general charge of debts; that the devisee, and not the executor, was the proper person to raise the money to pay the debts, and that the mortgagee having had no notice of the breach of trust, and being under no obligation to see to the application of the mortgage-money, had a good title, and was entitled to priority over the testator's creditors. *Ib.* L. R. 8 Ch. 971; 29 L. T. 596; 21 W. R. 938.

Where there is a general charge of debts, but no legal estate is given, the executors may have implied authority to convey the legal estate in

order to raise the money to satisfy the charge; but where there is a devise of the legal estate to a particular person, and the estate is charged with payment of debts or legacies, the money must be raised through the instrumentality of the devisee, and he is the only person that can make a legal title. *Colyer* v. *Finch*, 5 H. L. Cas. 905; 26 L. J., Ch. 65; 3 Jur. (N.S.) 25.

—— **Land charged with Debts beneficially Devised.**]—Executors have no implied power of sale by reason of a legacy being charged on lands devised beneficially in fee or in tail. *Rebbeck, In re, Bennett* v. *Rebbeck*, 63 L. J., Ch. 596; 8 R. 376; 71 L. T. 74; 42 W. R. 473.

A testator directed his debts to be paid out of his real and personal estates; he then devised his freehold lands to trustees for 500 years, and subject to that, he gave all his real and personal estate to his five sons, their heirs, executors, administrators and assigns, upon condition that they should proportionately contribute to the payment of his debts, legacies, &c., on failure of which the trustees of the term were to raise out of the rents, or by mortgage or sale of the shares of the defaulting son, as much money as the son ought to have paid. The testator appointed his five sons executors, and two of them, after the death of their three brothers, sold a portion of the estates:—Held, that the executors had an implied power of sale under the direction to pay debts, and that a contract entered into by them after the death of their three brothers, and thirty-one years after the decease of the testator, was valid, and a decree was made for specific performance. *Wrigley* v. *Sykes*, 20 Beav. 337; 25 L. J., Ch. 458; 2 Jur. (N.S.) 78; 4 W. R. 228.

A testator devised lands for life, with contingent remainders over, and then devised other lands to another tenant for life, with contingent remainders over, and charged the latter lands with the payment of a mortgage on the former lands, and also with his debts generally, but gave no express power of sale:—Held, that the executor took a power of sale by implication, and that after a sale of the latter lands by the executor, the devisees of the former had no equity against the purchaser in respect of the charge of the mortgage debt. *Robinson* v. *Lowater*, 5 De G. M. & G. 272; 23 L. J., Ch. 641; 18 Jur. 363; 2 W. R. 394.

A testator devised to his brother all his estate, by discharging all his bequests and just debts; if not, the estate was to be sold by auction at the discretion of his executors; and he wished them to discharge his just debts:—Held, that the executors took no interest in the testator's real estate, but had merely a power to sell. *Thompson* v. *Todd*, 15 Ir. Ch. R. 337.

A testator directed his executors to pay his debts, &c., and after bequests of sums of money, some of which were to be invested by the executors for the benefit of the beneficiaries, devised and bequeathed his real and personal estate to his wife and four daughters, "in manner and form following." He then directed that the residue of his real and personal estate should be equally divided between his wife and daughters, and that his wife should enjoy her share for life; and that after her death his surviving executor should distribute her share among his daughters, or if a daughter should not survive his wife, such daughter's share should be distributed among her children; and he appointed an executor and an executrix, the latter being his wife, "to act jointly in carrying out all the intentions" of his will. After the death of the testator and his wife, and while the pecuniary bequests were still not fully satisfied, the surviving executor contracted to sell a part of the residuary realty:—Held, that he could sell the realty and pass the legal estate therein and make a good title thereto. *Oates* d. *Markham* v. *Cooke* (3 Burr. 1684), and *Anthony* v. *Rees* (2 C. & J. 75), considered and followed. *Davies to Jones, In re*, 52 L. J., Ch. 720; 24 Ch. D. 190; 49 L. T. 624.

ii. Mortgages.

Implied Power.]—An executor has no implied power to sell or mortgage land which descends to the heir, charged simpliciter with the payment of debts. *Doe* d. *Jones* v. *Hughes*, 6 Ex. 223; 20 L. J., Ex. 148. Sed quære, *see cases*, col. 1270, ante.

With Power of Sale.]—An executor may create a mortgage of his testator's property, with power of sale. *Cruickshank* v. *Duffin*, 41 L. J., Ch. 317; L. R. 13 Eq. 555; 26 L. T. 121; 20 W. R. 354.

By Executor, Devisee of Real Estate charged with Debts.]—A testator devised his real estate, charged with the payment of his debts and legacies, to his eldest son, in fee, and appointed him executor. Nine years after the testator's death, the devisee, being then in possession, mortgaged the estate, and covenanted against all incumbrances except the legacies. In a suit subsequently instituted by one of the legatees for payment of his legacy, the estate was sold, and the proceeds proved insufficient to satisfy the testator's unpaid debts and legacies, together with the mortgage-money:—Held, that the mortgagee's title was complete, subject only to the amount of the legacies, and therefore, that after reserving the amount of the legacies, the mortgagee was entitled to the residue of the fund as a security for his debt, and that the amount so reserved was assets of the testator unadministered, and was therefore to be applied, first in satisfaction of his debts, and then, so far as it would extend, in payment of his legacies. *Eland* v. *Eland*, 4 Myl. & C. 420; 8 L. J., Ch. 289; 3 Jur. 474. See also *Ball* v. *Harris*, 8 Sim. 485; 4 Myl. & C. 264; 8 L. J., Ch. 114; 1 Jur. 706.

When an executor mortgages property, devised or bequeathed to him absolutely, as a security for his own antecedent debt, and the mortgagee has notice that there are debts of the devisor and testator unpaid, the property mortgaged still remains assets of the testator. *Hall* v. *Andrews*, 27 L. T. 195; 20 W. R. 799.

A., after becoming surety for B. to a bank, died, leaving a will, by which he appointed B. his executor, and left all his personal and real estate (charged with his debts) to B.'s wife. At A.'s death B. owed the bank a considerable sum. Shortly afterwards B. and his wife mortgaged to the bank real and personal estate forming part of A.'s assets, as a security for the money then owing by B. Subsequently B. became bankrupt. In a suit for the administration of A.'s estate, instituted by a creditor:—Held, that as the bank had notice that the property comprised in the mortgage had formed

part of A.'s assets, all moneys realised under it came from his estate. *Ib.*

For Payment of Debt to Testator's Firm, subject to Bequeathed Annuities — Creditors — Annuitant.]—By the marriage settlement of W., an annuity of 800*l.* Jamaica currency was settled on his wife for life, and was subsequently charged on an estate of W. in that island. W. afterwards made his will, whereby he charged his estate in a certain manner with the payment of his debts, and then, after reciting the settlement, and that he was desirous of making a larger provision for his wife, he gave her a rent-charge of 2,000*l.* per annum for life, which he charged on the R. estate, and which was to be in lieu of all dower and thirds. Upon the death of W., the widow released her title, if any, to dower, and elected to take the 2,000*l.* annuity, and payments were made to her on account of it by the executors. W., however, being at his death largely indebted to the firm of W. & Co., of which he was a partner, that debt was paid by his executors by means of a mortgage of the R. estate, and by the terms of the mortgage deed the mortgagee was to hold the estate subject to the several annuities given by the will of W., but freed and discharged of and from the debts and legacies charged upon the premises by the will, and of and from all other charges and incumbrances whatsoever. The assets of W. turned out to be insufficient for payment of all his debts:—Held, that a portion of the payments made by the executors to the widow must be ascribed to the annuity of 800*l.* Jamaica currency, and were to that extent good, but that the residue of such payments were not good against the creditors of W.:—Held, also, there being certain arrears of the annuity of 2,000*l.*, and a fund in court arising from the produce of the R. estate, that as to that part of the fund which was not applicable to the portion of the annuity representing the annuity of 800*l.* currency, the creditors of W. had priority over the mortgagee as well as over the executors of the widow. *Lyon* v. *Colville*, 1 Coll. C. C. 449.

Under Lord St. Leonards' Act—Devise by way of Settlement.]—Section 18 of Lord St. Leonards' Act does not apply to a case where a testator has devised his real estate, by way of settlement, to a person or persons for life, with remainders over. The meaning of that section is, that where a testator has devised his whole estate and interest directly to A. or to A. and B., or any number of persons as tenants in common, or joint-tenants in fee or in tail, so that the devisee or devisees can themselves mortgage the property, then the executors are not to have the power. But where the estate is devised by way of settlement, so that there is no individual or individuals who are able to make a title to a mortgage, then that is a case to which s. 16 (whereby executors are empowered to mortgage a testator's real estate for payment of debts or legacies) was intended to apply. A testator, by his will, appointed certain persons therein named executors and trustees thereof, and after making certain specific devises and bequests, he devised and bequeathed all the residue of his real and personal estate subject to his debts, funeral and testamentary expenses, and to the legacies thereinbefore bequeathed, unto and equally between his twin sons for life, with remainders over. The executors mortgaged a portion of the residuary real estate:—Held, that this was a case in which s. 16 was applicable, and that the mortgage was a perfectly valid one. *Wilson, In re, Pennington* v. *Payne*, 54 L. T. 600; 34 W. R. 512.

Express Powers — Mortgage for "Full or Valuable Consideration" — Priority of Mortgage to Legacy.]—A. died in 1866, appointing his two sons (his partners) trustees and executors. He gave 5,000*l.* in trust for his daughters and their children, charged on all his estate. He empowered his trustees to retain the 5,000*l.* in their business as long as they might reasonably require or wish, and subject to that option, and as soon as they conveniently could, they were to invest it otherwise. He gave all his residue to his sons, and declared, if they should sell or charge any part of the real estate for a "full or valuable consideration," it should not be liable in the hands of the purchaser, to the legacy. Certain freehold business premises belonged to A. and his sons, in common, subject to a mortgage for 2,000*l.* In 1878 the sons mortgaged these premises to R., to secure past and future advances. No fresh advance was made at the time. Out of previous advances the sons had (without any stipulation to that effect by R.) paid off the 2,000*l.* mortgage and taken a reconveyance to themselves. Other part of such advance they had applied in extending their business:—Held, that the mortgage to R. was a charge for a valuable consideration within the terms of the will; that the testator had made his sons the sole judges of the length of time during which it was reasonable to keep the amount of the legacies in the business: and in the absence of mala fides the mortgage to R. had priority for the whole amount due on it to the charge of the 5,000*l.* *Redman* v. *Rymer*, 65 L. T. 270—C. A.

—— **"Sale and Arrangements," Power to make—Mortgage.**]—A testator, after appointing two persons executors and trustees of his will, directed "that the trustees for the time being of my will shall have full power to settle my accounts and wind up my affairs as they or he shall think fit, and in so doing to make any sales and arrangements they or he shall judge expedient." And the testator devised and bequeathed all his real and residuary personal estate unto and to the use of his trustees upon the trusts therein declared. Shortly after the testator's death, one of the trustees named in the will (the other having renounced probate and disclaimed the trusts thereof) raised a sum of 500*l.* by a mortgage of a portion of the testator's real estate for the purpose of satisfying some pressing claims against the testator's estate:—Held, that the mortgage was authorised by the terms of the will. *Jones, In re, Dutton* v. *Brookfield*, 59 L. J., Ch. 31; 61 L. T. 661; 38 W. R. 90.

Notice of Breach of Trust — Circumstances amounting to—Consequences.]—An executor and devisee in trust having paid off all the debts of his testator borrowed 1,000*l.* from B., upon deposit of the title deeds of the estate, alleging that the money was required to pay debts, but 150*l.*, part of the 1,000*l.*, was taken out in wine. The debt was paid off, and subsequently, seventeen years after the death of the testatrix, another sum of 1,000*l.* was borrowed in the same manner from B. by the executor, who agreed to purchase 200*l.* worth of wine. The executor also agreed

to execute a legal mortgage when called upon to do so. The mortgagee assigned his security, and a legal mortgage was then executed. Upon a bill filed against the representative of that mortgagee:—Held, that the nature of the original transaction was sufficient proof that the money was not borrowed by the executor for payment of debts, and the assignee from B. the original mortgagee could not stand in a better position than B. himself, and the mortgage was therefore declared void. *Burt* v. *Trueman*, 29 L. J., Ch. 902; 6 Jur. (N.S.) 721; 8 W. R. 635.

A. devised real estate to trustees for eight hundred years, to raise money sufficient for payment of such of his debts and legacies as his personal estate should be insufficient to pay, and declared that the receipts of the trustees should be valid discharges. Subject to the term, he gave the estate to his sons B. and T., whom he appointed executors, B. being one of the trustees of the term, and the only one who acted in the trust. The personal estate at his death was sufficient for the payment of his debts and legacies. The debts and all but two of the legacies were paid, but the executors spent the rest of the personal estate, and became bankrupts:—Held, that the real estate, as against mortgagees, was subject to the two unpaid legacies. *Howard* v. *Chaffer*, 32 L. J., Ch. 686; 9 Jur. (N.S.) 767; 9 L. T. 243; 11 W. R. 1057.

R. and B. advanced 1,000*l.* to B. and T. on the security of the term and the fee, and in the mortgage deed it was stated that the trusts of the term had not been performed, and that the sum of 1,000*l.* was paid to B. as trustee of the term:—Held, that R. and B. were aware that the money was not advanced for the purposes of the trust, and that their security was subject to the unpaid legacies. *Ib.*

S. advanced 500*l.* to B. and T. on the security of the term and the fee, and in the mortgage deed it was stated that all the debts and legacies had been raised or provided for:—Held, that the debts having been paid, the mortgagee was bound to see that the legacies were satisfied, and that his security was subject to the unpaid legacies. *Ib.*

B. and T., as executors, had signed two legacy duty office receipts for the two legacies:—Held, that this did not amount to an appropriation by the executors of the sums required for the legacies so as to discharge the real estate. *Ib.*

An executor, who was also devisee, subject to a charge of debts, mortgaged, by one and the same deed, real estate of the testator, and property belonging to himself personally. Subsequently he again mortgaged part of the testator's property; and by a contemporaneous deed made between the same parties, and for the same sum, mortgaged property of his own:—Held, that these circumstances were not in themselves sufficient to rebut the ordinary presumption of law; that the executor must be taken to have been acting in the due discharge of his duty; and that therefore the mortgagees must be satisfied out of the mortgaged estates in priority to the creditors of the testator. *Barrow* v. *Griffith*, *Barrow* v. *Newman*, 11 Jur. (N.S.) 6; 13 W. R. 41.

Persons who under a will were executors and also beneficial devisees subject to debts and legacies, borrowed money on mortgage of the devised real estate. The testator's property proved insufficient, apart from the premises thus charged, to pay his debts; and a bill was filed by a creditor, seeking to have the mortgagees postponed to the testator's unsatisfied creditors, and stating circumstances in the transactions respecting the loan leading to the implication that the mortgagors had been dealt with as beneficial owners rather than as executors. On an appeal from an order of Vice-Chancellor Stuart, overruling a general demurrer founded on the proposition that in order to postpone the mortgagees, they must be fixed with actual knowledge that the money was not wanted for payment of debts and legacies:—Held, that a sufficient primâ facie case had been stated to entitle the plaintiffs to call for an answer, and that the demurrer must be overruled, without costs, reserving the benefit of the defence to the hearing. *Collingwood* v. *Russell*, 34 L. J., Ch. 22; 10 Jur. (N.S.) 1062; 11 L. T. 322; 13 W. R. 63—L.JJ.

Semble, the fact that, in the dealings for a loan, executors who happen to be also beneficial owners have been treated with in their latter character, is not sufficient ground for inferring that the money was not borrowed to pay the testator's debts. *Ib.*

A testator charged his debts and legacies upon his estate generally, and devised and bequeathed the residue to his six sons as tenants in common, giving his executors power of sale. One of the sons, who was the only acting executor, was in partnership with another person, and paid debts of the testator with moneys advanced by the partnership; he also purchased the residuary shares of several of his brothers, and he borrowed money from the plaintiff, and deposited with him the title deeds of real and leasehold estates of the testator by way of security for the same, with a note, undertaking to make over such property to the plaintiff when required. The partnership became bankrupts, and a deed was made, conveying the residuary estate of the testator to trustees upon trust, among other things, to repay to the assignees of the bankrupts the advances made to the executor by the firm:—Held, in the circumstances of the case, that the contract for security between the plaintiff and the executor was not for an equitable mortgage of the testator's estate, comprised in the deposited deeds under the powers given to the executors by the will, but was a contract for an equitable mortgage of no more than the beneficial interest of the executor therein. That, although debts of the testator had been paid by means of the advances made by the partnership to the executor, and although the assignees of the bankrupts might possibly be entitled to stand in the places of the creditor so paid as against property still remaining in the hands of the executor, they could not so stand in the places of such creditors as to possess the rights which those creditors originally had of following the property of the testator, which had been alienated by the executor for his own purposes or benefit. That the plaintiff was entitled to have the estate of the testator marshalled so that the subsisting debts and charges thereon might be thrown in the first place on the residuary estate of the testator, not comprised in the original mortgage. *Haynes* v. *Forshaw*, 11 Hare, 93; 22 L. J., Ch. 1060; 17 Jur. 930; 1 W. R. 346.

Semble, no case goes so far as to decide that where an executor, having also an interest, aliens land of his testator, and afterwards borrows money for the purposes of the estate, the lender can come upon the lands aliened in the hands of the alienee. *Ib.*

(c) *Liability for Application of Proceeds.*

See now the Trustee Act, 1893, *s.* 20, *conferring full power on trustees to give effectual discharges, replacing Conveyancing and Law of Property Act*, 1881, *s.* 36. *And cp. prior thereto* 22 *&* 23 *Vict. c.* 35, *s.* 23, *and* 23 *&* 24 *Vict. c.* 145, *s.* 29.

Apart from Statute.]—On a purchase from an executor or other person having power to deal with real estate if there be no reason to infer that the executor is not selling for payment of debts, the purchaser is discharged from seeing to the application of the purchase-moneys. Secus, if the executor be selling for securing his own private debt, or otherwise for his own benefit. *Haynes* v. *Forshaw*, 11 Hare, 93; 22 L. J., Ch. 1060; 17 Jur. 930; 1 W. R. 346.

When a testator gives a power to mortgage his real estates in aid of the personal estate, a person dealing with his sole acting executrix is not bound to see to the application of money advanced to her and secured by mortgage of real estate of the testator. *Farhall* v. *Farhall*, 38 L. J., Ch. 281; L. R. 7 Eq. 286; 17 W. R. 350.

A testator gave A. a power to mortgage the whole or any portion of his real estate in aid of his personal estate. His sole acting executrix opened an executorship account with his bankers. She, having overdrawn this account, and being required by the bank to find security, mortgaged real estate of the testator to secure the balance due and future advances. She expended most of the money on her own personal expenses, and those of her children:—Held, that the bank was not bound to see to the application of the money advanced to her; and, therefore, on a claim being sent in by the bankers, under a decree for administration, for their balance, that they were entitled to receive it out of the estate. *Ib.*

—— **Where General Charge of Debts and Legacies.**]—If lands are devised for payment of debts in a schedule, purchaser is bound to see to application of purchase-money; but if trust be general to pay debts, though he has notice of them, he is not so bound. *Abbot* v. *Gibbs*, 1 Eq. Abr. 358. And see *Dunch* v. *Kent*, 1 Vern. 260. S. P., *Walker* v. *Flamstead*, 2 Ken. Ch. 57. *Rogers* v. *Skillicorne*, Ambl. 188. *Jenkins* v. *Hiles*, 6 Ves. 654, n.; 6 R. R. 14. *Williamson* v. *Curtis*, 3 Bro. C. C. 96. *Culpepper* v. *Aston*, 2 Ch. Ca. 115. *Elliott* v. *Merryman*, 2 Atk. 4; Barnard, 78. *Shaleross* v. *Dixon*, 7 L. J., Ch. 180. *Robinson* v. *Lowater*, 17 Beav. 592; 5 De G. M. & G. 272; 23 L. J., Ch. 641; 18 Jur. 363; 2 W. R. 394.

Where land is directed by will to be sold generally, and the money to form part of the personal estate, the purchaser is not bound to see to the application of the money. *Smith* v. *Guyon*, 1 Bro. C. C. 186.

Whether the rule, that where there is a general charge of debts not scheduled, a purchaser is not to see to the application, holds where the purchase is not from the original trustees, but from others to whom they conveyed, quære. An objection upon the distinction was overruled upon circumstances. *Braybroke* (*Lord*) v. *Inskip*, 8 Ves. 417; 7 R. R. 106.

Generally, a purchaser from an executor, not bound by his misapplication of the money, nor in many cases even of pledge, if free from fraud or direct evidence on the face of the transaction of an intended misapplication. *M'Leod* v. *Drummond*, 17 Ves. 154; 11 R. R. 41. See also *Whale* v. *Booth*, 4 Term Rep. 625, n.; 2 R. R. 483, n.

Where the purchase-money is to be laid out again by the trustees generally, the purchaser need not look to the application. *Doran* v. *Wiltshire*, 3 Swanst. 699; 19 R. R. 287.

Mortgagee or purchaser from executor of land charged is not generally bound to see to the disposition of the trust fund; but where, in the transaction, there is intrinsic evidence of breach of trust, and that the mortgagee or purchaser must have been aware of it, such land will still remain charged and liable. *Watkins* v. *Cheek*, 2 Sim. & S. 199; 25 R. R. 181.

—— **General Charge of Debts and Legacies—Payment of Debts, effect of.**]—Where an estate is charged generally with the payment of debts and legacies, and the debts have been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase-money, unless it be proved that he knew of the payment of the debts; and the taking of a general bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment. *Johnson* v. *Kennett*, 3 Myl. & K. 624. Reversing 6 Sim. 384.

The rule relieving a purchaser from seeing to the application of his purchase-money, where there is a general charge of debts and legacies, has reference to the state of things at the death of the testator; and if the debts are afterwards paid, leaving the legacies charged, that circumstance cannot vary the rule. *Eland* v. *Eland*, 4 Myl. & C. 420; 8 L. J., Ch. 289.

The rule which relieves a purchaser from seeing to the application of the purchase-money when the estate is subject to a primary general charge of debts, has reference to the time of the testator's death, and does not cease to be applicable though the debts be subsequently paid; and therefore, where an estate so charged was sold by the trustee, it was held that the cestuis que trustent were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser whether all the debts were not paid, had refused to answer the question. *Forbes* v. *Peacock*, 1 Ph. 717; 15 L. J., Ch. 31. Reversing 12 Sim. 528; 13 L. J., Ch. 46; 7 Jur 688. *S. C.*, at law, 11 M. & W. 630; 12 L. J., Ex. 460. *And see* 6 Jur. 476. And see *Tanqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434; 20 Ch. D. 465; 46 L. T. 542; 30 W. R. 801—C. A.

The rule of courts of equity as to the non-liability of a purchaser to see to the application of the purchase-money, where a trustee is selling an estate which has been charged by the will with debts and legacies, does not depend upon the existence of debts, but upon an implied declaration of the testator that he means to intrust his trustees with the exclusive power of receiving the money, and of absolving the purchaser or mortgagee from seeing to the application of it; and this power does not cease by there being no debts. *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 22 L. J., Ch. 130; 16 Jur. 671.

If it appears that a man is himself the trustee as well as owner of the property, if it absolutely appears that he is raising money not for the payment of the obligation with which it is charged, there the purchaser or mortgagee will be bound to see to the application of the purchase-money. *Ib.*

If it clearly appears that a man is not meaning to execute his trust, but endeavouring to do something for his own personal benefit, which cannot go to the trust, that cannot be deemed a good execution of the trust, so as to absolve the purchaser from seeing to the application of the money. *Ib.*

If authority be given to sell for the payment of debts and legacies, and the purchaser knows that the debts are paid, he is not bound to see to the application of the purchase-money. *Ib.*

If a trust be created for the payment of debts and legacies, the purchaser or mortgagee is in no case bound to see to the application of the purchase-money. *Ib.*

Persons who deal with trustees at a considerable distance of time, without an apparent reason for raising money, must be considered under some obligation to inquire into the bonâ fides of the trustees. Distinction between a trustee raising money after a distance of time where he is merely a trustee, and where the trustee is also entitled to the estate subject to the charge. *Ib.*

—— **Devise in Trust to pay Debts or Subject to Debts.**]—A testator, after commencing his will with words amounting to a charge of his real estate with the payment of his debts, devised an advowson to trustees, upon trust to present his youngest son to the living when vacant, and subject thereto in trust to sell and apply the produce of the sale for the special purposes therein mentioned, and he devised his residuary real estate upon certain trusts to other trustees, and appointed three executors (who proved his will), one of whom was his youngest son, and another one of the trustees of the advowson. The personal estate being insufficient for the payment of his debts, the trustees of the advowson, one of whom was an executor, at the instance of the other executors, contracted to sell the advowson before any vacancy had occurred in the living. In a suit for specific performance by the plaintiffs, the trustees of the advowson and executors, against the purchaser, it was held that the charge being in effect a devise of real estate in trust to pay debts, a good title could be made by plaintiffs without institution of a suit to ascertain deficiency of personal estate, and that purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or see to the application of purchase-money. *Shaw* v. *Borrer*, 1 Keen, 559 ; 5 L. J., Ch. 364.

A devise in trust, subject to payment of debts, gives the trustee a power to mortgage for the purpose of paying debts ; and where the trustee says the money is wanted for such purpose, the lender is not bound to inquire further. *Ball* v. *Harris*, 8 Sim. 485 ; 4 Myl. & C. 264 ; 8 L. J., Ch. 114 ; 1 Jur. 706.

There is no distinction between annuities and other legacies, as to the right or duty of a purchaser to inquire into the satisfaction of such charges, where the estate sold is by the will first charged with the debts, and then with the annuities. And it was held, that the purchaser had no right to require the concurrence of the annuitants, even in a case where the devisee selling, who was also executor, admitted by his answer that the personalty was sufficient for the payment of the debts. *Page* v. *Adam*, 4 Beav. 269 ; 10 L. J., Ch. 407 ; 5 Jur. 793.

A testator ordered his debts to be paid by his executors, and after giving legacies he gave the residue of his real and personal estate, subject as aforesaid, to A., and he appointed A. and B. executors :—Held, that if the legacies were charged on the real estate, the debts must also be charged thereon, and that therefore A. was able to give valid receipts for the purchase-money of the real estate, which relieved a purchaser from the necessity of seeing to its application. *Dowling* v. *Hudson*, 17 Beav. 248.

E., by will, appointed R. and T. trustees and executors of her will, and she gave to them and the survivor 2,000*l.* upon trust to invest it, and pay the produce to her daughter for life, with remainder to her children, and in default of children, or descendants of a child, who should attain a vested interest, in trust for R. She also gave her residuary real and personal estate, "subject to the payment of her debts and legacies," to R. absolutely. R. died ; and T., by a deed, which recited that all debts and legacies had been paid, conveyed the testatrix's real estate to the devisees of R. The plaintiff purchased the rectory of J. It was objected that there was no proof that the debts and legacies were paid, and it was found that the 2,000*l.* had not been duly invested :—Held, that the devisees made a good title to the vendor, without proving that the debts and legacies were paid as stated by the recital in the deed conveying the estate to them ; and that a purchaser from them was not bound to make inquiries into the payment. *Storry* v. *Walsh*, 18 Beav. 559 ; 27 L. J., Ch. 338 ; 18 Jur. 503.

Semble, that where a devisee of a real estate, charged with payment of debts, sells the real estate, the purchaser is not bound to inquire (unless special circumstances call for such an inquiry) whether the money is applied in the payment of debts, or whether the sale was intended for that purpose. *Colyer* v. *Finch*, 5 H. L. Cas. 905 ; 26 L. J., Ch. 65 ; 3 Jur. (N.S.) 25.

An executor, who is also a devisee of an estate charged with the payment of debts, may be presumed by a bonâ fide purchaser or mortgagee of that estate to be dealing with it for the purposes of the administration, and may give a valid title to it. Such purchaser or mortgagee, therefore, will not be bound to look to the application of the money. *Corser* v. *Cartwright*, 45 L. J., Ch. 605 ; L. R. 7 H. L. 731.

Mere absence of statement of the purpose for which the money obtained by the sale or mortgage is to be used will not make the purchaser or mortgagee liable, on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts. *Ib.*

On a creditor of the testator, who impeaches the validity of the mortgage or purchase, lies the burthen of proving that the mortgagee or purchaser had notice of the true state of the facts. *Ib.*

A testator having charged his real estate with the payment of his debts, devised it subject to his debts to A., his executor and trustee beneficially. A. being also possessed in his own right of another estate, which was then subject to a mortgage for 1,000*l.*, executed a mortgage of both estates for 3,000*l.* The mortgage recited the will of the testator, and expressed that part of the mortgage money was to be applied in redemption of the mortgage of the trustee's private estate, and A. covenanted to pay the 3,000*l.* :—Held, that the circumstances were not

such as to render it incumbent on the mortgagee to see to the application of the part of the money which was not applied in liquidation of the mortgage on A.'s estate. *Shalcross* v. *Dixon*, 7 L. J., Ch. 180.

—— **Where Particular Debts charged.**]—Where lands are to be sold for payment of particular debts, the purchaser must take care to see his purchase-money rightly applied; but if more is sold than is sufficient to pay the debts, that shall not turn to the prejudice of the purchaser. *Spalding* v. *Shalmer*, 1 Vern. 301.

Objection to title by a purchaser, under a trust to sell, as bound to see to the application of the money in satisfaction of scheduled creditors and others, coming in within a limited time after the date of the deed or disabilities removed, overruled, upon the tenor of the deed implying that the receipt of the trustees should be a discharge. *Balfour* v. *Welland*, 16 Ves. 151.

The doctrine as to binding a purchaser to see to the application of the money by trustees, has been extended further than any sound equitable principle will warrant. *Id.* 156.

Mortgagees with notice of a specific charge for payment of debts upon devised estates, were:—Held, notwithstanding releases of the executors to the devisees (such devisees being themselves two of the executors, and the releases not shewing that the charge had been raised and paid), to be bound to see to the application of the mortgage money. *Braithwaite* v. *Britain*, 1 Keen, 206.

When lands are sold subject to bond, or other specialty debts, this court presumes that the money is to be applied in payment of those debts, and that the sale is made with that view, and the purchaser will be discharged. But it is a different case when the parties are purchasers for valuable but not money consideration under a settlement pendente lite; and the creditors are entitled to follow the lands in the hands of such purchasers, semble. *Higgins* v. *Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400.

Under a trust to pay a specified debt of the testator, and debts generally, a purchaser of the estate is not bound to see the specified debt paid. *Robinson* v. *Lowater*, 17 Beav. 592. Affirmed, 5 De G. M. & G. 272; 23 L. J., Ch. 641; 18 Jur. 363; 2 W. R. 394.

—— **Power to give Receipts.**]—The question whether an executor or trustee who sells an estate, can give a good receipt for the purchase-money, is not a question of conveyance but of title. *Forbes* v. *Peacock*, 12 Sim. 528; 13 L. J., Ch. 46; 7 Jur. 688. And see *S. C.*, 6 Jur. 476. And on appeal, 1 Ph. 717; 15 L. J., Ch. 371.

The doctrine of *Forbes* v. *Peacock* (supra) amounts only to this, that where prior to 22 & 23 Vict. c. 35, and 23 & 24 Vict. c. 145, there is a trust to sell real estate, and pay debts and legacies out of the proceeds, there is also an implied power in the trustees to give receipts for the purchase-money. There is nothing in that case authorising trustees, by reason merely of such a charge, to sell a settled estate. *Carlyon* v. *Truscott*, 44 L. J., Ch. 186; L. R. 20 Eq. 348; 32 L. T. 50.

A testator by his will, dated the 4th September, 1858, devised his real and personal estate to trustees upon trusts to pay debts, and subject thereto upon trust as to a freehold house to allow his wife to reside there during her widowhood, and on her death or second marriage, upon trust for sale. The testator died in the same year. An administration suit was instituted, and the chief clerk found that all the debts were paid. The court afterwards decreed a sale of the estate in question, and the purchaser raised the objection that the widow being still alive, the order was beyond the jurisdiction of the court:—Held, that the court had no power to make the order. *Ib.*

Where there is a power of sale for the purpose of making certain payments, a power to give receipts and discharges may be inferred. *Greville* v. *Browne*, 7 H. L. Cas. 689; 5 Jur. (N.S.) 849; 7 W. R. 673.

Testator devised his estates to trustees in trust to sell, and declared their receipts to be sufficient discharges; and he directed his trustees to complete any contracts for the sale of his estates, entered into during his lifetime, and remaining incomplete at his death:—Held, that his executor was the proper party to give receipts for the purchase-moneys of the estates contracted to be sold by the testator. *Eaton* v. *Sanxter*, 6 Sim. 517; 3 L. J., Ch. 197.

A testator, "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate:—Held, that the executor had an implied power to sell and give valid receipts for the purchase-money without shewing the insufficiency of the personal estate. *Greetham* v. *Colton*, 34 Beav. 615; 11 Jur. (N.S.) 848; 13 L. T. 34; 13 W. R. 1009.

Held, also, that the lapse of thirteen years between the death and the sale did not affect the executor's power. *Ib.*

47 Geo. 3, c. 74, s. 2.]—Where legacies were charged on the real estate of trader, and his devisee and executor sold part of the real estates before the debts were paid:—Held, that purchasers, notwithstanding the 47 Geo. 3, s. 2, c. 74, were liable to see to application of purchase-money. *Horne* v. *Horne*, 2 Sim. & S. 448; 4 L. J. (O.S.) Ch. 52.

3 & 4 Will. 4, c. 104.]—Where real estate is, under 3 & 4 Will. 4, c. 104, assets for the payment of a simple contract debt, a purchaser of that estate, having notice of such debt, is not bound to see that his purchase-money is applied in payment thereof. *Jones* v. *Noyes*, 28 L. J., Ch. 47; 4 Jur. (N.S.) 1033; 7 W. R. 21.

Where a deceased owner was lunatic, the fact that the simple contract creditor was the committee of his estate, and that the debt was due in respect of such committeeship, does not alter the case. *Ib.*

Inquiry as to Existence of Debts—Lapse of Time, Effect of.]—Persons who deal with trustees raising money at a considerable distance of time, and without apparent reason for so doing, are under an obligation to inquire and see that no breach of trust is being committed. *Stroughill* v. *Anstey*, 1 De G. M. & G. 635; 22 L. J., Ch. 130; 16 Jur. 671.

S. devised all his real and personal estate to G., his heirs, &c., charged with his debts; plaintiffs were bond creditors, and received their interest of G., as executor, regularly for sixteen years, but never asked for the principal, and G. during this interval made several sales of the testator's estate:—Held, that the purchaser shall not be

disturbed after a quiet possession of so many years. *Elliott* v. *Merriman*. 2 Atk. 41 ; Barnard. 78.

Where a testator had expressly directed payment of his debts, and the executor, after a lapse of twenty-seven years from the death of the testator, exercised the implied power of sale thereby given, although the parties beneficially entitled had been in possession, by the permission of the legal representative, for nine years, and the executor refused to answer a requisition whether there were any debts of the testator still unpaid, the court refused to disturb the established rule that the executor can, without shewing that there are debts unpaid, make a good title to the property sold, and absolve the purchaser from liability to see to the application of the purchase-money. *Sabin* v. *Heape*, 27 Beav. 553 ; 29 L. J., Ch. 79 ; 5 Jur. (N.S.) 1146 ; 1 L. T. 51 ; 8 W. R. 120.

A testator, "in case his personal estate should be insufficient for the payment of his debts," charged them upon his real estate :—Held, that the executor had an implied power to sell and give valid receipts for the purchase-money without shewing the insufficiency of the personal estate. *Greetham* v. *Colton*, 34 Beav. 615 ; 11 Jur. (N.S.) 848 ; 13 L. T. 34 ; 13 W. R. 1009.

Held, also, that the lapse of thirteen years between the death and the sale did not affect the executor's power. *Ib.*

Where executors in whom the legal fee is vested are selling real estate charged with debts, a purchaser is not bound or entitled to inquire whether debts remain unpaid, unless twenty years have elapsed from the testator's decease. *Tunqueray-Willaume and Landau, In re*, 51 L. J., Ch. 434 ; 20 Ch. D. 465 ; 30 W. R. 801—C. A. Reversing 45 L. T. 281. See also *Forbes* v. *Peacock*, 1 Ph. 715 ; 15 L. J., Ch. 371.

5. Other Dealings.

Insurance of Trust Property.]—An executor is not bound to insure or continue the insurance of his testator's property against fire. *Bailey* v. *Gould*, 4 Y. & C. 221 ; 9 L. J., Ex. Eq. 43.

Upon a reference to the master to inquire what sums executors might have received but for their wilful default, the master has no authority to charge executors neglecting to insure with the amount of the policy for which the testator to the time of his death was accustomed to insure premises which, in the hands of the executors, are destroyed by fire. *Ib.*

A testator, as lessee, was bound to insure. The insurance expired on the 25th March, and he died on the 27th, without having paid the premium. The premium was not paid by his executors, and the house was burnt down on the 26th May :—Held, that the executors were not personally liable for not having kept up the insurance. *Fry* v. *Fry*, 27 Beav. 146 ; 28 L. J., Ch. 593 ; 5 Jur. (N.S.) 1047.

Leaseholds—Renewals.]—Lessor covenanted to renew the lease at the request of the lessee within the term. Lessee did not request, but executors do within the term ; lessor is compellable to renew. *Hyde* v. *Skinner*, 2 P. W. 196.

A testator directed his executors to get in and convert all his real and personal estate, invest the same from time to time, and pay and divide the interest and dividends to two tenants for life, with benefit of survivorship. At the death of survivor to convert the whole, and to pay and divide the same amongst his nephews and nieces, naming them. Part of his personal estate consisted of leaseholds for lives, renewable on the death of the last nominee, under different terms of renewal, some arbitrary, some not. Some of the premises contained in the leases had come under the control of the charity commissioners, and alterations as to the terms of renewal had been made by other lessors :—Held, that the executors were not bound to obtain any renewal which would be prejudicial to the interests of the tenants for life, with a reference to chambers as to what contracts the executors should enter into as to renewal or sale of the testator's interest in the leases, and as to raising the necessary amount of fines, &c., as should be most beneficial for all parties interested under the will. *Alden* v. *Kennerley*, 7 L. T. 312.

A testatrix by will gave her executor all her interest in a farming lease upon trust to carry on the farm for the benefit of the plaintiff. The executor accordingly carried on the farm until the expiration of the lease, and then obtained a new lease. Under the circumstances, held by the court below that the defendant was a trustee for the plaintiff, and an account was ordered of all moneys expended or received by the defendant in carrying on the farm. Upon appeal by the plaintiff against so much of the order as directed accounts :—Held, his having elected to claim the profits of the farm, he could not resist the taking of such an account. *Kendall* v. *Marsters*, 2 De G. F. & J. 200 ; 2 L. T. 709 ; 8 W. R. 747.

An executor to a tenant by sufferance or at will, obtaining a larger interest, is a trustee for the residuary legatee like the case of general occupancy. *James* v. *Dean*, 11 Ves. 392.

—— **Leases by Executors.**]—Lessee of a term for years, with a toties quoties covenant for renewal, having died intestate, his administratrix in 1806 subdemised the premises at an increased rent, with a covenant that she, her executors, administrators and assigns, would renew to the sublessee, at the same rent, as often as she could herself procure a renewal from her head landlord. Upon the death of the administratrix, administration de bonis non was obtained by the defendant :—Held, 1st, upon the evidence in the case, that the sublease of 1806 was a due administration of the assets ; 2nd, that the sublessee was entitled, as against the administrator de bonis non, to a specific performance of the covenant for renewal. *Hackett* v. *M'Namara*, Ll. & G. t. Plunk. 283.

The appellant in this case having claimed the renewal of a lease from the heirs of the covenantor pursuant to his covenant, they refused, alleging that the covenantor was a bare tenant for life. This refusal is a breach of covenant, for which an action at law will lie against the representatives of the covenantor. *Macartney* v. *Blundell*, 2 Ridgw. P. C. 113.

Lease by an administrator to a party having notice that a sale was required by the persons beneficially interested, set aside. *Drohan* v. *Drohan*, 1 Ball & B. 185 ; 12 R. R. 10.

In selling or subletting the leaseholds of a testator or intestate, an executor or administrator stands to the beneficiaries, or next of kin, in the same relation as a trustee to his cestui que trust. Therefore, for an executor or administrator to grant an underlease with the option of purchase

to be exercised by the sublessees at a future time, at a price now fixed, is ultra vires, and a breach of trust. Such a transaction cannot be supported as against the beneficiaries or next of kin, however advantageous the transaction may have been to their estate. *Oceanic Steam Navigation Co.* v. *Sutherberry*, 50 L. J., Ch. 308; 16 Ch. D. 236; 43 L. T. 743; 29 W. R. 113.

The owner of six leasehold houses agreed in writing to let one of them, numbered 737, to a tradesman, the agreement saying nothing about a restrictive covenant. On the same day he also agreed to let another of the houses, numbered 735, to a grocer, and he agreed with him that the business of a grocer should not be carried on in any of the other five houses. Afterwards he contracted to sell the house numbered 737, and a third house numbered 739, to T., also a grocer, and the agreement, which was in writing, and dated the 6th July, 1870, contained nothing about a restrictive covenant, but an underlease was prepared and engrossed which did contain a covenant that the premises should not be used for a grocer's business. An appointment was made for the execution of the underlease and counterpart on a certain day; but on the previous evening, T. died suddenly, intestate. It was stated, but on the plaintiff's evidence only, that after the written agreement of the 6th July, and before T.'s death, T. verbally agreed to the insertion of the restriction, and there was other evidence that he was prepared to execute a counterpart of the engrossment. It having been shewn that the insertion of such a restriction would considerably diminish the value of the property:—Held, that the administrator of the intestate could not be compelled to execute a counterpart of a lease containing such a restriction. *Snelling* v. *Thomas*, 43 L. J., Ch. 506; L. R. 17 Eq. 303.

The written agreement of the 6th July stipulated that the property should be bought "subject to the existing tenancies." The plaintiff alleged that on the 6th July the lessee of the house numbered 737 was under an agreement to consent to a restrictive covenant, and in proof of this the counterpart of a lease, bearing date the day before the agreement of the 6th July, was produced, containing such a covenant. It having been shewn that the lease was antedated, and was not in fact executed till after the 6th July, 1870:—Held, that the administrator was not by this clause bound to execute the counterpart of a lease containing the restriction. *Ib.*

—— **Assignments by Executors.**]—An agreement to assign a lease is good against an executrix. *Smith* v. *Watson*, Bunb. 55.

The purchaser of a term cannot have a covenant for title from executor assignor. *Staines* v. *Morris*, 1 Ves. & B. 8.

Executors sell by auction, in nine lots, sundry houses, which the testator, during his life, held by lease under the Crown, and of which they, after his death, obtained a new lease, subject to one entire rent of 24*l.*; the printed particulars mention that the sale is by executors, and that the nine lots are all held under one lease, and at one entire reserved rent:—Decree, upon a bill filed by the vendors, and an answer, submitting to perform the contract upon an indemnity being given, that the purchaser of one lot, with respect to which the particulars stated that the apportioned rent for it was 5*2l.*, was entitled to have an indemnity from the executors against his liability for the whole reserved rent, and the breach of any of the covenants in the original lease. In such a case the defendant is entitled to have his costs, up to and including the hearing. *West* v. *Wild*, 3 L. J. (O.S.) Ch. 15.

—— **Agreement to take Lease—Obligation of Representative.**]—A. leased premises to B. for ten years, and B. covenanted not to assign the premises without A.'s consent. A. agreed to grant to C. a lease for ten years from the end of B.'s term, subject to the same covenants as were contained in B.'s lease. C. died before the lease was executed to him. A. filed a bill against C.'s executors (who admitted assets), for a specific performance of the agreement, and offered so to qualify the covenants of the lease as that the executors should be no further liable thereon than they would have been on the covenants which ought to have been entered into by the testator in case a proper lease had been made to him. Specific performance of the agreement decreed, with a reference to the Master to settle the lease. *Phillips* v. *Everard*, 5 Sim. 102.

Agreement for a lease, with a covenant that the lessee should build a wall round the land. A lease was executed by the lessor, but not by the lessee, which did not contain the covenant to build:—Held, after the death of the lessee, that a suit could not be maintained against the administrator having assets for a specific performance of the original agreement. *Blosse* v. *Prendergast*, 13 Ir. Ch. R. 373.

Specific performance of a covenant in a lease to take a renewed lease decreed against lessee's executors, who had entered and admitted assets. *Stephens* v. *Hotham*, 1 Kay & J. 571; 24 L. J., Ch. 665; 1 Jur. (N.S.) 842; 3 Eq. R. 571; 3 W. R. 340.

But the court will take care that the renewed lease, if not beneficial, is so framed as that no personal liability shall be incurred by the executors. *Ib.*

Rent—Right of Administrator de bonis non.]—An executor makes a lease, rendering rent; his administrator shall have the rent, and not the administrator de bonis non. *Noel* v. *Robinson*, 1 Vern. 94.

A. indebted to B. for rent; B. dies; C. administrator to B.; A. gives a note for this rent to C.; C. dies intestate. The note is an alteration of the property, and the rent belongs to the administrator of C., and not to the administrator de bonis non of B. *Barker* v. *Talcot*, 1 Vern. 473.

e. Allowances and Payments.

In General.]—An executor making payments in the usual and regular course, without any circumstances of suspicion, shall be allowed them in account, and be discharged from any loss. *Bacon* v. *Bacon*, 5 Ves. 331; 5 R. R. 52.

No allowance to administrators for debts paid after a decree to account, but they shall stand in the place of the creditors paid. *Jones* v. *Jukes*, 2 Ves. J. 517; 2 R. R. 308.

Semble, that an administrator is entitled to the reasonable charges of collecting the intestate's debts. *Giles* v. *Dyson*, 1 Stark. 32; 18 R. R. 743.

Payments to Beneficiaries.]—The trustee of a will, prior to the institution of a suit for the

administration of the testator's estate, made certain payments to persons beneficially interested in the residue. The chief clerk in his certificate disallowed these payments on the ground that at the time they were made there was a debt due from the testator. At the time the payments were made, the testator's estate was sufficient for them and for payment of an equal sum to the other residuary legatees as well as of the debt, but it was not now sufficient for these purposes, and also for payment of the costs of the suit :—Held, that L. was entitled to be allowed these payments, although the time for reviewing the chief clerk's certificate had expired. *Lloyd* v. *Lloyd*, 23 W. R. 787.

Statute-Barred Debt.]—An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations ; and on the same principle may have a right to retain his own debt, although barred by the statute. *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415. S. P., *Hill* v. *Walker*, 4 Kay & J. 166.

Where a judgment has been recovered against executors for a debt due from their testator, and they pay the debt, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up against the creditor who recovered the judgment. *Hunter* v. *Baxter*, 3 Giff. 214 ; 31 L. J., Ch. 432 ; 5 L. T. 46.

—— **Res Judicata.**—An executor who pays a statute-barred debt after a judicial decision that the debt is not recoverable out of the testator's estate by reason of its being statute-barred, commits a devastavit ; and the creditor who receives payment of such debt, with knowledge of the circumstances, is also liable to the testator's estate for its repayment. *Midgley* v. *Midgley*, 62 L. J., Ch. 905 ; [1893] 3 Ch. 282 ; 2 R. 561 ; 69 L. T. 241 ; 41 W. R. 659—C. A.

Claim within Statute of Frauds.]—An administrator is not bound to set up the Statute of Frauds in respect of the payment of the balance of a sum of money promised by the deceased to be paid to his daughter on her marriage. *Garratt's Trusts, In re*, 18 W. R. 684.

Contra as to debt, *Rownson, In re*, *Field* v. *White*, 54 L. J., Ch. 950 ; 29 Ch. D. 358 ; 52 L. T. 825 ; 35 W. R. 604 ; 49 J. P. 759—C. A.

Beneficial Expenditure.]—A testator devised his real estate upon the common trusts for sale, making his real and personal estate a mixed fund. His trustees and executors were advised that a few acres of freehold land which belonged to him might be advantageously sold in lots for building purposes, and that to develop their value it was desirable to build a villa upon part of them. They accordingly built one at a cost of 1,600*l.* out of the testator's personal estate. This villa had ever since been let at 80*l.* a year, most of the other land had been sold, and the evidence tended to shew that the outlay had benefited the estate :—Held, that as the trustees had, in the bonâ fide exercise of their judgment, expended this sum as the best means of improving the estate, they could, at most, only be disallowed the amount of loss (if any) occasioned to the estate by the expenditure. *Vyse* v. *Foster*, L. R. 8 Ch. 309 ; 27 L. T. 774 ; 21 W. R. 207.

An inquiry directed as to what allowances for permanent improvements should be made to an executor, who was ordered to account for the rents of the real estate which he had appropriated to his own use in breach of trust. *Pelly* v. *Bascombe*, 4 Giff. 390 ; 33 L. J., Ch. 100. Affirmed, 34 L. J., Ch. 233 ; 11 Jur. (N.S.) 52 ; 13 W. R. 306.

C., an executor, expended large sums of money for the benefit of the estate of, and pending a suit which had been instituted against, his testator A. for the administration of the estate of his testator B., and to whose estate A. was liable for the default of his co-executor. There was a balance due to C. on the account. The real estates of A. were ordered to be sold, and it was declared that the debt due to B.'s estate ought to be paid out of the estates of A. The proceeds of A.'s estates being insufficient to pay all the claims :—Held, that as C. had expended the moneys as executor, he was entitled to be recouped the whole amount due to him before any of the debts of A. were paid, and that the doctrine of retainer did not apply. *Spackman* v. *Holbrook*, 2 Giff. 198 ; 6 Jur. (N.S.) 881 ; 2 L. T. 367.

A solicitor, acting for the administrator of a deceased intestate, retained in his hands a portion of the estate and failed to account for the same. The administrator applied for and obtained in 1876, in the Queen's Bench Division, a rule that the solicitor should be struck off the rolls, or should answer an affidavit relating to the retention of the sum by him. A writ of attachment was issued against the solicitor, who absconded, and the writ was renewed in each term down to 1887. In that year, upon further consideration of an action to administer the intestate's estate, the taxing-master was directed to tax the costs, charges, and expenses of the administrator properly incurred. He disallowed all the costs of the proceedings against the solicitor, on the ground that they were not ordinary proceedings, but were in the nature of punishment to the solicitor :—Held, upon a summons to review the taxation, that the real object of the proceedings against the solicitor was to obtain the money due to the estate, and that therefore some of the costs incurred ought to be allowed ; but it was referred to the taxing-master to consider how far the costs incurred subsequently to obtaining the rule were for the benefit of the estate and should be allowed. *Davis, In re*, *Muckalt* v. *Davis*, 57 L. J., Ch. 3 ; 57 L. T. 755.

Probate and Succession Duty, Advances for Payment of.]—A testator died in August, 1861, and his executors remitted to their solicitor 80*l.* to obtain probate, and 25*l.* to pay legacy duty. The solicitor became bankrupt in November, 1861, and the money was lost. The court allowed the executors the 80*l.*, but not the 25*l.*, the latter advance being premature, the legacies not having been paid in 1863. *Castle* v. *Warland*, 32 Beav. 660.

For Time and Trouble.]—An executor and trustee cannot claim compensation for personal trouble and loss of time in the performance of the trusts under a will, but should have made a special case for compensation before he entered on the performance of the trusts. *Brocksopp* v. *Barnes*, 5 Madd. 90.

An executor will not have a salary given him in the absence of some contract to that effect between him and the testator. *Browne* v. *Collins*, 21 W. R. 222.

—— **Carrying on Trade.**]—Where a surviving partner is also the executor of the one deceased:—Held, not entitled to an allowance for carrying on the business after his partner's death, for the benefit of the estate. So, in the case of an executor and legatee of such surviving partner. *Stocken* v. *Dawson*, 6 Beav. 371.

A surviving partner being executor is not entitled, without express stipulation, to any allowance for carrying on the trade after the testator's death. Allowed expenses actually incurred under an erroneous conception that he was sole proprietor by purchase from his co-executors, but which purchase was set aside as a breach of trust, though bonâ fide. *Burden* v. *Burden*, 1 Ves. & B. 170; 12 R. R. 210.

Circumstances under which the court making the executors and trustees an allowance for trouble and loss of time in managing the testator's leasehold property and carrying on his business, fixed the amount itself, without directing an inquiry. *Forster* v. *Ridley*, 4 De G. J. & S. 452; 11 L. T. 200.

Professional Charges—As Agent.]—An agent named executor is not entitled to charge commission on business done subsequently to the testator's death. *Sheriff* v. *Axe*, 4 Russ. 33.

—— **Executor Banker.**]—An executor, who is one of a banking firm, cannot charge the ordinary banker's commission against his testator's estate. *Heighington* v. *Grant*, 9 L. J., Ch. 142.

—— **Executor Solicitor.**]—The principle that an executor, a solicitor, is not entitled to profit costs out of the estate applies equally where the executor is one of a firm of solicitors. *Burge* v. *Brutton*, 2 Hare, 373; 12 L. J., Ch. 368; 7 Jur. 988.

Payment of costs to a London agent allowed to executor as costs out of pocket. *Ib.*

An executor is not entitled to be allowed the costs of a suit in respect of the estate, prosecuted by a solicitor whom he did not employ; the solicitor himself is the party to apply for costs as a lien on the fund which he has recovered. *Ib.*

An executor, conducting suits as solicitor for the legatees under the will of his testator, was not allowed his costs in the first instance, where it appeared that he had conducted the suits in a negligent and tardy manner. *Carmichael* v. *Wilson*, 4 Bligh (N.S.) 146. *S. C.*, nom. *Wilson* v. *Carmichael*, 2 Dow & Cl. 51.

—— **Where allowed by Will.**]—A testator gave all his residuary real and personal estate to trustees upon trust for his wife for life; and after her death he directed that a just and true valuation should be made of "all his freehold and leasehold estates, stocks, funds, and securities, and other residuary personal estate," and directed the same to be divided, or considered as divided, into seven equal parts, and then disposed thereof; and the testator directed that A. B., one of his executors, who was a surveyor by profession, "should be entitled to charge, and should be allowed, all reasonable charges as a surveyor, in valuing his said freehold and leasehold estates, and in letting the same, and in collecting the rents, or otherwise in the management of the said estates, whenever requested or instructed so to act by his co-trustees":—Held, that this latter clause applied solely to the valuation and management of the freehold and leasehold estates, and that A. B. was not entitled, under this clause, to make any charges in respect of valuations made by him of the residuary personalty after the death of the testator's widow. *Knott* v. *Cottee*, 16 Jur. 752.

If a solicitor is appointed an executor, liberty to charge for professional services will not authorise him to charge for services which appertain to the ordinary duties of an executor. *Harbin* v. *Darby*, 28 Beav. 325; 29 L. J., Ch. 622; 6 Jur. (N.S.) 906; 2 L. T. 531; 8 W. R. 512.

Commission on Indian Estates.—An executor in India proving his accounts in this court is entitled to the commission upon payments according to the practice in India. *Chetham* v. *Audley (Lord)*, 4 Ves. 72.

Agents, being also appointed executors of the principal, are not entitled to the commission upon remittances from India by the testator not received till after his death. *Hovey* v. *Blakeman*, 4 Ves. 596.

An executor in India is entitled to a commission of 5 per cent. on all assets of a testator collected by him there, including the assets which he retains in respect of a legacy to himself, not given to him in the character of executor, and including moneys belonging to the testator which were in the hands of a commercial house in which the executor was, and the testator had been, a partner, semble. *Cockerell* v. *Barber* 1 Sim. 23; 2 Russ. 585; 5 L. J. (O.S.) Ch. 77; 28 R. R. 181.

Executor in India, having a legacy for his trouble, not entitled to commission on receipts and payments, or either, as executor; not allowed, in passing his accounts, after a series of years, to renounce his legacy and charge commission on such receipts and payments. *Freeman* v. *Fairlie*, 3 Mer. 24; 17 R. R. 7.

If an executor in India collects part of the assets there, and then comes to England and has the remainder remitted to him by his agent, he is entitled to commission on that part only which he collected in India. *Campbell* v. *Campbell*, 13 Sim. 168; 11 L. J., Ch. 382; 6 Jur. 635.

By a decree made in a suit for administering the assets of a testator who died in India, the master was directed to allow Indian commission to the executor only in respect of assets received by him while resident in India. The testator (whose estate was solvent for the payment of legacies) died possessed of certain notes of the Bengal government, which the executor took from the treasury at Calcutta and handed over to certain trustees in discharge of a legacy of the testator of equal amount with the notes:—Held, that the notes were assets within the meaning of the decree. *S. C.*, 2 Y. & C. C. C. 607; 8 Jur. 28.

A planter in India obtained advances from his agents, who, by custom, were entitled to a commission on their advances and on the produce of the sales of the crop. The planter died, and his executors sold the factory, and got in the crops, and remitted them to the agents, who sold the latter, and accounted to the executors for the balance, after deducting the amount due to them:—Held, that the executors were entitled to 5 per cent. (Indian commission) on the gross proceeds of the factory and crop. *Matthews* v. *Bagshaw*, 14 Beav. 123; 15 Jur. 977.

Keeping up Testator's Establishment.]—Trustee and executor, although taking under will a commission as a satisfaction for trouble,

is entitled to allowances under a general trust to let and manage as he should think proper, and out of the rents and profits to pay all rates and taxes, charges of repairs, stewards, bailiffs, and gamekeepers' salaries and expenses, and all other charges and expenses he should think proper; but he was not allowed to appoint an establishment, gamekeepers, &c., except as the due management required. *Webb* v. *Shaftesbury (Earl)*, 7 Ves. 480; 6 R. R. 154.

An executor's expenses in keeping up an establishment not disallowed simpliciter, but there being a question whether travelling expenses were thereby economised, an inquiry was directed with liberty to the executor to bring forward afterwards such claims as he might have to be recouped his expenses, notwithstanding the further consideration of the cause was the proper time for doing so. *Browne* v. *Collins*, 21 W. R. 222.

Executors must be allowed a reasonable time for breaking up a testator's domestic establishment, and discharging his servants. Two months held not to be an unreasonable delay, having regard to the circumstances. *Field* v. *Peckett*, 29 Beav. 576.

For Maintenance of Deceased's Children.]—The infant children of testator, being respectively entitled to pecuniary legacies, which were lodged in the bank, and successively to the testator's house and stock in trade, and equally to the residue, an offer of the executrix, the mother, to maintain all the children without requiring any assistance from the fund in court, upon the terms of being released from accounting for the profits of the business which she continued to carry on between the time of the death of the testator, and the attaining his age by the first legatee entitled in the house and with the stock in trade of the testator on the consent of the pr. ami, and approval of the master, was decreed accordingly. *Drake* v. *Fortune*, 1 Moll. 201.

In a creditor's suit for the administration of a testator's estate, where the personal estate was insufficient for payment of debts, and the master had found that the executor and trustee had made advances for the maintenance of the testator's children, but had refused to allow him to retain the amount of such advances out of the balance in his hands, arising from the rents of the real estate, the court, on the trustee and executor submitting to account, relieved him from paying the balance into court until the amount of the proceeds of the real estate should be ascertained. *Littleboy* v. *Hill*, 9 Jur. 986.

But, as against creditors, an administrator cannot be allowed for disbursements in the schooling, feeding, or clothing the intestate's children subsequently to his decease. *Giles* v. *Dyson*, 1 Stark. 32; 18 R. R. 743.

Maintenance to some extent allowed out of capital, though the direction in the will applied only to income, the whole estate amounting to about 12,000*l.*, but the income having proved insufficient, owing to temporary charges; but sums expended in luxuries, &c., as for the purchase of ponies, were disallowed. *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

—— **Interest.**]—Generally executor making advances for maintenance beyond income in his hands is not entitled to interest, but, on further directions, the executor may be able to shew that common justice requires the allowance of interest. The case in which maintenance may exceed income, is where there was a reasonable expectation that the amount of fortune would be greater than it turned out to be. *Kilbee* v. *Sneyd*, 2 Moll. 235.

Solicitor's Costs.]—Executor, as such, employing solicitor is allowed his costs. *Macnamara* v. *Jones*, Dick. 587.

An executor or trustee is not to be allowed, without question, the amount of bills of costs, which he has paid bonâ fide to the solicitor to the trust; and the master, without regularly taxing the bills, will moderate their amount. *Johnson* v. *Telford*, 3 Russ. 477; 27 R. R. 116.

In taking the accounts of a personal representative, bills of costs paid by her are not to be taxed, but the master will consider the reasonableness of any items to which objections may be taken. *Pitchford* v. *Hulme*, 3 L. J. (O.S.) Ch. 223.

An executor will not be allowed the charges of his solicitor for doing things which the executor ought strictly to have done himself. *Harbin* v. *Darby*, 28 Beav. 325; 29 L. J., Ch. 622; 6 Jur. (N.S.) 906; 2 L. T. 531; 8 W. R. 512.

An executor is not entitled to be allowed the costs of a suit in respect of the estate, prosecuted by a solicitor whom he did not employ. The solicitor himself is the party to apply for costs, as a lien on the fund which he has recovered. *Burge* v. *Button*, 2 Hare, 373; 12 L. J., Ch. 368; 7 Jur. 988.

—— **Incurred whilst no Personal Representative—Ratification.**]—During a period in which there was no personal representative of the estate of a deceased testatrix, the appellant, acting upon the instructions of Easton, a relative of the deceased, did work as a solicitor in respect of the administration and for the benefit of the estate. Subsequently the respondent Phillips obtained letters of administration de bonis non, and refused to pay the appellant's bill of costs: —Held, that the respondent was not bound, as administrator, to pay such costs. *Phillips, Ex parte, Watson, In re*, 56 L. J., Q. B. 619; 19 Q. B. D. 234; 57 L. T. 215; 35 W. R. 709—C. A.

—— **Interest on.**]—Court will not allow executor interest on costs paid by him, pending a suit concerning the estate. Where interest is allowed, it is only from the time of the balance having been struck on the general report. *Gordon* v. *Trail*, 8 Price, 416.

Accountant's Charges.]—The master ought to allow in an executor's accounts the expense of an accountant, where the nature of the accounts justifies it. *Henderson* v. *M'Iver*, 3 Madd. 275.

Agent's Commission.]—Executors will not be allowed to charge for the employment of an agent, except under very special circumstances. *Weiss* v. *Dill*, 3 Myl. & K. 26.

An exception to the master's report, by which he had reduced an executor's charge for the employment of an agent at 5 per cent. to 2½ per cent., overruled. *Ib.*

Executor with annuity allowed expenses of collection of rents. *Wilkinson* v. *Wilkinson*, 2 Sim. & S. 237; 25 R. R. 193.

Where the book debts were numerous, the executors of a tradesman were held justified in appointing an agent to collect them, and in

allowing him a salary for his trouble. *Hopkinson* v. *Roe*, 1 Beav. 181.

Broker's Commission on Identification.]—An executor, upon transferring stock to a legatee, paid one-sixteenth per cent. to a stockbroker for identifying him at the bank. He was allowed the payment in passing his accounts. *Jones* v. *Powell*, 6 Beav. 488; 7 Jur. 781.

To Executor or Administrator paying or making himself Liable for Debts of Deceased.]—An executor who makes himself liable for debts of the testator has no priority in respect of such debts over the other creditors of the testator, but stands in the same position as the creditors for whose debts he has made himself liable. *Lucas* v. *Williams*, 4 De G. F. & J. 439; 10 W. R. 677.

An executor who in winding up his testator's affairs, and acting in pursuance of the will, and according to the testator's course of business, gave a promissory note for a trade debt of the testator's:—Held, not entitled to be indemnified in full in respect of the note out of the estate, which was insufficient to pay his debts. *Ib.*

Executor paying to creditors more than the value of his testator's personal assets, acquires an absolute right to them. *Chalmer* v. *Bradley*, 1 Jac. & Walk. 64; 20 R. R. 216.

A. owes money by real judgments and bonds, and dies intestate; his administrator pays the judgments and some of the bonds, and pays more than the personal estate amounts to. What the administrator paid on the judgments must be allowed him; but as to what he paid on the bonds, he must come in pro ratâ with the other bond creditors. *Robinson* v. *Tonge*, 3 P. W. 400.

Where there was a doubtful claim against the estate of an intestate, which, if unsatisfied, would have left a surplus, but which the surplus, after paying all other demands, was insufficient to pay, the sole next of kin, not admitting the validity of such claim, agreed to give up the surplus if the administrator, who was a surety for the debt, supposing it to be a valid one, would contribute the remainder of what was wanted for payment of it, and by deed, which recited that the assets then in the hands of the administrator were all the assets belonging to the estate, the next of kin released to the administrator, in consideration of his covenant to pay the debt, the whole of his right and interest, &c., in the personal estate of the intestate. The debt was accordingly paid, and after that assets fell in:—Held, that they were not included in the release, and that the administrator was not even entitled to recoup himself out of them what he had contributed towards the debt. *Lindo* v. *Lindo*, 1 Beav. 496; 8 L. J., Ch. 284.

A testator, seised of real estate, and leasehold and personal estate, and, among other property, of leasehold collieries or mines, gave certain real estates to his son; he devised and bequeathed all his other real and personal estate upon trust, with the approbation of his son, at some convenient and proper period to sell and convert the same, and to invest and apply 1,000*l.*, part thereof, for his granddaughter; and after giving some small annuities, in trust to pay to his daughter 200*l.* a year, besides one half share of the yearly income and produce of his real and personal estates, his intention being that she should enjoy an equal yearly income with his son during her natural life, treating 200*l.* a year as equivalent to the real estate given to his son, provided that his daughter's annuity should in no case exceed 600*l.* a year; and that the overplus, after 600*l.* a year to her and 400*l.* to his son, should go to his son, but that what he called produce of his personal estate was not to be taken as the income derived from the mines, but the profit arising after laying by 10*l.* per cent. to pay back the capital expended in plant, &c.; and, subject to these gifts and devises, he gave all his real and personal estate to his son. The son was appointed, with the trustees, executor; they disclaimed and renounced, and he entered into sole possession. In taking the accounts of the testator's estate:—Held, that the son had a right to apply, in payment of debts, all permanent personal property before disposing of the mines; that having paid off with his own moneys debts which could not have been paid off without resorting to the mines, the debts so kept alive in his hands were a charge on the net produce of the mines; that the accumulations of the 10*l.* per cent. were a fund liable to the debts in exoneration of the mines; that as to any liabilities due to him in respect of over payments of debts made by him beyond the assets applicable, he would be entitled to interest; that the 1,000*l.* legacy to the granddaughter was a charge on the real and personal estate, pro ratâ. *Lord* v. *Wightwick*, 1 Drew. 576.

An executor having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum of money equal in amount to the debt; and the creditor accepted the personal security of the executor for the amount, and released his debt against the estate:—Held, that the executor having, by such substitution of his own security for that of the estate, discharged the debt as against the estate, should not be treated as a mere purchaser of the debt of the creditor, and, as such, entitled only to stand in the place of the creditor; but that the executor was entitled to be allowed, in his own discharge, the amount of the debt as a debt of the testator preferred and paid. *Hepworth* v. *Heslop*, 6 Hare, 561; 18 L. J., Ch. 352; 13 Jur. 166.

A., who was both heir and administrator, gave to a creditor of the intestate a mortgage on the descended estate for his debt, which he covenanted to pay. The creditor thereupon gave to A., as administrator, a receipt for the debt, but no money passed:—Held, in taking an account of the personal estate of the intestate as against A., that he was entitled to charge the amount of this debt as a payment out of the personal estate. *George* v. *George*, 35 Beav. 382.

Executor pays debts with money received under a decree which is reversed; he must refund; otherwise, if the appeal is delayed. *Pickering* v. *Stamford* (*Lord*), 2 Ves. Jun. 582.

—— **Interest.**]—An executrix, who advanced money for the payment of simple contract debts charged on the testator's real estate, allowed interest on such advances. *Biggar* v. *Eastwood*, 15 L. R., Ir. 219.

Executor borrowing or advancing money to pay testator's creditors, who were very importunate, is entitled to allowance of interest thereon. *Small* v. *Wing*, 5 Bro. P. C. 66.

Interest on Advances by.]—By the will of a trader, the residue of his real and personal estate, including his stock-in-trade and effects used

therein and the goodwill of his business, was bequeathed to a trustee and executor, upon ordinary trusts for sale and conversion. The executor had from time to time out of his own moneys advanced various sums in excess of the balance in his hands. The court allowed the executor 4*l.* per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances. *Finch* v. *Prescott*, 43 L. J., Ch. 728; L. R. 17 Eq. 554; 30 L. T. 156; 22 W. R. 437.

Payment after Suit—Debts.]—No allowance to administrator for debts paid after a decree to account, but he shall stand in the place of the creditors paid. *Jones* v. *Jukes*, 2 Ves. Jun. 517; 2 R. R. 308.

After a bill and answer put in the executor voluntarily paid a bond debt, and allowed on the account. *Darston* v. *Orford* (*Earl*), Pre. Ch. 188; Colles, 229.

After a decree in a suit for the administration of assets, an executor is not at liberty to do any act which affects the relative rights of creditors. *Shewen* v. *Vanderhorst*, 2 Russ. & M. 75; 1 L. J., Ch. 107.

Executor or administrator, after suit for account, may pay simple contract or specialty debts. *Maltby* v. *Russell*, 2 Sim. & S. 227; 3 L. J. (O.S.) Ch. 85; 25 R. R. 191.

Payments made to creditors by executors after the decree in an administration suit, were not allowed to them, the utmost they were entitled to being to stand in the place of the creditors as to such payments. *Mitchelson* v. *Piper*, 8 Sim. 64; 5 L. J., Ch. 294.

When, after a decree directing a legal personal representative to admit assets or to account, he pays debts, he will be allowed them, though the estate should be deficient. But when such a payment is made after a decree for the administration of the estate the rule is otherwise. *George* v. *George*, 35 Beav. 350.

If after a decree an executor thinks fit to pay a creditor, he does so at his own risk, and he is only entitled to stand in the place of his creditor against the estate. *Irby* v. *Irby*, 24 Beav. 525; 3 Jur. (N.S.) 1314.

A testator had mortgaged his real estate to secure moneys held on the trust of his marriage settlement. A suit was instituted to administer his estate, and to realise the mortgage. After the decree (in 1832) the executors advanced considerable sums out of the rents and personal estate, on account of interest, to the persons entitled to the mortgage. The estate proved deficient to pay all the creditors:—Held, in 1857, that the payments could not be justified, that the executors must repay the amount and be charged with interest on the balances, composed of the money so improperly paid by them. *Ib.*

—— **Since Judicature Act.**]—Where an executor or administrator, after the commencement of a creditor's administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under Judicature Act, 1873, s. 25, sub-s. 11; and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. *Radcliffe, In re, European Assurance Society* v. *Radcliffe*, 7 Ch. D. 733; 26 W. R. 417. S. P., *Vibart* v. *Coles*, 59 L. J., Q. B. 152; 24 Q. B. D. 364; 62 L. T. 551; 38 W. R. 359—C. A.

To prevent such payments being made in any such action, the plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver. *Ib.* *But see next case*, contra.

An administrator or executor may prefer one creditor to another, and there is no equity which entitles the court to interfere except after judgment for administration. Therefore the plaintiff in a creditor's action for administration is not entitled to interim relief against the executor or administrator unless a case is shewn of the assets being wasted. *Harris, In re, Harris* v. *Harris*, 56 L. J., Ch. 754; 56 L. T. 507; 35 W. R. 710. Approved, *Wells, In re, Molony* v. *Brooke*, 59 L. J., Ch. 810; 45 Ch. D. 569; 63 L. T. 521; 39 W. R. 139.

—— **Legacy.**]—Where an administrator, possessed of the intestate's goods, gave legacies and died, and his executor, without compulsion, and pending a suit in right of the intestate to recover the goods, paid the legacies, the court would not relieve him, for his payment was voluntary, and with notice that the intestate's right to the goods was controverted. *Hodges* v. *Waddington*, 2 Ch. Ca. 9.

f. Right of Indemnity.

In General.]—The court will protect an executor having done that which it would order him to do. *Howe* v. *Dartmouth*, 7 Ves. 150; 6 R. R. 96. And see *Lee* v. *Brown*, 4 Ves. 369; 4 R. R. 208.

Under Lord St. Leonards' Act—Notice to Creditors by Advertisement.]—The 22 & 23 Vict. c. 35, is retrospective in its operation. *Smith* v. *Smith*, 1 Dr. & Sm. 384; 7 Jur. (N.S.) 652; 4 L. T. 44; 9 W. R. 406.

An executor who has distributed the assets of his testator, after issuing advertisements and taking the steps pointed out by the 22 & 23 Vict. c. 35, s. 29, will have the same protection as if he had administered the estate under a decree of the court, and if he should have retained any legacies as trustee, after appropriating them for the benefit of the cestuis que trustent, he will no longer be under any liability qua executor. *Clegg* v. *Rowland*, 36 L. J., Ch. 137; L. R. 3 Eq. 368; 15 L. T. 385; 15 W. R. 251.

—— **Next of Kin.**]—The 22 & 23 Vict. c. 35, s. 29, is not confined to claims of creditors of the testator or intestate, but applies also to persons having claims as next of kin. *Newton* v. *Sherry*, 45 L. J., C. P. 257; 1 C. P. D. 246; 34 L. T. 251; 24 W. R. 371.

—— **Sureties in Administration Bond.**]—It also affords protection to the sureties in an administration bond, where the administrator, before distributing the assets of the intestate, has pursued the course pointed out by that section. *Ib.*

—— **Sufficiency of Notice.**]—A notice addressed to "creditors and other persons having claims or demands against or upon the estate of the intestate," requiring them to send in particulars of their claims or demands upon the estate to the administrator, or that, in default thereof, he would, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims and demands of which he should then have had notice, is a sufficient notice under the statute to a person having a claim as next of kin. *Ib.*

The daughter of the intestate left her home

at an early age (in 1857), changed her name, and, without notice to any of her relatives, went to America. In 1871 she returned to England and endeavoured to find her mother; but, the mother having changed her residence and married again, she was unable to find her. She again came to England in 1874, when she found that her mother was dead. In the meantime a sister of her mother had obtained letters of administration, and, after advertising in the "London Gazette" and in "The Times" and another London newspaper, in the terms of s. 29 of 22 & 23 Vict. c. 35, for "creditors and other persons having claims or demands against or upon the estate of the deceased," distributed the assets amongst the brother and two sisters (herself being one) of the deceased, being ignorant that the daughter of the intestate was still living. In an action by her (who had procured the revocation of the letters of administration granted to her aunt, and a fresh grant to herself, and an assignment of the administration bond) against the sureties: —Held, that the notice being good in form, and the publication all that could reasonably be required under the circumstances, s. 29 of 22 & 23 Vict. c. 35, afforded a good defence. *Ib.*

The executors of a testator whose estate was liable to replace trust money in consequence of a breach of trust are not protected from liability under 22 & 23 Vict. c. 35, s. 29, they having only issued notices for claims against the testator's estate, to be sent in within three weeks, by advertisement in local newspapers in the neighbourhood where the testator resided, and not in the "London Gazette." *Wood* or *Woods* v. *Weightman*, L. R. 13 Eq. 434; 26 L. T. 385; 20 W. R. 459.

There is no absolute rule that notices issued by executors, under s. 29 of the act 22 & 23 Vict. c. 35, to creditors and others to come in and claim against the estate of the testator should be published in a London daily newpaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether executors have given such notices as are sufficient to entitle them to the protection of s. 29, the court will have regard to the circumstances of the particular case, such as the place of residence of the testator and his position in life. *Wood* v. *Weightman*, supra, explained. *Bracken, In re, Doughty* v. *Townson*, 59 L. J., Ch. 18; 43 Ch. D. 1; 61 L. T. 531; 38 W. R. 48—C. A.

A testator was a small farmer in the country. He had lived at the same place for forty years previously to his death, and had never been engaged in any other occupation than that of farming his own land, consisting of about fifty-two acres. After his death his executors issued a notice inviting creditors and others to come in and make their claims against the testator's estate. The notice was published once in each of three local newspapers, and once in the "London Gazette," but it was not published in any other London newspaper. The notice fixed the period of a month from its date for the bringing in of claims, but it was not published till a day or two after its date. After the expiration of the notice the executors distributed the estate among the claimants of whose claims they had notice:—Held, that, as against claims of which they had not then any notice, the notice was sufficient to entitle the executors to the protection given by s. 29. Quære, whether an appeal lies against the decision of the judge on such a point. *Ib.*

The executor of a testator whose estate was liable to replace trust money, in consequence of a breach of trust:—Held, not protected from liability under 22 & 23 Vict. c. 35, s. 29, he having published notices in one local paper twice, and in the "General Advertiser" twice, the time allowed by the first notice published in the latter paper being less than one month from the date of publication. *Stuart* v. *Babington*, 27 L. R., Ir. 551.

—— **Notice of Claim against Estate.**]—An executor with notice of a claim against his testator's estate is not discharged from liability to satisfy that claim by the fact that the person entitled to make the claim has failed to send in particulars of it in answer to an advertisement for creditors under 22 & 23 Vict. c. 35, s. 29. *Land Credit Co. of Ireland, In re, Markwell's Case*, 21 W. R. 135.

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund. *Jerris* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

—— **Duty to give Information of Parties receiving Money.**]—A personal representative who has duly distributed the assets under 22 & 23 Vict. c. 35, s. 29, ought to give an unpaid creditor full information as to particular parties among whom he has so distributed the assets; but for this purpose a reference to the residuary account passed by him is sufficient. *Lindsey, In re, Filgate* v. *Lindsey*, Ir. R. 8 Eq. 61.

If he did not give such information before suit instituted by the creditor, he will be refused the costs of defending himself and claiming the protection of the statute. *Ib.*

—— **Calls.**] — When an administratrix had distributed the whole of the intestate's assets without making provision for calls on shares after being placed on the list of contributories in a winding-up:—Held, that there ought to be a decree for payment, and in default for administration. *Price* v. *Mayo*, 43 L. J., Ch. 402; 22 W. R. 401.

An executor who held shares in a solvent banking company paid a legacy out of the assets. Afterwards the company stopped payment and was ordered to be wound up, and calls were made:—Held, that the executor was not entitled to be allowed the amount of the legacy in his accounts. *Taylor* v. *Taylor*, 39 L. J., Ch. 676; L. R. 10 Eq. 477; 23 L. T. 134; 18 W. R. 1102. And see *Newcastle Banking Co.* v. *Hymers*, 22 Beav. 367, before the 22 & 23 Vict. c. 35.

The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate; afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed: —Held, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund. *Jerris* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

Executors are not bound, in distributing their testator's estate, to retain assets in their hands to meet a liability of which they have notice unless the liability amounts to a debt. Subject to s. 75 of the Companies Act, 1862, the liability of a shareholder for future calls is not a debt. *Kershaw, In re, Whittaker* v. *Kershaw*, 60 L. J., Ch. 9 ; 45 Ch. D. 320 ; 63 L. T. 203 ; 39 W. R. 23 —C. A. *And see further*, X. *c.* 6, col. 1544, post.

—— **Mortgage Debt.**]—Where executors, who were actually aware of an apparently well-secured mortgage affecting their testator's real estate, having issued the usual statutory advertisement for creditors, and received no reply thereto from the mortgagee, distributed the personal estate among the legatees without providing thereout for the mortgage debt, which the real estate afterwards proved insufficient to meet :—Held, that the executors were personally liable to the mortgagee for such deficiency to the extent of the assets so distributed. *Scottish Equitable Life Assurance Society* v. *Beatty*, 29 L. R., Ir. 290—C. A.

—— **Unpaid Legacy.**]—This was an action by a legatee under the will of F., who died in 1870, asking for payment of her legacy, which was directed to be raised out of real estate, and the non-raising of which she alleged to be a breach of trust, and for the execution of the trusts of F.'s will. There had originally been three executors and trustees of F.'s will ; one of these, J., still survived, and was a party to the action. C. H. F., another of the executors, had died in 1878. The executors of C. H. F. were made defendants, but claimed to be dismissed on the ground that in October, 1879, they had issued advertisements for claims under the provisions of 22 & 23 Vict. c. 35, s. 29, that no claim had been made for the legacy, and they had distributed the whole of C. H. F.'s estate. The plaintiff insisted that they ought to be retained as defendants : (1) because J., the surviving trustee, had acted as solicitor for the executors of C. H. F., and had committed a breach of trust in not seeing that the plaintiff's legacy was raised, and that the executors of C. H. F. had constructive notice of this breach of trust when they distributed the estate ; (2) because the plaintiff had a right to follow C. H. F.'s estate in the hands of the beneficiaries, and his executors ought to be defendants in order that an account might be had against his estate :—Held, (1) that under the circumstances no notice of the plaintiff's claim could be brought home to the executors of C. H. F. ; (2) that the plaintiff had no right to keep them before the court in order to obtain an account which she could use against the beneficiaries in whose hands she could follow C. H. F.'s assets, but must bring the beneficiaries themselves before the court, if she desired to follow the assets in their hands. *Frewen, In re, Frewen* v. *Frewen*, 60 L. T. 953.

Under Judicial Trustees Act, 1896—Devastavit.]—A testator, who at the date of his death was of high reputation, and apparently abundantly solvent, after bequeathing to his widow a sum of 300*l.*, payable immediately after his death, gave the rest of his property to his widow for life, and after her death to his children. The executor, who had reason to believe that the testator's net assets would amount to at least 20,000*l.*, paid the 300*l.* legacy at once, and also paid some small sums out of income. Four months after the testator's death the executor proved the will and advertised in the usual way for creditors. The claims against the estate, with one exception, were of a trifling character. The testator had for many years acted as agent of very large estates, and the present owner of the estates had, previously to the advertisement for creditors, sent in a claim for sums due to him from the testator as his agent. Immediately after the advertisement an action was instituted against the executor by the present owner and the representatives of his predecessor, alleging defalcations by the testator as agent. The executor, notwithstanding the action, continued to make payments of income to the widow. Judgment having been given for the plaintiffs for a sum which more than exhausted the whole assets of the testator, relief was claimed by the executor under the Judicial Trustees Act, 1896, in respect of the payments he had made to the widow :—Held, that, under the circumstances, the executor was entitled to be relieved in respect of the payment of the 300*l.* legacy and other sums paid by him before the issue of the writ in the action, but not in respect of sums paid subsequently to the writ. *Kay, In re, Mosley* v. *Keyworth*, 66 L. J., Ch. 759 ; [1897] 2 Ch. 518 ; 46 W. R. 74.

—— **Alleged Wilful Default—Acting "honestly and reasonably"—"Fairly to be excused."**]—Where the executor of a deceased solicitor was bonâ fide and on reasonable grounds satisfied that he could not maintain an action against a client personally to recover costs incurred in an administration action and owing to the solicitor, there being an arrangement between the solicitor and the client to the effect that the latter should not be personally liable to the solicitor for the costs, except in the event of his being unable to recover the same in the administration action, it was held that the principle of *Clack* v. *Holland* (19 Beav. 262) was applicable, and that the executor was not guilty of any wilful default ; but that even if the executor was technically liable for a breach of trust, then under s. 3 of the Judicial Trustees Act, 1896, he having acted honestly and reasonably, ought fairly to be excused. *Roberts, In re, Knight* v. *Roberts*, 76 L. T. 479—C. A.

Administration Action—Effect of.]—In an administration suit the order of the court is an indemnity to the executors. *Williams* v. *Headland*, 4 Giff. 495 ; 3 N. R. 412 ; 34 L. J., Ch. 20 ; 10 Jur. (N.S.) 384 ; 9 L. T. 824 ; 12 W. R. 367.

In an administration suit, executors claimed to retain part of the residue as an indemnity against possible liability in respect of mining shares. The court refused the claim, but required the residuary legatees to undertake to answer such liability. *Ib.* S. P., *Addams* v. *Ferick*, 26 Beav. 384.

The decree of the court in an administration suit, where an executor acts bonâ fide, is a complete indemnity to him, and it is not necessary to set apart an indemnity fund. *Dodson* v. *Sammell*, 1 Dr. & Sm. 175 ; 30 L. J., Ch. 799 ; 9 W. R. 887.

Where equity has taken the management of assets from an executor, it will not permit him to be charged for what has been done pursuant to its directions. *Farrell* v. *Smith*, 2 Ball & B. 342.

A decree in an administration suit practically indemnifies executors against any claim in respect of property of which their testator was the surviving trustee and executor. *Lowndes* v. *Williams*, 24 L. T. 465.

A bill was filed for the administration of the estate of the surviving trustee and executor of the will of C. A decree was made, and subsequently a claim was sent in by persons beneficially interested under the will of C. On motion by the executor for leave to take proceedings to administer the estate of C.:—Held, that the executors were practically indemnified by the decree, and the motion was dismissed. *Ib.*

Where an estate is administered and the residue is paid over under an order of the court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. *Dean* v. *Allen*, 20 Beav. 1.

An executor who, in an action at law by a creditor of the testator, has pleaded according to the truth of the case, is, when the assets are taken from and administered in equity, entitled to the protection of the court against any personal liability in respect of such plea. *Gaunt* v. *Taylor*, 2 Hare, 413.

An estate was administered under the court, and, all claims being provided for, the devisee was let into possession. A further claim was afterwards made against the estate:—Held, that the trustees of the will were not justified, of their own authority, in taking possession, to provide for it. *Underwood* v. *Hutton*, 5 Beav. 36.

Leaseholds—Independently of 22 & 23 Vict. c. 35.]—Where the respondent, being remainderman under the settlement after the death of the father, tenant for life, demanded the residue of his father's personal estate of the executor, having power to avoid the leases granted by his father, whose executor might therefore be liable in damages in case of eviction:—Held, that the executor was entitled to indemnity from him, or a confirmation of the leases before he could be required to pay over the residue. *Vernon* v. *Egmont* (*Earl*), 1 Bli. (N.S.) 554.

Executor liable to future contingent demands, in respect of covenants entered into by the testator for payment of rent of premises specifically devised, is entitled to a sufficient indemnity to be given by the legatee; but if there is no surplus after payment of debts, the executor is protected against demands on foot of such covenants, by payments made even to simple contract creditors before notice of the breach. *Wildridge* v. *M'Kane*, 1 Moll. 122.

Executor claiming to retain out of the residue certain parts of the property, to protect himself against a future contingent demand in respect of covenants entered into by the testator for payment of rents and repairs of an estate held by him under lease from a corporation, though there was no existing breach of covenant, nor arrears of rent, in respect of which he was liable; on a bill by the residuary legatee for the property so retained, ordered that the funds in question be made over to the plaintiff, on his giving a sufficient indemnity to the executor; the terms of such indemnity to be settled before the master. *Simmons* v. *Bolland*, 3 Mer. 547.

Where an executor assented unconditionally to a specific bequest of leasehold:—Held, that he could require no indemnity against covenants from the residuary legatees. *Shadbolt* v. *Woodfall*, 2 Coll. C. C. 30; 9 Jur. 229.

A testator, to whom the interest in a lease was assigned, entered into an express covenant with his assignors, the Commissioners of Public Works, to pay the rent reserved by the lease to the commissioners, and further to indemnify them from the payment thereof:—Held, that the executor was entitled to an indemnity from the parties entitled to the assets in respect of his liability to the rent, although the commissioners might possibly be entitled to insist that they were not personally liable, having contracted to pay it as commissioners and overseers of public works in Ireland. *Trevor* v. *Thomas*, 13 Ir. Eq. R. 222.

In an administration suit, it appeared that the testator and his surviving partners were lessees of certain ironworks and premises for a term of years of which eleven were unexpired, and as such lessees were subject to covenants for rent, repairs, insurance, &c., and that by the articles of partnership the executors of a deceased partner might elect to become partners in the concern, or to withdraw the capital of the deceased therefrom:—Held, that although the executors had elected not to become partners, and no breach of the covenants appeared to have happened, yet as such covenants, if broken, might leave the estate of the testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained; or if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund the same, if required, to satisfy any future demand. *Fletcher* v. *Stevenson*, 3 Hare, 360; 13 L. J., Ch. 202; 8 Jur. 307.

Z. T. bequeathed certain leasehold property, to which she had become entitled by will, to R. A., his executors, administrators and assigns absolutely, during the residue of her term therein, subject to the payment of the rent and performance of the covenants reserved and contained in the lease under which she held the premises; and as to her residuary personal estate, subject to the payment of her debts, funeral, testamentary and other expenses, she gave, devised and bequeathed the same to J. B., his heirs, executors, administrators and assigns absolutely. The lease under which the premises thus bequeathed to R. A. were held contained a covenant, by the lessee, to keep them in repair. It appeared that at the time of the testator's decease dilapidations had taken place, but whether any of them had taken place before she came into possession of the premises was not shewn. An order having been made letting R. A. into possession, and setting aside a sum of stock out of the testatrix's estate to indemnify the executors:—Held, on appeal, that R. A. took the property cum onere, and was liable, as between himself on the one hand and the executors of Z. T. and her residuary legatee on the other, to do the repairs in respect of dilapidations existing at the testatrix's death; held, also, that the executors of Z. T., being liable as between themselves and the lessor in respect of dilapidations which had taken place during their testatrix's lifetime, were entitled to receive from R. A. an indemnity in respect of such liability before he was let into possession.

Hickling v. *Boyer*, 3 Macn. & G. 635; 21 L. J., Ch. 388; 13 Jur. 137.

Where leaseholds, of which a testator was lessee, have been specifically bequeathed, the executors are entitled to indemnity out of the general estate against liability on the covenants, if the leaseholds do not afford or the legatee cannot give a sufficient indemnity. *Garratt* v. *Lancefield*, 2 Jur. (N.S.) 177.

The executors of a lessee held entitled to no further indemnity against the covenants than the personal indemnity of the residuary legatees. *Dean* v. *Allen*, 20 Beav. 1.

Executors of an assignee of leaseholds held after an assignment by them, entitled to have a fund set apart for their indemnity, but refused as to valuable leaseholds of which the testator was original lessee. *Brewer* v. *Pocock*, 23 Beav. 310.

Where leaseholds were devised to three trustees and executors, and one of them having died, the two surviving trustees and executors (one of whom had never acted as executor) under an order of the court assigned the leasehold in trust for themselves and a newly-appointed trustee:—Held, that by such assignment the leaseholds vested in them, quâ trustees, and not quâ executors, and that they were not entitled to an indemnity upon assigning them to the person entitled under the will. *Smith* v. *Smith*, 1 Dr. & Sm. 384; 7 Jur. (N.S.) 652; 4 L. T. 44; 9 W. R. 406.

A lessee by his lease had covenanted to pay rent, to insure, repair, &c., and died leaving several years of his lease to run, but none of the covenants had been hitherto broken:—Held, that the lessor was not entitled to have any portion of the assets brought into court as a security for the performance of the covenants in the lease. *King* v. *Wallcott*, 16 Jur. 237.

When there was an indemnity fund in court for the protection of executors against the rents and covenants of the leases which had formed part of their testator's estate, the court, on being satisfied that the risk was very small, and that no claim had been made for twenty-one years, ordered the whole fund to be paid out, notwithstanding that some of the leases had about fifty years to run. *Crook* v. *Hendry*, 26 W. R. 325.

On a petition by residuary legatees for payment out of court of their legacy, the executors applied to have part of the funds set apart to indemnify them against a breach of covenant committed by the testator as lessee. No action had been taken by the lessor on the breach, nor had he made any claim under a decree made in a suit for the administration of the testator's estate:—Held, that, under the circumstances, the lessor had lost all remedy against the executors, who therefore required no indemnification against the breach of covenant. *Ross* v. *Tatham*, 38 L. J., Ch. 577; 17 W. R. 960.

A testator was the original lessee of certain leasehold property. In a suit to administer the estate the usual advertisement for creditors was made, but the landlord made no claim in respect of any breaches of the covenants. Subsequently he gave notice to the executors of such claim. The court refused to distribute the estate without an inquiry in reference thereto, and making a provision for the indemnity of the executors. *Hughes* v. *Young*, 4 N. R. 17.

In an action by the executrix of the assignor of a lease against the executrix of the assignee, upon a covenant by the assignee to perform the covenants in the lease, and indemnify the assignor for the breach of any of them, she pleaded plene administravit, and at the trial proved that the entire assets, including the consideration-money for a sale by him of the lease, had, before the breach of covenant complained of, been applied to the payment of simple contract debts:—Held, a sufficient defence, for that the executrix was not bound to retain the proceeds of such sale for the purpose of indemnifying against any future breach of covenant, although some of the breaches were by non-payment of rent. *Collins* v. *Crouch*, 13 Q. B. 542; 18 L. J., Q. B. 209; 13 Jur. 361.

An executor who pays legacies six months after probate cannot plead such payment in discharge of his testator's liability on a covenant. *Davis* v. *Blackwell*, 9 Bing. 5; 2 M. & Scott, 7; 1 L. J., C. P. 140.

A testator, after some small bequests, appointed his daughter residuary legatee, and appointed her executrix, and another person executor of his will. Part of the estate consisted of leaseholds. The executor was guilty of great misconduct and obstruction, which occasioned much expense to the executrix and delay in the administration of the estate. His solicitors took out an administration summons on behalf of an assignee of a pecuniary legacy, whose name they had refused to give to the executrix, that she might satisfy his claim. The executor commenced an action for the administration of the estate:—Held, that, notwithstanding the executor's misconduct, he was entitled to obtain an indemnity in respect of the leaseholds, and, therefore, to such costs of the action as would have been occasioned by a simple administration summons, but that he must pay all costs of the legatee's administration summons, including the costs of the affidavits used there and in the action, and that he must be disallowed all other costs, charges and expenses incurred since a certain date, when he declined to entertain a reasonable scheme for the administration of the estate submitted to him by the executrix, but that, subject as aforesaid, he should be allowed his costs, charges and expenses properly incurred before the commencement of the action. *Bosworth, In re, Howard* v. *Easton*, 45 L. T. 136; 29 W. R. 885.

—— **Since 22 & 23 Vict. c. 35, s. 27.**]—On the sale of a leasehold before the 22 & 23 Vict. c. 35, the purchaser covenanted to indemnify the vendor against the covenants of the lease. He bequeathed the leasehold to his widow and appointed her his executrix:—Held, that the act applied, and that the executors of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenants. *Green, In re*, 2 De G. F. & J. 121.

Where an indemnity fund is set apart by the court in respect of leasehold property belonging to a testator, it is done for the security of the ground landlord and not for the protection of the executors; and the parties beneficially interested are not entitled to have it paid out, under s. 27 of 23 & 24 Vict. c. 35, without the consent of the ground landlord. *Bunting* v. *Marriott*, 7 Jur. (N.S.) 565; 9 W. R. 264.

A fund set apart in 1857 to answer liabilities of an intestate's estate in respect of leasehold covenants, was distributed in 1865 amongst the next of kin, it appearing that all the leases had either been sold or surrendered, and the 22 & 23 Vict. c. 35, s. 27, having passed in the meantime. *Reilly* v. *Reilly*, 34 Beav. 406.

Service on the ground landlord of a petition for payment out of a fund set aside as an indemnity to executors on sale of their testator's leaseholds is unnecessary. *Sowdon* v. *Marriott*, 28 L. T. 867; 21 W. R. 808.

When there was an indemnity fund in court for the protection of executors against the rents and covenants of the leases which had formed part of the testator's estate, the court, on being satisfied that the risk was very small and that no claim had been made for twenty-one years, ordered the whole fund to be paid out, notwithstanding that some of the leases had about fifty years to run. *Crook* v. *Hendry*, 26 W. R. 325.

—— **Administration Action, Effect of.**]—In an administration suit, instituted before the 22 & 23 Vict. c. 35, a fund was set apart as an indemnity to the executors in respect of any possible breaches of covenant by their testator, in regard to his leasehold property. After the passing of the act the party entitled to the residuary estate petitioned for payment out of court of the indemnity fund. The court being of opinion that the act was not retrospective, that petition was dismissed. *Dodson* v. *Sammell*, 29 L. J., Ch. 335; 6 Jur. (N.S.) 137; 1 L. T. 429; 8 W. R. 252.

It being subsequently held that the act was retrospective, a petition for rehearing was presented with the same object as the original petition:—Held, that the decree of the court in an administration suit, where an executor acts bonâ fide, is a complete indemnity to him, and it is not necessary to set apart an indemnity fund, and an order was made according to the prayer. *S. C.*, 1 Dr. & Sm. 575; 30 L. J., Ch. 799; 8 Jur. (N.S.) 584; 9 W. R. 887.

The case of an assignment of a leasehold to a residuary legatee is not within the meaning of s. 27 of the 22 & 23 Vict. c. 35. *Ib.*

Where an executor administers his testator's estate under the direction of the court, and brings fully before its attention the covenants in respect of which the estate is liable, he is protected from all future liability. *Waller* v. *Barrett*, 24 Beav. 413; 27 L. J., Ch. 214; 4 Jur. (N.S.) 128. S. P., *Sanford, In re, Bennett* v. *Lytton*, 2 John. & H. 155. *Smith* v. *Smith*, 1 Dr. & Sm. 384. Contra, *Garratt* v. *Lancefield*, 2 Jur. (N.S.) 177. *Brewer* v. *Pocock*, 23 Beav. 310. *Dobson* v. *Carpenter*, 12 Beav. 370. *Cochrane* v. *Robinson*, 11 Sim. 378; 10 L. J., Ch. 109; 5 Jur. 4.

Therefore, where a testator was possessed of leasehold estate in respect of which he was liable upon onerous covenants, in a suit for administration of his estate, the leaseholds were sold and the money brought into court:—Held, that the suit indemnified the executor from all future breaches of covenant; that no part of the testator's estate ought to be set aside to meet contingent liabilities; that the estate ought to be distributed, and that the remedy of any future creditor was not against the executor, but against the parties among whom the estate had been distributed. *Ib.*

g. Right of Retainer.

In General.]—An executor, by an established rule of law, may retain to pay his own debt, and he is not obliged to take in part where there are not assets enough to pay the whole. *Robinson* v. *Cummings*, 2 Atk. 411.

The executor or administrator may retain out of the assets, as well for a debt due in trust for himself as for a debt due to himself. *Cockroft* v. *Black*, 2 P. W. 298.

Who entitled.]—Each executor has entire control over a testator's personal estate; he may release, pay or transfer without the others; and so as to each administrator, though formerly questioned; one executor may retain in satisfaction of his own debt, if no fraud. *Jacomb* v. *Harwood*, 2 Ves. Sen. 265. S. P., *Stewart, In re, Crowder* v. *Stewart*, 50 L. J., Ch. 136; 16 Ch. D. 368; 29 W. R. 331.

The court, in a creditors' suit, refused to order an executor to pay into court money which in his answer he stated to have retained in satisfaction of a debt due from the testator. *Middleton* v. *Poole*, 2 Coll. C. C. 246.

—— **Executor of Executor.**]—The executor of an executor is entitled to retain out of the balance of the produce of the original testator's West India plantation, received by him as consignee appointed by the court, debts due from the testator to him, either in his own right, or as an executor of the deceased executor. *Thomson* v. *Grant*, 1 Russ. 540, n.

O., as executor of A., received 2,010*l.*, the amount of a policy of insurance effected by A. on his life:—Held, that P., who was executor of O., was bound as such to retain that sum as a security against a sum of 8,250*l.*, for which O. had made his assets liable as a security for A. *Owen, In re*, 23 L. R., Ir. 328.

—— **Representative of two Estates.**]—The personal representative of A. has a right of retainer, in respect of a sum due to him from A.'s estate as personal representative of B. *Thompson* v. *Cooper*, 1 Coll. C. C. 85; 13 L. J., Ch. 416; 8 Jur. 164. S. P., *Wynch* v. *Grant*, 2 Drew. 312; 3 Eq. R. 60; 24 L. J., Ch. 6; 18 Jur. 1010; 3 W. R. 6.

The same individual was administrator both of A. and B., whose estates were being administered by the court. A.'s estate was found indebted to B.'s:—Held, that the administrator was entitled, and was bound, at the instance of the parties interested in B.'s estate, to retain the debt out of A.'s assets in preference to A.'s other creditors. *Fox* v. *Garrett*, 28 Beav. 16; 29 L. J., Ch. 423; 6 Jur. (N.S.) 208; 1 L. T. 474.

The administrator of a sole trustee who has died insolvent is entitled, in respect of the trusteeship which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debt due to the trust estate, and is bound to do so if required by the cestuis que trustent. *Sander* v. *Heathfield*, 44 L. J., Ch. 113; L. R. 19 Eq. 21; 31 L. T. 400; 23 W. R. 331.

—— **Joint Executors.**]—Joint executors and administrators must retain their debts ratably, and in proportion to the assets. *Chapman* v. *Turner*, 9 Mod. 268.

One of two executors has a right to retain his own debt out of a balance due from both to the testator's estate. *Kent* v. *Pickering*, 2 Keen, 1; 6 L. J., Ch. 375.

Retainer allowed to one executor out of a legacy to his co-executor, in respect of a devastavit. *Sims* v. *Doughty*, 5 Ves. 243.

—— **Executor who has renounced Probate.**]—An executor who has renounced probate of the will, is not entitled to retain a debt, due to him from the testator, out of assets in his hands. *Smith* v. *North*, 13 Jur. 998.

—— **Right of Representatives of Deceased Executor—Debt under Covenant.**]—An executor's right of retainer is limited to so much of the assets of his testator as comes into the possession or under the control of the executor, or is paid into court during his lifetime. If an executor asserts in his lifetime a right of retainer, but dies without having exercised it, his representatives may exercise that right for the benefit of his estate only as to anything which came into the actual possession or under the actual control of their testator, or which was paid into court during his lifetime. Claims by an executor for breach of a covenant to assign a policy, and to replace furniture, if sold, by other furniture of like value, are claims for damages for breach of pecuniary contracts for which there is a certain standard or measure, and may, therefore, on the authority of *Loane* v. *Casey* (2 W. Bl. 965), be retained. *Compton, In re, Norton* v. *Compton*, 54 L. J., Ch. 904; 30 Ch. D. 15; 53 L. T. 410—C. A.

—— **After Death of Executor.**]—Executor of an executor may retain towards satisfaction of the debt owing by the first testator, because he is executor of the first testator; but if one be indebted by bond to A., and makes A. and B. executors, and dies, and then A. makes C. executor, and dies; in this case C. cannot retain, because he is not executor of the first testator; but B. is executor by survivorship; and the only reason for allowing retainer is because the executor cannot sue himself. *Hopton* v. *Dryden*, Pre. Ch. 179.

But if an executor dies after having claimed a right of retainer, but without having actually exercised it, leaving another executor of the original testator surviving, the executors of the deceased executor have the right of retainer for the benefit of his estate. *Wilson* v. *Coxwell*, 52 L. J., Ch. 975; 23 Ch. D. 764.

The representative of a deceased executor, in accounting for the executor's receipts of the trust estate:—Held, not to be entitled by way of discharge to the amount of a debt owing to the executor from his testator, without evidence of retainer of the debt by the executor in his lifetime. *Burge* v. *Brutton*, 2 Hare, 373; 12 L. J., Ch. 368; 7 Jur. 988.

What amounts to.]—An administrator having claimed his debt before the master, that is sufficient to entitle him to retain it. The administrator entitled to his costs out of the produce of the sale of real estate, his intestate having been a trader. The heir-at-law entitled to his costs from the plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator. *Winter* v. *Hicks*, Taml. 475.

In respect of what Matters—Joint Debts.]—One of three executors, who is also one of two joint creditors, has a right of retainer in respect of his joint debt. *Stewart, In re, Crowder* v. *Stewart*, 50 L. J., Ch. 136; 16 Ch. D. 368; 29 W. R. 331.

One of two executors has a right to retain his own debt out of a balance due from both to the testator's estate. *Kent* v. *Pickering*, 2 Keen, 1; 6 L. J., Ch. 375.

—— **Unliquidated Demand.**]—An executor's right to retain his testator's assets for his own debts extends as well to a debt which can only be ascertained by taking accounts in a court of equity as to a debt which is ascertainable at law. *Morris, In re, Morris* v. *Morris*, 44 L. J., Ch. 178; L. R. 10 Ch. 68; 31 L. T. 491; 23 W. R. 120.

—— **Trade Debts.**]—A testator carried on business in partnership under two firms, both composed of the same individuals, and died, having appointed one of the surviving partners his executor. In a suit for administration of his estate the chief clerk found that the executor had in his hands a balance of 1,675*l.*, including 964*l.* due to the estate from one of the firms; that no account of the dealings and transactions between the partners in either business was ever taken, and it would not answer any useful purpose that the accounts should be taken; but it was alleged that the other of the businesses was carried on at a loss, and that there was due from the testator's estate in respect of the liabilities of the firm carrying on that business 3,105*l.*, and there was due to his estate in respect of his share as a partner in the other firm the sum of 964*l.*:—Held, that the executor was entitled as surviving partner in the creditor firm to retain out of the 1,675*l.* the amount of 964*l.* due from the one firm to the estate, by way of set-off against the amount due to the other firm, and as executor to retain the balance of the 1,675*l.* in part satisfaction of the same debt. *Ib.*

The testator carrying on trade in partnership, and being indebted to the partnership, appoints his partner executor. The executor continues to employ the ships in which the testator had an interest, and dies after the institution of a creditors' suit for the administration of the testator's estate:—Held, that the executor had a right to retain against the testator's debt all profits made during his, the executor's life, notwithstanding the institution of the suit. *Thornton* v. *Stokill*, 1 Jur. (N.S.) 751.

—— **Debt due to Attorney and Agent.**]—A testator, at his death, was indebted to A. B., his attorney and general agent, in 900*l.* and upwards; the agent had in his hands a sum of 900*l.*, and he was appointed executor. On a deficiency of assets:—Held, that A. B. was entitled to retain the 900*l.*, in payment of his claim against the testator. *Potter* v. *Fowler*, 6 L. J., Ch. 273.

—— **Contract of Indemnity.**]—A., at the request of and on a verbal offer by B. to indemnify him against loss, joined with C. in a joint and several promissory note, which he was afterwards compelled to pay:—Held, that the offer to indemnify A. was not an agreement within the Statute of Frauds, and therefore need not be in writing, and that A. having afterwards become the executor of B., was entitled to retain the amount paid by him on the note as a debt due from B.'s estate. *Wildes* v. *Dudlow*, L. R. 19 Eq. 198.

—— **Trusteeship.**]—The administrator of a sole trustee who has died insolvent is entitled, in

respect of the trusteeship which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debt due to the trust estate, and is bound to do so if required by the cestuis que trustent. *Sander* v. *Heathfield*, 44 L. J., Ch. 113; L. R. 19 Eq. 21; 31 L. T. 400; 23 W. R. 331.

B. was the executrix of her late husband, whose estate was insolvent, and who was indebted to the estate of A., of which he was sole trustee, in a considerable sum of money in respect of the proceeds of sale of certain real estate, and therefore the right to receive the money and the obligation to pay were centred in the same person. Under these circumstances B. claimed to be entitled, in priority to all other creditors upon her late husband's estate, to retain out of his personal assets which had come to, or were in her hands, or had been paid into court, a sum in respect of the proceeds of sale of the real estate. The question was, whether an executor or administrator was bound to retain for debts to which he was entitled as trustee when required to do so by his cestui que trust:—Held, on the authority of *Sander* v. *Heathfield* (L. R. 19 Eq. 21), that the right of retainer must be allowed. *Faithfull, In re, Hardwick* v. *Sutton*, 57 L. T. 14.

A marriage covenant with a trustee for securing a provision for the wife may be given in evidence by her, under a plea of plene administravit, in an action brought against her as executrix; and she may retain out of the personal assets so much as is equal to the damages she has sustained by the breach of such covenant. *Loane* v. *Casey*, 2 W. Bl. 965.

But where a covenant was made with trustees in a deed of settlement before marriage, that the intended husband, in case the marriage should take place, would pay or cause to be paid to his intended wife an annuity of 20*l.*; or that his heirs, executors or administrators should pay or cause to be paid to the trustees, or the survivor of them, or the heirs, &c., of such survivor, within —— months after his decease, 400*l.*, to remain vested in them:—Held, that this was not such a covenant as would enable the widow to retain the 400*l.* as administratrix of her husband, and set up the retainer under the plea of plene administravit, because the corpus was to be paid to the trustees. *Thompson* v. *Thompson*, 9 Price, 464.

An executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill from time to time, until sufficient effects were received from the estate of the testator:—Held, that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying assets to pay 3,000*l.* to trustees for her own use in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance. *Bowerbank* v. *Monteiro*, 4 Taunt. 844; 14 R. R. 679.

Where in a marriage settlement a husband covenanted to pay to a trustee certain sums of money upon trust to pay the income to the wife for life, with an ultimate trust for himself absolutely, and died without performing his covenant, having appointed his wife sole executrix; and his creditors brought an administration action against the executrix and obtained an order for accounts under Ord. XV. r. 1, without a decree for administration, and the executrix was afterwards appointed trustee of marriage settlement, and the testator's estate proved insolvent:—Held, that the executrix, notwithstanding the order for accounts, was entitled to apply the assets in her hands as executrix in payment to herself as trustee of the debt due on the covenant in the marriage settlement. *Barratt, In re, Whitaker* v. *Barratt*, 59 L. J., Ch. 218; 43 Ch. D. 70; 38 W. R. 59.

A testator appointed his wife sole executrix of his will. By a settlement executed on the marriage of the testator and his wife certain funds were settled upon trust for the wife for life, with remainder to the children of the marriage. The testator, who acted as solicitor for this trust, appropriated certain of the trust funds. He also appropriated to his own use the residuary estate to which his children were entitled under the will of a testatrix and of which he was one of the trustees. The testator died, and an action was brought by a creditor for the administration of his estate, which was insolvent. The executrix, on behalf of her own life interest, and also on behalf of her children, claimed the right to retain out of the estate of the testator the amounts appropriated by him as above stated:—Held, that the trustees of the settlement and will being the persons to sue for and recover the funds appropriated, and not the executrix, she had no right of retainer. *Dunning, In re, Hatherley* v. *Dunning*, 54 L. J., Ch. 900; 53 L. T. 413; 33 W. R. 760—C. A.

—— **Suretyship.**]—An executor, being surety for his testator, paid the debt after the testator's death:—Held, that he had a right to retain his debt in preference to the other creditors of equal degree. *Boyd* v. *Brooks*, 34 Beav. 7. Affirmed, on appeal, 34 L. J., Ch. 605; 12 L. T. 38; 13 W. R. 419. S. P., *Bathurst* v. *De la Zouch*, Dick. 460.

A surety has a right to retain out of the estate of an intestate against specialty creditors the whole amount of a debt for which he is surety, where the principal debtor, whose administrator he is, has covenanted with him for the due payment thereof to the creditor, although the surety has not himself paid any part of the debt to the creditor. *Allen, In re, Adcock* v. *Evans*, 65 L. J., Ch. 760; [1896] 2 Ch. 345; 75 L. T. 136; 44 W. R. 644.

Quære, whether in such case the surety has the same right under a covenant only of indemnity by the principal debtor. *Ib.*

An executor who is surety for a debt of his testator has a right of retainer by way of indemnity out of legal assets paid by him into court, though at the date of payment into court he has not paid or been called upon to pay the debt to the creditor. *Ferguson* v. *Gibson* (41 L. J., Ch. 640; L. R. 14 Eq. 379), and *Harrison, In re, Latimer* v. *Harrison* (55 L. J., Ch. 687; 32 Ch. D. 395), discussed. Proof allowed after expiration of time fixed by advertisement for bringing in claims. *Giles, In re, Jones* v. *Pennefather*, 65 L. J., Ch. 419; [1886] 1 Ch. 956; 74 L. T. 21; 44 W. R. 283.

—— **After Judgment for Administration.**]—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who was her eldest son, and who was acting under letters of administration granted to him previously. The defendant had joined, as surety, with the intestate in giving a security for certain loans which had been

procured by her for her own purposes, and he claimed to retain out of the assets of the intestate, in or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not, in fact, repaid them, although he was personally liable to do so. The defendant was at one period engaged in farming, and the intestate from time to time made him small advances when he was in want of money, to assist him in carrying on his business, or for his maintenance. The intestate never attempted to recover these moneys, and she took no acknowledgment for them. The plaintiffs sought to charge the defendant with the moneys so received by him. By the chief clerk's certificate it was certified, amongst other things, that the defendant had made the claim above mentioned, which the chief clerk had allowed, and that the plaintiffs had brought in the set-off before referred to, but which the chief clerk had disallowed. The plaintiffs took out a summons to vary the chief clerk's certificate:—Held, that the right of the retainer existed notwithstanding the judgment for administration, and notwithstanding that the defendant had not in fact repaid the loans before the judgment; and that, upon his repaying them, he would be permitted to retain. *Orme, In re, Evans* v. *Maxwell*, 50 L. T. 51.

—— **Legacy.**]—In an administration suit an executor has no right of retainer in respect of a debt proved by a creditor under the decree, and subsequently bequeathed to him by the creditor. *Jones* v. *Evans*, 45 L. J., Ch. 751; 2 Ch. D. 420; 24 W. R. 778.

On motion by the plaintiffs (residuary legatees), that the executor, who was one of the pecuniary legatees under the will should pay into court the amount admitted by his answer:—Held, that the executor was not entitled to retain the amount of his legacy before the accounts had been taken. *Harding* v. *Harding*, 16 L. J., Ch. 179.

—— **Debt in respect of Annuity.**]—An intestate by deed covenanted to pay to a woman, who afterwards became his administratrix, an annuity of 6*l.* a week. The intestate's estate was insolvent:—Held, that the administratrix was not entitled to retain the present capitalised value of her future annuity, but was only entitled to retain arrears due, and to prove for such value against the estate. *Beeman, In re, Fowler* v. *James*, 65 L. J., Ch. 190; [1896] 1 Ch. 48; 73 L. T. 555; 44 W. R. 247.

—— **In respect of Administration Expenses.**]—Under the plea of plene administravit, an administrator may prove the expenses of administration, and shew that he retained money to that amount. *Gillies* v. *Smither*, 2 Stark. 528.

—— **Debt to Firm—Right of Executor Partner.**]—A. being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue. A. died without having satisfied the original debt, and having contracted further debts subsequently to the execution of the deed:—Held, that his executors, two of whom were partners in the house in trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt. *De Tastet* v. *Shaw*, 1 B. & Ald. 664.

—— **Husband Executor—Funeral Expenses of Wife.**]—A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *McMyn, In re, Lightbown* v. *McMyn*, 55 L. J., Ch. 845; 33 Ch. D. 575; 55 L. T. 834; 35 W. R. 179.

—— **Loan by Wife to Husband to be used in Business.**]—Sect. 10 of the Judicature Act, 1875, does not operate to introduce s. 3 of the Married Woman's Property Act, 1882, into the administration of a deceased person's estate so as to deprive his widow and administratrix of her right to retain out of his estate the amount of a debt due to her from the deceased, even though such debt is due in respect of moneys advanced by her to him for the purpose of being used, and which were in fact used, by him in his business. *May, In re, Crawford* v. *May*, 60 L. J., Ch. 34; 45 Ch. D. 499; 63 L. T. 375; 38 W. R. 765. And see *Leng, In re, Turn* v. *Emmerson*, 64 L. J., Ch. 468; [1895] 1 Ch. 652; 12 R. 202; 72 L. T. 407; 43 W. R. 406—C. A. *Moore* v. *Smith*, [1895] 1 Ir. R. 512—C. A.

Effect of Proceedings — Insolvent Estate, Petition for Administration of.]—The right of an executor to retain a debt due to himself from the testator is not affected by s. 125 of the Bankruptcy Act, 1883, where such right has been exercised before the notice prescribed by that section has been given to the executor of the presentation to the court of a petition for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy. *Lewis, Ex parte, Williams, In re*, 8 Morrell, 65.

—— **Balance Order for Amount of Calls.**]—A balance order obtained by a liquidator of a company in course of winding up against the executors of a deceased contributory for the payment of the amount of calls due from him, does not operate as a judgment to destroy the executors' right of retainer in respect of a debt due to them from their testator's estate. *Hubback, In re, International Hydropathic Co.* v. *Hawes*, 54 L. J., Ch. 923; 29 Ch. D. 934; 52 L. T. 908; 33 W. R. 666—C. A.

—— **Order for Inquiries as to Persons entitled to Fund in Court.**]—By an order made in the presence of A., the legal representative of B., B.'s share of a fund in court was carried to a separate account, and inquiries were directed as to the persons entitled thereto. A. was also in the position of a statute-barred creditor of B. to the full amount of his share. Pending the prosecution of the inquiries, A. applied to have the money paid out to him as the legal personal representative of B. in order to exercise his right of retainer in respect of the statute-barred debt:—Held, that by submitting to the order for inquiries he had waived his right of retainer. *Trevor* v. *Hutchins*, 65 L. J., Ch. 738; [1896] 1 Ch. 844; 74 L. T. 470; 44 W. R. 417—C. A.

—— **Administration Action—Receiver appointed.**]—A creditor who has been appointed

executor by his debtor, and who, as executor, has got in assets to the full amount of his debt, is entitled to priority, in respect of his right of retainer, after a creditor's administration action has been commenced, and he has handed over the assets to a receiver appointed in the action, and this notwithstanding that he has proved for his debt in the action. *Harrison, In re, Latimer* v. *Harrison*, 55 L. J., Ch. 687; 32 Ch. D. 395; 55 L. T. 150; 34 W. R. 736.

In a creditor's administration action brought against an executrix, who was also a creditor of the testator, a receiver was appointed, who obtained possession of certain legal assets as to which the executrix would have had a right of retainer if they had come to her hands:—Held, following with reluctance, *Richmond* v. *White* (12 Ch. D. 361, post), and *Birt, In re* (22 Ch. D. 604, post), that after the appointment of the receiver the executrix could not claim retainer out of any assets got in by him. *Williams' Estate, In re* (L. R. 15 Eq. 270), distinguished. *Jones, In re, Calver* v. *Laxton*, 55 L. J., Ch. 350; 31 Ch. D. 440; 53 L. T. 855; 34 W. R. 249.

The estate was insolvent, there were both specialty and simple contract creditors, and the executrix, who was a simple contract creditor, had got in certain legal assets before the receiver was appointed:—Held, that she could only exercise her right of retainer as against creditors of equal degree with herself; and accordingly, that the assets being treated as divided ratably among the specialty and simple contract creditors, she could retain her debt against the dividends payable to the simple contract creditors to the extent of the legal assets received by him. *Ib.*

Hinde Palmer's Act, 1869, the object of which was only to place specialty and simple contract creditors on an equal footing inter se for the purpose of distribution, ought not to be so construed as to give incidentally to an executor the power to defeat specialty as well as simple contract creditors; although the act, by augmenting the fund for the payment of simple contract debts, has to that extent enlarged the right of retainer. *Ib.*

Out of what Assets—Equitable Assets.]—There is no right of retainer out of equitable assets. *Poole, In re, Thompson* v. *Bennet*, 46 L. J., Ch. 803; 6 Ch. D. 739; 37 L. T. 119; 25 W. R. 862. S. P., *Duignan* v. *Croome*, 41 L. T. 672. What are equitable assets, *see* x. *a.* 1, post, col. 1418.

—— **Legacy.**]—G., in 1836, borrowed 1,000*l.* of C. upon the promissory note of himself and his brother W., who joined as surety, which sum (together with a further loan of 1,000*l.* from C.) he further secured, in 1839, by depositing with C. a policy of assurance upon his own life for 2,000*l.* In 1841 C. bequeathed a deferred legacy of 1,000*l.* to W., and in 1843 C. died. In 1845 G. became a bankrupt. The executrixes of C. then surrendered the policy, and proved for the balance of the debts against the estate of G. The legacy became payable to W. in 1859:—Held, that the surviving executrix was entitled to retain out of the legacy the amount due from W. as surety, notwithstanding the bar of the Statute of Limitations; and also that the surrender of the policy of assurance was a proper act, and did not release the surety or prejudice the right of retainer of the executrix. *Coates* v. *Coates*, 33 L. J., Ch. 448; 10 Jur. (N.S.) 532; 9 L. T. 795; 12 W. R. 634.

A wife whose husband was indebted to a testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it for value, by deed duly executed and acknowledged by her under 20 & 21 Vict. c. 57. On the reversion falling in, the executors of the testator claimed to be entitled to retain the amount of the debt out of the legacy:—Held, that there was no right of retainer, and that the assignee must be paid in full. *Batchelor, In re, Sloper* v. *Oliver*, 43 L. J., Ch. 101; L. R. 16 Eq. 481; 21 W. R. 901.

Executors who have set apart and appropriated assets to meet a legacy, cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of the testator. *Ballard* v. *Marsden*, 49 L. J., Ch. 614; 14 Ch. D. 374; 42 L. T. 763; 28 W. R. 914.

Where executors and trustees have paid a pecuniary legacy, not charged on real estate, to a legatee, who is also one of the residuary legatees of the proceeds of sale of the testator's real estate, the legatee covenanting to repay the legacy if required so to do; on the personal estate, after defraying prior charges upon it, proving to be insufficient to meet the pecuniary legacy, the executors and trustees are entitled, as against a mortgagee, subsequent in date, of the legatee's residuary interest in the proceeds of sale of realty, to retain thereout a sum equal in amount to the pecuniary legacy which was paid in advance. *Moore, In re, Moore* v. *Moore*, 45 L. T. 466.

Retainer allowed to one executor out of a legacy to his co-executor in respect of a devastavit. *Sims* v. *Doughty*, 5 Ves. 243.

—— **Surplus of Mortgage Debt.**]—A mortgagee of a policy who, after a mortgagor's death, has received the policy moneys and paid his mortgage debt, is simply a trustee of the surplus for the mortgagor's estate, and cannot retain it to satisfy a simple contract debt due to himself in preference to the claims of other creditors. *Talbot* v. *Frere*, 9 Ch. D. 568; 27 W. R. 148.

The fact of his being the mortgagor's executor gives him no right so to retain the surplus in preference to creditors of a higher degree. *Ib.*

—— **Proceeds of Mortgaged Premises—General Assets.**]—Where in a suit by an equitable mortgagee against the executor and devisee, the general assets proved insufficient to pay the debts and costs, and the parties beneficially interested under the will disclaimed:—Held, that the plaintiff was entitled to the proceeds of the sale of the mortgaged premises, and the executors to retain their own debts in full out of the general assets, and the residue to be applied, first, in satisfaction of the costs of the executor; secondly, of the plaintiff and the purchaser; thirdly, of the devisee, the defendant beneficially entitled under the devise; and lastly, of the debts remaining due of the plaintiff and the other creditors. *Tipping* v. *Power*, 1 Hare, 405; 11 L. J., Ch. 257; 6 Jur. 434.

—— **Proceeds of Sale of Realty.**]—If lands are devised to trustees for payment of debts, simple contracts and specialities shall be paid in proportion, and, though the trustees are creditors and sureties for the testators, they shall not prefer themselves. *Anon.*, 2 Ch. Ca. 54.

Devisee has a right to retain specialty debt due to himself or to his trustee out of the produce of the estate devised to him. *Loomes* v. *Stotherd*, 1 Sim. & S. 458; 1 L. J. (O.S.) Ch. 220.

So also if devisee be executor for deceased creditor, he may first retain for his own debt, and next for the debt of his testator, the creditor. But not in priority to costs. *Ib.*

Real estate is by the statute 3 & 4 Will. 4, c. 104, made assets for the payment of debts only in equity, and an executor has no right of retainer against it. Personal estate being the primary fund for the payment of specialty debts, the circumstance that the specialty debts of a testator, whose personal estate is insufficient to pay those debts in full, have been actually paid in the first instance partly out of the proceeds of the sale of real estate, will not give the executor a right to retain his own simple contract debt out of personal estate subsequently realised, which he would not have had if the whole personal estate had been applied in the first instance in payment of the specialty debts. *Walters* v. *Walters*, 50 L. J., Ch. 819; 18 Ch. D. 182; 44 L. T. 769; 29 W. R. 888.

A trustee for sale of a testator's real estate for the payment of debts has no right of retainer for a debt due to him from the testator, although he may be also executor. *Bain* v. *Sadler*, 40 L. J., Ch. 791; L. R. 12 Eq. 570; 25 L. T. 202; 19 W. R. 1077. But see *Hall* v. *Macdonald*, 14 Sim. 1.

Where real estate has been sold by the court under 3 & 4 Will. 4, c. 104, the heir-at-law or devisee has no right to retain out of the proceeds the amount of a simple contract debt due to himself. *Ferguson* v. *Gibson* (L. R. 14 Eq. 379) post, explained. *Illidge, In re, Davidson* v. *Illidge*, 53 L. J. Ch. 991; 27 Ch. D. 478; 51 L. T. 523; 33 W. R. 18—C. A.

There is nothing in Hinde Palmer's Act to prevent a specialty creditor, where the heirs are bound, if he is the heir-at-law, from retaining the amount of his debt.—Per Cotton, L. J. *Ib.*

—— **Assets received Subsequent to Decree.**]—Administrator may retain his debt, though decree has been made for administration of assets in suit by other creditors, and though assets out of which he seeks to retain came to his hands since decree. *Nunn* v. *Barlow*, 1 Sim. & S. 588; 2 L. J. (O.S.) Ch. 123; 24 R. R. 242.

Priority.]—An executor is not entitled to retain in preference to a creditor in higher degree. *Talbot* v. *Frere*, 9 Ch. D. 568; 27 W. R. 148.

An administrator in India, being a creditor of the intestate by specialty, and also by simple contract, possesses himself of assets not sufficient to discharge the two debts which are due to him, and claims against the assets possessed by another administrator in England:—Held, that his right of retainer must be exercised in satisfaction of the specialty debt; and that he will rank only as a simple contract creditor upon the assets in England. *Johnson* v. *Ward*, 2 L. J. (O.S.) Ch. 137.

—— **Against Specialty Creditors.**]—A father died leaving a deficient estate, his wife and daughter being executrixes. The wife having real estate settled on her for life, with a general power of appointment, had appointed it as collateral security for a mortgage debt of her husband. This debt had not been paid at the date of the decree:—Held, that the right of the widow as surety to be indemnified created a simple contract debt only, and did not entitle her to retain as against specialty creditors. *Ferguson* v. *Gibson*, 41 L. J., Ch. 640; L. R. 14 Eq. 379. And see *Illidge, In re, Davidson* v. *Illidge*, 53 L. J., Ch. 991; 27 Ch. D. 478; 51 L. T. 523; 33 W. R. 18—C. A., supra.

The daughter was absolutely entitled under a settlement, subject to her father's life interest, to funds out of which the trustees had power to advance 2,000*l.* to the father on his bond, which they did. They afterwards made large further advances to him on promissory notes:—Held, that the daughter had a right to retain as against specialty creditors the 2,000*l.* and interest from his death, but not the subsequent advances. *Ib.*

Extent of Right — Against Compounding Debtor.]—D., who was indebted to his father L., on a bill of sale, and a promissory note, was adjudicated bankrupt. At a meeting of the creditors of D. a composition of 2*s.* 6*d.* in the pound was accepted in satisfaction of the debts due to them, and the bankruptcy was annulled. L., who did not prove his debt, and was not paid the composition, died, having bequeathed to D. a share of his estate. The executors who proved the will (D. being an executor, who did not prove) did not prove the debt under the composition. D. assigned his share of the estate to B., who brought an action for the administration of L.'s estate. The executors claimed a right of retainer against B. for the debt:—Held, that the amount of composition was substituted for the provable debts, whether such debts were proved by the creditors or not; and that the executors were not entitled to the right of retainer against the bequest of the share of the estate for the whole debt, but only for the composition on the debt and interest; six years' arrears of interest on the promissory note, and the whole arrears on the bill of sale. *Orpen, In re, Beswick* v. *Orpen*, 50 L. J., Ch. 25; 16 Ch. D. 202; 43 L. T. 728; 29 W. R. 467.

How Lost—Renunciation.]—An executor, who has renounced probate of the will, is not entitled to retain a debt, due to him from the testator, out of assets in his hands. *Smith* v. *North*, 13 Jur. 998.

—— **Taking Grant as Nominee of Creditor.**]—A right of retainer is not prejudiced by the circumstance that the administration is granted to another for the use of the creditor, a lunatic, any more than if durante minore ætate, nor that the debt is due to a trustee. *Franks* v. *Cooper*, 4 Ves. 763.

—— **Executor, Mortgagee and Legatee.**]—Where an executor is mortgagee and also a legatee, and the personal estate is insufficient to pay the mortgage debt and legacies, the executor is not bound to pay the mortgage debt out of the first assets in his hands, and is not prejudiced by not doing so. *Binns* v. *Nichols*, 35 L. J., Ch. 635; L. R. 2 Eq. 256.

—— **Executor Suing on Behalf of Himself and all other Creditors.**]—In the administration of a testator's estate, the right of an executor to retain for his debt is not affected by the circumstances that he is himself the plaintiff, suing on behalf of

himself and all other the creditors, and that he has submitted to account in the ordinary form of an administration decree. *Campbell. In re, Campbell* v. *Campbell*, 16 Ch. D. 198; 43 L. T. 727; 29 W. R. 233.

—— **Administration Decree.**]—The right of a personal representative to retain, out of the assets in his possession, a debt due to him from the deceased, is not affected by the circumstance that he did not acquire the character of personal representative till after the usual decree had been made in a suit instituted by creditors against the former administrator. *Nunn* v. *Barlow*, 1 Sim. & S. 588; 2 L. J. (O.S.) Ch. 123; 24 R. R. 242.

An administrator of a deceased executor of a testator in a cause is entitled, as against specialty creditors of such testator, to retain assets of his intestate, who had died indebted to the estate of the testator, towards payment of a judgment debt, recovered by himself against his intestate in his lifetime. *Horne* v. *Shepherd*, 26 L. J., Ch. 817; 3 Jur. (N.S.) 806.

In taking the accounts of the estate of S. S., who died insolvent, the master found that C. S., who died insolvent and intestate, had, as executor and trustee, received and paid several sums, and that there remained a balance due from C. S.'s estate. D. was appointed administrator of the estate of C. S., and in that capacity received 446*l.* 18*s.*, and paid 142*l.* 10*s.* 11*d.*, and the balance he claimed to retain in part payment of a judgment recovered by him against C. S. for debt and costs, but which had not been registered. D. also claimed to retain the outstanding estate of C. S. towards the payment of his judgment debt:—Held, on a bill filed by creditors of S. S. for the administration of his estate, and claiming to have the assets of C. S. handed over, that D. was entitled to retain such assets in part payment of his judgment debt. *Ib.*

—— **Payment into Court.**]—An administrator does not lose his right of retainer by paying the assets into court, where the fund in court is insufficient to discharge the administrator's debt; his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied. *Chissum* v. *Dewes*, 5 Russ. 29; 29 R. R. 10.

The right of retainer of an executor is not lost by payment into court, and takes precedence of the costs of suit. *Tipping* v. *Power*, 1 Hare, 405; 11 L. J., Ch. 257; 6 Jur. 434. S. P., *Langton* v. *Higgs*, 5 Sim. 228; 1 L. J., Ch. 150; *Hall* v. *Macdonald*, 14 Sim. 1.

Semble, that the executor's right to retain for his own debt may be asserted, not only after the assets have been paid by him into court, but at any time before the distribution of the estate. *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415.

An executor admitting assets, and ordered to bring them in, cannot rely upon his own demands set forth in a charge under the decree, but not proved, as cause against the issuing of an attachment for noncompliance with the order; nor would the court extend the time for bringing in the money until after the master should have made his report; there having already been unreasonable delay. *D'Arcy* v. *D'Arcy*, 1 Ir. Eq. R. 407. But see *Middleton* v. *Poole*, 2 Coll. C. C. 246.

—— **Payment by Person other than Executor.**]—In an action by residuary legatees against an executor to administer an insolvent estate, after the usual administration judgment had been given, an order was made in chambers, on the application of the plaintiffs and in the presence of the executor, pursuant to which an insurance company paid certain policy moneys which formed part of the assets of the testator into court to the credit of the cause. Upon the further consideration of the action, the executor, who was a creditor of the testator, claimed to retain his own debt out of the moneys so paid in, in priority to the costs of the action and the debts of the other creditors:—Held, that the payment into court was in substance a payment by the executor, and that he was entitled to a right of retainer out of the fund. *Richmond* v. *White*, 48 L. J., Ch. 798; 12 Ch. D. 361; 41 L. T. 570; 27 W. R. 878—C. A.

—— **Appointment of Receiver.**]—The retainer of his debt by an executor as against a receiver appointed by the court is improper. *Davenport* v. *Moss*, 14 L. T. 133; 14 W. R. 453.

—— **Appointment of Receiver—Solicitor—Administrator.**]—In a creditor's administration action, brought against the administrator of an intestate (the defendant being a solicitor, and a member of the firm of solicitors who were acting for the plaintiff), after judgment for administration had been pronounced, an order was made on the application of the plaintiff by his solicitors for the appointment of a specified person, "upon his giving security," to receive the rents of the intestate's real estate, and to collect and get in his outstanding personal estate. On the application for this order the defendant made an affidavit stating his approval of the person proposed. Before the receiver had perfected his security some money arising from the sale of furniture belonging to the intestate was received by the defendant's firm, and appropriated by him, and he claimed to retain out of it a debt due to him by the intestate:—Held, that, by reason of the relation in which the defendant stood to the plaintiff as a member of the firm of solicitors who were acting for him, the defendant stood in no better position than he would have stood after the receiver had perfected his security, and that the defendant could not under the circumstances exercise his right of retainer. *Wickens* v. *Townshend* (1 Russ. & My. 361) applied. *Birt, In re, Birt* v. *Burt*, 52 L. J., Ch. 397; 22 Ch. D. 604; 48 L. T. 67; 31 W. R. 334.

How affected by Statute—Hinde Palmer's Act (32 & 33 Vict. c. 46).]—The right of retainer is not affected by Hinde Palmer's Act abolishing the distinction between specialty and simple contract debts. *Stewart, In re, Crowder* v. *Stewart*, 50 L. J., Ch. 136; 16 Ch. D. 368; 29 W. R. 331.

The right of retainer by an executor has not been abolished by Hinde Palmer's Act, nor has it been enlarged so as to enable the executor to retain his debt as against a creditor of higher degree than himself. Notwithstanding the act, an executor who is only a simple contract creditor of his testator cannot retain his debt as against a specialty creditor. If an executor dies after having claimed a right of retainer, but without having actually exercised it, leaving another executor of the original testator surviving, the executors of the deceased executor have the right of retainer for the benefit of his estate. *Wilson* v. *Coxwell*, 52 L. J., Ch. 975; 23 Ch. D. 764.

A right of retainer being claimed on behalf of the estate of an executor who was a simple contract creditor of the testator, and there being a specialty creditor:—Held, that the assets must (after payment of costs) be apportioned on the footing of giving an equal dividend to all the creditors (specialty and simple contract); that the dividend must be paid in full to the specialty creditor; that the executor must then retain his debt out of the residue; and that the surplus (if any) must be divided equally among the simple contract creditors. *Ib.*

—— **Judicature Act, 1875—Executor not a Secured Creditor.**]—An executor's right to retain a debt due to himself does not make him a secured creditor within the meaning of the Judicature Act, 1875, s. 10, and his right to retain is not affected by that section. *Lee* v. *Nuttall*, 48 L. J., Ch. 616; 12 Ch. D. 61; 41 L. T. 363; 27 W. R. 805—C. A.

—— **Statute of Limitations.**]—An executor may pay a debt proved to be justly due by his testator, although barred by the Statute of Limitations; and on the same principle may have a right to retain his own debt, although barred by the statute. *Stahlschmidt* v. *Lett*, 1 Sm. & G. 415. S. P., *Hill* v. *Walker*, 4 K. & J. 166.

One of several executors, after a decree for administration of assets, may retain his own debt, although there has been no acknowledgment of it within six years before the death of the testator. *Sharman* v. *Rudd*, 27 L. J., Ch. 844; 4 Jur. (N.S.) 527.

Executors or administrators may retain for debts barred by the Statute of Limitations, though it is set up by the legatees or next of kin. *Clinton* v. *Brophy*, 10 Ir. Eq. R. 139.

A testator devised and bequeathed his personal estate and a portion of his real estate to his executor, the plaintiff, subject to debts. The other portion of his estate he gave to the defendant, charged with a specific debt. The executor sold the estate devised to himself, and paid debts; but other debts remaining due, the rest of the real estate was ordered to be sold under the statute 3 & 4 Will. 4, c. 104. The executor claimed, as against the proceeds of this estate, a debt due to himself, which was barred by the Statute of Limitations:—Held, that the devisee might set up the statute, and the plaintiff's claim could not be sustained. *Dring* v. *Greetham*, 23 L. J., Ch. 156; 1 W. R. 528.

—— **Statute of Frauds—Claim within Statute of Frauds.**]—An executor or administrator would commit a devastavit who paid a debt to a creditor who is prevented from enforcing it by the Statute of Frauds. And for the same reason an executor or administrator cannot retain such debt if due to himself. A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter and her husband 500*l.* He died intestate without performing his promise, and the daughter took out administration to his estate:—Held, that the administratrix could not retain the debt out of the assets. *Rownson, In re, Field* v. *White*, 54 L. J., Ch. 950; 29 Ch. D. 358; 52 L. T. 825; 33 W. R. 604; 49 J. P. 759—C. A.

Other Matters.]—Under the common decree in a suit by creditors against an administrator:—Held, upon the authority of *Spicer* v. *James* (2 Myl. & K. 387) that the master had no jurisdiction to decide and report upon a question of retainer, the claim as to which had been set up by the defendant in his answer, but was disputed by the plaintiff. *Thompson* v. *Cooper*, 1 Coll. C. C. 81; 13 L. J., Ch. 416; 8 Jur. 164.

A testator, who died in 1833, bequeathed two cottages to his executor, in trust to sell and retain a debt due to him from the testator, and hold the surplus for other persons. The executor never proved the will, but retained the property in discharge of his debt. He bequeathed it by his will, and it was enjoyed by the tenant for life thereunder until 1852. A legatee in remainder under the second testator, afterwards instituted a suit to recover the cottages, which was resisted by a person claiming under the will of the first testator. The executor's debt was alleged to be 300*l.*, and the value, according to one side, was 300*l.*, and on the other, 360*l.*, but the value of the property had lately greatly increased from local circumstances. The court, notwithstanding the lapse of time, granted relief by ordering sale. *Smith* v. *Bakes*, 20 Beav. 568.

An executor, who was also named as devisee in a will, not attested so as to pass real estate, entered into possession of the real estate, expended his own moneys in improvements, and died intestate. His administratrix took a transfer to herself of a mortgage on the estate, and claimed it as assets under an alleged arrangement with the testator's widow, that her husband took the estate in discharge of debt due from the testator. On a bill by the testator's heiress:—Held, that the executor must account for the rents from the testator's death, with an allowance for permanent improvements. *Pelly* v. *Bascombe*, 4 Giff. 390; 33 L. J., Ch. 100. Affirmed 34 L. J., Ch. 233; 11 Jur. (N.S.) 52; 13 W. R. 306

h. Right of Set-off.

By Executors.]—An executor, sued as such for a debt which accrued to the plaintiff from the testator in his lifetime, cannot set off a debt for money had and received to the defendant's use as executor, such debts not being mutual within 2 Geo. 2, c. 22, s. 13. *Mardall* v. *Thellusson*, 6 El. & Bl. 976; 3 Jur. (N.S.) 314; 5 W. R. 25—Ex. Ch. Reversing, 21 L. J., Q. B. 410.

Action for money paid and money due, on an account stated with a testator. A plea of a set-off for money had and received to the defendant's use, as executor, and money due on an account stated with him as executor, after verdict for the defendant, is a bad plea, and it cannot be severed. *Ib.*

B., a residuary legatee, and surviving executrix of her husband, to whom C. and O. had given a joint bond; C. died, and the plaintiff was indebted on her own private account to O., who was a bankrupt; the bill brought against his assignees for an injunction, and to set off what was become due to her as executrix against the debt from herself to the bankrupt. Injunction denied; for as such a set-off could not be done at law there is no instance of its being allowed here; for the debts are due in different rights and 2 Geo. 2 does not comprehend it. *Bishop* v. *Church*, 3 Atk. 691; 2 Ves. Sen. 100, 371.

A demand, in the character of trustee or executor, cannot be set off against a debt due from the trustee or executor personally, although the executor gives evidence to shew that he is,

in fact, personally, beneficially entitled to the amount which is due to him in the character of executor. *Middleton* v. *Pollock, Nugee, Ex parte*, 44 L. J., Ch. 584; L. R. 20 Eq. 29; 33 L. T. 240; 23 W. R. 766.

The only cases in which such a set-off of claims arising in different rights can be allowed are those where the person claiming the benefit of it can shew some equitable ground (other than the mere claim of set-off) for being protected against the legal demand. *Ib.*

A. was an executor and trustee of a fund to which as to one moiety he was entitled beneficially. The fund was in the hands of P., who died insolvent; at the time of P.'s death A. was indebted to P.:—Held, that A. could not set off the debt to the trust against his debt due to P. *Ib.*

F. had an account with a banking firm, with which bank A. also had an account. At the end of 1869 A. died, leaving F. her executor and sole residuary legatee. At the time of A.'s death there stood to her account in the bank book 600*l.*, and this balance was at once transferred by the bank to the credit of F., in a fresh account with him as "executor of the late Mrs. A." Of this sum F. drew out about 200*l.*, and paid in about 100*l.*, thus leaving 500*l.* standing to his credit. He overdrew his own private account to the extent of 300*l.* In July, 1870, the bank stopped payment and was declared bankrupt; at that time, after satisfying the legacies in A.'s will, there would have been a surplus of about 1,900*l.* of her estate, inclusive of the 500*l.* in the bank, to which F. was entitled as residuary legatee. B., as trustee of the bankrupt firm, brought an action against F. for the 300*l.*, the amount of his overdrawn private account:—Held, that F. could set off the 500*l.* balance of the executorship account, to which he was entitled as residuary legatee, against the 300*l.*, the amount of his overdrawn private account due from him to B., inasmuch as there were no equitable interests existing at that time of legatees or other third parties that could affect the 500*l.* standing in F.'s name as executor in the books of the bank. *Bailey* v. *Finch*, 41 L. J., Q. B. 83; L. R. 7 Q. B. 34; 25 L. T. 871; 20 W. R. 294.

To an action against an executor, on an account stated by him as executor, a set-off for debts due from the plaintiff to the testator in his lifetime may be pleaded. *Blakesley* v. *Smallwood*, 8 Q. B. 538; 15 L. J., Q. B. 185; 10 Jur. 470.

To an action against an executor for a debt due by his testator, he pleaded a set-off for the use and occupation of the testator's house, and for money lent by the testator; the plaintiff replied, on equitable grounds, that the testator bequeathed to the plaintiff and his other children certain sums of money, and declared by his will that the moneys and other effects then already advanced and delivered by him to his children were, and should be deemed, advancements, and that they should not be required to account for the same. Averment, that the matters of set-off were money and effects then already advanced and delivered by the testator to the plaintiff:—Held, that the replication was bad. *Gulliver* v. *Gulliver*, 1 H. & N. 174; 25 L. J., Ex. 341; 2 Jur. (N.S.) 1051; 4 W. R. 653.

—— **Debt of Husband to Testator—Against Wife's Share in Residue.**]—A testator bequeathed to his married daughter, after the death of his wife, a share of the residue of his real and personal estate. The daughter's husband owed the testator 725*l.*, a sum equal to or in excess of her share of residue. There were six children of the marriage. The daughter had about 70*l.* a year derived from an uncle, for her life, with remainder to her children, and her husband had no private means, and made only some 60*l.* a year by his business. The testator left six children him surviving. He died in 1877:—Held, the case not coming within the Married Women's Property Act, 1882, that although the executors had a right to set off the debt due from the husband against the share given to the wife, yet as the claim of the husband, if there had been no debt, would have been subject to the wife's equity to a settlement, which would therefore have been prior to the husband's claim, the wife's equity was also prior to the executor's right of retainer. *Knight* v. *Knight* (L. R. 18 Eq. 487) distinguished. *Briant, In re, Poulter* v. *Shackel*, 57 L. J., Ch. 953; 39 Ch. D. 471; 59 L. T. 215; 36 W. R. 825.

—— **Debt of Heir-at-Law—Against Descended Realty for.**]—A testator devised his realty to his executors and trustees, to be converted and divided equally amongst five persons, one of whom died in his lifetime, and a portion of the testator's realty lapsed to his heir-at-law, who was indebted to the testator. The realty was sold and the proceeds received by the surviving executor and trustee, who claimed to set off the debt against the value of the descended realty:—Held, that the executor could not set off the debt against the lapsed realty which had descended to the debtor as heir-at-law. *Milnes* v. *Sherwin*, 53 L. T. 534; 33 W. R. 927.

—— **Undischarged Debtor—Against Legacy to.**]—A. owed B. a sum of 668*l.* In May, 1883, A. filed a liquidation petition. B. proved for his debt, but did not receive any dividend. On the 4th December, 1886, the liquidation was closed, but no discharge had been granted to A. In January, 1888, B. died, leaving A. a legacy of 1,000*l.* by his will:—Held, that, inasmuch as there was no debt which could be enforced until the expiration of three years from the close of the liquidation, the executors of B. could not retain or set off the debt as against the legacy. *Rees, In re, Rees* v. *Rees*, 60 L. T. 260.

—— **Debt incurred as Receiver—Counterclaim for Money paid as Executor.**]—The defendant was receiver and manager of the estate of John Grimes, deceased, under an order of Chitty, J., as well as his executor. John Grimes had guaranteed a loan made by the plaintiff to Joseph Grimes, in respect of which, in default of payment by Joseph Grimes, the defendant had paid the sum of 550*l.*, for which he obtained judgment against Joseph Grimes. In the course of his management of the farms of John Grimes the defendant bought lambs of Joseph Grimes, for which he owed 45*l.*, a debt which Joseph Grimes assigned to the plaintiff. In an action for the 45*l.* brought by the plaintiff as such assignee the defendant sought, by way of set-off and counter-claim, to set up the unsatisfied judgment for 550*l.* against Joseph Grimes, the assignor, on the ground that he was acting as receiver and manager of John Grimes' estate in buying the lambs, and that he was entitled to set off a debt due to him as executor against a

debt due from him as receiver in respect of the same estate :—Held, that, as between the defendant and Joseph Grimes, the assignor, the liability in respect of the lambs was a purely personal one, and that the defendant was therefore not entitled to set off against it a debt due to the estate. *Nelson* v. *Roberts*, 69 L. T. 352.

—— **Debt due by Legatee on Bond—Contract by Legatee to Purchase Part of Estate—Bankruptcy of Legatee—Disclaimer by Trustee.**]—Where a residuary legatee is indebted to the estate on a bond, and has entered into a contract to purchase part of the estate, and on his bankruptcy the contract is disclaimed by his trustee, and no claim proved by the executors, the latter are entitled to set off against his interest under the will the sum due on the bond, but have no claim which they can set off in respect of the contract. *Stammers* v. *Elliott* (L. R. 3 Ch. 195), discussed and distinguished. *Palmer, In re, Palmer* v. *Clarke*, 13 R. 220.

—— **Retainer against Share of Beneficiary—Testator Surety for Legatee—Bankruptcy of Legatee.**]—Executors who have paid money out of a testator's estate in respect of a liability incurred by the testator as surety for the debt of a person to whom he bequeathed a share of his residuary estate, and who was made bankrupt after the testator's death, have (if they have not proved in the bankruptcy) a right of retainer of the amount paid by them, with interest at 4 per cent., out of the share of the legatee in the testator's estate. *Watson, In re, Turner* v. *Watson*, 65 L. J., Ch. 553 ; [1896] 1 Ch. 925 ; 74 L. T. 453 ; 44 W. R. 571.

They may also retain as against the legatee's share the sum deducted by the creditor in satisfaction of his claim from the proceeds of sale of property mortgaged by the testator as a collateral security for the debt. *Ib.*

An executor or trustee of a will cannot, as against the trustee in bankruptcy of a legatee or beneficiary who has become bankrupt after the testator's death, retain a legacy or share of residue in respect of a continuing collateral liability of the testator's estate by way of suretyship for a debt that has been proved by the principal creditor in the bankruptcy. *Watson, In re, Turner* v. *Watson* (supra) distinguished. *Binns, In re, Lee* v. *Binns*, 65 L. J., Ch. 830 ; [1896] 2 Ch. 584 ; 75 L. T. 99.

Statute-barred Debt—Residuary Real and Personal Estate.]—A testator devised and bequeathed all his residuary real and personal estate to trustees upon trust to convert, and out of the moneys to arise from the conversion to pay his debts and funeral and testamentary expenses and legacies, and divide the net residue into seven parts, three of which were given to three of his sons absolutely. The testator in his lifetime had advanced sums of money to each of the three sons, but any right of action in respect of such sums, assuming them to be debts owing to the testator, was at the time of his death barred by the Statute of Limitations :—Held, that a person who owes an estate money—that is to say, who is bound to increase the general mass of the estate by a contribution of his own, cannot claim an aliquot share given to him out of that mass without first making the contribution which completes it ; and that by the application of this principle to the present case, the three sons were bound to bring into account as against their respective shares, as well of the proceeds of sale of the residuary real estate as of the residuary personal estate, any sums due by them to the testator at the date of his death, with interest at 4 per cent. from that date. *Akerman, In re, Akerman* v. *Akerman*, 61 L. J., Ch. 34 ; [1891] 3 Ch. 212 ; 65 L. T. 194 ; 40 W. R. 12.

—— **Specific Gifts.**]—By the will freehold and leasehold hereditaments were given specifically to the three sons :—Held, that they were respectively entitled to the properties specifically given without first making good what (if anything) they owed to the testator's estate. *Ib.*

A testator specifically bequeathed the profits of his share in a brewery in trust for his son, who was indebted to his estate upon two promissory notes. The debt was barred by the Statute of Limitations. The executors had not assented to the legacy :—Held, that moneys in the hands of the executors on account of profits of the said business ought to be retained by them against the debt owing to the testator's estate by the legatee. *Akerman* v. *Akerman* ([1891] 3 Ch. 212) distinguished, and dictum not followed. *Taylor, In re, Taylor* v. *Wade*, 63 L. J., Ch. 424 ; [1894] 1 Ch. 671 ; 8 R. 186 ; 70 L. T. 556 ; 42 W. R. 373.

—— **Pecuniary Legacy.**]—In a suit by a legatee to obtain payment of the legacy out of the assets of the testator, in a due course of administration, the executors may retain so much of a legacy as is sufficient to satisfy a debt due from the legatee to the testator at the time of his death, although the remedy for such debt is at the time of the death of the testator barred by by the Statute of Limitations. *Courteney* v. *Williams*, 3 Hare, 539 ; 13 L. J., Ch. 461. Affirmed 15 L. J., Ch. 204 ; 8 Jur. 844—L. C.

Although a debt due to a testator's estate is barred by the Statute of Limitations, his executors may set off a legacy bequeathed by him to the debtor against the debt, and retain the same accordingly. *Coates* v. *Coates*, 33 L. J., Ch. 448 ; 10 Jur. (N.S.) 532 ; 9 L. T. 795 ; 12 W. R. 634.

By Executor against Administrator.]—Cross demands, existing in separate rights, are not, in equity (except under special circumstances), allowed to be set off one against the other ; and therefore an executor and trustee of a legacy, who was also the residuary legatee, and had become a creditor of the husband and administrator of a deceased legatee, was not, in the absence of any special agreement, allowed to set off his debt against the legacy to which the husband (having survived his wife, the legatee) was, as such administrator, entitled. *Freeman* v. *Lomas*, 9 Hare, 109 ; 20 L. J., Ch. 564 ; 15 Jur. 648.

By Administrators.]—A debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate. *Taylor* v. *Taylor*, 44 L. J., Ch. 718 ; L. R. 20 Eq. 155.

An administrator is entitled to set off against the share of one of the next of kin in the intes-

tate's estate, the whole of a debt of which part had become barred by the Statute of Limitations. *Cordwell, In re, White* v. *Cordwell*, 44 L. J., Ch. 746 ; L. R. 20 Eq. 644 ; 23 W. R. 826.

Where some of the next of kin of an intestate have brought an action against an administrator, acting as executor of another estate, and have been ordered to pay the costs of the action which failed, the administrator will be entitled to set off his debt due for costs against the shares in the intestate's estate due from him to such next of kin. *Jones, In re, Christmas* v. *Jones*, 66 L. J., Ch. 439 ; [1897] 2 Ch. 190 ; 76 L. T. 454 ; 45 W. R. 598.

—— **Against Wife's Share of Estate for Debt of Husband to.**]—Upon the bill of a married woman entitled to a share of the personal estate as one of the next of kin of the intestate against her husband and administrator, the latter claiming to retain toward satisfaction of a debt by bond from the husband to him, it was declared he was not entitled to retain, but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed ; and it was referred to the master to see a proper settlement made on her and her children ; regard being had to the extent of her fortune, and the settlement already made upon him. *Elibank (Lady)* v. *Montolieu*, 5 Ves. 737.

Against Executors.]—A., one of the executors of the will of B., was entitled thereunder to a share of the estate. A., being at the time a debtor to B. for 500*l.*, was adjudicated bankrupt in the lifetime of B. :—Held, that the debt of 500*l.* could not be retained by way of set-off against the share payable to A., nor any dividend in respect thereof, but that the share must be paid over intact to A.'s trustee in bankruptcy, and the executors must put in their proof as ordinary creditors. *Hodgson, In re, Hodgson* v. *Fox*, 48 L. J., Ch. 52 ; 9 Ch. D. 673 ; 27 W. R. 38.

Where a stranger received rent due to the testator in his lifetime, and afterwards by desire of the tenant in possession, paid a demand for ground-rent due at the same time for the same premises :—Held, that he might deduct such payment in an action by the executor for the rent received, but not a payment of ground-rents arising after the death of the testator. *Wilkinson* v. *Cawood*, 3 Anst. 905.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her ; and before the error was discovered, or her right disputed, she died. On a bill filed by the heir, against her personal representative, praying the delivery of title deeds, and an account, it was held, that the suit was maintainable for the rents received during her continuance in possession ; that, as the defence of the Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued ; and that the plaintiff was not at liberty to set off the amount of such rents against the amount of payments made by the widow in her character of executrix, those payments not forming a personal demand against the plaintiff. *Monypenny* v. *Bristow*, 2 Russ. & M. 117 ; 1 L. J., Ch. 88.

—— **Bankrupt Executor—Costs of Suit.**]—A bankrupt executor was charged with interest on his balances, but he was allowed his costs of suit : —Held, that the costs subsequent to the bankruptcy were not to be set off against his debt, which had accrued prior to his bankruptcy. *Cotton* v. *Clark*, 16 Beav. 134 ; 16 Jur. 879.

Against Administrator—Loss of Trust Fund by Administratrix's Solicitor—Settlement by Administratrix prior to Breach of Trust.]—The defendant, Mrs. P., was the administratrix of H., and as one of the next of kin of the intestate was entitled, after payment of debts, to one moiety of the residue, which amounted to 20,000*l.* In 1869, before the death of H., Mrs. P. settled all her property by a covenant to settle after-acquired property. The money was misappropriated by the solicitors of Mrs. P., and in an action to administer the estate of H., the chief clerk found that Mrs. P. must replace the balance of the money so lost, part of it having been recovered. The plaintiff, Mrs. S., was entitled to the other moiety of the residue. She, in 1879, had settled her share by a covenant to settle after-acquired property. A summons taken out by Mrs. P. to vary the chief clerk's certificate, was dismissed with costs. On the same summons : —Held, that Mrs. P., as one of the next of kin of H., could take nothing out of the personal estate until the amount which she was liable as administratrix to replace had been made good by her. Held, also, that the trustees of her marriage settlement were subject to the same equity. *Hervey, In re, Short* v. *Parratt*, 61 L. T. 429.

A. was indebted on bond to B. B. died, leaving C. his sole next of kin, who obtained letters of administration of his estate. The estate of B., after all debts, &c., were paid, left a clear residue exceeding the amount of the bond debt. A. became surety for C. by joining in promissory notes. C. became an insolvent debtor, and A. was compelled to pay the notes. C. died, and then the assignee under his insolvency took out letters of administration de bonis non of B., and sued A. on the bond :—Held, that A. might set off the sums which he had been compelled to pay as surety for C. against the bond debt. *Jones* v. *Mossop*, 3 Hare, 568 ; 13 L. J., Ch. 470 ; 8 Jur. 1064.

To an action by an administrator de bonis non, who sues in his representative character, for a debt due after the death of the intestate, and in the lifetime of the first administrator, the defendant cannot set off a debt due to him from the first administrator. *Allison* v. *Smith*, 10 B. & S. 747.

To an action by an administrator for the balance of the intestate's banking account at the time of his death, the defendants in their statement of defence sought to avail themselves, either by way of set-off or of counter-claim, of a debt due to them from the intestate as one of several makers of a promissory note for 1,000*l.* which did not become due until after the intestate's death. Reply, that before action, an order was made in an administration suit in the Chancery Division, to take an account of the debts and liabilities affecting the personal estate of the deceased, of which the defendants before action had notice ; and that, under 23 & 24 Vict. c. 38, s. 14, equity would restrain any proceedings on the note until the account had been taken :—Held, that the claim in respect of the promissory note could not be relied on as a set-

off; and that in accordance with the practice in equity, the defendants must under the circumstances be restrained from setting it up by way of counter-claim, and be left to prove for it in the administration suit. *Newell* v. *National Provincial Bank of England*, 45 L. J., C. P. 285; 1 C. P. D. 496; 34 L. T. 533; 24 W. R. 458.

A creditor of an intestate purchasing part of the intestate's goods from his administrator cannot set off the amount against a debt due to him from the intestate at his decease. *Lambarde* v. *Older*, 17 Beav. 542; 23 L. J., Ch. 18; 17 Jur. 1110; 2 W. R. 32.

To an action by an administrator, who sues in his representative character for a debt due after the death of the intestate, the defendant cannot set off a debt due to him from the intestate in his lifetime. *Rees* v. *Watts*, 11 Ex. 410; 25 L. J., Ex. 30; 1 Jur. (N.S.) 1023; 3 W. R. 575—Ex. Ch.

To an action for money received to the use of the plaintiff as administrator, and on an account stated with him as administrator, with promises to him as administrator, the defendant cannot plead a set-off for money due from the intestate in his lifetime. *Schofield* v. *Corbett*, 11 Q. B. 779, n.; 6 N. & M. 527.

Debt from Estate to Joint Trustees—Debt due from one Trustee to Estate.]—Crombie and Storer were two trustees of an estate administered by the court. Crombie became bankrupt after 1869. A balance of 896*l.* was found due from Crombie to the estate and a balance of 745*l.* was found due from the estate to the two trustees jointly:—Held, that the debt due from the estate to the two trustees could not be set off against the debt due from one; that the plaintiffs were entitled to an inquiry what part of the 745*l.* found due to the two trustees was, as between the two, due to Crombie the bankrupt, but as that inquiry was not asked for, and as there was evidence shewing that all the money was in fact due to Storer, the debt so due must be paid to him. *McEwan* v. *Crombie* or *Porter* v. *Grant*, 53 L. J., Ch. 24; 25 Ch. D. 175; 49 L. T. 499; 32 W. R. 115.

Other Cases.]—In a sale by an executor of "book debts" due to his testator, the purchaser is entitled not to the sums appearing in the books as due to the testator, but only to what, on a proper adjustment of accounts between his debtors and his estate, should be found to be due to his estate. *Chick* v. *Blackmore*, 2 Sm. & G. 274; 23 L. J., Ch. 622; 2 W. R. 488.

The executor of A. sold A.'s book debts to B. At the time of A.'s death, A. was himself indebted to several of the persons who appeared as his debtors in his books. The executor, instead of setting off the debts due by A. against the debts due to him, paid in full the debts from A. In a suit for the administration of A.'s estate:—Held, that the executor was not entitled to be allowed these sums in his accounts. *Ib.*

Executor becoming indebted as such to the estate of a testator in respect of receipts, annuity given him by will directed to be applied to repay estate. *Skinner* v. *Sweet*, 3 Madd. 244; G. Coop. 54.

i. Respecting Creditors.

1. Right of Preference.

Simple Contract Debts.]—Payment by an executor of a simple contract debt before breach of the condition of a bond is good, and no devastavit in case of deficiency of assets; but payment of legacies is not. *Hawkins* v. *Day*, Amb. 160; Dick. 151.

An executor will be allowed payments made by him to simple contract creditors of his testator, a bond being in existence, but not payable, but he will not be allowed payments to legatees, notwithstanding he had no notice of the bond. *Norman* v. *Baldry*, 6 Sim. 621.

Payment by an executor of simple contract debts before he has notice of a specialty debt is good. *Hawkins* v. *Day*, Amb. 162; Dick. 151. S. P., *Bettenson* v. *Winder*, Dick. 468.

An executor may, after allowing a reasonable time to elapse after the testator's death, pay simple contract debts in priority to specialty debts, of which he has no notice; and where the testator lived and died in India, and the executor seven months afterwards received notice of the existence of the will and his own appointment as executor, and three months afterwards repaid to the testator's widow moneys for which his estate was liable on simple contract, and which she had paid out of her own moneys, and then sixteen months afterwards received notice of a specialty debt due to a creditor of the testator in India:—Held, that he was justified in making the payment which he had made to the widow, she having by those payments placed herself in the position of the creditors whose claims she had discharged, and that the date of his repayment to her was the date at which the payment by him out of the estate of the so discharged debts must be considered to have been made. *Le Geyt, In re, Nosotti* v. *Jefferson*, 3 De G. J. & S. 570; 9 Jur. (N.S.) 656; 8 L. T. 589; 11 W. R. 841.

Payment of simple contract debts by executors allowed, where the testator had been a shareholder in a banking company by deed under seal, and calls had been afterwards made in respect of the shares held by him, to meet which calls there were no assets. *Henderson* v. *Gilchrist*, 22 L. J., Ch. 970; 17 Jur. 570; 1 W. R. 426.

Executor liable to future contingent demands in respect of covenants entered into by the testator for payment of rent of premises specifically devised, is entitled to a sufficient indemnity to be given by the legatee; but if there is no surplus after payment of debts, the executor is protected against demands on foot of such covenants by payments made even to simple contract creditors before notice of the breach. *Wildridge* v. *M'Kane*, 1 Moll. 122.

An executor having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of the testator for a loan of a sum of money equal in amount to the debt; and the creditor accepted the personal security of the executor for the amount, and released his debt against the estate:—Held, that the executor having, by such substitution of his own security for that of the estate, discharged the debt as against the estate, should not be treated as a mere purchaser of the debt of the creditor, and, as such, entitled only to stand in the place of the creditor; but that the executor was entitled to be allowed, in his own discharge, the amount of the debt as a debt of the testator preferred and paid. *Hepworth* v. *Heslop*, 6 Hare, 561; 18 L. J., Ch. 352; 13 Jur. 166.

A direction in will to pay simple contract

creditors before specialty ones, is not void, being within the exception in the Statute of Fraudulent Devises. *Millar* v. *Horton*, Coop. 45.

When there is a sufficiency of assets for payment of debts, executors may pay simple contract debts not bearing interest, before specialty debts bearing interest, if not objected to by the specialty creditors; and the legatees are not at liberty to complain of the order of payment. *Turner* v. *Turner*, 1 Jac. & Walk. 39.

—— **After Action brought.**]—Where an executor or administrator, after the commencement of a creditor's administration action and before judgment, has voluntarily paid any creditor in full, the rule in equity and not at law must now prevail, under Judicature Act, 1873, s. 25, sub-s. 11, and he will accordingly be held to have made a good payment, and will be allowed it in passing his accounts, even though he may have had notice of the action before payment. *Radcliffe, In re, European Assurance Society*, v. *Radcliffe*, 7 Ch. D. 733; 26 W. R. 417.

To prevent such payments being made in any such action, the plaintiff should, immediately upon issuing the writ, apply for and obtain a receiver. *Ib.* Overruled on this point, *Harris, In re, Harris* v. *Harris*, 56 L. J., Ch. 754; 56 L. T. 507; 35 W. R. 710. *Wells, In re, Molony* v. *Brooke*, 59 L. J., Ch. 810; 45 Ch. D. 569; 63 L. T. 54; 39 W. R. 139.

An executor or administrator is entitled, after action brought against him by a creditor of the deceased for his debt, to apply the assets in payment of the debt of another creditor, inasmuch as, the rules of law and equity on the subject having been in conflict, the equity rule must now prevail. *Radcliffe, In re* (7 Ch. D. 733), followed. *Vibart* v. *Coles*, 59 L. J., Q. B. 152; 24 Q. B. D. 364; 62 L. T. 551; 38 W. R. 359—C. A.

Specialty Debt.]—The effect of Hinde Palmer's Act being to place simple contract creditors and specialty creditors on an equal footing in the administration of an estate, an executor may, in exercise of his right of preference, pay a simple contract creditor in priority to a specialty creditor of his testator. *Orsmond, In re, Drury* v. *Orsmond*, 58 L. T. 24.

2. Compromises and Compounding Debts.

The Trustee Act, 1893, *s.* 21, *replacing the repealed s.* 37 *of Conveyancing and Law of Property Act*, 1881, *gives an executor or administrator full powers to compromise and compound debts, and enter into arrangements.*

Apart from Statute.] — Though, generally speaking, an executor or trustee compounding or releasing a debt, must answer for the same, yet, if this appears to have been for the benefit of the trust estate, it is an excuse. *Blue* v. *Marshall*, 3 P. W. 381.

Executor having, under a misconception of a will, at the trial of an issue upon a debt, entered into an improper compromise with the creditor, expressly subject to the approbation of the court, was permitted to try the issue, paying the costs. *Legh* v. *Holloway*, 8 Ves. 213.

A testator who was tenant for life of his real estate, bequeathed to a trustee the residue of his real and personal estate, and all rent and arrears of rent which might be due to him at the time of his decease, and all timber or other trees he might be entitled to, upon trust, to sell and convert into money, get in, and recover so much thereof as should not consist of ready money; and declared certain trusts of the proceeds. He authorised the executors of his will, of whom the trustee was one, to compromise and compound, or submit to arbitration and settle, all debts owing to or from him; and generally to act in relation to the premises as they should think expedient, without being liable to any loss which might be occasioned thereby:—Held, that this will did not authorise the trustee or executors to sell the arrears of rent to the remainderman. *Alexander, In re*, 13 Ir. Ch. R. 137.

The executors, one of whom became agent to the remainderman, sold the arrears, which amounted to 49,000*l.*, to the remainderman for 20,000*l.* Almost the whole amount of arrears was collected by the remainderman:—Held, that the executors were to be charged with the entire amount of the arrears which had been received. *Ib.*

Testatrix contracted with A. for the sale of an estate for 1,000*l.* She, by will, directed the executor to complete it, and pay plaintiff the 1,000*l.*, and devised other estates to A. and her executor, who compromised, for 500*l.* each, a claim set up after her death, impeaching the title to her estates, the executor becoming by the compromise owner of the contracted estate, and A. owner of the other estates:—Held, that the plaintiff was entitled to the 1,000*l.* from the executor without contributing to the payment of the 500*l.* for the compromise, which must fall on the residuary estate devised to the executor, the compromise being a device between A. and the executor to avoid the consequence of A. becoming owner of the contracted estate. *Mark* v. *Willington*, Beat. 128.

A parol agreement was entered into between the executors of L. and T., that various old accounts between the testators should be settled without reference to the time that they had been running, and that a balance should be struck. The accounts were accordingly settled, and the executors of L. were allowed the value of a promissory note, which, but for the agreement, would have been barred by the Statute of Limitations. The executors of T. afterwards discovered a note from L. to T., which but for the same reason, would have been barred by the statute:—Held, that the agreement was one for valuable consideration, on both sides, to waive the benefit of the statute, and ought to be enforced. *Lade* v. *Trill*, 6 Jur. 272.

One of several executors may settle an account with a person accountable to the estate, and, in the absence of fraud, the settlement will be binding on the others, though dissenting. *Smith* v. *Everett*, 27 Beav. 446; 29 L. J., Ch. 236; 5 Jur. (N.S.) 1332; 7 W. R. 605.

But where one of three executors, against the will of his co-executors, compromised a claim against the testator's estate, and the effect of the compromise was to relieve him from a liability which he was under to the estate jointly with the creditor the compromise was held not to bind the estate, and, at the instance of the co-executors, it was set aside. *Stott* v. *Lord*, 31 L. J., Ch. 391; 8 Jur. (N.S.) 249; 5 L. T. 817; 10 W. R. 284.

About a year after a testator's death, the

executrix brought an action against a debtor, and recovered judgment, but she did not issue execution until a year after, when a bankruptcy ensued, and the debt was lost. The executrix was empowered to compound or allow time for the payment of any debts :—Held, that she was not liable for a devastavit. *Ratcliffe* v. *Winch*, 17 Beav. 217.

—— **Several Executors—Debt Due from one.**]—A. C., being one of several executors, a debtor to his testator's estate in the sum of 20,130*l.*, and entitled to one-sixth of the said estate (estimated at 6,000*l.*) as legatee under the will, agreed with his co-executors, in accordance with the terms of the will and without objection from the parties interested, to set off the said 6,000*l.* against the like amount of the debt then payable by him, at the same time paying about 1,000*l.* in cash. Thereafter having become insolvent, A. C. agreed, by way of compromise with his creditors, including the said executors, that they should accept 5*s.* in the pound in full of their demands, secretly arranging with some of the said creditors to pay to them further sums if he should be in a position so to do, and subsequently paying to them, or some of them, further sums. For the purposes of the compromise the debt due to the testator's estate was treated by the executors as amounting to 19,808*l.*, thus in effect reviving the debt of 6,000*l.* which had been previously discharged, and accepting in respect of it a composition of 5*s.* in the pound ; and the executors also treated as revived A. C.'s right to one-sixth of the testator's estate. In a suit brought by a legatee against the executors, all of whom proved the will :—Held, that the above agreement of set-off extinguished A. C.'s debt pro tanto, and had the same effect as if A. C. had paid 6,000*l.* in cash. It also extinguished A. C.'s right under the bequest, unless it should turn out that the one-sixth share exceeded the estimated 6,000*l.*, and subject to his liability to refund pro tanto in case the same should fall short of the estimated 6,000*l.* *De Cordova* v. *De Cordova*, 4 App. Cas. 692 ; 41 L. T. 43—P. C.

Held, also, that the agreement of compromise was a breach of trust and void as against the plaintiff, and that it was fraudulent as regards A. C. The secret arrangement, though not legally binding, was sufficient to vitiate the compromise. *Ib.*

Held, further, that A. C. was liable to the estate for the full amount of what would have been due and payable by him if the compromise had never been effected, and that the co-executors were severally liable for so much of the said amount as would or might at any time have come to their hands but for their wilful neglect and default. *Ib.*

23 & 24 Vict. 145, s. 30.]—Section 30 of the Trustees and Mortgagees Act, 1860, which empowers executors to compromise claims relating to the estate of their testator is not confined to claims outside his will, but applies to the claim of a legatee. *Warren, In re, Weedon* v. *Reading*, 53 L. J., Ch. 1016 ; 51 L. T. 561 ; 32 W. R. 916. *And see now* Trustee Act, 1893, s. 21.

44 & 45 Vict. c. 41, s. 37.] — Semble, that the effect of s. 37 of the Conveyancing Act, 1881, is, that an executor is only liable for delay in suing for his testator's debt when he has not acted bonâ fide. *Owens, In re, Jones* v. *Owens*, 47 L. T. 61—C. A.

Even before the passing of the Conveyancing Act, 1881, executors had a fair discretion, whether they would or would not immediately sue a debtor of the testator for the amount due to the estate, and their not doing so, although loss occurred by the delay, was not necessarily wilful neglect or default for which they were liable. *Ib.*

And see now Trustee Act, 1893, s. 21.

Partnership Property.]—A testator, who died in 1879, by his will gave an annuity to his wife, and legacies of considerable amount to trustees for the benefit of his seven daughters and their husbands and children, and he bequeathed one moiety of his share of the businesses carried on by him in partnership with his two eldest sons to trustees upon trust for his youngest son, and he devised and bequeathed the residue of his real and personal estate to his two eldest sons in equal moieties, and he authorised his trustees to postpone the realisation of his estate, and to carry on and manage any trades or businesses in which he might be engaged at his death, for so long as they should think fit. The testator at the time of his death, carried on business in partnership with his two eldest sons, in various mining and colliery properties and ironworks. Actions had been commenced for the administration of his estate, and it was stated that the testator's share in the partnership businesses could not be realised without considerable loss, and if realised at once would not be sufficient to pay all the legacies bequeathed in full. Application was made for the sanction of the court to a scheme whereby a limited company was to be formed to take over the businesses in which the testator was a partner, and to consist in the first instance, of persons interested in the testator's estate, to whom it was proposed to allot debentures, preference and ordinary shares, in lieu of their several interests in the testator's estate :—Held, that the court had no jurisdiction to sanction such a scheme, which was in no way authorised by the testator's will. *Crawshay, In re, Dennis* v. *Crawshay*, 60 L. T. 357.

A., B., C., D., and E. obtained a concession from, and entered into a contract with, the Egyptian government for the construction of certain works. Before the works had been actually begun A. died. Doubts existing as to the rights of A.'s trustees and executors (who by his will had the fullest power of management given them, and of completing any existing contracts), and the other contractors inter se, a contract was, after considerable negotiation, drawn up between B., C., D., and E., and " executors and trustees of the will of " A., and signed by B., C., D., and E. before the will of A. had been proved. The agreement was that the work should be completed in the joint interests of the survivors and the estate of A. Subsequently one of the executors and trustees renounced and disclaimed, and the others signed the agreement. B., C., D., and E. filed a bill to set aside the agreement for a declaration that the partnership was dissolved by A.'s death, and for winding-up : —Held, first, that the agreement was binding on all parties. *McClean* v. *Kennard*, 30 L. T. 186 ; 22 W. R. 382.

Held, secondly, that independently of the agreement, the right of A.'s representatives was to have the contract completed, the estate being

liable to contribute towards the required capital, and liable for any losses. *Ib.*

A testator, who carried on business in partnership with his brother, by his will, dated the 23rd November, 1861, directing payment of his debts, and, after bequeathing specific and pecuniary legacies, he devised and bequeathed all his real and leasehold and personal estate to trustees, upon trust for sale and conversion into money, and to hold the proceeds of sale on certain trusts. In 1872 the brother and the testator's widow, who was then the sole trustee and executrix of the will, joined in selling and conveying real estate, of which the brother and the testator had been tenants in common, and which was in fact partnership property, to a limited company who purchased the business. The purchase-money was to be paid partly in cash and partly in fully paid-up shares and debentures of the company. At the same time an arrangement was made for the handing over of the whole purchase-money to the bankers of the partnership, to whom the partnership was largely indebted, and whose debt was secured by mortgages of the partnership property, in satisfaction of the debt due to the bankers, the bankers undertaking to pay the other creditors of the partnership, and handing back to the executrix a sum of cash and some of the debentures, and providing certain other benefits for the brother. The conveyance of the real estate to the company contained a recital that the brother and the widow were entitled to the property in equal undivided moieties, and the widow purported to convey as trustee of her husband's will, but it was not stated in the deed that she was his executrix or that the property was partnership property. On a subsequent sale of the property by the company, the purchaser objected that the sale by the widow was not authorised by the trust for sale, the consideration not being entirely paid in money: — Held, that the arrangement as to the disposition of the purchase-money received from the company amounted to a compromise by the widow with the creditors and with the surviving partner into which it was competent to her as executrix to enter under s. 30 of the act 23 & 24 Vict. c. 145. *West of England and South Wales Bank* v. *Murch*, 52 L. J., Ch. 784; 23 Ch. D. 138; 48 L. T. 417; 31 W. R. 467.

A., B., C. and D. purchased land on a joint speculation, reserving to each other a right of pre-emption over the shares of any that might wish to withdraw. A. died, leaving B. and C. executors and trustees, devising to them his fourth share, with power to join with the other parties in managing, selling, conveying or making partition of the property. C., who was indebted to the concern, on mortgage of his share for the amount of his purchase-money, then agreed with B. and D. to release to them absolutely, in discharge of his mortgage, but subject to his mortgage, the greater part of his fourth share, the remainder of his share being conveyed to him in severalty. B. and D. then carried to the account of A.'s estate one-fourth of the amount of C.'s mortgage-money: — Held, on a suit by the parties interested under A.'s will, that A.'s estate was not entitled to the benefit of the agreement for the purchase of C.'s share, by reason of there being no power in A.'s will to purchase land, and because his executors had no right to subject his estate to the payment of C.'s mortgage-money. *Peck* v. *Cardwell*, 2 Beav. 137.

j. Respecting Legacies.

1. Right of Assent.

What constitutes Assent.]—H. devised a term to his nephew for life, with remainder over, with a leasing power for twenty-one years, and made him and two others executors; the nephew entered and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c.:—Held, that neither his entry on the land, nor his sole lease reserving rent to himself and his executors, which was alike inconsistent with his interest as tenant for life and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as executor. *Doe* d. *Hayes* v. *Sturges*, 7 Taunt. 217; 2 Marsh. 505; 17 R. R. 491.

Where an executrix has a life estate in a chattel under a bequest, her taking possession of the chattel is no assent to a further bequest thereof in remainder. *Richards* v. *Browne*, 3 Bing. (N.C.) 493; 4 Scott, 262; 3 Hodges, 27; 6 L. J., C. P. 95.

A testator made the following will: "Subject to my debts, I bequeath to my wife the clear rentals of my two (leasehold) houses, Nos. 17 and 19, P. Street, for her life, to be paid to her every month; and after her decease, I leave No. 17 (and other property) to my son R.; and I direct that the rents shall be received and the property be under the management of my executors. After R.'s decease I direct his share of the property be equally divided between his children; but, should he die without leaving lawful issue, I direct the same to be equally divided amongst the surviving children of my daughter M. A. C. I appoint my son-in-law, J. C., and his wife, M. A. C., my executors." The executors proved the will, and collected the rents of the property, and paid the rents of No. 17 to the widow during her life, and, after her death, to R., who died without leaving issue:—Held, that the assent of the executors to the life estates was an assent to the bequest in remainder. *Stevenson* v. *Liverpool Corporation*, 44 L. J., Q. B. 34; L. R. 10 Q. B. 81; 31 L. T. 673; 23 W. R. 246. And see *Webster* v. *Johnson*, 3 W. R. 60.

Payments made by an executor for the benefit of the legatee of specifically bequeathed leaseholds, generally out of funds coming to his hands, and not specially out of the rents of the leaseholds, will not, without more, constitute an assent by the executor to the bequest. *Thorne* v. *Thorne*, 63 L. J., Ch. 38; [1893] 3 Ch. 196; 8 R. 282; 69 L. T. 378; 42 W. R. 282.

Bequest of Residue.]—Testator bequeathed the residue of his estate, including the lease of a colliery, to trustees, who were also executors of his will, on trust for his son on his attaining twenty-one years of age. On the son attaining that age, the trustees let him into possession, but made no formal assignment of the lease, and there were still debts due from the testator's estate:—Held, that the assent of the executors was sufficient to pass the property in the colliery, and that it was competent for them to assent to the bequest of part of the residue of the estate without assenting to the rest. *Austin* v. *Beddoe*, 3 R. 580; 41 W. R. 619.

An executor, by assenting to a bequest of residue, does not thereby constitute himself a

trustee of the fund so as to prevent the operation of the Statute of Limitations. An executrix in 1870 signed a declaration at the foot of her residuary account, whereby she declared that the residue of the estate which she was administering was 607*l.* 7*s.* 9*d.*, being the residue and moneys which she intended to retain to her own use and the use of J., being a sister and a descendant of a brother of the deceased. J. was in fact the residuary legatee. In 1887 the representative of the residuary legatee instituted an action against the representative of the executrix to recover the fund :—Held, that the Statute of Limitations was a defence to the action. *Rowe, In re, Jacobs* v. *Hind*, 58 L. J., Ch. 703 ; 61 L. T. 581—C. A.

Effect of.]—Whenever an executor assents to a bequest in his testator's will, there is an end of his interest in the things bequeathed, and he cannot afterwards dissent. And it is equally true that the executor's assent to the first devise is an assent to the remainder over. *Foley* v. *Burnell*, 4 Bro. P. C. 34.

Where a person, executor and trustee of legacy to be laid out in stock, has fully administered estate and assented to legacy, and retains legacy in his hands not as assets but as trustee, he is liable for breach of trust, and ordered to purchase stock at price of time when he was first able to invest. *Byrchall* v. *Bradford*, 6 Madd. 235 ; 23 R. R. 204.

Before Probate.]—An assent to a legacy, given by an executor who dies without proving the will, becomes operative, on administration being afterwards taken out, with the will annexed. *Johnson* v. *Warwick*, 17 C. B. 516 ; 25 L. J., C. P. 102.

Evidence as to.]—A. devised the residue of a term determinable on lives to B. After the decease of the testator the administrator with the will annexed paid the rent reserved for six years, and charged it to B. :—Held, that this was sufficient evidence of his assent to the bequest to enable B. to maintain ejectment. *Doe* d. *Mabberly* v. *Mabberly*, 6 Car. & P. 126.

A. bequeathed to his two sons his two carriage manufactories, with all fixtures, implements, tools, stock, job-carriages, harness, and everything appertaining to his trade in the manufactories. At the time of his death a carriage was in one of the manufactories, unfinished, which was being built to the order of a purchaser. A question arose between the executors and the sons, whether this carriage fell within the bequest ; and the executors paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt :—"A disagreement arising between the sons and the executors, as to whether the whole of this item belongs to the sons, or part to the residue, the executors desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty when the matter in dispute shall be determined." The sons retained possession of and finished the carriage, delivered it to the purchaser, and received the price. In an action by the executors against them for money had and received, commenced two years afterwards :—Held, that there was no evidence to go to the jury of assent by the executors to the legacy of the carriage to the sons. *Elliott* v. *Elliott*, 9 M. & W. 23 ; 11 L. J., Ex. 3.

F., the elder, bequeathed leasehold premises to F., the younger, in trust to sell the same, and out of the proceeds to retain for his own use 150*l.* to reimburse himself funeral expenses, and to divide the surplus, if any, amongst the testator's children and grandchild. F. did not take out probate of his father's will, but entered into possession of the premises and retained them till his death, having by his will bequeathed them to his executors, who demised them to the defendant. The plaintiff having taken out administration with the will annexed of F., the elder, and brought ejectment to recover the premises :—Held, that he was not entitled to recover, as the act of bequeathing the premises by F., the younger, was evidence of the latter having elected to take the premises as legatee. *Fenton* v. *Clegg*, 9 Ex. 680 ; 2 C. L. R. 1014 ; 23 L. J., Ex. 197.

Leasehold property was bequeathed to three persons, who were also appointed executors of the will, upon certain trusts. One only of the executors proved the will. Six years afterwards he conveyed the whole property, professing to do so as executor :—Held, that lapse of time from the probate of the will was no evidence of an assent to the legacy, and that, therefore, the whole property passed. *Hawkins* v. *Williams*, 10 W. R. 692.

The doctrine that slight evidence of the assent of executors to a bequest is sufficient, or that it may be implied, only applies in ordinary cases, where the assent would be rightful, and not where it must be implied against their own acts. *Tudor* v. *Guest*, 27 L. J., Ex. 395.

Where a bequest to the defendant was by a husband of leasehold property devised to his deceased wife for her separate use, and which she had bequeathed to the plaintiff, and the husband's executors joined with the devisee of the wife in suing :—Held, that even supposing that the husband's assent was necessary to the validity of the wife's will, the assent of the executors to the bequest by him to the defendant required to be proved by express evidence, and was not to be presumed or implied in opposition to their own act in suing. *Ib.*

Question of Fact for Jury.]—Where A., the legatee of a term, entered and occupied for a short time, and then quitted the possession, it is a question for the jury whether the executors have or have not assented to the bequest ; and if a party contracts with A. for an underlease, it may be left to the jury to say whether the contract was made with A. in his own right, or as agent to the executors. *Richardson* v. *Gifford*, 3 N. & M. 325.

The assent of an executor to a bequest is not a matter of law, but a question of fact for the jury. *Mason* v. *Farnell*, 12 M. & W. 674 ; 1 D. & L. 576 ; 13 L. J., Ex. 142.

2. Interest on.

In General.]—It is a general rule for convenience, to consider the personal estate to have been reduced into possession in a year from the death of the testator, and therefore interest is given upon legacies from that period, unless some other is fixed by the will, though actual payment within that time may in many instances be impracticable. *Wood* v. *Penoyre*, 13 Ves. 333 ; 9 R. R. 185. S. P., *Bourke* v. *Ricketts*, 10 Ves. 333.

Interest on legacies is given for delay of payment, and, consequently, until the day of payment arrives, no interest is, in general,

demandable. *Donovan* v. *Needham*, 9 Beav. 164; 15 L. J., Ch. 193; 10 Jur. 150.

The rule that general legacies bear interest only from the end of a year from the death of the testator, applies to similar legacies under a feme covert's will made in exercise of a power of appointment. *Tatham* v. *Drummond*, 2 H. & M. 262.

Legacy to Infant.]—A legacy to a child carries interest, on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest. *Rouse, In re*, 9 Hare, 649.

A testator made a settlement on his daughter, who was adult, and gave her a legacy by his will:—Held, that the legacy did not bear interest from the death of the testator, but only from the end of the first year after that event. *Wall* v. *Wall*, 15 Sim. 513; 16 L. J., Ch. 305; 11 Jur. 403.

Legacy to be paid within Four Years after Testator's Decease.]—A testator directed that certain legacies given by his will should be paid within four years after his decease. The executors paid some of the legacies within one year after the testator's decease, but others of them remained unpaid by reason of the inability of the legatees, being infants, to give receipts. It was not necessary for the convenient administration of the estate that the payment of any of the legacies should be postponed:—Held, that the unpaid legacies carried interest from the expiration of one year after the testator's death. *Olive, In re, Olive* v. *Westerman*, 53 L. J., Ch. 525; 50 L. T. 355.

Reversionary Interest not realised at once.]—Where it is for the benefit of all entitled that a reversionary interest should not be realised at once, a legatee, whose legacy could not be paid out of any other fund than this reversion, is entitled, not only to six years' interest, but to interest from the expiration of one year from the death of the testatrix. *Blachford, In re, Blachford* v. *Worsley*, 54 L. J., Ch. 215; 27 Ch. D. 676; 33 W. R. 11.

Contingent deferred Legacy.]—Where a contingent deferred legacy has been severed from the general estate of the testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself. *Judkin's Trusts, In re*, 53 L. J., Ch. 496; 25 Ch. D. 743; 50 L. T. 200; 32 W. R. 407.

Release—Subsequent Acquisition of Funds.]—A testatrix by her will bequeathed several pecuniary legacies on various persons, who, on the estates proving insufficient to pay the legacies in full, executed a deed of release to the executors. One of the legatees afterwards died, and her share, by the terms of the will, formed part of the residuary estate, which was now sufficient to pay the other legacies in full:—Held, that the legatees would be entitled to interest on the balances at the rate of four per cent. from one year after the testatrix's death. *Ghost's Trusts, In re*, 49 L. T. 588.

Out of what Fund Payable.]—The testator bequeathed the lands of B., in which his brother R. and his sister had life estates by title paramount, upon trust to sell after the death of his brother and sister, and out of the proceeds to pay, among other legacies, to his said brother R. the sum of 5,000*l.* R. died in the testator's lifetime; and by a codicil the testator bequeathed the 5,000*l.* to R.'s daughter and directed that she should be paid the legal interest thereon from the time of his decease till the said sum of 5,000*l.* be paid in due course of law:—Held, that interest on this legacy from the testator's death was properly paid by the executors out of his residuary personal estate. *Greene* v. *Flood*, 15 L. R., Ir. 450.

Rate.]—A testator, by his will, gave certain legacies payable five years after his death and interest in the meantime to be paid on them at the rate of three per cent. half-yearly:—Held, that the rate of interest to be paid was six per cent. per annum. *Booker, In re, Booker* v. *Booker*, 54 L. T. 239.

Deduction for Property-Tax.]—Where executor paid interest on legacy for seventeen years without deducting property-tax:—Held, he could not afterwards deduct out of future interest due the amount of property-tax on preceding payments. *Currie* v. *Goold*, 2 Madd. 163.

How Calculated.]—The allowance of interest upon a legacy charged upon real estate, and due upwards of six years, is to be calculated from the filing of the bill in equity and not from the date of the decree, though the bill is not filed by the legatee. *Chappell* v. *Rees*, 1 De G. M. & G. 393; 16 Jur. 417.

Statute of Limitations.] — A., who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estates:—Held, that the legatee was not barred by the 3 & 4 Will. 4, c. 27, s. 42, from claiming interest on the legacy from the end of the first year after the testator's death. *Gough* v. *Bult*, 16 Sim. 323; 17 L. J., Ch. 486; 12 Jur. 859.

A testator, after bequeathing an annuity, charged the same upon his real estates, and then devised his real estates, subject to, and charged with, the payment of the annuity, to his grandson in fee:—Held, that the grandson was not a trustee for the annuitant, within 3 & 4 Will. 4, c. 27, s. 25, so as to entitle the latter to recover more than six years' arrears of the annuity. *Francis* v. *Grover*, 5 Hare, 39; 10 Jur. 280. *And see further cases under* WILL.

3. Appropriation to Satisfy.

The Land Transfer Act, 1897, *gives the personal representatives power to appropriate any part of the residuary estate in or towards satisfaction of legacy or share. See s.* 4.

Appropriation, Power of—Mortgage in Part Satisfaction of Share.]—Testator devised and bequeathed his residuary estate upon trust for sale and conversion, and directed the proceeds to be divided into sixths — three-sixths to be held in trust respectively for G., and two other persons absolutely, and three-sixths to be settled. G. agreed with the trustee to accept a mortgage belonging to the testator's estate in part satisfaction of his share, and the deeds were handed over to him, but no transfer was executed. The trustee subsequently made away

with part of the residuary estate. The owners of the settled shares disputed the right of G. to the mortgage:—Held, that the agreement was within the powers of the trustee, and that G. was entitled to the mortgage. *Lepine, In re, Dowsett* v. *Culver*, 61 L. J., Ch. 153; [1892] 1 Ch. 210; 66 L. T. 360—C. A.

In 1836, shortly after a mortgage of certain freeholds had been executed, the mortgagee died intestate, leaving four next of kin, viz. his brothers R. F. and C. F., another brother, and a lunatic sister. R. F. was the heir-at-law of the intestate. C. F. took out letters of administration to the intestate's estate and paid his lunatic sister's share into court; paid to his two brothers their shares and took receipts, and retained a fourth of the estate, including the mortgage, for himself. Interest on the mortgage was paid by the tenant for life of the equity of redemption to C. F., the administrator, till his death in 1863; then to his widow, executrix and residuary legatee under his will, till 1883, when she died intestate; and then to her administrator and sole next of kin till 1886. In an action by the last-named person for foreclosure of the mortgage, all the defendants admitted the payment of interest, but two of them set up the defence of the Statute of Limitations, and argued that an administrator had no power to appropriate a chose in action; that the mortgage was, therefore, not properly appropriated by C. F., and did not pass under his will; that after his death there was no legal personal representative of the mortgagee, and consequently, that the subsequent payments of interest were not made to persons entitled to receive them:—Held, that the Statute of Limitations did not apply; that an administrator had no power to appropriate a debt in this way; that the right of an administrator, who was also one of the next of kin, to appropriate part of the estate to his own share was a right entirely independent of the agreement of the next of kin, and this right was not confined to chattels; and that the payments of interest were made to the right persons:—Held, therefore, that there must be the ordinary foreclosure judgment. *Barclay* v. *Owen*, 60 L. T. 220.

—— **Appropriation of Assets before Final Division.**]—Executors may, before final division, appropriate particular assets on account of a share in the residue of the estate without making a similar appropriation in respect of the other shares. *Richardson, In re, Morgan* v. *Richardson*, 65 L. J., Ch. 512; [1896] 1 Ch. 512; 74 L. T. 12; 44 W. R. 279.

Before final division the executors of a testator appropriated certain stock forming part of the estate at the market price of the day to one of themselves, as part of his one-fifth share of the testator's estate under his will, but did not at that time appropriate a proportionate amount of such stock in respect of certain settled shares of the estate. Prior to the final division of the estate the balance of this stock in the executor's hands had risen in value:—Held, that the appropriation was valid as against persons entitled to the settled shares. *Ib.*

—— **Power to retain Investments.**]—A testator gave specific property upon trust to sell and invest the proceeds, and set apart portions to answer settled legacies, and he gave power to the trustees to retain any part of his personal estate in the investments in which they were at the time of his decease, and the residue he bequeathed upon trust for all his children and the issue of such as should be dead, in equal shares, the shares of daughters to be settled. Part of the securities held by the testator at the time of his death consisted of shares in a brewery which had been very successful. Some of these the trustees appropriated to answer one of the settled legacies, and the remainder to the same legatee in part satisfaction of her share of residue. On a summons asking whether they were justified in so doing:—Held, first, as to the settled legacies, that there was power to appropriate, having regard to the power to retain existing investments, and to the decision in *Fraser* v. *Murdoch* (6 App. Cas. 855); and secondly, as to the residue, that, these shares being an authorised investment, there was no duty to sell and invest on security of the like nature, and that they, therefore, might be appropriated, even, according to *Richardson, In re* ([1896] 1 Ch. 512), in advance; that all such appropriations must be fairly made, and, there being no allegation of unfairness, that the trustees had acted within their powers. *Brooks, In re, Coles* v. *Davis*, 76 L. T. 771.

Legacies Payable in Futuro.]—T., by his will, gave all his real and personal estate to his wife for life or widowhood, and if she married again gave her an annuity of 2,000*l.* a year, and he gave legacies amounting to 157,700*l.*, which, according to the construction put upon the will by the Court of Appeal, were not payable until the widow's death. The widow had married again. This was a summons taken out by one of the executors for directions as to what securities should be set apart to meet the legacies payable at the death of the widow:—Held, that the right of the legatees was to have the amount of their legacies brought into court and invested in consols. But, as the 2¾ per cent. consolidated annuities would certainly fall in price when the reduction of interest to 2½ per cent. took place, and it was not certain that the legacies would be payable before then, the amounts must either be invested in 2½ per cent. consolidated annuities, or an additional sum equal to one-tenth of the amount of each legacy must be invested in the 2¾ per cent. consols to cover the risk of loss. The consols purchased were ordered in either case to be transferred into court to the separate accounts of the respective legatees. *Tredwell, In re, Jaffray* v. *Tredwell*, 65 L. T. 742.

4. Other Matters.

Inoperative Bequest.]—A testator directed his executors to apply 600*l.* in getting an act of parliament to continue an invalid disposition made by him of real estate to a charity:—Held, that this imposed no duty or obligation on the executors. *Wickham* v. *Bath (Marquis)*, 35 Beav. 59.

Annuity—Fund to answer—Right of Residuary Legatee to Balance.]—Where residue is bequeathed on trust to pay an annuity to A., and after the decease of A. to pay the corpus to B., the court has jurisdiction to order, in spite of opposition by A., that a fund shall be set apart to answer the annuity, and the balance be paid over to B. *Harbin* v. *Masterman*, 65

L. J., Ch. 195 ; [1896] 1 Ch. 351 ; 73 L. T. 591 ; 44 W. R. 421—C. A.

Discretionary Gift.]—Direction in will that executors shall pay annuity, "unless circumstances render it unnecessary, impracticable and inexpedient," means unless in the opinion of executors it shall become so, and court has no control over such discretion, unless they act malâ fide. *French* v. *Davidson*, 3 Madd. 396.

One, by will, gives annuities, and directs the residue of her estate to be disposed of in charity to such persons, and in such manner, as her executors or survivor shall think fit. On the death of them new trustees were appointed to sustain the annuities, but they could not dispose of the residue, it being a trust confined to the executors personally. *Hibbard* v. *Lamb*, Ambl. 309.

Costs of Release—Legatee not bound to Pay.]—Executors refused to pay a legacy to the legatee until he would execute a release and pay the costs of it. He offered to execute the release, but refused to pay the costs. The executor, therefore, brought the amount of the legacy into court, deducting from it the costs of bringing it into court. On a petition by the legatee to have the money paid out to him :—Held, that the executors had no right to call on him to pay the costs of a release, and that they should pay the costs of the petition. *Fortune, In re*, Ir. R. 4 Eq. 351.

k. AUTHORISING AGENTS.

To Accept Bill of Exchange.]—Semble, that a letter of attorney given by an executor to A., enabling him to transact the affairs of the testator in the name of the executor, as executor, and to pay, discharge and satisfy all debts due from the testator, conveys a sufficient authority to A., to accept a bill of exchange in the name of the executor, drawn by a creditor for the amount of a debt due from the testator, so as to make the executor personally liable. *Howard* v. *Baillie*, 2 H. Bl. 618 ; 3 R. R. 531. And see *Atwood* v. *Munnings*, 7 B. & C. 278 ; 1 Man. & Ry. 66 ; 6 L. J. (o.s.) K. B. 9 ; 31 R. R. 194.

But if the executor admits that a bill, which has been accepted by a third person with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to such person to accept that particular bill, without resorting to the letter of attorney. *Ib.*

But it was afterwards held, that a power of attorney given by an executrix to act for her as executrix, did not authorise the accepting of bills so as to charge her in her own right, though for debts due from her testator. *Gardner* v. *Baillie*, 6 Term Rep. 591 ; 1 Bos. & P. 32 ; 3 R. R. 531, 538.

Liability of Agent.]—Bankers, the agents of executors, and authorised by them to receive certain assets, remitting the amount to the executors in the course of their duty as agents, and the assets when received being afterwards applied in payment of the amount of such remittances, are not responsible in respect of a misapplication by the executors, they not being privy to any intention of such misapplication. *Keane* v. *Robarts*, 4 Madd. 332 ; 20 R. R. 306.

If a person, employed by the administrator of a deceased debtor to wind up the concerns of the deceased's business, gives an undertaking to a creditor of the deceased to furnish money to meet an acceptance which such creditor has given in furtherance of an accommodation arrangement for delaying payment in the hope that funds may be forthcoming, he is liable on such undertaking, though he was merely a clerk, and had no interest in the goods sold by the creditor, and had not received any funds which he could apply to the discharge of the debt. *Maud* v. *Waterhouse*, 2 C. & P. 579.

A person who becomes possessed of property of an intestate, as agent of his executor de son tort, or administrator, is not, after handing it over to the administrator, liable either at law or in equity, to account for it to the persons beneficially interested in it. *Hill* v. *Curtis*, 14 W. R. 125.

Agent of an administrator keeping money of the intestate in his hands, which he had proposed to his principal to lay out in the funds, ordered to pay interest with annual rests. *Brown* v. *Southhouse*, 3 Bro. C. C. 107.

III. LIABILITIES.

a. FUNERAL EXPENSES.

Are generally Liable for.]—An executor, who has assets sufficient for that purpose, is liable, upon an implied promise, to pay for a funeral suitable to the degree of the testator, furnished by the directions of a third person. *Rodgers* v. *Price*, 3 Y. & J. 28.

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. *Tugwell* v. *Hayman*, 3 Camp. 298 ; 13 R. R. 810.

—— **If Reasonable.**]—The estate of a deceased person is always liable for the reasonable expenses of his funeral, and can in no event be liable beyond them. *Green* v. *Salmon*, 3 N. & P. 388 ; 1 W. W. & H. 460 ; 8 A. & E. 348 ; 7 L. J., Q. B. 236 ; 2 Jur. 567.

As against creditors, an executor can only be allowed for funeral expenses what is absolutely necessary, regard being had to the degree and condition of the deceased. *Hancock* v. *Podmore*, 1 B. & Ad. 260 ; 8 L. J. (o.s.) K. B. 403.

An executor, who gives no orders for the funeral of his testator, is liable only to the extent of the expenses of a funeral suitable to the rank and circumstances of the testator. And it seems that he is not liable at all where the funeral is ordered by another person, to whom the undertaker gives credit. *Brice* v. *Wilson*, 3 N. & M. 512 ; 3 L. J., K. B. 93.

A plea by an executor, of money paid for expenses attending his testator's funeral, and for proving the will, amounting to 70*l.*, and no assets, except, &c., which were not sufficient to pay and satisfy the expenses, is bad, as against the Crown, on a writ of diem clausit extremum against the estate of the deceased Crown debtor, on general demurrer, such a plea not being perfect either as a plea of retainer, or of plene administravit, or fairly issuable in the pleaded form, and wanting necessary averments, as that the assets had been retained on account of the funeral expenses, or that the sum laid out was reasonable. *Rex* v. *Wade*, 5 Price, 621 ; 19 R. R. 664.

The expenses which executors will be justified

in incurring about the funeral of the deceased, when his estate turns out insolvent, must be reasonable, according to the circumstances of each particular case, with reference to the testator's condition in life. *Edwards* v. *Edwards*, 4 Tyr. 438; 2 C. & M. 612; 3 L. J., Ex. 204.

—— **What Reasonable.**]—The usual allowance for funeral expenses to be paid from an insolvent estate is 20*l.* *Yardley* v. *Arnold*, Car. & M. 434.

Where the deceased was a small tradesman, the sum of 10*l.* is a reasonable allowance to the executrix for funeral expenses, as against a creditor. *Reeves* v. *Ward*, 2 Scott, 390; 2 Bing. (N.C.) 235; 1 Hodges, 300; 5 L. J., C. P. 67.

The sum of 79*l.* is too much where the deceased was a captain in the army on half-pay. *Hancock* v. *Podmore*, 1 B. & Ad. 260; 8 L. J. (O.S.) K. B. 403.

The court refused to allow 2,210*l.* for the funeral expenses of a deceased nobleman, whose personal estate was believed to be solvent at his death, but ultimately, from unforeseen circumstances, proved to be insolvent. *Bissett* v. *Antrobus*, 4 Sim. 512.

Even in an insolvent estate, the personal representative will be allowed a sum expended for funeral expenses, acording to the situation of life in which the deceased had lived. *Pitchford* v. *Hulme*, 3 L. J. (O.S.) Ch. 223.

One hundred pounds only was allowed out of 145*l.*, expended by executors for funeral expenses, on an estate of about 12,000*l.* *Bridge* v. *Brown*, 2 Y. & C. C. C. 181.

—— **Contagious Illness—Liability for Value of Infected Property.**]—The testator, while on a visit, died of a malignant fever. The furniture was, by the advice of the medical advisers, destroyed, and the friend was obliged to remove from his house:—Held, that the testator's estate was liable for the damage. *Shalleross* v. *Wright*, 12 Beav. 558; 19 L. J., Ch. 443; 14 Jur. 1037.

Special Agreement as to.]—Where an administrator received a sum of money, which it was agreed by the parties entitled to it should be applied in the reimbursement of the plaintiff, who had laid out money for funeral expenses, and promised so to apply it:—Held, that he was entitled to recover it in an action for money had and received. *Meert* v. *Moessard*, 1 M. & P. 8.

Ratification of Charges by Executor.]—If an executor ratifies orders given by another person for an extravagant funeral, he may be sued by the undertaker individually, and not as executor, for the whole expense. *Brice* v. *Wilson*, 8 A. & E. 349.

A testator's widow ordered an extravagant funeral without the knowledge of the executor, who, however, was present at the funeral, and did not object to it as extravagant. The undertaker in his bill charged the widow, but subsequently applied for payment to the executor, who promised to pay. An action was brought against the executor in his own right, in which he suffered judgment by default:—Held, that under these special circumstances, the executor was liable for the whole amount of the reasonable charges for the funeral as ordered by the widow. *Ib.*

The assent of a party, before taking out administration, to the correctness of the funeral expenses ordered by another, is binding on such first-mentioned party when he subsequently takes out administration. *Lucy* v. *Walrond*, 5 Scott, 46; 3 Bing. (N.C.) 841; 3 Hodges, 215; 6 L. J., C. P. 290.

The defendant's mother died, and, in his absence, his uncle ordered an expensive funeral. In a letter written after the funeral, the defendant expressed his acknowledgments to his uncle for all that he had done, "which were certainly the best, and all that could be done." A year after, the defendant took out administration, and was sued by the undertaker for the expenses of the funeral:—Held, that after taking out letters of administration, the defendant was liable, in the capacity of administrator, for these expenses; and that, although he ratified the order long before he became administrator, he was bound by it, on the same principle that a creditor is bound after administration by an assent given before, to a particular disposition of the intestate's effects. *Ib.*

Third Person Promising to Pay.]—The widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licences of the house, as a security for the payment of his bill. A., one of the firm of distillers who supplied the house with spirits, by arrangement with the widow, took out administration; B., the other partner in the firm, promised the undertaker that, if he would give up the licences to him, he would pay his bill for the funeral:—Held, that the undertaker, having given up the licences to B., might recover his bill against B., although the widow was his original employer, and although he had made out his account, charging the administrator as his debtor. *Walker* v. *Taylor*, 6 Car. & P. 752.

Third Person Paying.]—Where an heir-at-law had voluntarily paid the funeral expenses of an intestate, the court would not allow the expenses to be refunded out of the intestate's personal estate. *Coleby* v. *Coleby*, 12 Jur. (N.S.) 496; 14 L. T. 697.

Mourning not a Funeral Expense.]—A demand for mourning furnished to the widow and family of a deceased person is not a funeral expense, and cannot be claimed against his estate by the executor, if he gives the order. *Johnson* v. *Baker*, 2 Car. & P. 207; 31 R. R. 663.

A payment for mourning rings, though not directed by the will, allowed under the direction given to the executors. *Paice* v. *Canterbury* (*Archbishop*), 14 Ves. 364.

Married Woman.]—The estate of husband is liable to funeral expenses of wife, though she lived separate from him, and had separate maintenance. *Bertie* v. *Chesterfield* (*Lord*), 9 Mod. 31.

Vice-Chancellor doubted whether husband has a general right to throw wife's funeral expenses on her separate estate. *Gregory* v. *Lockyer*, 6 Madd. 90; 22 R. R. 246.

A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, and "after payment of her just debts, funeral and testamentary expenses, and the expenses attending the execution of her will, appointed" the residue of her trust moneys among her nieces:—Held, that the charge of funeral expenses was not contingent upon her surviving her husband, and that her husband surviving was entitled to repayment, out of trust

moneys, of money paid by him in respect of such expenses. *Willeter* v. *Dobie*, 2 Kay & J. 647; 5 W. R. 669.

A husband, executor of his wife's will made under a testamentary power of appointment, is entitled to retain out of her estate the expenses of her funeral, though such estate was insufficient for creditors, and her will did not contain any charge of debts and funeral expenses. *McMyn, In re, Lightbown* v. *McMyn*, 55 L. J., Ch. 845; 33 Ch. D. 575; 55 L. T. 834; 35 W. R. 179.

b. EXECUTORSHIP EXPENSES.

What are.]—The term "executorship expenses" in a will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies—as, for instance, for warehousing furniture specifically bequeathed—pending the distribution of the assets; and payments by the executors in discharge of debts falling due from the testator's estate after his death—as, for instance, rent due after the testator's death for a house of which he was tenant from year to year. *Sharp* v. *Lush*, 48 L. J., Ch. 231; 10 Ch. D. 468; 27 W. R. 528.

The costs of executing the will are always paid out of a residue undisposed of. *Howse* v. *Chapman*, 4 Ves. 550; 4 R. R. 292.

Four persons were entitled to a fund; one had mortgaged her share beyond its value, and died. A suit was instituted to administer the fund. Another of the persons entitled took out administration, and the costs of it were directed to be borne by the whole estate, and not by the particular fund. *Cotton* v. *Penrose*, 18 L. J., Ch. 128; 13 Jur. 761.

The executor of an administrator who died in England, proved his will in Ireland, for the purpose of taking administration de bonis non to the intestate, but afterwards did not do so:—Held, that the costs of such probate were not chargeable against the intestate's estate. *Langford* v. *Mahony*, 2 Con. & L. 317; 4 Dr. & War. 81; 5 Ir. Eq. R. 569.

—— **Expenses relating to Real Estate.**]—As to what expenses relating to real estate are properly payable out of a fund set apart to pay, amongst other things, the expenses of executing the trusts of the will. *Brougham* (*Lord*) v. *Poulett* (*Lord*), 19 Beav. 119; 24 L. J., Ch. 233; 1 Jur. (N.S.) 151.

A testator declared trusts relating to his real and personal estate, and gave his personal estate to trustees, in trust to set apart and invest a sufficient fund to pay his debts, legacies, funeral expenses, expenses of proving his will, "and the execution of the trusts thereof":—Held, that the "expenses in the execution of the trusts of the will" were limited to those properly payable by the executors, in their character of executors alone, and therefore that the costs of executing the trusts of the various real estates fell on the cestuis que trustent. *Ib.*

Devise of a copyhold estate to three trustees upon trust, to permit A. to occupy the same or receive the rents and profits thereof for his life; and after the death of A., upon trust, to sell the estate, and divide the proceeds amongst the children of A.; and gift of the testator's residuary estate to the trustees upon other trusts, but charged with debts and "the costs and charges of proving and executing" the will:—Held, that the fines payable on the admission of the devisees in trust to the copyhold estate were not part of the costs and charges of executing the will to be borne by the residuary estate, but that such expenses of admission were a charge upon the copyhold estate so devised. *Cole* v. *Jealous*, 5 Hare, 31.

An heir-at-law is not entitled to have the costs of the conveyance of an estate, contracted for after the date of the will, paid out of the personalty. *Waite* v. *Barnes*, C. P. Coop. 502.

—— **Direction to Pay, Effect of—Charge.**]—As a general rule, where the executor is indebted to the estate of his testator to an amount equal to or exceeding the amount due for testamentary expenses, those expenses are not a charge upon the estate for the benefit of the person to whom they are due. But where the will directs the testamentary expenses to be paid, those expenses are a charge upon the estate. *Tanner* v. *Carter*, 25 L. J., Ch. 664; 2 Jur. (N.S.) 413; 4 W. R. 533.

A testatrix directed all her debts, funeral and testamentary expenses, to be first paid. Her executrix died indebted to her estate, and without having paid the testamentary expenses. A bill was filed to administer both estates, and the decree directed payment of testamentary as well as other expenses:—Held, upon petition by the proctor, that he was entitled to payment of the testamentary charges out of the estate of the testatrix before distribution of the assets. *Ib.*

And see COSTS, LIABILITY FOR, XIII. *i.* post.

c. FOR PERSONAL ACTS AND OMISSIONS.

Generally.]—Executor acting with regard to the testator's property, in any other manner than the trust requires, is answerable to the cestui que trust for any gain, and is liable for any loss. *Piety* v. *Stace*, 4 Ves. 622.

Wilful Default—What is.]—Wilful default means improper neglect to receive assets, not the misapplication of assets once received. The latter act is a devastavit, for which executors are chargeable, under the ordinary decree to account. *Blount* v. *O'Connor*, 17 L. R., Ir. 620.

Neglect or default may be wilful, though it may have been unintentional, and have arisen from forgetfulness. *Elliott* v. *Turner*, 13 Sim. 477.

—— **Delay in Probate—Loss of Interest.**]—The loss of interest, if any, arising from a debtor's refusal to pay an executor a debt before probate is too remote a consequence of a delay in proving the will to render the executor liable to account on the footing of wilful default. *Stevens, In re, Cooke* v. *Stevens*, 66 L. J., Ch. 155; [1897] 1 Ch. 422; 76 L. T. 18; 45 W. R. 284. Affirmed, [1898] 1 Ch. 162; 46 W. R. 177—C. A.

—— **Division of Securities.**]—After payment of the debts and legacies, &c., the trustees divided the securities representing the residue, into four parts, and allocated a part to each of the four persons entitled to the residue with their assent,

and out of the two parts purchased residences for the persons entitled to them, at their request, charging the sums so invested as payments on account of their respective shares:—Held, that the executors were not guilty of wilful default or breach of trust. *Blount* v. *O'Connor*, 17 L. R., Ir. 620.

—— **Investment.**]—Executors are not bound to make any investments within the year, notwithstanding all the liabilities of the testator are apparently liquidated, and they have a fund of realty ample to indemnify them against any debts which could come forward. *Johnston* v. *Newton*, 22 L. J., Ch. 1039; 17 Jur. 825.

The executors invested part of the assets in the purchase of railway stock and of freehold premises in England, and on the security of a mortgage:—Held, not wilful default, but acts which (if not authorised by the will) would render them liable to account for the money so invested, under the ordinary decree to account. *Blount* v. *O'Connor*, supra. *See also* TRUST AND TRUSTEE.

Debts not got in.]—Executor having three guineas per annum for collecting rents, and being a trustee as to the residue of personal estate, and not having brought an action to recover a bond debt, was charged therewith. Having put the next of kin to prove their relationship, ordered to pay the costs of taking the accounts. *Lowson* v. *Copeland*, 2 Bro. C. C. 156.

By the decree in a suit instituted by persons beneficially interested under a will, one object of which was to charge two of the executors with a debt which the third (who had become insolvent) owed to the testator at his decease, an inquiry was directed at the suggestion of the solvent executors, whether, if they had taken measures to call in the debt, it could have been recovered; but neither they nor the plaintiffs prosecuted the inquiry. On the hearing for further directions, the court held, that the solvent executors ought to have prosecuted the inquiry, notwithstanding they must have proved a negative; and, as they had not done so, it ordered them to pay the amount of the debt into court, with interest, from the testator's death. *Stiles* or *Styles* v. *Guy*, 16 Sim. 230. And see *Id.* 233, n. Affirmed, 1 Macn. & G. 422; 1 H. & Tw. 523; 19 L. J., Ch. 185; 14 Jur. 355.

—— **Rent.**]—Executor charged with arrears of rent unreceived, and balances in his hands, together with interest at rate of 4 per cent., and costs of suit relating to such arrears and balances. *Tebbs* v. *Carpenter*, 1 Madd. 290; 16 R. R. 224.

The difficulty of collecting arrears of rent does not excuse executors for not collecting them, without some evidence that in fact they could not have been recovered. *Alexander, In re*, 13 Ir. Ch. R. 137.

—— **Insuring Debtor's Life.**]—An executor, without a special authority applied the testator's assets for several years in insuring the life of a debtor to the estate. He then dropped the policy without consulting the parties beneficially interested, and without applying for the direction of the Court of Chancery, in a suit for administration of the estate then pending:—Held, that he was liable for the whole sum, which would have been recovered if he had kept up the policy. *Garner* v. *Moore*, 3 Drew. 277; 24 L. J., Ch. 687; 3 W. R. 497.

—— **Out of Partnership Assets—Moneys Lent by Testator to his Firm.**]—In 1825 Henry Wyatt, and his son Henry E., who had previously carried on business as brewers, admitted another son, George, into partnership. By the partnership-deed it was agreed that the plant, &c., which was stated to have been valued at 63,000*l.*, exclusive of the stock and debts, should be the capital, to a moiety of which the father was to be entitled. His surplus moneys in the business were stated to amount to 48,915*l.*, on which he was to receive interest. He died in July, 1826, having, by his will, given his surplus capital to his executors in trust to invest the same in government or other security, and pay the income to his wife, and after her death to set apart two legacies of 12,000*l.* each for each of his two daughters and their children. He gave his interest in the business and the stipulated ordinary capital to his sons Henry E., George, and William, who was a minor; and he directed his executors to carry on the business, in conjunction with his two sons, until William attained twenty-one, and he empowered them to sell his share in the brewery during his minority. He charged his freehold and other property with the payment of his surplus capital, and directed mortgages of his real estate for securing the legacies. The will was not proved till December, 1827, the executors having in the meantime left the surviving partners in undisturbed possession of the partnership property; and the business, although they did not take any active part in it, was carried on with their concurrence. Disputes having arisen between the surviving partners, the adult legatees filed a bill in 1827, for administration, which, through the interference of the executors, was abandoned. In 1828 the executors joined in deeds whereby the partnership was dissolved, and Henry E. assigned his interest to George in consideration of 20,000*l.*, and the executors released Henry E. from all claims in respect of any surplus capital. The business, which was afterwards sold with the sanction of the court, was found to be insolvent, and the partnership property turned out to be wholly unproductive to the testator's estate. The executors then filed a bill for administration of the estate, and in January, 1831, a bill was filed by the children of the testator's two daughters, seeking to charge the executors with wilful default in not having obtained payment of the legacies out of the surplus capital. By several decretal orders, made in both causes, accounts were directed to be taken as to the accuracy of the recitals in the partnership-deed, the value of the plant, and the surplus money due to the testator at his death, and accounts were directed to be taken of the partnership dealings and transactions; and if the master should find that he was unable to take such accounts, by reason of the non-production of books of account, he was to state the circumstances. The master having reported that he could not take the accounts for non-production of books, he was, by another order, directed further to inquire by whom the partnership property was possessed at the death of the testator, and how disposed of, and whether the executors with due diligence, and without their wilful default, might have possessed themselves out of the partnership property of sufficient to pay the two legacies of 12,000*l.* The master again reported that he was unable to take the accounts, by reason of the non-production of the books; he found, however, on the evidence before

him, large sums to have been due to the testator at his death, and large partnership assets, and that the executors might, with due diligence, and without their wilful default, have possessed themselves out of the partnership property of a sufficient sum to pay the two legacies. The court upon exceptions, negatived the finding of wilful default :—Held, by the House of Lords, that there was no just ground of appeal against the order directing further inquiries as to sufficiency of assets, and wilful default of the executors. *Rowley* v. *Adams*, 2 H. L. Cas. 725. And see *Ward* v. *Ward*, 2 H. L. Cas. 777, n.

Held, also, by their lordships, affirming the order of the court below upon the exceptions, that the master's findings of the sufficiency of assets and wilful default were displaced by his former findings, confirmed by the court, of the impossibility of ascertaining the testator's surplus capital; that there was no reason for thinking that the surplus capital could, if at all, have been realised without putting an end to the business, which the executors could not do without breach of their duty; that though the executors had not properly performed their duty, still, as it had not been satisfactorily made out that there ever were partnership assets, out of which the legacies could have been recovered or secured, the executors ought not to be charged with the wilful default. *Ib.*

Executors are not chargeable with the value of their testator's property, as stated by himself and others in deeds to which the executors are not parties. *Ib.*

—— **Discretion as to.**]—Even before the passing of the Conveyancing Act, 1881, executors had a fair discretion, whether they would or would not immediately sue a debtor of the testator for the amount due to the estate, and their not doing so, although loss occurred by the delay, was not necessarily wilful neglect or default for which they were liable. *Owens, In re, Jones* v. *Owens*, 47 L. T. 61—C. A. *And see now the* Trustee Act, 1893, s. 21.

Borrowing Money.]—An executor or an administrator borrowing money in that character, does not give the lender any claim against the testator's or intestate's estate. The contract simply creates a personal liability on the part of the executor or administrator. *Farhall* v. *Farhall*, 41 L. J., Ch. 146; L. R. 7 Ch. 123; 25 L. T. 865; 20 W. R. 157.

Loan out of Assets and Private Moneys—Deficient Security.]—An administrator having advanced a sum consisting partly of the intestate's, and partly of his own moneys on a security which it was apprehended would prove deficient :—Held, that the deficiency, if any, must be borne by his own share of the moneys advanced in exoneration of the intestate's estate. *Lambe* v. *Orton*, 33 L. J., Ch. 81.

For Loss by Retaining Leaseholds—Duty to Assign.]—Where the testator was assignee of a leasehold which it had become a loss to retain, an order directing the executors "to take such steps as might be necessary to put an end to all liability on the testator's estate in respect of such lease," and a subsequent order declaring that they had not used due diligence in carrying out the first order, and referring it to the master to state when they might with due diligence have put an end to the liability—were on appeal confirmed with costs; the Lord Chancellor treating it as clear law that the liability on the testator's estate would have ceased by an assignment; and holding that the executors were bound to effect such assignment if possible, and that it did not appear that they had used any endeavours for that purpose. *Rowley* v. *Adams*, 4 Myl. & C. 534; 9 L. J., Ch. 34; 3 Jur. 1069; 2 Jur. 915.

For Loss by Fire—Duty to Insure.]—A testator who was at his death lessee of a house under a lease, in which he had covenanted to keep the house insured, appointed A., his son, his executor. The testator had effected a policy of insurance. The policy expired on the 25th of March. He died on the 27th of March. The house was burnt down on the 26th of May. A. proved the will on the 17th of June. Evidence was given that between the death of the testator and the 26th of May, A. had received money of some of the customers of the testator, who had been a tradesman :—Held, that A. was not liable in respect of the breach of the covenant. *Fry* v. *Fry*, 27 Beav. 146; 28 L. J., Ch. 593; 5 Jur. (N.S.) 1047. And see *Bailey* v. *Gould*, 4 Y. & C. 221.

Contract for Sale by Executor under Mistake.]—One of two executors, erroneously believing that he was acting with the authority of the other, contracted to sell a leasehold house, part of the testator's estate :—Held, that the purchaser could not enforce a specific performance of the contract. *Sneesby* v. *Thorne*, 7 De G. M. & G. 399; 1 Jur. (N.S.) 1058; 3 W. R. 604.

Losing Assets.]—When assets have come into the possession of an executor and are afterwards lost to the estate, the rule as well at law as in equity now is, that the executor stands in the position of a gratuitous bailee, and therefore cannot be charged without some wilful default by virtue of the Judicature Act, 1873, s. 25, sub-s. 11. *Job* v. *Job*, 6 Ch. D. 562; 26 W. R. 206.

For Dividends of Funds left in Court.]—The court in a case of mistake permitted an executor to transfer a principal sum of stock standing in bank in his name, and purchased out of estate of testator a considerable time before, without the dividends which had accrued in the meantime. *Della Cainea* v. *Hayward*, M'Clel. 16.

Release set aside.]—The rule that an executor who pays a legacy is personally liable to pay the amount of the legacy to any creditor of the testator whose claim is unsatisfied, whether he has notice or not of the claim, applies to a case in which the creditor has given the testator what purports to be a release of his claim, and the executor bonâ fide believes the release to be valid, and the creditor does not question its validity till some years after the executor has paid the legacy, and fails in the first instance, but succeeds in setting aside the release on appeal. *Bewley, In re, Jefferys* v. *Jefferys*, 24 L. T. 177; 19 W. R. 464.

Before Lord St. Leonards' Act—Advertisement for Legatees.]—Legatees are not precluded from claim by non-appearance in pursuance of advertisement, to come in under decree, or to be excluded from benefit of it. *Anon.*, 9 Price, 210.

—— **Advertisement for Creditors.**]—In the case of a claim under an agreement creating, as was alleged, a trust for plaintiff, brought forward nine years after testator's death, at which time the agreement was first discovered; it was held that the executor, who, after duly advertising, had long ago distributed the estate, would have been liable if the agreement had been valid. The plaintiff was an infant within six years of bringing the suit. *Hill* v. *Gomme*, 1 Beav. 540; 8 L. J., Ch. 350; 3 Jur. 744. Affirmed, 5 Myl. & C. 250; 9 L. J., Ch. 54; 4 Jur. 165.

—— **Claim after Payment of Legacies.**]—The executors of a deceased trustee, having admitted the receipt of assets which would have been sufficient to answer a particular breach of trust committed by their testator besides his other debts:—Held, chargeable with the loss occasioned by such breach of trusts, although they had paid all his debts of which they had any knowledge out of the assets, and had distributed the whole surplus among his residuary legatees many years before, and at a time when they had no notice of the breach of trust, or of any claim in respect of it. *Knatchbull* v. *Fearnhead*, 3 Myl & C. 122; 1 Jur. 687. *And see* 6 L. J., Ch. 13, n.

Overholding by Sub-Tenant.]—H. held certain premises as yearly tenant from the plaintiffs up to his death, which occurred in the month of October, 1879. He had sublet a portion of them. The defendant, as his administratrix, became entitled to the premises. The plaintiff terminated the tenancy on the 1st of February, 1880, by a notice to quit, and on that day the defendant quitted the premises, gave notice of such quitting to the plaintiffs, and offered to give them possession of all save the portion in the possession of the sub-tenant, but they refused to accept such possession. The defendant never again went into possession of the premises, but the sub-tenant remained in possession and refused to leave, and the plaintiffs were obliged to bring an action of ejectment to recover possession. The defendant was unable to evict the sub-tenant, because the term for which H. had made the subletting was unexpired. The defendant, after the said 1st of February, 1880, did not derive, and could not with reasonable diligence have derived, any profits from the premises. The plaintiffs brought an action against the defendant for trespass for mesne profit, from the 1st of February, 1880, and for the costs of evicting the sub-tenant:—Held, on demurrer to a defence setting out the above facts, that a good answer to the action was thereby shewn, as the defendant was not personally liable for the refusal of the sub-tenant to give up possession. *L. & N. W. Ry.* v. *Hill*, 12 L. R., Ir. 140.

Held, also, that an action for mesne profit lay only against such persons as had been actually or virtually in possession of the premises at the time when the plaintiffs became rightfully entitled to such possession. *Henderson* v. *Squire* (L. R. 4 Q. B. 170) distinguished. *Ib.*

An administrator having let lands of the intestate under a written agreement for a lease, which could not be enforced, and neglected to take legal proceedings to remove an occupier in order to give possession in pursuance of the agreement, in consequence of which the tenant refused to take the lease, and the lands remained unlet for half a year, was charged with a year's rent and the costs of the abortive letting. *Connolly* v. *Connolly*, 17 Ir. Ch. R. 208.

Wilful default in an executor does not imply deliberate or intentional default. He may be charged with a loss arising from mere negligence or imprudence if unexcused. *Ib.*

Executor indebted to Estate—Mortgage of Assets by.]—A testatrix bequeathed a leasehold estate to trustees and executors, in trust for sale, and gave one of such executors a beneficial interest for his life in one-fourth part of the estate. The latter executor, being at the time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to secure a private debt which he owed to a creditor, and deposited the title-deeds with the creditor:—Held, on a bill by his co-executors, to recover the title-deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the court decreed the title-deeds to be delivered up, with a declaration that they belonged to the three trustees. *Cole* v. *Muddle*, 10 Hare, 186; 22 L. J., Ch. 401; 16 Jur. 853.

R., a surviving executor, entitled as next of kin and personal representative of W., a deceased co-executor, deposits a lease belonging to his testator with creditors for a private debt of his own. W. is an appointee under a power created by the will of the testator. In an administration suit R. is found to be a defaulting executor; and a bill being filed to recover the lease by parties interested under the testator's will:—Held, that R.'s interest, as personal representative and next of kin of W., is not liable for R.'s default; that the lease must be brought into court, with an inquiry as to what was due from the estate of the deceased executor, W. *Wilson* v. *Leslie*, 5 W. R. 815.

For Fraudulent Omission from Inventory—Law of Isle of Man.]—By the ecclesiastical law of the Isle of Man, an executor or administrator becomes liable for the full amount of the debts of the deceased: first, if he be executor de son tort; secondly, if he omits to return an inventory of the assets to the episcopal registry, as he is sworn to do; and thirdly, if there be a fraudulent omission in the inventory of any part of the assets of the deceased, of which he has taken possession. Where, therefore, an executor omitted from the inventory a sum of 25*l.* taken by him out of the desk of the deceased, the judicial committee held (affirming the judgment of the courts below) that such omission was fraudulent, and rendered the executor liable to the full amount of the deceased's debts. *Jackson* v. *Wilson*, 3 Moore, P. C. 177.

Statute of Frauds.]—An administrator is not bound to set up the Statute of Frauds in respect of the payment of the balance of a sum of money promised by the deceased to be paid to his daughter on her marriage. *Garratt's Trusts, In re*, 18 W. R. 684. But see *Rownson, In re, Field* v. *White*, 54 L. J., Ch. 950; 29 Ch. D. 358; 52 L. T. 825; 35 W. R. 604; 49 J. P. 759—C. A.

Lapse of Time—Presumption.]—Circumstances under which, from distance of time and the necessity of presuming that what has been done has been honestly done, executors have been

exonerated from the consequences of a breach of trust in not taking steps to recover a fund which has been misapplied by the trustees. *Taylor* v. *Millington*, 4 Jur. (N.S.) 204.

For Profits—Purchase by Executor of Debts due from Estate.]—An executor cannot buy for his own benefit debts due from the testator's estate. *James*, *Ex parte*, 8 Ves. 346; 7 R. R. 56.

—— **Purchase of Equity of Redemption by Executor of Mortgagee.**]—The executor of a mortgagee purchased the equity of redemption of the mortgaged estate in his own name, with the money due on the mortgage, and a small advance beyond it:—Held, that he was a trustee of the purchase for the benefit of the testator's estate. *Fosbrooke* v. *Balguy*, 1 Myl. & K. 226; 2 L. J., Ch. 135. *And see further*, TRUST AND TRUSTEE.

—— **Onus of Proof on Sale of Legacy to.**]—If a legatee agrees to sell to the executor of the will his legacy for an annuity, the burden will lie on the executor to shew that there was no unfairness in the transaction. *Gray* v. *Warner*, *Biel*, *In re*, 42 L. J., Ch. 556; L. R. 16 Eq. 577; 28 L. T. 835; 21 W. R. 808.

—— **Gift to Executor by Beneficiary—Onus of Proof.**]—Where a document has been obtained by an executor named in a will, before probate, from a beneficiary, for a gift by the latter to the former, the court will regard the transaction with great suspicion, and will not uphold it unless the circumstances shew that there was no misrepresentation, pressure, or unfairness on the executor's part, that the beneficiary acted deliberately and thoroughly knew and appreciated what he was doing, that he signed the document independently of any influence on the executor's part and without being actuated by any fear of not complying with the wishes of the executor. *Wheeler* v. *Sargeant*, 3 R. 663; 69 L. T. 181.

—— **Corrupt Presentation set aside.**]—Where executor or trustee, entrusted with disposition of some church preferments, made a presentation to A., under a secret condition for his own benefit, the presentation was set aside, and he was decreed to present a more proper person. *Richardson* v. *Chapman*, 7 Bro. P. C. 317. *And see* ECCLESIASTICAL LAW.

For Costs.]—*See* XIII. *i.* post.

d. FOR ACTS OF EACH OTHER.

In General—At Law.]—It is not sufficient to charge an executor with assets, to shew that he has acquiesced in the receipt of assets by his co-executor. *Stearne* v. *Mills*, 1 N. & M. 434; 4 B. & Ad. 657; 2 L. J., K. B. 106.

In order that an executor may be liable for the act of his co-executor, the co-executor must have acted in his representative capacity. *Scholey* v. *Walton*, 12 M. & W. 510; 13 L. J., Ex. 122.

—— **In Equity.**]—Notice to one executor, who concealed it from the other, will not affect the latter. Executors are not affected by each other's acts. *Hawkins* v. *Day*, Ambl. 162; Dick. 131.

One will not be answerable for a sum come to the hands of the other, unless they have done joint acts; but each will be liable to the whole costs. *Littlehales* v. *Gascoyne*, 3 Bro. C. C. 73.

An executor doing any act by which property gets into possession of another executor is equally answerable. Otherwise if he is merely passive. *Langford* v. *Gascoyne*, 11 Ves. 333; 8 R. R. 170.

The relative liabilities of executors and trustees concurring in acts to enable their co-executors or co-trustees to receive money considered. General rule, that executors joining in a receipt are all chargeable; in the case of trustees, only the person receiving the money. The reason of the distinction. *Chambers* v. *Minchin*, 7 Ves. 186; 6 R. R. 111.

A., B., C., D. and E. (the two latter being married women) take out administration to an intestate, and afterwards appoint C. to be the acting administrator, and direct the debtors to pay their debts to him. C. becomes insolvent:—Held, that A., B. and C., and the husbands of D. and E., are responsible for C.'s receipts. *Lees* v. *Sanderson*, 4 Sim. 28.

Forgery by One Executor.]—Where an executor, personating the testator (who was his father), mortgaged freeholds and leaseholds of the father, and applied the money to his own use, the deeds were held to be forgeries, and to have passed nothing but the beneficial interest of the executor, and that the co-executrixes were entitled to recover the property mortgaged. *Cooper*, *In re*, *Cooper* v. *Vesey*, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A.

A testatrix, who had a general power of appointment over a sum of consols comprised in her marriage settlement, gave certain specific legacies of this stock. On her death the stock was sold by the trustees of the settlement, and the proceeds paid into a bank to the joint account of the two executors of the will. Crossed cheques for the legacies were drawn by the executors, payable to the order of the legatees respectively. The indorsements were forged by one of the executors, who obtained payment to himself, and absconded. The legatees never consented to the payment being made in cash:—Held, that it was the duty of the executors to have re-converted the money into stock, and that the remaining executor was liable for the value of the legacies. *Bennison*, *In re*, *Cutler* v. *Boyd*, 60 L. T. 859.

Where the Executor has had Control.]—If executor possesses testator's estate and trusts it to other executors, first is liable for any risk. *Townsend* v. *Barber*, Dick. 356.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond-creditor of his testator, by shewing that he paid the money over to his co-executor for the express purpose of satisfying such bond-creditor, although his co-executor may have misapplied such money by using it in discharge of his own simple contract debts. *Crosse* v. *Smith*, 7 East, 246; 3 Smith, 203.

An executor doing any act by which property gets into possession of another executor, though with an innocent motive, is equally answerable. *Langford* v. *Gascoyne*, 11 Ves. 333; 8 R. R. 170.

A co-executor, who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate, and sending it

immediately to the acting executor. *Balchen* v. *Scott*, 2 Ves. J. 677; 3 R. R. 29. S. P., *Hovey* v. *Blakeman*, 4 Ves. 596.

One of two executors under a will, which directed the accumulation of a residue:—Held, not answerable for the misapplication of the dividends of stock, part of the testator's estate, which the other executor, who was the acting one, had received. *Williams* v. *Nixon*, 2 Beav. 472; 9 L. J., Ch. 269.

Two executors sold out stock, and the produce was received by one:—Held, that the other was responsible for its misapplication, but was entitled to an inquiry whether any part had been applied in discharge of claims against the testator. *Ib.*

Testator having devised a real estate to his three executors, upon trust to sell and apply the produce of the sale as part of his personalty, and having given to one of his executors an option to purchase the estate at a certain price, the two other executors conveyed it to him, and joined in a receipt for the purchase-money. The purchase-money was, in fact, not paid, and afterwards the third executor became bankrupt:—Held, that the two other executors were answerable to the residuary legatee for the deficiency. *Gregory* v. *Gregory*, 2 Y. & C. 313; 6 L. J., Ex. Eq. 52.

One of three executors who had not proved, but acted in the receipt and application of some of the testator's moneys, as the agent or assistant of the other executors:—Held, to be answerable only for what he had actually received. *Lowry* v. *Fulton*, 9 Sim. 115; 8 L. J., Ch. 314; 3 Jur. 454.

A testator who died in 1835 directed his executors and trustees (A. and B.) to convert his real and personal estate, and after paying his debts to invest the proceeds on mortgage of freeholds, or on government securities. A. and B. deposited the proceeds in a bank at interest in their joint names. A. died in 1842, and B. drew out the balance and applied it to his own use. No sufficient reason being shewn for retaining the money in the bank:—Held, that the estate of A. was liable to make good the loss. *Gibbins* v. *Taylor*, 22 Beav. 344.

An executor who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the executor, because he had no legal right to retain it, although by the will of the testator the price of the estate, when sold, was to be considered as part of his personal estate. *Davies* v. *Spurling*, 1 Russ. & M. 64; Taml. 199; 31 R. R. 78.

Three executors, A., B. and C., were appointed; two (A. and B.) proved the will; the third (C.) did not prove, but administered part of the assets. A. and B. sold the stock-in-trade of the testator to C.:—Held, that he, having paid part of the purchase-money into the hands of A., was answerable for his misapplication, and that, although as mere purchaser the payment would be a complete discharge, he is liable as executor: having acted in one instance he cannot exclude a particular part of his dealings with the assets, but is completely executor, notwithstanding his intention of not interfering generally, and his own transaction as purchaser is not an exception. But, although payment by executor to co-executor is no discharge, subject, however, to its being shewn, notwithstanding waste of the assets by the co-executor, that the specific moneys paid were duly applied, payment into a bank to the credit of the executors' account by one executor, although the money lodged was thereby put in the power of a defaulting executor (one executor being competent by the custom of bankers to withdraw funds standing to the credit of the executors generally), and it was drawn out upon his single draft and misapplied, is sufficient. The lodgment, being an absolute discharge, does not involve him in such breach of trust. *Kilbee* v. *Sneyd*, 2 Moll. 186.

If one executor does an act which enables his co-executor to obtain sole possession of money belonging to the estate, and which but for that act he could not have obtained possession of, and the money is afterwards misapplied by such co-executor, both are liable for the loss. *Candler* v. *Tillett*, 22 Beav. 257; 25 L. J., Ch. 505; 4 W. R. 160.

C., who knew that T., his co-executor, owed money to the testator on an equitable mortgage, allowed him to keep the title-deeds in his sole possession, taking no steps to compel payment, though he was very active in recovering a debt due to himself personally from T. S. deposited his title-deeds with another person as a security for fresh advances, and the testator's debt was lost:—Held, that C. was liable for the loss. *Ib.*

A testator placed his securities in the custody of T., his confidential solicitor. By his will he appointed him and C. his executors. T. made out a list of such securities, which he signed and retained in a box, but he gave the key to C. Afterwards T. sent the box to C., requesting him to take out a mortgage security, and send it to him for the purposes of an intended transfer. C., having no reason to suspect T., complied, and the mortgage money was received by T. alone, and misapplied by him:—Held, that his co-executor C. was not liable, it appearing from the evidence that the solicitor had a second key to the box, and could, and probably did, open the box himself. *Ib.*

Two executors and trustees who, bonâ fide and without reason for suspicion, act according to the usual course of business, and put it into the power of a third (whom they properly employ as a stockbroker in the trust) to unregister certain bonds which he then misappropriates, are not liable for his defalcations. *Gasquoine, In re, Gasquoine* v. *Gasquoine*, 63 L. J., Ch. 377; [1894] 1 Ch. 470; 7 R. 449; 70 L. T. 196—C. A.

—— **Joint Acts and Receipts.**]—Where executors are jointly charged, one only having received the money, and the other joined in the receipt, it is on the ground that the property is under the control of both; the question in such a case is, whether the executor joining in the receipt had a control, and of that joining in the receipt is evidence. *Doyle* v. *Blake*, 2 Sch. & Lef. 231; 9 R. R. 76. S. P., *Hovey* v. *Blakeman*, 4 Ves. 596; *Joy* v. *Campbell*, 1 Sch. & Lef. 341; 9 R. R. 39.

Executors drawing a joint draft for property of the testator, and suffering it to remain in the hands of a tradesman, both held liable, although one of them had done no other act in execution of the will. *Sadler* v. *Hobbs*, 2 Bro. C. C. 114.

An executor who proves a will may be wholly passive, or active, so far as it is necessary to enable his co-executor to act in the administration of the estate; but the acts in which he joins must be necessary for the purpose of such administration. *Terrell* v. *Matthews*, 11 L. J.,

Ch. 31; 5 Jur. 1074. Semble, *S. C.*, 1 Macn. & G. 433, n.

A., an executor and trustee, concurs with his co-executor and co-trustee, B., in selling out public stock, part of their testator's property, and in conveying and surrendering the testator's freehold, leasehold, and copyhold estates to purchasers, and they both subscribe the receipts in writing for the amount of the respective purchase-moneys, which were endorsed on the back of the purchase-deeds; but B. alone received the moneys, and the purchase of the stock:—Held, that the acts in which A. had joined with B. being indispensable and necessary for the administration of the testator's estate, he was not liable for a devastavit thereof committed by B. *Ib.*

If an executor or trustee, without taking due means to learn from his co-executor or co-trustee, whether it is necessary, in the due execution of the trust, to sell stock, concurs in the sale of stock, and leaves it in the disposition of his co-executor or co-trustee, he is liable for the stock so sold. *Harrington* v. *Harrington*, 1 L. J., Ch. (O.S.) 41.

Where a surviving executor denied by his answer that he had ever acted during the lifetime of the co-executor, and it was clear that he had not proved till after his death, yet there being some slight evidence of his acceptance of the office during the life of his co-executor, and he having been a party to a composition deed, entered into by the executors of such co-executor, the court held there was ground for special inquiries with a view to charge him for devastavits committed during the life of the other. *James* v. *Frearson*, 1 Y. & C. C. C. 370.

—— **Extent of Liability.**]—Executors charged for negligence by joining in a transfer to a co-executor, upon his representation that it was required for debts; but not liable so far as they can prove the application to that purpose, though he possessed other funds, part of the assets, not through them, which funds he wasted. *Shipbrook* (*Lord*) v. *Hinchinbrook* (*Lord*), 11 Ves. 252; 8 R. R. 138. S. P., *Underwood* v. *Stevens*, 1 Mer. 712; *Moses* v. *Levi*, 3 Y. & C. 359; *Hewitt* v. *Foster*, 6 Beav. 259; 7 Jur. 228.

In Action for Use and Occupation.] — An action was brought against two persons, being the executors of a deceased termor, for the use and occupation by them of the demised premises; an entry and occupation by them were proved:—Held, that it did not enure as that of both, so as to make them jointly liable de bonis propriis, in an action for use and occupation. *Nation* v. *Tozer*, 4 Tyr. 561; 1 C. M. & R. 172; 3 L. J., Ex. 234.

To an action for use and occupation, for a quarter's rent from Lady-day to Midsummer, the defendant pleaded, that by an agreement between the executors of T. and the defendant, the defendant agreed to take of the executors the premises; that it was afterwards agreed between them and W., that W. should become tenant to the executors from Lady-day, and that the defendant should be discharged from all liability to subsequent rent; that the defendant accordingly gave up possession to W., and the executors accepted him as tenant:—Held, that this plea was not proved by evidence that one of the executors had so agreed to accept W. as tenant in lieu of the defendant. *Turner* v. *Hardy*, 9 M. & W. 770; 1 D. (N.S.) 954; 11 L. J., Ex. 277.

In Action on Covenant for Quiet Enjoyment.]—In an action against two executors upon a covenant of their testator for quiet enjoyment against all claiming under him, the breach assigned was, that the executors having, at the time when the demise was made, lawful title in their own right, entered and evicted the covenantee. Entry and eviction by the two were proved, the only evidence shewing that it was under lawful title, being a declaration by one after the entry, that the two had lawful title through the testator under a deed prior to that sued upon. Quære, whether the declaration was admissible at all as evidence of the title without production of the deed. *Foæ* v. *Waters*, 4 P. & D. 1; 12 A. & E. 43; 9 L. J., Q. B. 329.

But held, that assuming it to be admissible as against the party making it, the declaration was not evidence against the other, as it did not relate to the affairs of the executorship. And therefore that no proof had been given to support the action. *Ib.*

When the Executors have become Trustees.]—Two executors permitting their co-executor to retain in his hands the ascertained residue, held liable as for a breach of trust. *Lincoln* v. *Wright*, 4 Beav. 427.

Upon assenting to a specific bequest given them in trust, executors forthwith became trustees. *Dix* v. *Burford*, 19 Beav. 409.

A testator bequeathed a mortgage secured by a conditional surrender, and which had become absolute, to his two executors, upon trust to continue and hold it on certain trusts. The executors assented to the legacy, but did not procure themselves to be admitted, and by reason thereof, one of them was enabled to receive money and release the estate. The money being misapplied:—Held, that the co-executor had become a trustee, and was liable for his default. *Ib.*

Testator bequeathed 500*l.* to his executors, upon trust that they should lay out and invest the same in the public funds, or in such other security, or in such other manner as to them should seem expedient, at interest, and apply the produce to a charitable purpose. One of the executors, who took the entire management of the estate, paid the debts, and most of the legacies of the testator, but neither specifically appropriated nor invested 500*l.* for the charity. He paid interest, however, on 500*l.* to the charity; at the same time receiving interest on the promissory note of a debtor to the estate who was in good credit, but whose debt was the only fund available for payment of the legacy. The executor afterwards died. On the admission, by his representatives, that he had, in his lifetime, assented to the payment of the legacy to himself as trustee:—Held, that his estate was severally answerable as for a breach of trust. *Att.-Gen.* v. *Higham*, 2 Y. & C. C. C. 634.

Where the Executor has acted Negligently.]—Two of three executors, with the knowledge that there were unsettled accounts subsisting at the testator's death between the testator and their co-executor, in respect of which they had reason to believe that the latter was considerably indebted to the estate, took no effectual steps to compel him to account and pay, or secure the balance due for several years after the testator's death, at the end of which he became bankrupt. The solvent executors, being unable to prove

that an attempt to recover the money at an earlier period would have been fruitless, were decreed to make good the loss, as having been occasioned by their wilful neglect and default. *Styles* or *Stiles* v. *Guy*, 1 Macn. & G. 422; 1 H. & Tw. 523; 19 L. J., Ch. 185; 14 Jur. 355. Affirming on this point, 16 Sim. 230. And see *Id.* 233, n.

It is the duty of executors, no less than of trustees, to keep a check upon each other's conduct, and an executor is equally chargeable with neglect in allowing a part of the estate to remain outstanding in an improper state of investment, whether the party in whose hands it is so outstanding be a co-executor or a stranger. *Ib.*

A testator gave annuities to the plaintiffs and appointed three executors, one of whom, A., was the residuary legatee. No fund was set apart to answer the annuities, but A. was permitted by his co-executors to receive the assets which he wasted, though he paid the annuities for eighteen years, at the end of which he became insolvent: —Held, that the co-executors were liable to the plaintiff's for A.'s receipts. *Egbert* v. *Butter*, 21 Beav. 560.

The acts of one of several executors cannot bind their testator's estate so as to preclude other persons interested in that estate from relying on their legal title, unless the legal owner himself, or some predecessor of his in title, has personally either been guilty of misconduct or conferred on the mortgagor an apparent authority to deal with the mortgaged property as if it were unincumbered. *Ingham, In re, Jones* v. *Ingham*, 62 L. J., Ch. 100; [1893] 1 Ch. 352; 3 R. 126; 68 L. T. 152; 41 W. R. 235.

Administrator de bonis non.]—An administrator de bonis non is not responsible for the assets which came to the hands of his predecessor. *Att.-Gen.* v. *Köhler*, 9 H. L. Cas. 654; 8 Jur. (N.S.) 467; 5 L. T. 35; 9 W. R. 933.

Personal Representative.]—Where one executor, who has been allowed by the other executor improperly to receive part of the trust funds, dies, the estate of the executor so dying is liable to make good the amount so received. *Pattenden* v. *Hobson*, 22 L. J., Ch. 697; 17 Jur. 406; 1 W. R. 282.

Indemnity Clause.] — Where testator had directed that his executors should not be liable for each other's acts, one of them, who was in good credit at the time, having called in a mortgage, and received the money, sends round the assignment to his co-executors, who execute it and sign a receipt:—Held, that as no part of the money had come to their hands, they should not be answerable. *Westley* v. *Clarke*, 1 Eden, 356; Dick. 329.

A testator authorised his two trustees and executors, A. and D., to carry on his business, giving them full discretion as to its management, and power to employ collectors of debts and accountants. The will contained an indemnity clause, that each trustee should be answerable only for losses arising from his own default, and that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the purposes of the will, should not be obliged to see to the application thereof, nor should such trustee be rendered responsible by an express notice of the actual misapplication of the same moneys. The business was carried on, with the consent of the beneficiaries, by one trustee, A., the testator's son, and an account was opened at the bank, and a letter signed by both executors and trustees, authorising the bank to honour the signature of the one trustee, viz., A. the son. Under this authority, the trustee (A.) drew out, nominally for the business, large sums of money, which he misappropriated to his own purposes:—Held (following *Wilkins* v. *Hogg*, 3 Giff. 116; 10 W. R. 47), that, in the absence of proof of gross negligence or personal misconduct on the part of the trustee, D., he was fully protected by the indemnity clause from liability in respect of the loss to the estate occasioned by the defalcations of his co-trustee, A. *Pass* v. *Dundas*, 43 L. T. 665; 29 W. R. 332.

e. DEVASTAVIT.

Persons liable—Generally.]—Whoever deals with an executor for the assets of a testator for a purpose perfectly inconsistent with a due administration of those assets, subjects himself to the consequences of a devastavit. *Downes* v. *Power*, 2 Ball & B. 498.

—— **Executors of Executors and Administrators.**]—It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead plene administravit all the goods and chattels of the original testator at the time of his death, come to the hands of the defendant, &c., without also pleading plene administravit by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund out of which any devastavit by the first executor could be made good. *Wells* v. *Fydell*, 10 East, 315.

In an action against the executor of A., the declaration alleged that the plaintiff had recovered judgment against A., executor of R., and that A. had been guilty of a devastavit. The defendant pleaded that R. appointed A. and B. his executors; that B. was still living; that A. at his death, and after his death B., had effects of R. sufficient to satisfy the judgment, and that the defendant never had in his hands any effects of R. as executor:—Held, that the plea was bad, as, by 30 Car. 2, st. 1, c. 7, the defendant was responsible as executor for A.'s devastavit, which the plea admitted. *Coward* v. *Gregory*, 36 L. J., C. P. 1; L. R. 2 C. P. 153; 12 Jur. (N.S.) 1000; 15 L. T. 279; 15 W. R. 170.

The death of an executor before payment of his testator's debts is no excuse to a charge of devastavit. *Ib.*

—— **Executors of Executor de son tort.**]—J. being indebted to the plaintiff for 360*l.* died intestate, and his widow, A., without obtaining letters of administration, intermeddled with his assets, and on the plaintiff suing her as executrix of her husband for that sum, she allowed judgment to go by consent. A. died shortly after, having appointed the defendants her executors. The plaintiff then brought an action against her executors to recover the 360*l.*, suggesting a devastavit by A.; they pleaded no assets and denied the devastavit; the plaintiff replied, by way of estoppel, the judgment against A. The jury found that at A.'s death there remained assets of J. to the amount of 154*l.*:—Held, that the judgment against A. was conclusive to shew that she had then assets of J. to the amount of 360*l.*, and that therefore a devastavit must be

presumed to have been committed by her to the extent of the difference between 360*l.* and 154*l.* *Ennis* v. *Rochford*, 14 L. R., Ir. 285.

—— **Married Women.**]—*See cases under* MARRIED WOMAN EXECUTRIX OR ADMINISTRATRIX, VIII. post.

—— **Infants.**] — *See cases under* INFANT EXECUTOR OR ADMINISTRATOR, IX. post.

Debt by—Nature of.]—A devastavit by an administrator only creates a simple contract debt to the next of kin. *Dunne* v. *Doran*, 13 Ir. Eq. R. 545.

Specific legacy to an executor who afterwards becomes bankrupt, and commits a devastavit. The subject of the specific bequest being sold by his assignees:—Held, the produce in their hands not specifically liable to make good the devastavit in favour of the parties beneficially entitled under the will, but that such parties are only entitled to prove the amount of the devastavit. *Geary* v. *Beaumont*, 3 Mer. 431.

—— **Retainer for against Co-executor.**] — Retainer allowed to one executor out of a legacy to a co-executor in respect of a devastavit. *Sims* v. *Doughty*, 5 Ves. 243.

Difference between Sum accepted by Administrator and Amount of Verdict.]—An administrator, having arrested a debtor to the intestate for money had and received to the defendant's use, obtained a verdict and charged him in execution. The defendant obtained a rule for a new trial, and petitioned the insolvent court for his discharge. Under these circumstances the debtor requested to be discharged on payment of a sum considerably less than that recovered in the action, and less than the costs. The administrator consented to the terms, and the debtor was liberated. A creditor of the intestate sued the administrator:—Held, that the administrator was not personally liable, as for assets, for any part of the sum given by the verdict against the debtor, and was not guilty of a devastavit in permitting his liberation. *Pennington* v. *Healey*, 3 Tyr. 319; 1 C. & M. 402; 2 L. J., Ex. 98.

Lending Money.]—If an executor lends money belonging to the testator, but not wanted for the immediate uses of the will, to a third person on private security, it does not amount to a devastavit, provided he exercised a fair and reasonable discretion. *Webster* v. *Spencer*, 3 B. & Ald. 360; 22 R. R. 427.

One executor lent to his co-executor their testator's money, taking a bond for the same, payable to himself and his executors. The lender died, and afterwards the borrower:—Held, first, that this was a misapplication of the assets, and therefore, that the personal representatives of the lending executor might sue on the bond in order to exonerate their testator and themselves; and, secondly, that the rule against circuity of action did not apply. *Gleadow* v. *Atkin*, 2 Tyr. 593; 2 C. & J. 548; 1 L. J., Ex. 223.

Executors cannot lend money on personal security, though words which may imply a discretion so to do are used by the testator. *Wilkes* v. *Steward*, G. Coop. 6.

Where a testator authorises his three executors to lend money on personal security, it is a breach of trust if two of the executors lend it to the third. —— v. *Walker*, 5 Russ. 7.

Laches—Effect of.]—Mere laches in abstaining from calling upon the executors to realise for the purpose of paying his debt will not deprive a creditor of his right to sue the executors for devastavit, unless there has been such a course of conduct, or express authority on his part, that the executors have been thereby misled into parting with the assets, available to answer his claim. *Birch, In re, Roe* v. *Birch*, 54 L. J., Ch. 119; 27 Ch. D. 622; 51 L. T. 777; 33 W. R. 72.

Delay, Effect of—Specialty Debt.]—There is no rule in equity, any more than at law, that the mere nonsuing by a specialty creditor for any period within the statutory limit of twenty years is such negligence as deprives him of the right of requiring payment of the specialty debt. S. covenanted with B. for immediate payment of a sum of money in exoneration of B., and in substitution for a similar sum which B. was liable to pay within six months of his death. S. died without having paid, or been called on to pay that sum, leaving property amply sufficient to meet it, but her executor, instead of providing out of her estate funds to meet the liability on her covenant, left her estate, consisting entirely of shares in a bank, which afterwards failed, unconverted. The investment in bank shares was authorised by the will of S.:—Held, that the executors of B. were entitled, after a lapse of eighteen and a half years, to enforce that covenant against the estate of S., and that the executor of S., having committed a devastavit in not converting the shares to provide for payment of the debt, was liable to make good the amount for which his testatrix was so liable under her covenant. *Baker, In re, Collins* v. *Rhodes*, 51 L. J., Ch. 315; 20 Ch. D. 230; 45 L. T. 658; 30 W. R. 858—C. A.

—— **Mortgage Debt.**] — Testator mortgaged an estate to plaintiffs, and devised it to three executors upon trusts in favour of his daughters, and after the death of all his children, for sale. The executors distributed the whole personal estate without providing for the mortgage debt. After this one of the executors died. The daughters occupied the farm for twenty years after the distribution of the personal estate, paying rent to the executors, and, until 1880, paying the interest on the mortgage. The mortgagees then brought an action for foreclosure or sale, and claimed to have any deficiency made good by the two surviving executors and the executors of the deceased executor:—Held, that any claim founded on the devastavit in distributing the personal estate was barred after six years, but that the plaintiffs were entitled to foreclosure, and to an order for administration of the mortgagor's estate. *Gale, In re, Blake* v. *Gale*, 22 Ch. D. 820; 48 L. T. 101; 31 W. R. 538.

A testator mortgaged freeholds, and died in May, 1867, having devised all his real and personal estate to A. and B. upon certain trusts, and having appointed them his executors. The executors, without making provision for the mortgage debt, applied the whole of the personal estate in payment to simple contract creditors and beneficiaries. In 1869, A. died, and C. was appointed trustee in his place in 1871. The rents of the real estate were received by A. and B., and by B. and C., and after payment of the

interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against B. and C., under which accounts of the testator's personal estate received by A. and B., or by B. alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits against B. and C. Accounts were accordingly carried in, in which B. and C. claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and further that as to such of the payments as were made by A. and B. upwards of six years prior to the action any claim on a devastavit was statute barred, and that as to the rents and profits they were not liable to account for them at all:—Held, following *Marsden, In re* (26 Ch. D. 783), on this point, and distinguishing *Gale, In re* (22 Ch. D. 820), that B. could not set up his own and A.'s wrongful payment by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations. *Hyatt, In re, Bowles* v. *Hyatt*, 57 L. J., Ch. 777; 38 Ch. D. 609; 59 L. T. 227.

That as to the rents and profits which had been received by B., or B. and C. jointly, that they were under 3 & 4 Will. 4, c. 104, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute. *Ib.*

The executors of a testator who had mortgaged certain leasehold property belonging to him continued to pay interest on the mortgage debts, but applied the surplus of the testator's estate in payments to beneficiaries under his will, making no provision for meeting the mortgages. The mortgaged property proved insufficient for payment of the mortgages. In an action commenced for administration of the testator's estate, the mortgagees claimed that the executors were liable to them for the payment made to beneficiaries. The executors claimed to be credited with these payments on the ground of acquiescence by the mortgagees, and as to such of them as were made more than six years before the commencement of the action, they claimed the benefit of the Statute of Limitations:—Held, that there had been no acquiescence by the mortgagees, and that the executors, being trustees for the creditors, could not set up the Statute of Limitations as a bar to a claim in respect of a devastavit committed by them. *Marsden, In re, Bowden* v. *Layland*, 54 L. J., Ch. 640; 26 Ch. D. 784; 51 L. T. 417; 33 W. R. 28.

Statute-barred Debt—Res Judicata—Subsequent Payment of Debt by Executor.]—An executor who pays a statute-barred debt after a judicial decision that the debt is not recoverable out of the testator's estate by reason of its being statute-barred, commits a devastavit; and the creditor who receives payment of such debt, with knowledge of the circumstances, is also liable to the testator's estate for its repayment. *Midgley* v. *Midgley*, 62 L. J., Ch. 905; [1893] 3 Ch. 282; 2 R. 561; 69 L. T. 241; 41 W. R. 659—C. A.

Claim within Statute of Frauds.]—An executor or administrator commits a devastavit by paying a creditor who is prevented from enforcing his claim by the Statute of Frauds. *Rownson, In re, Field* v. *White*, 54 L. J., Ch. 950; 29 Ch. D. 358; 52 L. T. 825; 35 W. R. 604; 49 J. P. 759—C. A.

Loss, how Borne—Liability of Legal Life Estate Devised to Executor.]—A testator devised a real estate to A. for life, in terms which gave him the legal estate, and he bequeathed to him his personal estate, subject to some annuities bequeathed to other parties, and appointed him an executor. A. wasted the assets:—Held, that his life estate in the realty was not liable to make good the annuities. *Egbert* v. *Butter*, 21 Beav. 560.

A testator devised real estate for life to one of his executors and trustees: the devisee afterwards committed breaches of trust and then filed a petition for liquidation:—Held, that, as against the trustee in the liquidation, the life estate of the executor and trustee being legal, could not be taken and applied in replacing losses occasioned by the breaches of trust. *Fox* v. *Buckley*, 3 Ch. D. 508; 25 W. R. 508. And see *Barff, Ex parte, Cousen, In re*, De G. 613; 17 L. J., Bk. 22; 12 Jur. 668.

—— **By Legatees.**]—A loss happening by the default of a trustee appointed by a testator, falls on the legatees, and the estate is discharged from it. *Hutchinson* v. *Massareene* (*Lord*), 2 Ball & B. 54.

A testator bequeathed stock to his executors, subject to his debts, to pay the dividends to his wife for life, and at her death to sell the capital, and out of the proceeds to pay certain legacies which would exhaust about one-half of the fund, and he made A. his residuary legatee. Thirty years before the death of the tenant for life, the stock, not being wanted for the payment of debts, was set apart in accordance with the will. Shortly before the death of the tenant for life, the administrator of the last surviving trustee, who in that capacity had control over the stock, misappropriated a part of it:—Held, that the loss arising from this misappropriation must fall upon the residuary legatee. *Baker* v. *Farmer*, 37 L. J., Ch. 820; L. R. 3 Ch. 537; 16 W. R. 923.

An executor, who was also trustee, divided his assets; he paid to the adult legatees their shares, and invested the shares of the infants in his own name, but he executed no declaration of trust thereof; he afterwards applied these sums to his own use. Further assets having unexpectedly fallen in:—Held, that they ought in the first place, to be applied in making good the infants' legacies. *Willmott* v. *Jenkins*, 1 Beav. 401.

—— **As between Creditors of Deceased Executor and Unpaid Legatees.**]—The testator devised his real estate to trustees for a term, in trust, to pay debts and legacies, if his personal estate should be deficient; and, subject to the term, he gave his real estates, and the residue of his personalty, to A., B. and C., and named them his executors. The personalty which came to the hands of the executors was more than sufficient to pay all the debts and legacies, but was misappropriated by them:—Held, that the legatees were entitled to the benefit of the term, in priority to the claims of the creditors of one of the executors who was dead. *Humble* v. *Humble*, 2 Jur. 696.

f. INTEREST.

1. Simple Interest.

When Liable for.] — Executor keeping the money of testator longer than the exigencies of his affairs require shall pay interest. But one executor shall not be answerable for the sums come to the hands of another; unless they have done joint acts; but each shall be liable to the whole costs. *Littlehales* v. *Gascoyne*, 3 Bro. C. C. 73.

Executor keeping money of testator's in his hands, liable to interest and costs. Lord Chancellor said, if he laid it out in the 3 per cents., the court would affirm his act. *Franklin* v. *Frith*, 3 Bro. C. C. 433.

An executor retaining a large part of testator's personal estate, during the pendency of divers suits touching the validity of some of his debts, shall be chargeable with interest for the annual balance in his hands. *Kildare* v. *Hopson*, 4 Bro. P. C. 550.

An executor and trustee having for several years retained in his hands uninvested funds which he ought to have invested:—Held, not to be chargeable with interest at 5 per cent., or upon the principle of annual rests, but with simple interest only at 4 per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct. *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; 1 Jur. (N.S.) 361; 3 W. R. 200.

The principle applicable to charging executors and trustees with interest in such cases considered. *Ib.*

The court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive, and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption. *Ib.*

Under what circumstances an executor or trustee shall be chargeable with interest for the money in his hands. *Lincoln (Earl)* v. *Allen*, 4 Bro. P. C. 553.

Executors not liable to interest on balance, unless the purposes for which the money is retained appear to be answered; but trustees and guardians are, without such proof. *Dawson* v. *Massey*, 1 Ball & B. 231.

Executor charged with arrears of rent unreceived and balances in his hands, together with interest at the rate of 4 per cent. and costs of a suit relating to such arrears and balances. *Tebbs* v. *Carpenter*, 1 Madd. 290; 16 R. R. 224.

Trustees and executors, under the will of a testator, who had directed them to invest a share of his residuary estate, either in the public funds, or on mortgage, at 5 per cent., having admitted by their answer that they had from time to time balances in their hands, and it being proved that many years after the death of the testator they had not invested the share either in the funds or on mortgage, inquiries will be directed at the original hearing concerning the balances retained by them, and the price of 3 per cent. stock at the several times when such balances were in their hands. *Hockley* v. *Bantock*, 1 Russ. 141; 25 R. R. 16.

Interest against executors for balances in their hands, with costs, upon the circumstances, but not, as of course. *Ashburnham* v. *Thompson*, 13 Ves. 402.

General principle on which the court proceeds in making declarations, in directing inquiries as to wilful default and interest on balances in the hands of executors or trustees. *Jones* v. *Morrell*, 2 Sim. (N.S.) 241.

An administrator, who allowed balances of the intestate's property to remain uninvested for a considerable length of time, standing at the banker's to the credit of the intestate's estate, was ordered to pay interest at 4 per cent. on the shares of those balances which belonged to some infants. *Gresley* v. *Heathcote*, 3 L. J. (O.S.) Ch. 107.

Executors having left money lying at a banker's, who paid 2½ per cent. for it, ordered to pay interest themselves on the balances from time to time at the rate of 4 per cent. per annum. *Williams* v. *Williams*, 1 W. R. 237.

A testator directed his trustees and executors to invest the residue of his estate on good freehold security; the trustee retained in his hands a balance of between 300*l.* and 400*l.* for a period of more than two years, part of which money was in the hands of his bankers:—Held, under the circumstances, that he was not responsible for interest during that time, although he had been informed of certain persons who were desirous of borrowing money on freehold security, he having employed a solicitor to procure a proper investment. *Wyatt* v. *Wallis*, C. P. Cooper, 155, n.; 8 Jur. 117.

An executor held chargeable with interest upon certain sums which he retained, and mixed with his own moneys at his banker's, the sum being retained out of the income of the testator's residuary estate, in order to satisfy a debt which there was probable ground to believe was due to the testator's estate from a person entitled to a share of such income, but which turned out not to be due to the extent supposed. *Melland* v. *Gray*, 2 Coll. C. C. 295.

Where executors, directed to invest, allowed the property to be enjoyed by the tenant for life in specie, and three years after her death accounted for the value, and paid it into court, held liable also for interest from the death of the tenant until the day of payment. *Mackenzie* v. *Taylor*, 7 Beav. 467.

Executor charged with interest on dividends of stock received by him and kept at his banker's with his own money for a number of years, instead of being invested to accumulate. *Goodchild* v. *Fenton*, 3 Y. & J. 481.

A testator by his will gave his residuary real and personal estate to trustees, upon trust for his wife for life, and after her decease upon trust for his children; and he directed that, after the death of his wife, and during the minority of any of his children, the trustees should apply, towards the maintenance of his children, a certain portion of the income of their then expectant shares, and accumulate the surplus income of each such share at compound interest. After the death of the widow the sole surviving trustee neglected to accumulate the surplus income of each child's share, and invested large portions of the testator's estate in exchequer bills and other securities not authorised by the trusts of the will:—Held, that the investments which had been made being improper investments, the executor was chargeable in the same manner as if he had retained the moneys in his own hands; but, under the circumstances of the case, as it did not appear that he had benefited himself by it, and had not employed the sums so retained in

trade, that he was chargeable only with interest at 4 per cent.; held, also, that as the trustee had been guilty of a breach of trust in neglecting to accumulate the surplus income of each child's share, he was to be charged with annual rests; held, also, notwithstanding he was chargeable as above, that he was entitled to his usual cost of suit, as between solicitor and client, out of the estate. *Knott* v. *Cottee*, 16 Beav. 77; 16 Jur. 752.

An administrator unnecessarily retained a balance of 3,700*l.* in his hands for three years. He was charged with interest, but was allowed his costs of an administration suit:—Held, also, that the pendency of a suit for administration in the Duchy Court of Lancashire during the time was no justification for the non-investment. *Holgate* v. *Haworth*, 17 Beav. 259.

An executor who had unnecessarily retained in his hands uninvested a balance of 655*l.* for a year and a half, charged interest thereon. *Stafford* v. *Fiddon*, 23 Beav. 386.

Where there is a direction in a will to accumulate a residue, with which the executor and trustee does not comply, he will not be allowed to pay the bare residue into court, but must pay also interest from the expiration of one year after the testator's decease up to the date of filing the answer. *Amiss* v. *Hall*, 3 Jur. (N.S.) 584.

An executor charged, on further consideration, with interest on balances retained in his hands for various periods, varying from 670 to 229 days. *Johnson* v. *Prendergast*, 28 Beav. 480.

Executors, in passing their residuary account, erroneously stated the degrees of relationship of the legatees to the testator, in consequence of which a large sum was paid to the Crown for legacy duty in excess of that properly chargeable. The liability for the principal being admitted:—Held, that the executors were also chargeable with interest. *Shaw* v. *Turbett*, 13 Ir. Ch. R. 324.

The executors, by their answer, submitted that they were not liable for interest, and the decree at the first hearing was silent upon the subject:—Held, that the charge for interest could properly be made on further directions. *Ib.*

An executor, under a bonâ fide belief that on the true construction of the will they were entitled thereto, sold out stock, retained one-third and paid two-thirds to the co-executors. It having been declared in the suit that the next of kin were entitled to this fund, and that the executor was bound to restore it:—Held, that he was only liable to pay interest on the one-third retained by himself. *Saltmarsh* v. *Barrett*, 31 Beav. 349; 31 L. J., Ch. 783; 8 Jur. (N.S.) 737; 5 L. T. 87; 10 W. R. 640.

The decision in *Saltmarsh* v. *Barrett* (31 Beav. 349), that executors who, acting bonâ fide, have distributed the assets upon what turns out to be an erroneous construction of the will, are not liable to be charged with interest upon the principal sums wrongly paid, which must be refunded to the estate, dissented from as departing from the principle established in *Att.-Gen.* v. *Köhler* (9 H. L. Cas. 654), post, and *Att.-Gen.* v. *Alford* (4 De G. M. & G. 843), ante. *Hulkes, In re, Powell* v. *Hulkes*, 55 L. J., Ch. 846; 33 Ch. D. 552; 55 L. T. 209; 34 W. R. 733; 35 W. R. 194.

Although, as a general rule, executors are liable to be charged with interest at 4 per cent. on sums improperly paid or improperly retained by them, they are not liable for interest to the legatee (or his representatives) to whom, with full knowledge on his part and in common mistake, the payments which he must refund have thus been erroneously made. *Ib.*

Mere delay in taking accounts is not sufficient to charge an executor with interest on the balance retained in his hands. *Blogg* v. *Johnson*, 36 L. J., Ch. 859; L. R. 2 Ch. 225; 16 L. T. 306; 15 W. R. 626.

A bill was filed by the executor of a tenant for life under a will against the executor of the testator for an account of income due at the decease of the tenant for life, and considerable delay took place in taking the accounts, but ultimately a large balance was found to have been due from the defendant at the death of the tenant for life, and he was ordered to pay the amount so found due to the plaintiff. The delay in taking the accounts not being attributable to the defendant:—Held, that he was not liable to pay interest, except from the date of the order. *Ib.*

Administrator on Behalf of Crown.]—Where administration of the effects of an intestate has been granted to the nominee of the Crown in the absence of any next of kin, the nominee of the Crown is liable to pay interest to the next of kin upon the balance in the hands of the nominee. *Edgar* v. *Reynolds*, 4 Drew. 269; 27 L. J., Ch. 562; 4 Jur. (N.S.) 399; 6 W. R. 404. S. P., *Att.-Gen.* v. *Köhler*, 9 H. L. Cas. 654; 5 L. T. 35; 9 W. R. 933.

A., on behalf of the Crown, took out administration to the estate of B., who, it was alleged, had died without leaving any next of kin, and as such administrator sold out a sum of stock belonging to B., and paid the proceeds into the Treasury. Some years after, a suit was instituted by the next of kin of B. against A., and a decree obtained in his favour:—Held, that interest was payable on the proceeds of the sale of the stock since the time of the sale. *Turner* v. *Maule*, 3 De G. & Sm. 497; 18 L. J., Ch. 454; 14 Jur. 165.

Dividends received by Solicitor of.] — An administratrix, who had permitted her solicitor to receive dividends of a fund set apart for an infant next of kin, was ordered to account for the dividends, with interest at the rate of 3*l.* per cent. with half-yearly rests. *Gilroy* v. *Stevens* or *Stephen*, 51 L. J., Ch. 834; 46 L. T. 761; 30 W. R. 745.

Administrator pendente lite.]—An administrator pendente lite is not liable for interest upon a balance in his banker's hands during the pendency of the suit in the Ecclesiastical Court. *Gallivan* v. *Evans*, 1 Ball & B. 191.

Executor of Executor.]—A. S., the sole executrix and tenant for life, died, having 12,500*l.* of the assets in her hands. Her executors admitted assets:—Held, that in the absence of any further proof, they were not liable for interest. *Davenport* v. *Stafford*, 14 Beav. 319.

Executor of Receiver.]—Admission of assets to answer rents by the executor of a receiver, makes him liable to interest, if made. *Foster* v. *Foster*, 2 Bro. C. C. 616.

Contract to pay.]—B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account: "Mr. G. having consented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same at 5*l.* per cent. until the same is

settled":—Held, that the executors were personally liable to pay the debt and interest. *Bradly* v. *Heath*, 3 Sim. 543; 30 R. R. 217.

Retained under a Misapprehension of Right.]—Executor not charged with interest for a balance in his hands, retained under a fair misapprehension of his right to it. *Bruere* v. *Pemberton*, 12 Ves. 386.

An executor is charged with interest not by way of punishing misconduct, but of protecting the interests of the persons entitled, and must, therefore, pay interest for a balance retained under a fair misapprehension of his right to it. *Meader* v. *M'Cready*, 1 Moll. 119.

Need not be prayed by Bill.]—Executors charged with interest on balances, though not prayed by the bill. *Turner* v. *Turner*, 1 Jac. & Walk. 39. S. P., *Hollingsworth* v. *Shakeshaft*, 14 Beav. 492; 21 L. J., Ch. 722; *Woodhead* v. *Marriott*, C. P. Cooper, 62.

On what Balance.]—No interest upon balances held to answer demands, which, though not actually made, might have been made at any time upon the executor, such balances being only ostensible. Although anticipated payments to legatees are not credited to the executor in taking the account of assets, they reduce the balance for the purpose of interest to be charged against him. *Flanagan* v. *Nolan*, 1 Moll. 84.

Under a decree to account, against executors, the master had charged them with certain funds, and with certain balances, from time to time, in their hands; but had not charged interest on the balances, and had given them credit for payments on account of interests on legacies bequeathed by their testator. By a subsequent decree it was referred back to the master, to ascertain the balances, from time to time, in the hands of the executors, and charge them with interest on those balances:—Held, that the master was not merely to charge simple interest on the balances before ascertained, but was to take a new account of the balances, and to apply such interest in discharge of the disbursements made by the executors before any of such disbursements were to be deemed as paid out of sum found due from them on the previous balance. *Irwin* v. *Knox*, 8 Ir. Ch. R. 503.

2. Compound Interest.

Special Case must be made.]—Executor directed to lay out testator's personalty in the funds; unnecessarily selling out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, charged with 5*l.* per cent. interest and costs; but the court refused to make rests in the account. *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586; 21 R. R. 241.

Where there is a Trust to accumulate.]—Executor charged with compound interest at 5 per cent. under a direction for half-yearly rests, as not having attempted to execute a trust to accumulate, though no loss happened, and a due execution of the trusts could not have produced so much; allowed subsequent costs of proceedings consequential upon those of which the costs were allowed him by the original decree, not as to the inquiries and accounts relating to the breach of trust, not charged with those costs arising principally from a necessary investigation as to the rule by which he ought to be charged. *Raphael* v. *Boehm*, 13 Ves. 407; 8 R. R. 95.

Executor bound by will to accumulate, cannot account as if the money had been laid out in the funds, if it was not so laid out, or, being so, he had sold out at an advance. *S. C.*, 11 Ves. 108.

Executor under a direction to accumulate for an infant, having become a bankrupt, his estate was charged with interest at 5 per cent., with rests. *Dornford* v. *Dornford*, 12 Ves. 127; 8 R. R. 316.

In other Cases.]—Principles on which, in cases of breach of trust, trustees are charged with simple and compound interest, and with the profits made in the investment of trust money in trade. *Jones* v. *Foxall*, 15 Beav. 388; 21 L. J., Ch. 725.

Generally an executor improperly retaining balances is charged with interest at 4 per cent.; but if, in addition, he commits a breach of trust, or changes money from a proper into an improper state of investment, he is charged 5 per cent. If he employ the trust money in trade, he will be charged either with the profits, or 5 per cent. compound interest. *Ib.*

From 1834 to 1850 a trustee who ought to have withdrawn a trust fund from a trading firm, of which he was a member, neglected to do so. He was charged with compound interest at 5 per cent., and with costs. *Ib.*

An executor and trustee having for several years retained in his hands uninvested funds which he ought to have invested:—Held, not to be chargeable with interest at 5 per cent., or upon the principle of annual rests, but with simple interest only at 4 per cent., there being no circumstances to lead to the conclusion that he had made any profit by his misconduct. *Att.-Gen.* v. *Alford*, 4 De G. M. & G. 843; 1 Jur. (N.S.) 361; 3 W. R. 200.

The principle applicable to charging executors and trustees with interest in such cases considered. *Ib.*

The court will only charge an executor or trustee with the interest which he has received, or which he ought to have received, or which it is fairly to be presumed that he did receive, and misconduct on the part of an executor or trustee will not, generally speaking, warrant such a presumption. *Ib.*

Rule as to charging executors and trustees with interest on balances, and at what rate, and whether with annual rests. *Knott* v. *Cottee*, 16 Beav. 77; 16 Jur. 752.

An executor and trustee who was directed to invest in government stocks of Great Britain, or upon real security, and accumulate the surplus, after maintaining infants, invested the estate in the foreign funds. It was held, that the investment was improper, and he was charged with 4 per cent., with annual rests. *Ib.*

In 1846 an executor invested part of the assets in exchequer bills; they were ordered into court and sold in the same year at a loss. In 1848 it was declared by the decree, that the investment was improper, but at that time the price of exchequer bills had risen, so that there would have been then no loss if they had been retained:—Held, that the executor ought to be charged with the amount improperly invested, and credited with the produce of the exchequer bills in 1846. *Ib.*

Administration is taken out in 1771. Distribution to certain extent is made, but a large sum is retained on fraudulent pretences. No effectual stir is made against administrators till 1792, and that is protracted in great measure by administrator's fault in court below till 1810:—Held, that notwithstanding lapse, administrator should be charged with full interest on sum remaining undistributed during the whole period of retention, with annual rests and costs incurred since original decree. *Stackpoole* v. *Stackpoole*, 4 Dow, 209.

W., a solicitor, having been appointed and acting as an executor in the administration of the affairs of the estate, brought and defended many suits, in which he employed himself as the attorney. Upon a bill filed by the residuary legatees against the executor, by the decree upon further directions, it was ordered that interest should be charged upon all balances in the hands of the executor, at the end of every year, and that interest should be charged against the residuary legatees upon all advances made to them by the executor from the time of the advances. Upon appeal, this order was varied by declaring that the master should be directed in taking the accounts, to make a rest, and state the balance at the end of each year, and to charge the executor with interest on such balance, and to apply such interest as might be so found due from him in each year; in the first place, towards his future payments, before any application should be made of the balance of principal money in his hands. *Carmichael* v. *Wilson*, 4 Bligh (N.S.) 145. Varying on this point, *S. C.*, 3 Moll. 79. See *S. C.*, 2 Dow & Cl. 51.

When the executor has unduly held the assets in his hands, the court will give a direction to take the account with rests, and charge him with compound interest, although there be no accumulation clause in the will. *S. C.*, 3 Moll. 79.

An administrator, who had without reason sold out stock specifically bequeathed to an infant, and retained the produce after an order for payment, charged with compound interest. *Walrond* v. *Walrond*, 29 Beav. 586.

A defendant having stated in his answer, that by carrying on business on a farm, and with stock belonging to the assets of an intestate, he had made no profit; but that, as he had not kept any accounts, and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered, that in taking the accounts against him, annual rests should be made, and interest calculated at 5 per cent. upon those annual rests. *Walker* v. *Woodward*, 1 Russ. 107; 25 R. R. 9.

Form of Decree.]—By the decree, it was directed that the master should ascertain what balances the defendant had in his hands unapplied at the end of twelve months from the testator's death, and also what balances at the end of each year since that time; and it was ordered that the master should compute interest at the rate of 5*l.* per cent. per annum on the balances in the defendant's hands at the end of each year; and the master, in taking the accounts, was to make annual rests; and it was ordered that the defendant be charged with interest after the rate and in manner aforesaid upon such balances:—Held, that the master was wrong in not charging the defendant with compound interest. *Heighington* v. *Grant*, 10 L. J., Ch. 12; 4 Jur. 1052.

3. Rate.

Penal Rate—Special Case must be shewn.]—Executor charged for withholding money and not putting in his examination, with interest; but not beyond 4 per cent., except in a special case. *Rocke* v. *Hart*, 11 Ves. 58. S. P., *Woodhead* v. *Marriott*, C. P. Cooper, 62.

—— **Discretion of Court.**]—As to discretion of the court as to the rate of interest to be charged upon balances in the hands of executors, administrators, &c. *Cuffe* v. *Cuffe*, 3 Ir. Eq. R. 469.

The rate of interest upon balances retained by an executor is in the discretion of the court, governed by the fact of his having used the fund or otherwise. *Flanagan* v. *Nolan*, 1 Moll. 84.

—— **Where his Conduct causes Loss to the Estate.**]—Where an executor appears to have made 5 per cent. of the assets in his hands, or where he has by the nonapplication of assets done damage to the estate to the amount of 5 per cent., in either case he shall be charged with interest at that rate. *Hall* v. *Hallet*, 1 Cox, 134; 1 R. R. 3.

Executor and trustee having been guilty of a breach of trust, by selling out stock and dealing improperly with the money, the cestuis que trustent have an option to have the stock replaced, or the money produced by the sales, with interest of 5 per cent. or more, if more has been made by it, and the costs occasioned by his misconduct. *Pocock* v. *Reddington*, 5 Ves. 794.

—— **Where Estate is retained.**]—At death of testatrix, her executor, a banker, has funds belonging to her in his hands, it does not appear upon what terms. The executor dies three months after his testatrix; there was no evidence that he had committed any breach of trust, or made any use or profit of the money in his business:—Held, that his estate could only be charged 4 per cent. on the money. *Penny* v. *Avison*, 3 Jur. (N.S.) 62.

An executor keeping the fund, and using it for his own benefit, contrary to his trust, decreed to account, with interest at 5 per cent. and costs. *Piety* v. *Stace*, 4 Ves. 620.

Executor in trust for infants unnecessarily calling in the property out upon good security, at 5 per cent., except a small part, keeping large balances in his hands, and using it as his own, charged with interest at 5 per cent. and costs. *Mosley* v. *Ward*, 11 Ves. 581; 8 R. R. 249.

Where the master by his report finds a fact involving, according to the practice of the court, a particular consequence, the court will act upon the fact so found, and it is not a ground of exception, that such consequence is not stated in the report. The master found that two executors had, by signing joint cheques, enabled each other to receive sums belonging to the estate of their testatrix, when they were both largely indebted to that estate, and that the sums so received by them were debts provable under their respective commissions, both executors having become bankrupt:—Held, that interest at 5 per cent., as the consequence of the devastavit, was to be added to the principal sums found to be provable against the bankrupt estates of the executors. *Beck* v. *Motley*, 2 Myl. & K. 312; 4 L. J., Ch. 63.

It is not according to the ordinary course or practice of the court to direct the master, in taking the accounts against an executor, to calculate interest upon an unascertained residue. It is the duty of an executor to distribute the assets in payment of legacies when the time for distribution has arrived; and if, having ample funds in his hands, and there being no excuse for retaining the money, the executor, instead of paying the legacies and dividing the residue amongst the residuary legatees, retain the money in his own hands, he is guilty of a breach of trust, and will be charged 5 per cent. interest on the money so retained; and if he pays the money into his banker's and mixes it with his own money, he will be considered to have had the same benefit in respect of it as if he had embarked it in trade, and will be charged with annual rests on the balance in his hands, and the burthen lies on the executor to shew that he has derived no benefit from the balance thus in his banker's hands. *Williams* v. *Powell*, 15 Beav. 461; 16 Jur. 393.

Executor directed to lay out testator's personalty in the funds, &c. unnecessarily selling out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands, charged with 5 per cent. interest and costs; but the court refused to make rests in the account. *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586; 21 R. R. 241.

Where trustees and executors, after payment of a testator's debts, kept the balance of the personal estate at their bankers, the court charged them with interest on the balance at 5 per cent. from the date of the payment of the debts, but allowed them their costs. *Jones, In re, Jones* v. *Searle*, 49 L. T. 91.

—— **Estate employed in Private Trade.**]—A trustee, in a will which directed money to be lent, at such rate of interest as they should think reasonable, by consent of his co-trustee, keeps it at 4 per cent.; ordered to pay 5, and the executors to pay the costs of taking the accounts as to that interest. *Forbes* v. *Ross*, 2 Bro. C. C. 430; 2 Cox, 113.

Interest to be computed at 5 per cent. when the property has been employed in trade. *Heathcote* v. *Hulme*, 1 Jac. & Walk. 122; 20 R. R. 248.

An executor, being a trader, who, after paying pecuniary legacies in due time, retains for many years balances belonging to the residue and mixes them with his own moneys, will be charged with interest at 5*l.* per cent., though it could not be ascertained, without a decree of the court, who were the persons entitled to the fund. *Sutton* v. *Sharp*, 1 Russ. 146.

A defendant having stated in his answer that by carrying on business on a farm, and with stock belonging to the assets of an intestate, he had made no profit, but that as he had not kept any accounts and had blended the transactions of the farm with his other concerns, he could not set forth the amount of the profits; it was ordered that in taking the accounts against him, annual rests should be made, and interest calculated at 5 per cent. upon the annual rests. *Walker* v. *Woodward*, 1 Russ. 107; 25 R. R. 9.

g. For Acts and Defaults of Agents.

Generally.]—Executor is liable for the default of clerk or agent employed in the administration of assets; but if testator recommend a particular person to be employed, then executor is not liable merely for his default unless there has also been laches on his part in not making him account. *Kilbee* v. *Sneyd*, 2 Moll. 186.

Executors depositing moneys belonging to the estate with the same persons as the testator intrusted with the moneys in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy. *Dorchester* v. *Effingham*, Taml. 279; 31 R. R. 97.

Loss by Agent's Insolvency—Onus of Proof.]—A common order having been made for the administration of a testator's estate, the district registrar by his certificate found the outstanding personal estate to consist in part of book debts amounting nominally to 291*l.*; as to 113*l.*, part of which he certified that it represented a portion of book debts which the executors had employed H. to collect, and for which H. had not accounted, and had claimed to deduct 55*l.* for remuneration, but that 25*l.* was enough. The certificate went on to say, that H. had gone into liquidation and that no part of the 113*l.* was likely to be recovered. No application was made to vary this certificate. It appeared that H. had collected in all 168*l.*, had paid to the executors in April, May and June, 1880, sums amounting in all to 55*l.*, and had gone on collecting without making any further payment to the executors till July, 1881, when a receiver was appointed in the action, but it did not appear when he became insolvent, nor at what times the moneys received came to his hands. The action having come on for further consideration:—Held, that where an executor or trustee employs an agent to collect money under circumstances which make such employment proper, and the money collected is lost by the agent's insolvency, the burden of proof is not on the executor to shew that the loss was not attributable to his own default, but on the persons seeking to charge him to prove that it was. *Brier, In re, Brier* v. *Evison*, 26 Ch. D. 238; 33 W. R. 20—C. A.

What Agent—To get in Debts.]—A testator directs that his business shall be carried on by E. The executors permit E. to get in the outstanding debts. There being no such direction in the will, the executors are liable. *Pistor* v. *Dunbar*, 1 Anstr. 107, 186; 3 R. R. 561.

Executors held, under the circumstances, justified in appointing an agent to get in the testator's debts, and in allowing him a salary for his trouble. *Hopkinson* v. *Roe*, 1 Beav. 180.

Executors employed an auctioneer, who received the deposit. After some necessary delay the purchases were completed on the 17th December, 1831. The auctioneer failed to pay over the deposit. The executors, acting under legal advice, took no legal proceedings against him till the 14th March 1832, and the money was lost. The auctioneer was not at the completion of the sale, or afterwards, in circumstances to pay the balance:—Held, under the circumstances, that the executors were not personally liable. *Edmonds* v. *Peake*, 7 Beav. 239; 13 L. J., Ch. 13.

—— **Auctioneer — Insolvency.**]—An auctioneer, in good credit and extensive business, was employed by executors to sell the testator's leasehold estates. Owing to objections raised by the purchaser's solicitors, the purchases were not

completed until six months afterwards. On the day on which the purchases were completed, the auctioneer failed to attend or to account for the deposit moneys in his hands, but shortly afterwards admitted to the executors his inability to pay the amount due from him in respect of such deposits, and promised to pay the same shortly, out of moneys coming to him in respect of a sale of large property which he was about to effect. The executors, by the advice of their solicitors, did not issue legal process against the auctioneer until two months after the time appointed for the completion of the purchases, when it was found that the defendant, being in insolvent circumstances, had absconded:—Held, that the executors were not liable to make good the loss sustained by the auctioneer's insolvency. *Edmonds* v. *Peake*, 7 Beav. 239; 13 L. J., Ch. 13.

—— **Bankers—Failure.**]—Executor directed, with all convenient speed, to pay debts and lay out the residue in mortgages:—Held, not answerable for a loss by the insolvency of the testator's banker, after selling negotiable securities deposited with him by the testator. *Routh* v. *Howell*, 3 Ves. 565.

Executor placing testator's money, which he ought to have invested in stock, in banker's hands, mixedly with his own, is liable to loss by failure of bankers. *Fletcher* v. *Walker*, 3 Madd. 73; 18 R. R. 195.

Executors depositing moneys belonging to the estate with the same persons as the testator entrusted with his moneys in his lifetime, although they are not bankers, are not liable for a loss sustained by their bankruptcy. *Dorchester* v. *Effingham*, Taml. 279; 31 R. R. 97.

A testator directed his executors to invest money within six months after his decease. This was not done for many years. In the meantime, part of the money was lost by the bankruptcy of a banker, in whose hands it was lodged. The surviving executor directed the money to be properly laid out, but it was not done; and, the banker having failed, the court ordered him to pay interest upon the balances from time to time in the hands of himself and his co-executors, and to repay the money lost by the bankruptcy. *Newton* v. *Reid*, 9 L. J. (O.S.) Ch. 273.

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss. *Moyle* v. *Moyle*, 2 Russ. & M. 710.

A testator resident in India directed his trustees and executors to invest his residue in government or other good securities, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed:—Held, that the acting executor and trustee was responsible for the loss thereby occasioned to the estate. *Lowry* v. *Fulton*, 9 Sim. 115; 8 L. J., Ch. 314; 3 Jur. 454.

An executrix allowed 190*l.* (part of the estate) to remain at a banker's in her name, as executrix. A loss occurred, by his bankruptcy, a year after the testator's death:—Held, that she was not personally liable for the loss. *Swinfen* v. *Swinfen*, 29 Beav. 211.

A testatrix gave some legacies absolutely, others to tenants for life with remainders over, and directed the settled legacies to be invested in the funds or on mortgage. The assets were sufficient to pay all legacies and to leave a trifling residue. The executors paid all the legacies which were given absolutely, and left the remaining cash in hand, amounting to 500*l.*, at a bank, until the money due on some mortgages which were about to be paid off came in, intending them to invest the whole on a mortgage which they were negotiating. Fourteen months after the death of the testatrix, the bank, which up to that time had been in high repute, stopped payment, half of the 500*l.* was lost, and the estate was rendered insufficient for payment of the legacies in full:—Held, that the executors were not responsible for the loss, and that as the assets had been originally sufficient to pay all the legacies in full, the legatees who had been paid were not liable to contribute to the loss, which must fall wholly on the unsatisfied legatees. *Fenwick* v. *Clarke*, 4 De G. F. & J. 240; 6 L. T. 393; 10 W. R. 636.

A. at the time of his death had about 3,000*l.* in the hands of his bankers, and his executors paid some money which they received on account of the estate to their account at the same bank, and drew out such sums as they required. About nine months after A.'s death the bankers became bankrupt, having at that time a balance of about 2,000*l.* belonging to the estate in their hands, of which 1,000*l.* was ultimately lost by the bankruptcy. The Master, on a reference thereupon, found "that there was not any purposes of their trust which rendered it necessary for the executors to retain the balance, or any part of it with the bankers:" but the court held that they were not answerable for the loss. *Johnson* v. *Newton*, 11 Hare 160; 22 L. J., Ch. 1039; 17 Jur. 825.

A decree in an administration suit directed a contract for the sale of a particular house to be completed, but contained no directions as to the investment or otherwise of the purchase-money. The administratrix, with the knowledge of the solicitor of the testator, and of other persons interested under his will, paid the purchase-money for the house, and other moneys, into a private bank. The bank failed and the moneys were lost:—Held, that the administratrix was not liable for the moneys so lost. *Wilks* v. *Groom*, 3 Drew. 584; 25 L. J., Ch. 724; 2 Jur. (N.S.) 681; 4 W. R. 697.

Executors of a testator, who died in 1862, had, in March 1865, a balance of nearly 3,000*l.* at their bankers, who had been the bankers of the testator for twenty years. The estate realised more than 30,000*l.*, and considerable sums were from time to time required to be paid into and out of the account, and the balance was larger than it would otherwise have been in expectation of a mortgage having to be paid off. A loss having resulted from the failure of the bank:—Held, that the executors were not justified in keeping a balance of more than 1,000*l.* and the loss upon the excess above that sum must be borne by them. *Astbury* v. *Beasley*, 17 W. R. 638.

An administrator who had deposited trust moneys in a private bank on a separate account current, using ordinary prudence, was held not to be liable for the loss of the moneys through the failure of the bank, although the moneys had been suffered to remain so deposited for three and a half years after the death of the intestate, and

for nearly a year and a half after the administrator had carried into chambers in the suit, his accounts showing a large balance against himself. *Marcon, In re, Finch* v. *Marcon*, 40 L. J., Ch. 537.

—— **Solicitor.**]—An administratrix, who had permitted her solicitor to receive dividends of a fund set apart for an infant next of kin, was ordered to account for the dividends, with interest at the rate of 3*l.* per cent. with half yearly rests. *Gilroy* v. *Stephens*, 51 L. J., Ch. 834; 46 L. T. 761; 30 W. 745.

A testator died in August 1861, and his executors remitted to their solicitor 80*l.* to obtain probate, and 25*l.* to pay legacy duty. The solicitor became bankrupt in November 1861, and the money was lost. The court allowed the executors the 80*l.* but not the 25*l.*, the latter advance being premature, the legacies not having been paid in 1863. *Castle* v. *Warland*, 32 Beav. 660.

—— **Misappropriation by Solicitor.**]—One of three executors having employed in proving the will the solicitor who was employed by the testatrix in making it, also employed the same solicitor to negotiate for the compromise of a debt due from the estate. The executor and the creditor were both living in London. In June 1872 the solicitor wrote to the executor, informing him that a compromise had been effected of this particular debt for 260*l.*, and of another debt for 50*l.*, and asking for a cheque. The executor on the 4th July sent a cheque for 310*l.* to the solicitor, who paid it in to his own account. The compromise, in fact, had not been effected, and the money was misappropriated; but the executor, having taken no step in the meantime, did not find out the loss until December 1872: —Held, that the 310*l.* ought to be allowed to the executor. *Bird, In re, Oriental Commercial Bank* v. *Savin*, L. R. 16 Eq. 203; 28 L. T. 658; 21 W. R. 725.

A., one of two trustees and executors of a will, and resident in London, authorised a person to get in three mortgages (part of the estate). The solicitor forwarded the deeds of conveyance to B., the other trustee, in the country, who executed and returned them. The solicitor received the money and paid it to A. alone who misapplied it:—Held, that B. was liable for the amount. *Cowell* v. *Gatcombe*, 27 Beav. 568.

—— **Goods of Deceased Stolen from Solicitor.**]—A decree having been made for a general account, and payment of a balance against a party who died, and his personal representative having delivered certain goods, part of the effects, to her own solicitor, to be delivered over, is not answerable in the event of his being robbed of them. Tender of the goods not incumbent on her, she would not have been answerable if they had remained in her own possession till the accident. *Jones* v. *Lewis*, 2 Ves. Sen. 240.

IV. RIGHTS PECULIAR TO EXECUTORS.

a. LEGACY TO.

In General.]—Presumption that a legacy to a person appointed executor is given to him in that character, though not apparently connected, unless there are circumstances showing that it is intended for him personally. *Stackpoole* v. *Howell*, 13 Ves. 417; 9 R. R. 200.

If a legacy is given to a man who is appointed executor, he must prove the will in order to entitle himself to the legacy, though not made a condition by the will; but he may prove at any time. *Reed* v. *Devaynes*, 2 Cox, 285; 3 Bro. C. C. 95; 2 R. R. 48.

Deferred Legacy.]—The circumstance of payment being deferred rebuts the presumption that a legacy is given to the legatee in the character of executor. *Reeve In re*, 46 L. J., Ch. 412; 4 Ch. D. 841; 36 L. T. 906; 25 W. R. 62. Contra, *Slaney* v. *Watney*, 35 L. J., Ch. 783; L. R. 2 Eq. 418; 14 L. T. 657; 14 W. R. 818.

Inequality in Gifts.]—A testator, after giving a legacy to his friend and partner P., appoints him one of his executors, and makes other devises and bequests in his favour, so that P. is entitled under the will to much greater benefits than any of the other executors. By a codicil in which P. is described as one of the executors, a further legacy is given to him; these legacies are not given to P. in his character of executor. *Cockerell* v. *Barber*, 2 Russ. 585; 1 Sim. 23; 5 L. J. (o.s.) Ch. 77; 28 R. R. 181.

A testator bequeathed to A., one of the two persons whom he named in his will as executors, a leasehold house; to B., the other, a legacy of 100*l.*; describing either of them in either gift as "one of my trustees and executors hereinafter named." B. died without having proved the will, but without having renounced or disclaimed: —Held, that the inequality of the subject-matter of the two bequests rebutted the presumption of the legacy being conditional on the executor proving the will; and that B.'s representatives were entitled to the legacy. *Jewis* v. *Lawrence*, L. R. 8 Eq. 345.

Savings Bank Deposit—Nomination of Executor of Will.]—Where a testatrix, subsequent to the execution of her will, filled up a nomination in the prescribed form of the amount (being under 100*l.*) due to her by the Post Office Savings Bank at her decease in favour of one of her executors, and there was sufficient evidence to rebut the presumption that such executor should receive such amount as a gift, it was held that he received the same in his capacity of executor, and he was ordered to account for the same accordingly. *Read, In re, Turner* v. *Read*, 75 L. T. 295.

Construction of Will—Gift annexed to Office.]—A testatrix gave legacies of 100*l.* each to A., B., and C.; and in a subsequent part of her will she appointed them her executors. In the preceding clauses she made devises and bequests "to her executors thereinafter named, and to her executors and trustees." A. neither proved nor acted: —Held, that he was not entitled to the legacy. *Piggott* v. *Green*, 6 Sim. 72.

Testator appointed A. and B. his executors, and after making certain bequests gave them by name legacies of 500*l.*, giving also in the same sentence legacies of the like amount to two other parties; A. and B. renounced:—Held, that they were not entitled to their legacies. *Calvert* v. *Sebbon*, 4 Beav. 222.

—— **When not so annexed.**]—A legacy given to the testator's trustees and executors as a mark of his respect for them:—Held, not revoked by a codicil appointing other trustees in their room, and giving a legacy of equal amount to the

newly-appointed trustees and executors in similar language. *Burgess* v. *Burgess*, 1 Coll. C. C. 367; 8 Jur. 660.

Upon the construction of a will:—Held, that a legacy was given to an executor not in his character of executor, and that he did not lose the legacy by not proving and not acting under the will. *Compton* v. *Bloxam*, 2 Coll. C. C. 201; 14 L. J., Ch. 380; 9 Jur. 935.

Testator named two persons as executors, with legacy of 50*l.* each, conditioned on their taking upon themselves the trusts; and then says, "I give to my cousin, T. K., 50*l.*, whom I appoint joint executor"; and also to T. K.'s sisters 50*l.* each:—Held, legacy to T. K. was not annexed to and depending upon his taking the office. *Dix* v. *Reid*, 1 Sim. & S. 237.

A testator, by a codicil, gave to M. 200*l.*, and named him joint executor with the executors in the will; and in case the testator's son should die lunatic, then he gave 200*l.* to the said M.:—Held, that the latter gift was not annexed to the office, and that M. took, though he did not prove the will. *Wildes* v. *Davies*, 1 Sm. & G. 475; 22 L. J., Ch. 495; 1 W. R. 253.

A legacy was given to a party who was appointed an executor as follows: "I give to my friend, J. S., banker's clerk, and one of the executors of this my will, 50*l.*" J. S. renounced probate:—Held, that the legacy was not conditional on the acceptance of the executorship. *Dendy, In re*, 3 De G. F. & J. 350; 31 L. J., Ch. 184; 5 L. T. 514; 10 W. R. 115.

A testator appointed his friend A. an executor of his will, and gave him 1,000*l.* as a remembrance:—Held, that the legacy was not conditional on acceptance of the office of executor. *Bubb* v. *Yelverton*, L. R. 13 Eq. 131; 20 W. R. 164.

A testator appointed A. and B. his executors, and in a subsequent part of his will, with another legacy, gave to each of them 100*l.*, and also, in certain events, a share of his residuary estate, and appointed B., on a certain contingency happening, guardian of his daughter. B. renounced probate, but was willing to act as guardian, if the contingency happened:—Held, that the legacy was not annexed to the office of executor, and that B. was entitled to the legacy. *Brand* v. *Chaddock*, 24 L. T. 347; 19 W. R. 378.

A testator, having bequeathed 2,000*l.* to G., and appointed him executor and trustee, made a codicil whereby he revoked his appointment as executor and trustee, and nominated T. in his stead, and directed that the will, and a codicil previously executed, should be received and construed "as if the name of T. had been inserted in the place and stead of G.":—Held, that the legacies were not revoked, it appearing on the construction of the will and codicil that they were not gifts to G. virtute officii. *Bunbury, In re*, Ir. R. 10 Eq. 408.

—— **Right of Substituted Executor.**]—A testator, appointed A. B. and C. D. trustees and executors of his will. By a codicil he bequeathed to each of the trustees named in his will the sum of 5,000*l.* on condition that he accepted the trusts thereof. By a subsequent codicil he revoked all that part of his will which related to C. D., and requested E. F., "to undertake and fulfil the same purposes and intentions, and on the same conditions, for the effecting of which he had appointed the said C. D." By a subsequent codicil he revoked the appointment of A. B. and C. D. as trustees and executors, and all legacies to them, and he nominated E. F. executor and trustee thereof:—Held, that E. F. was entitled to the legacy of 5,000*l.* *Radburn* v. *Jerris*, 3 Beav. 450.

Upon the construction of a will and codicil:—Held, that a substituted executor was not entitled to a legacy of 100*l.* given by the will to the original executor for his trouble in the execution of it. *Finch* v. *Secker*, 1 De G. & Sm. 34; 11 Jur. 34.

A testatrix, by her will, gave to A., B., and C. distinct legacies, and appointed A. and B. executors, and gave "to her executors A. and B." her residuary estate. By a codicil she appointed C. executor and trustee of her will, "as if his name had been inserted therein as a trustee and executor," and gave C. a legacy for his trouble, "in addition to the benefit he derived under her will," and she declared that her trust estate should vest in A., and B. and C., and confirmed her will in all other respects. C. claimed one-third of the residue, but the court held that it was divisible between A. and B. *Hillersdon* v. *Grove*, 21 Beav. 518.

—— **Gift void for Uncertainty.**]—A request by a testator that a handsome gratuity should be given to each of his executors is void for uncertainty. *Jubber* v. *Jubber*, 9 Sim. 503.

What necessary to entitle—Proving Will.]—If a legacy is given to a man, who is appointed executor, he must prove the will in order to entitle himself to the legacy, though not made a condition by the will; but he may prove at any time. *Reed* v. *Devaynes*, 2 Cox, 285; 3 Bro. C. C. 95; 2 R. R. 48.

One of two executors, to whom a legacy was bequeathed, renounced in 1853, but afterwards, in 1859, he retracted and proved the will. An administration suit was subsequently instituted against him as an executor, and it appearing that the estate had not been administered when the executor proved:—Held, entitled to his legacy, but with interest only from the time of proving. *Angermann* v. *Ford*, 29 Beav. 349; 7 Jur. (N.S.) 668; 4 L. T. 230; 9 W. R. 512.

An executor who proves the will, but not with an intention of really acting in the execution of it, is not entitled to his legacy. *Harford* v. *Browning*, 1 Cox, 302.

—— **Proof prevented by Age or Sickness.**]—An aged executor, who was incapable by bodily and mental infirmity of proving the will:—Held, not entitled to a legacy given by the testator's will to him as executor. *Hanbury* v. *Spooner*, 5 Beav. 630; 12 L. J., Ch. 434.

A legacy to an executor for his trouble. He was prevented by illness from proving the will, and died without having done so:—Held, that the legacy failed. *Hawkins, In re*, 33 Beav. 570; 34 L. J., Ch. 80; 10 Jur. (N.S.) 922; 10 L. T. 557; 12 W. R. 945.

—— **Acting without Proving.**]—An executor, to whom a legacy was left for his trouble, being in Australia at the death of the testator, sent home a power of attorney, under which another person administered the estate, and under which the rents of the real estate were received. The executor died without proving the will:—Held, that the executor had sufficiently shown his intention to act under the trusts of the will to entitle his representatives to the legacy. *Lewis*

v. *Mathews*, 38 L. J., Ch. 510; L. R. 8 Eq. 277; 20 L. T. 905; 17 W. R. 841.

An executor, who died before probate, was held entitled to a legacy given for his care and loss of time in the execution of the trusts of the will, by having concurred with the other executors in directions for the funeral, and in paying some small sums on that occasion, Quære, whether an executor was entitled to a legacy in that character, who died at a distance without manifesting any intention to accept the trust, or without knowing it. *Harrison* v. *Rowley*, 4 Ves. 212: 4 R. R. 199.

Trustee dying nineteen months after the testatrix, without having acted, held entitled to a legacy given as a token of regard, and a recompense for his trouble; no refusal nor neglect to act where necessary appearing. *Brydges* v. *Wotton*, 1 Ves. & B. 134: 12 R. R. 200.

When a period of payment is appointed, the subsequent failure or breach even, of an express condition, annexed to a legacy, cannot affect the right to receive. *Ib.*

—— **Refusal to Act.**]—Legacy to a man as executor is forfeited by his refusal to act. *Abbot* v. *Massie*, 3 Ves. 148; 3 R. R. 79. S. P., *Freeman* v. *Fairlie*, 3 Mer. 24, 31; 17 R. R. 7.

For whose benefit the Gift Lapses.]—Devise to executors, as an encouragement to accept the trust, of 100*l.* a-piece, and 12*l.* for mourning, and a ring and 10*l.* a-piece per annum for their trouble; one refuses, yet he shall have his mourning and ring, but not the 100*l.* legacy, and the 10*l.* a year, which, in such case, shall not go to the acting executors, but sink into the estate. *Humberston* v. *Humberston*, 1 P. W. 333.

A bequest "to my two executors, whom I appoint to this purpose (i.e., the performance of trusts of the will, in trust to see the above fulfilled), I bequeath ten guineas, together with all the rest and residue of my estate, whether real or personal, wherever deposited, after my funeral expenses, &c., are paid by them, my executors": —Held, that legacies lapsed fall into the general residue, and that one executor having died in the lifetime of the testator, the other executor, though he died shortly after the testator, and had done no act manifesting an intention to take upon himself the excution of the will, was entitled to the whole of such general residue. *Parsons* v. *Saffery*, 9 Price 578; 23 R. R. 724.

A testator gave certain property, the produce of a mixed fund, in certain events, to A., B., C., and D. (whom he appointed his executors), to be divided betwixt them in equal proportions and to their heirs for ever, and in addition to these four he appointed two others his executors, and declared that, if any of those parties refused to act as executor, he annulled the bequest to him. D. declined to prove:—Held, that his share lapsed for the benefit of the next of kin, and did not belong to A., B., and C. *Barber* v. *Barber*, 3 Myl. & C. 688; 8 L. J., Ch. 36; 2 Jur. 1029.

Abatement.]—When a legacy is given to an executor generally, or for his care and pains, it makes no difference; for if there be a deficiency of assets, he must abate in proportion with other legatees. *Anon*, 2 Atk. 171. S. P., *Fretwell* v. *Stacey*, 2 Vern. 434. See also *Att.-Gen.* v. *Robins*, 2 P. W. 25; *Heron* v. *Heron*, 2 Atk. 162.

A bequest of an annuity to an executor, for his trouble in the conduct and management of the testator's affairs, has no priority over other legacies, in case of a deficiency, and it must abate. *Duncan* v. *Watts*, 16 Beav. 204. S. P., *Debney* v. *Eckett*, 4 Jur. (N.S.) 805.

Retainer.]—On motion by plaintiffs (residuary legatees), that the executor, who was one of the pecuniary legatees under the will, should pay into court the amount admitted by his answer: —Held, that the executor was not entitled to retain the amount of his legacy before the accounts had been taken. *Harding* v. *Harding*, 16 L. J., Ch. 179.

b. Right to Residue.

Before 11 Geo. 4 & 1 Will. 4, c. 40—In General.]—At law the appointment of executor is a gift of everything undisposed of by will. *Urquhart* v. *King*, 7 Ves. 225.

Strange, M. R., held, that executor, as such, takes all such as is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shewn, calling him a "legal residuary legatee." *Wilson* v. *Irat*, 2 Ves. Sen. 166.

Residue, if nothing given to them, and no intention to the contrary, belongs to executors. *Wilson* v. *Wombwell*, Dick. 477.

There is an old-established difference between an executor and trustee; a trustee has a mere legal right only, but an executor has more; for if there is a surplus he has a beneficial interest. *Mabank* v. *Metcalf*, 3 Atk. 96.

An executor or residuary legatee stands in the same light as to personalty, as an heir does to the realty, so as to take all that falls in beyond the intent of the testator, as by operation of law. *Marlborough* (*Duke*) v. *Godolphin* (*Lord*), 2 Ves. Sen. 74.

The rule that naming an executor is a gift to him of all the estate not otherwise disposed of, can only rationally be applied to cases in which the testament is perfect. *Browne* v. *M'Guire*, Beat. 366.

It is sufficient to exclude the executor, as such taking beneficially, that the testator professes to dispose of the whole of his property, although by the construction of his will he has not in fact done so. *Oldham* v. *Carleton*, 2 Cox, 399.

When executors are made trustees, they can take nothing for their own benefit unless it be particularly given to them; nor, as they have no ownership, can they alter the interest of the cestui que trust. *Read* v. *Snell*, 2 Atk. 643.

Legacy to an executor, who is also a trustee, excludes him from the beneficial interest in the residue, unless expressly given. *Bull* v. *Kingston*, 1 Mer. 314. S. P., *Seley* v. *Wood*, 10 Ves. 71.

Executors appointed expressly in trust, take the residue undisposed of, not beneficially, but in trust for the next of kin. *Pratt* v. *Sladden*, 14 Ves. 198. S. P., *Powell* v. *Marett*, 1 Sm. & G. 381; 22 L. J., Ch. 408; 17 Jur. 449; 1 W. R. 243.

Personal estate bequeathed to trustees upon trust; the executors, one of whom was also one of the trustees not entitled beneficially, in default of the declaration of trust. *Milnes* v. *Slater*, 8 Ves. 295; 7 R. R. 48.

One of the executors being a trustee of the residue, all are trustees. *White* v. *Evans*, 4 Ves. 21. S. P., *Sadler* v. *Turner*, 8 Ves. 617. *Griffiths* v. *Hamilton*, 12 Ves. 308.

No instance of an issue upon the question between executor and next of kin as to the residue. *Walton* v. *Walton*, 14 Ves. 323.

—— **Husband Sole Executor.**]—Where a husband is left sole executor he is entitled to the surplus, and it shall not be construed a resulting trust. *Partridge* v. *Powlet*, 1 Atk. 466.

—— **Legacy to the Next of Kin.**]—A legacy to the next of kin does not exclude him from taking the residue. *Att.-Gen.* v. *Parkin*, Ambl. 568. S. P., *North (Lord)* v. *Purdon*, 2 Ves. Sen. 495; *Seley* v. *Wood*, 10 Ves. 71; *Griffiths* v. *Hamilton*, 12 Ves. 310; *Andrew* v. *Clark*, 2 Ves. Sen. 162.

—— **Legacy to Heir-at-Law.**]—One devises lands to his executors (who are not relations) to sell for the best price, and to pay his debts, legacies, and funeral, so far as the same will extend, and gives legacies to his heirs-at-law, and 100*l.* to the children of one of his executors, but nothing to his executors; in such case the executors shall be but trustees for the heirs-at-law after debts paid. *Starkey* v. *Brooks*, 1 P. W. 390.

—— **Gift to Wife of Executor.**]—Under the law, prior to the 1 Will. 4, c. 40, the gift of a legacy to the wife of the executor did not prevent his taking the undisposed of residue beneficially. *Fruer* v. *Bouquet*, 21 Beav. 33. S. P., *Wilson* v. *Irat*, 2 Ves. Sen. 166.

—— **Gift to Daughter of Executor.**]—Legacy to the daughter, &c., of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. *Cloyne (Bishop)* v. *Young*, 2 Ves. Sen. 91.

—— **Non-Proving Executor.**]—If an executor is also residuary legatee he is entitled to the residue, although he does not prove the will. *Griffiths* v. *Pruen*, 11 Sim. 202.

In no case has the gift of a residue to an executor been lost by his refusal to prove. *Christian* v. *Devereux*, 12 Sim. 264. S. P., *Parsons* v. *Saffery*, 9 Price, 578; 23 R. R. 724.

—— **What is Residue.**]—The general residue of personal property comprehends everything not otherwise effectually disposed of; and no difference whether a legacy falls into it by lapse, or as void at law; the next of kin, therefore, excluded by an express bequest of the residue. *Dawson* v. *Clark*, 15 Ves. 409. Affirmed, 18 Ves. 247; 11 R. R. 188. S. P., *Parsons* v. *Saffery*, 9 Pri. 578; 23 R. R. 724.

—— **Legacy to Sole Executor.**]—Executor is entitled to an unbequeathed residue, unless there is a strong and violent presumption against him; a legacy to him affords such presumption; but parol evidence of the intention is admissible to rebut that, and is not to be confined to the time of making the will, but it must be to shew the intention at that time only. Residue unbequeathed, decreed to the executor, who was a legatee upon the intention appearing in the will, and by parol evidence. *Clennell* v. *Lewthwaite*, 2 Ves. J. 465. Affirmed *Id.* 644; 2 R. R. 285. S. P., *Rutland (Duke)* v. *Rutland (Duchess)*, 2 P. W. 209. *Martin* v. *Rebow*, 1 Bro. C. C. 154. *Lowson* v. *Copeland*, 2 Bro. C. C. 156. *Holford* v. *Wood*, 4 Ves. 76. *Abbott* v. *Abbott*, 6 Ves. 343.

—— **Legacy to Wife Executrix.**]—Wife excluded from taking the undisposed residue as executrix, by having a legacy. *Lake* v. *Lake*, Ambl. 127. S. P., *Gobsall* v. *Sounden*, 2 Eq. Abr. 445, pl. 58. But see *Lawson* v. *Lawson*, 4 Bro. P. C. 21.

—— **Legacy for Care and Trouble.**]—An executor cannot take the residue of a testator's property for his own benefit, where the will contains a specific bequest to him for his care and trouble. *Whitaker* v. *Tatham*, 7 Bing. 628; 5 M. & P. 628; 9 L. J. (o.s.) C. P. 189. S. P., *Davers* v. *Dewes*, 3 P. W. 43.

—— **Legacy to one or more of Several Executors.**]—Where a legacy is left to one of two executors, neither of them is thereby excluded from the surplus of the personal estate undisposed of. And though there have been a variety of opinions, and some different determinations, touching the residue of personal estates not expressly bequeathed by will, yet it has never been carried so far as to exclude two executors by reason of a legacy given only to one of them; decree affirmed. *Mason* v. *Hawkins*, 4 Bro. P. C. 7. S. P., *Cloyne (Bishop)* v. *Young*, 2 Ves. Sen. 91.

Executors entitled to the residue undisposed of; no inference against their legal right by any interest under the will, one only having a legacy; and, though called trustees as to specific trusts imposed upon them, distinct from their appointment as executors, no clear intention to make them trustees of the residue, which requires a strong and violent, though not irresistible, presumption. *Pratt* v. *Sladden*, 14 Ves. 193.

Legacies of a diamond ring to one, and of 200*l.* each to some of the others for mourning rings, as a token of affection, &c., would not make the executors trustees. *Sadler* v. *Turner*, 8 Ves. 617.

Executors held beneficially entitled, two of them only having a legacy, expressed to be a testimony of regard, and immediately following a particular trust imposed upon them. *Griffiths* v. *Hamilton*, 12 Ves. 298.

—— **Equal Legacies to Executors.**]—Executors having equal legacies for care, &c., are trustees of residue for next of kin. *Gibbs* v. *Rumsey*, 2 Ves. & B. 294; 13 R. R. 88. S. P., *Southouse* v. *Bate*, 2 Ves. & B. 396. *King* v. *Denison*, 1 Ves. & B. 277; 12 R. R. 227. *Carey* v. *Goodinge*, 3 Bro. C. C. 110. *Nisbett* v. *Murray*, 5 Ves. 149; 5 R. R. 6. *Cordell* v. *Noden*, 2 Vern. 148; Pre. Ch. 12.

Equal legacies to two executors makes them trustees for residue undisposed of, notwithstanding inequality as to the real estate. So, though legacies are given by a subsequent instrument. *Muckleston* v. *Brown*, 6 Ves. 64; 5 R. R. 211.

Testator, after bequeathing to A. and B. legacies of stock unequal in amount, and giving several legacies to public charities, requests the said A. and B. to be his executors, and gives them as such one hundred guineas each; he then orders his books, jewels, plate, and household furniture to be sold, and after desiring mourning to be provided for his servants, and five guineas each to be given to several persons named in the will, and to his executors for a ring as a token of remembrance, concludes his will in the following manner: "In case there is any money remaining, I should wish it to be given in private charity": —Held, that the executors having, as executors, equal legacies, could not take beneficially, and that the next of kin were therefore entitled to the general residue of the testator's personal estate, including what was comprehended in the residuary clause. *Ommanney* v. *Butcher*, Turn. & R. 260; 24 R. R. 42.

A testator gives to two persons, successively for their lives, his house and garden, with the furniture, and an income of 300*l.* a year to maintain it; and he directs that, at the death of the survivor, the whole of the premises shall become the property of the executors:—Held, that this bequest will not exclude the executors from taking the beneficial interest in the residue. *Gascoigne* v. *Lynde*, 4 L. J. (o.s.) Ch. 54.

A testator gave several legacies of considerable amount to his children, to be paid out of his real and personal estate; and he gave 10*l.* each to his two executors, in case they accepted and acted in the executorship of his will. He then made various specific bequests: "and as to the rest, residue, and remainder of his real and personal estate, not thereinbefore otherwise disposed of," he gave, devised, and bequeathed the same to A. B. and C. D. and made them sole executors of his will. By a codicil, he devised to his executors a particular house, not before mentioned, in trust for sale, and the proceeds to be divided between all his children:—Held, that the facts of the executors having equal legacies given them, and taking the residue in joint tenancy, though sufficient to have prevented them from taking the residuary personal estate beneficially by virtue of their office, were insufficient to prevent the operation of the clear gift to them as individuals, and that they took the residue under the will beneficially. *Henshaw, In re*, 34 L. J., Ch. 98; 10 Jur. (N.S.) 837; 11 L. T. 17; 12 W. R. 1139.

—— **Unequal Legacies.**]—Executors having legacies under the will held not to be precluded from taking property undisposed of by the will to their own use, the legacies being unequal in amount. *Russell* v. *Clowes*, 2 Coll. C. C. 648; 10 Jur. 732. S. P., *Bowker* v. *Hunter*, 1 Bro. C. C. 328. *Oliver* v. *Frewen*, 1 Bro. C. C. 590. *Griffiths* v. *Hamilton*, 12 Ves. 309. *Rawlings* v. *Jennings*, 13 Ves. 39; 9 R. R. 137.

—— **Parol Evidence to rebut Presumption.**]—Courts of law and equity admit parol evidence in two cases only,—to ascertain the person, where there are two persons the same name; and in resulting trusts, relating to personal estate, as where an executor has a small legacy, and the next of kin claim the residue, there parol proof is admitted to ascertain who shall have it. *Ulrich* v. *Lichfield*, 2 Atk. 372.

Executor having a legacy expressly for his care, etc., cannot produce evidence of intention that he should take the residue beneficially. *Langham* v. *Sanford*, 17 Ves. 435. Affirmed 19 Ves. 641; 2 Mer. 6.

One executor having a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for next of kin, and she was held entitled to the residue undisposed of. *Williams* v. *Jones*, 10 Ves. 77.

One makes a will and an executor, and gives a legacy of 500*l.* to the executor, but makes no disposition of the surplus, parol evidence of the intention and declaration of the testator touching the surplus admitted. *Rutland* (*Duke*) v. *Rutland* (*Duchess*), 2 P. W. 209.

Parol evidence admitted in favour of the legal title of the executor to the residue, unless plainly and unequivocally declared a trustee; so for a devisee for a particular purpose against an implied trust for the heir. *Walton* v. *Walton*, 14 Ves. 322.

A paper, proved as a will, reciting the marriage articles of the testator's daughter with A. confirming those articles, and directing that all the testator's property and effects shall be vested in A., preferable to any executor or administrator, upon and after the testator's decease, for all and every the purposes of his said agreement, expressed or intended. The probate obtained by A. as executor, held conclusive, and he was held not a trustee for the next of kin, upon parol evidence of declarations subsequent to the will. *Ib.* And see *Docksey* v. *Docksey*, 3 Bro. P. C. 39. *Buckley* v. *Littlebury*, 3 Bro. P. C. 43. *Beaufort* (*Duke*) v. *Granville* (*Lady*), 3 Bro. P. C. 37. *Clennell* v. *Lewthwaite*, 2 Ves. J. 465. Affirmed *Id.* 644; 2 R. R. 285; *White* v. *Evans*, 4 Ves. 22.

Executor, taking a contingent reversionary interest under the will, not precluded from giving evidence of the intention that he should have the residue beneficially, nothing upon the face of the will indicating that he was to take office merely. *Lynn* v. *Bearer*, Turn. & R. 63; 23 R. R. 185. S. P., *Oldman* v. *Slater*, 3 Sim. 84.

Claiming the residue as executor is sufficient to let in parol evidence in support of the legal title, without alleging a title by the effect of the parol evidence. *Id.* 66.

The motives which might influence the testator in favour of the executor are to be considered in determining whether the executor takes the residue beneficially. *Id.* 68.

A direction in will "to keep accounts," held to afford presumption that executrix was not to take beneficially; but parol evidence is admissible to explain away this uncertainty. *Gladding* v. *Yapp*, 5 Madd. 56; 21 R. R. 277.

Executor having general and specific legacies, not expressly for his care, etc., was not precluded from giving evidence of the intention that he should have the residue beneficially, by an exception of plate out of furniture bequeathed to him, and by a bequest to him of a contract for a leasehold house, subsequent to the appointment of executor; the effect being only that he should not take the plate under that bequest of furniture, and a future disposition of the residue might have been contemplated. Upon the evidence raising no direct intention from equivocal declarations, with an intention to make an express residuary disposition, the executor declared a trustee of the residue for the next of kin. *Langham* v. *Sanford*, 17 Ves. 435. Affirmed 19 Ves. 641; 2 Mer. 6.

The parol evidence need not to be confined to the time of making the will, but it must be to shew the intention at that time only. Residue unbequeathed, decreed to the executor, who was a legatee upon the intention appearing in the will, and by parol evidence. *Clennell* v. *Lewthwaite*, 2 Ves. J. 465. Affirmed *Id.* 644; 2 R. R. 285.

Testator manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee, it was held that the executors were not entitled to the surplus. Where parol evidence can be read, to shew no resulting trust, like evidence may be read contra, to disprove the implication from the former. *Cloyne* (*Bishop*) v. *Young*, 2 Ves. Sen. 91.

Testatrix, who made her will on a printed form, after giving certain legacies, gave all her estate real and personal "unto to and for own use and benefit absolutely," and then appointed C. W. C. to pay all her debts, &c., and to be executor

of her will. The chief clerk certified that the testatrix was illegitimate, and that she left no issue or next of kin. The Crown and the executor claimed the residue, and the executor tendered evidence to prove that the intention of the testatrix was, that he should take the residue, if any, for his own benefit:—Held, that, under the peculiar circumstances, parol evidence was admissible to rebut the presumption against the executor arising from the blanks in the will, and that the executor, subject to the payment of costs, was entitled for his own benefit to what should remain. *Bacon's Will, In re, Camp* v. *Cox*, 55 L. J., Ch. 368; 31 Ch. D. 460; 54 L. T. 150; 34 W. R. 319.

—— **On the Construction of the Will.**]—Executors, though not having legacies, held trustees for next of kin of residue. *Urquhart* v. *King*, 7 Ves. 225.

Where there appears "a plain implication or strong presumption" that the testator, by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named shall be considered a trustee for the next of kin of the undisposed surplus. *Ellcock* v. *Mapp*, 3 H. L. Cas. 492. Affirming 2 Ph. 793; 18 L. J., Ch. 217; 13 Jur. 290.

A testator devised "all my estate, both real and personal, to E. E., his executors, administrators, and assigns, to and for the several uses, intents, and purposes following, that is to say": and then, after specifying various objects of his bounty, appointed "the said E. E. executor of this my last will and testament." The trusts of the will did not exhaust the estate:—Held, affirming a decree of Lord Cottenham, that E. E. did not become entitled, for his own benefit, to the personal estate undisposed of, but was a trustee thereof for the widow and next of kin of the testator, according to the Statute of Distributions. The case of *Dawson* v. *Clark* (18 Ves. 247; 11 R. R. 188) commented on, and Lord Eldon's opinions adopted. *Ib.*

Where a man gives his wife a legacy of 300*l.*, which he declares to be her own money, and makes her executrix, but makes no disposition of the residue of his estate, this legacy shall not exclude her from being entitled to such residue. Both the decrees of the Lord Chancellor reversed. *Lawson* v. *Lawson*, 4 Bro. P. C. 21.

Where lands are devised to the executors to be sold for several purposes, and the surplus is expressly devised to them, there can be no resulting trust for the benefit of the heir. *Dormer* v. *Bertie*, Pre. Ch. 94.

Bequest of annuities for life, and when dead to return to executors:—Held, executors were beneficially entitled. *Selby* v. *Wood*, 10 Ves. 71.

A testatrix by her will gave the residue of her estate to A. B., whom she appointed her sole executor, and by a codicil after giving several legacies she added, "I direct that all my goods and chattels real and personal, except as before mentioned, shall go to my executor to be assets in his hands towards execution of the codicil to my will, and of the surplus, if any, I direct him to apply the whole in charity." The next of kin held to have no claim. *Henniker* v. *Henniker*, 17 L. J., Ch. 120; 12 Jur. 618.

One makes his wife his sole heiress and executrix of all his real and personal estate, to sell and dispose thereof at her pleasure to pay his debts and legacies, and gives his brother (who was his next of kin and heir) 5*l.*; the wife has the residue to her own use, and not as a trustee. *Rogers* v. *Rogers*, 3 P. W. 193; Sel. Ch. Ca. 81; Cas. t. Talb. 269.

By will testator nominated his wife his executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed," etc.:—Held, she is entitled, though not as executrix, to all his property, that such a will could pass. *Noel* v. *Hoy*, 5 Madd. 38; 21 R. R. 271.

Testator, after reciting that his property consisted of a house at C—— (which was freehold) and of mortgages, etc., directed the house to be sold, and then gave several pecuniary legacies, and amongst them 300*l.* to G. and 100*l.* to P., whom he appointed his executors. The will concluded thus: "And to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled." G. died the day after the testator, without having proved the will:—Held, in a suit by his executors against the testator's heir and next of kin, that the plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house. If an executor is also the residuary legatee he is entitled to the residue, although he does not prove the will. *Griffiths* v. *Pruen*, 11 Sim. 202.

Testator bequeathed his residuary estate to A., the executor and trustee of his will, with a gift over in case of the death of A., so that he might not be enabled to perform the duties thereby required of him. A. proved the will, but died before he had fully performed the trusts of it:—Held, that by merely proving the will he entitled himself to the residue absolutely. *Hollingsworth* v. *Grasatt*, 15 Sim. 52; 9 Jur. 932.

A testator beginning his will by expressing an intention to give the bulk of his property to two of his sisters, gave them only a life interest in the greater part of it; and after giving legacies to others of his sisters, he expressed his wish that A., and the testator's servant B., should be his executors, and that B. should live with his two sisters and take care of them and their property; and by a codicil he directed that the interest of 300*l.* should be paid to B., half-yearly, as wages, for taking care of his two sisters; and that, after the death of B. and his two sisters, the 300*l.* should be paid to P.:—Held, that the legacy given to B. by the codicil, was not a legacy given for her care and trouble, so as to convert her into a trustee of the residue for the next of kin, but that A. and B., in their character of executors, took the residue beneficially; that after the death of the two sisters, though the services for which the legacy was given as wages could no longer be performed, B. would still be entitled to the interest of the 300*l.* during her life. *Dawson* v. *Thorne*, 3 Russ. 235.

A testatrix by her will bequeathed all her personal estate to C., whom she appointed one of her executors, for her own use and benefit for ever, trusting and wholly confiding in his honour, that he would act in strict conformity with her wishes. Afterwards, on the same day, she executed a testamentary paper, which contained a list of the number of persons by name, and among others, the name of the person who was her sole next of kin, with the several sums to be given them respectively, and concluded with a declaration that such was the testatrix's wish:—Held, upon appeal, that C. took the personal estate for his own use absolutely, subject only to

the payment of the legacies specified in the testamentary paper, and of three other sums, which C. by his answer admitted that the testatrix had directed him, and which he submitted to pay. *Wood* v. *Cox*, 2 Myl. & C. 684; 6 L. J., Ch. 366; 1 Jur. 720.

A gift of residuary real and personal estate to the person appointed executor, and who was a stranger to the testator, "to enable him to carry into effect the purposes of this my will": —Held, that these words did not express the motive of the gift, but only what the executor was bound to do; and, therefore, that he was not entitled beneficially, but was trustee for the heir of the surplus real estate. *Barrs* v. *Fewkes*, 2 Hem. & M. 60; 33 L. J., Ch. 484; 10 Jur. (N.S.) 466; 10 L. T. 232; 12 W. R. 666.

Testator, revoking all wills and codicils, declared that to be his codicil by which he directs that the whole of his property "shall pass by this my codicil, according to law," save and except some legacies mentioned; and appointed his brother sole executor, requesting him to make such little arrangements as he has reason to think the testator should wish. The executor is a trustee for the next of kin and widow, according to the Statute of Distribution. *Cranley (Lord)* v. *Hale*, 14 Ves. 307.

Construction of an obscure will; executors not beneficially entitled. *Munyard* v. *New*, 3 Swan. 119.

Upon the construction of a will:—Held, that the executors were not entitled to a beneficial interest in the testator's residuary personal estate. *Andrew* v. *Andrew*, 1 Coll. C. C. 686.

Where there is no gift of the undisposed-of residue, a testator cannot by negative words exclude one of his next of kin from participating in it. *Johnson* v. *Johnson*, 4 Beav. 318. Contra, *Brasbridge* v. *Woodroffe*, 2 Atk. 69.

—— **Imperfect Disposition.**]—If property is given to executors as trustees generally, and the beneficial interest is only partially disposed of by the will, the executors are trustees of so much of the beneficial interest as is not disposed of, either for the next of kin, or for the heir, according to the nature of the property. *Madgin* v. *Lumley*, 1 L. J. (O.S.) Ch. 236.

Testatrix by will appointed an executor, and gave him a legacy; afterwards, by a testamentary paper, she directed the residue to be disposed of according to the private instructions to him; and having by a subsequent codicil added another executor, died without giving any instructions; the executors are trustees of the residue of the next of kin. *Mordaunt* v. *Hussey*, 4 Ves. 117.

Bequest of various particulars, comprising all the testator's personal estates, to his wife for life; then, after specifically disposing of and charging with legacies certain parts after the death of his wife, he appointed her executrix, she paying debts and funeral expenses:—Held, a resulting trust as to the residue, there being no further disposition and no evidence. *Dicks* v. *Lambert*, 4 Ves. 725; 4 Bro. C. C. 326.

If a testator means to create a trust, and the trust be ineffectually created, or fails, the next of kin take. *Ommanney* v. *Butcher*, Turn. & R. 260; 24 R. R. 42.

Residue to trustees, on trust for purposes too general for court to execute, next of kin shall take. *Vezey* v. *Jamson*, 1 Sim. & S. 69.

Testator appoints A. and B. his executors, together with his wife, "hoping they will be so good, out of respect to his wife, to accept the office"; and as to what worldly property he had, "I dispose of the same in the manner following": the testator then gave several specific and pecuniary legacies, but made no disposition of the residue:—Held, that the intention was clearly expressed by the clause requesting the executors to accept the office, followed by the declaration as to his disposal of his own property, that the executors should not take the residue beneficially. *Giraud* v. *Hanbury*, 3 Mer. 150.

Testator by will, without date, signature, or attestation, after giving several legacies, bequeathed unequal legacies to two persons, requesting them to see his will executed, leaving the residue undisposed of; probate afterwards granted to those persons as executors by implication. They are trustees of the residue for the next of kin, and take nothing beyond the legacies given them as compensation for their trouble in seeing the will executed. For the will being incomplete, afforded intrinsic evidence that the testator had not done all he intended in the way of testamentary disposition; therefore, the operation of the will was confined to that portion of the assets specifically bequeathed, and that portion, of which casualty prevented the disposition, was left to the rules of distribution, as in case of pure intestacy. *Browne* v. *M'Guire*, Beat. 358.

Construction of a will with this residuary clause, "all the remainder of my different bequests" to trustees for charitable purposes, and any thing not specified, "I commit to the discretion of my executors," as passing the general residue by the former words to the charity, not by the latter to the executors, who would not, under those words, have been trustees for the next of kin. *Paice* v. *Canterbury (Archbishop)*, 14 Ves. 364.

Bequest to executors in trust not declared, or failing, is a trust for the next of kin. *Id.* 378.

If a trust is imposed, the trustees cannot take beneficially, though the trust may be too indefinite for execution. *Gibbs* v. *Rumsey*, 2 Ves. & B. 294; 13 R. R. 88.

Residuary bequest to trustees and executors, describing both by their character and names, to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money as they in their discretion shall think proper and expedient, an absolute interest to them beneficially; or an absolute power of appointment, excluding the next of kin and the heir, as to the produce of real estate. *Ib.*

Residuary bequest cancelled by striking through with a pencil all the general description, with notes in pencil in the margin, indicating alteration, and a different disposition of certain articles, a resulting trust for the next of kin. *Mence* v. *Mence*, 18 Ves. 348.

Testator, after devising real estates to his daughters L. and P., directed J. C. to pay to his grand-daughter M. C. the interest of 400*l.* for life, and after her decease to her heirs; and if she should have no issue, equally between his daughters L. and P. "And I appoint the said J. C. to be the whole and sole executor of my will; and I appoint my said daughters, L. and P., executrixes of my will":—Held, they could not after claiming in their answer as next of kin,

now claim the residue as executors. *Green* v. *Chaloner*, 1 Jur. 132.

Bequest by a testator of 50*l.* per annum to his executor, to be paid for the keep of a mare, with a direction that the executor should consider himself bound in honour to fulfil this wish, and see that she be well provided for:—Held, that the trust in favour of the mare ought to be performed, and that the executor was entitled to the surplus not required for the mare's keep. *Pettingall* v. *Pettingall*, 11 L. J., Ch. 176.

—— **Residuary Gift — Lapse.**] — Residuary legatee dying in the life of testator, executor a trustee of residue for next of kin, though no legacy to them, except 10*l.* to one for mourning. *Bennet* v. *Batchelor*, 1 Ves. J. 63; 3 Bro. C. C. 28.

—— **Increase of Value after Will.**]—A. B. bequeathed dividends of property in funds to C. D. for life, and directed that after his decease principal should be divided amongst his children in manner after mentioned. He then gave children certain sums of money which would have exhausted the whole funded property at date of will. Between that time and A. B.'s death, that property greatly increased:—Held, executors entitled to surplus as undisposed of. *Haynes* v. *Littlefear*, 1 Sim. & S. 496; 2 L. J. (O.S.) Ch. 13.

—— **Blanks.**]—Bequest of residue, to go over in a particular event (which took place) to —— (leaving a blank). The executors excluded by such inchoate gift, and the next of kin entitled. Next of kin are not excluded from taking the residue by a gift to them of legacies, &c. *North (Lord)* v. *Purdon*, 2 Ves. Sen. 495. S. P., *Nourse* v. *Finch*, 1 Ves. J. 344.

Blank space left between last line of a will and signature raises no presumption of intent to dispose of residue against legal right of executor. *White* v. *Williams*, 3 Ves. & B. 72; G. Coop. 58.

—— **Direction to keep Accounts.**]—A direction in will "to keep accounts," held to afford presumption that executrix was not to take beneficially; but parol evidence is admissible to explain away this uncertainty. *Gladding* v. *Yapp*, 5 Madd. 56; 21 R. R. 277.

—— **Appointment of Partnership as Executors.**]—A partnership in London being appointed, not individually, but as a firm, executors and guardians claimed the residue undisposed of, in exclusion of persons appointed attorneys and executors in India; decreed a trust for the next of kin; and it was referred to the Master to appoint a guardian. *De Mazar* v. *Pybus*, 4 Ves. 644.

—— **Appointment "to carry out Will," &c.**]—A gift of residuary real and personal estate to the person appointed executor, and who was a stranger to the testator, "to enable him to carry into effect the purposes of this my will":—Held, that these words did not express the motive of the gift, but only what the executor was bound to do; and, therefore, that he was not entitled beneficially, but was trustee for the heir of the surplus real estate. *Barrs* v. *Fewkes*, 2 Hem. & M. 60; 33 L. J., Ch. 484; 10 Jur. (N.S.) 466; 10 L. T. 232; 12 W. R. 666.

A testatrix appointed A. B. her executor, to see that her will was put in force. The executor is a trustee for the next of kin. *Braddon* v. *Farrand*, 4 Russ. 87; 6 L. J. (O.S.) Ch. 35.

A testator appoints A. and B. his executors "for the just and due performance of his last will and testament":—Held, that these words will not convert the executors into trustees of the residue, for the testator's next of kin. *Gascoigne* v. *Lynde*, 4 L. J. (O.S.) Ch. 54.

—— **Investment, Reimbursement and other Trustee Clauses.**] — Testatrix by will made defendants trustees, and gave them legacies by codicil; she made them executors, and ordered them to be paid for journeys and expenses; this shews her intention to make them executors in trust only. *Dean* v. *Dalton*, 2 Bro. C. C. 634.

The expression, "I give to them" (the executors) "all my estate and effects whatsoever, upon trust," to pay a legacy out of particular part of fund, followed by the expression, "I give and bequeath" such and such legacies to others, with directions to reimburse themselves their costs, &c., out of the trust moneys, and that they shall not be answerable for the insufficiency of any security upon which the said trust moneys shall be placed, and followed by a declaration, that after payment of debts, &c., she gives the residue to the executors in trust to pay dividends to A. and B. for life, and if any children him surviving, to them absolutely, does not give executors the beneficial interest in the event of no children: but testatrix's next of kin are entitled. *Woollett* v. *Harris*, 5 Madd. 452.

Testator by his will, which was not affected by the statute 11 Geo. 4 & 1 Will. 4, c. 40, gave all his personal estate, his leasehold house and premises excepted, unto his cousin and two sisters by name, upon trust to convert the same into money, and apply the proceeds towards payment of his debts and funeral and testamentary expenses, but his wearing apparel was to be given away to whom they might think fit. He then gave his freehold and leasehold premises to the same persons, upon trust to sell and divide the proceeds among certain persons, two of whom were the trustees, with a declaration that, in order to facilitate such sale, the receipts of his said trusees should be sufficient discharges. He then, after appointing his said trustees to be his executors, declared that his said executors and trustees might retain to and reimburse themselves all their costs, charges, damages and expenses occasioned by the due execution of the trusts thereby in them reposed:—Held, that the executors did not take beneficially the residue of the personal estate which remained undisposed of after payment of the testator's debts and funeral and testamentary expenses. *Mullen* v. *Bowman*, 1 Coll. C. C. 197; 13 L. J., Ch. 342; 8 Jur. 438.

—— **Fraudulent Concealment.**] — Personal estate not disposed of by a will, drawn by the confidential counsel (the sole executor) without informing the testator of the legal effect of the will:—Held, to be a trust for the next of kin. *Segrave* v. *Kirwan*, Beat. 157.

—— **Survivorship.**] —Surplus of a personal estate bequeathed to A. and B.; it is a joint devise, and shall survive. There are two executors; one dies; his executor or administrator shall not have an account against the survivor. *Shore* v. *Billingsly*, 1 Vern. 482.

A., by his will, gives several legacies to his children, and appoints his two eldest sons joint executors; but makes no express disposition of the residue of his personal estate:—Held, that the residue belongs to the executors as joint tenants: and that one of them having died without making any severance, the whole survives to the other. *Hall* v. *Digby*, 4 Bro. P. C. 577.

Persons taking a residue as executors, take as joint tenants; therefore, if one dies before severance, his share survives. *Frewer* v. *Relfe*, 2 Bro. C. C. 220.

Probate conclusive as to the character of executor. The appointment of executor gives a joint interest in the residue, which, not being severed, survived. *Griffiths* v. *Hamilton*, 12 Ves. 298.

Survivorship among executors. *White* v. *Williams*, 3 Ves. & B. 72; G. Coop. 58.

A bequest "to my two executors, whom I appoint to this purpose (i.e., the performance of trusts of the will); in trust to see the above fulfilled, I bequeath ten guineas, together with all the rest and residue of my estate, whether real or personal, wherever deposited, after my funeral expenses, &c., are paid by them, my executors":—Held, that legacies lapsed fall into the general residue, and that one executor having died in the lifetime of the testator, the other executor, though he died shortly after the testator, and had done no act manifesting an intention to take upon himself the execution of the will, was entitled to the whole of such general residue. *Parsons* v. *Saffery*, 9 Price, 578; 23 R. R. 724.

A bequest of residue "to my executors hereinafter named, to enable them to pay my debts, legacies, funeral and testamentary charges, and also to recompense them for their trouble, equally between them," followed by the appointment of three persons as executors, is a gift to those persons as a class in their official character; and, therefore, one having died in the lifetime of the testator, the whole residue vests in the two survivors. *Knight* v. *Gould*, 2 Myl. & K. 295; Coop. t. Brough. 240.

Testator gave 300*l.* to each of his three trustees and executors who should prove and act; but if any of them should die without having acted, or should refuse or decline to act, the legacies intended for them were to go to the trustees, who, under the power for that purpose contained in the will, should be appointed in their place. Two of the trustees died in the testator's lifetime, and two new ones were proposed by the surviving trustees and appointed by the Master, in compliance with the decree in a suit for administering the testator's estate:—Held, that they were not entitled to the legacies intended for the deceased trustees. *Walsh* v. *Gladstone*, 14 Sim. 2; 8 Jur. 51.

A testator gave personal property in certain events to A., B., C. and D., to be divided betwixt them in equal proportions, and to their heirs for ever, whom with two others he appointed his executors, and declared that if any of those parties refused to act as executors he annulled the bequest to him. D. declined to prove:—Held, that his share lapsed for the benefit of the next of kin, and did not belong to A., B. and C. *Barber* v. *Barber*, 3 Myl. & C. 688; 8 L. J., Ch. 36; 2 Jur. 1029. S. P., *Page* v. *Page*, 2 Stra. 820; 2 P. W. 489; Mos. 42.

Where a testatrix gave the residue to "the persons thereinafter appointed her executors," in equal shares:—Held, that the gift was to the executors as individuals, and not as executors, and that the shares which lapsed fell into the residue. *Hoare* v. *Osborne*, 33 L. J., Ch. 586; 10 Jur. (N.S.) 382; 10 L. T. 20; 12 W. R. 397.

Since 11 Geo. 4. & 1 Will. 4, c. 40—Effect of Statute.]—The 11 Geo. 4 & 1 Will. 4, c. 40, has not introduced any new rule for the construction of wills. Its effect simply is that an executor shall no longer take residue by implication of law, and it has therefore no application where there is an express gift of the residue to an executor. *Williams* v. *Arkle*, 45 L. J., Ch. 590; L. R. 7 H. L. 606; 33 L. T. 187; 24 W. R. 215.

The question whether the executor or trustee under a will is to take in that capacity only, or is to take the beneficial interest, is a question of intention to be collected from the whole of the will. *Ib.*

Since the 1 Will. 4, c. 40, the intention that the executor shall take beneficially, must appear from the will, and parol evidence of the testator's intention is inadmissible: where the bequest was to them of all his personal estate, "in trust to pay as follows" (specifying legacies), and concluding, "I wish all this to be paid in six months after my death":—Held, that they did not take the residue unexhausted beneficially, but in trust for the next of kin. *Lore* v. *Gaze*, 8 Beav. 472; 9 Jur. 910.

The 1 Will. 4, c. 40 (as to the right of executors to the undisposed of residue) merely shifts the burden of proof from the next of kin to the executor. *Read* v. *Stedman*, 26 Beav. 495; 28 L. J., Ch. 481.

—— **Construction of Will.**]—A testator by his will appointed G. A. his executor and trustee; and, in the event of his death in his lifetime, he appointed B. A. executor and trustee. After giving various legacies, including two of 1,000*l.* each to G. A. and B. A., he left the whole of his real estate, and the residue of his personal estate, "unto G. A. for all my estate and interest therein respectively, if he shall be alive at my decease; but if he shall die in my lifetime, then" to B. A. In a suit by the heiress-at-law, and sole next of kin to the testator, praying that the executor, G. A., might be considered as a trustee for her of the real and personal estate:—Held, that the gift being an express devise to him by name, and not quâ executor, it must be taken to be for him beneficially and not as a trustee, and that 11 Geo. 4 & 1 Will. 4, c. 40, did not apply. *Williams* v. *Arkle*, 45 L. J., Ch. 590; L. R. 7 H. L. 606; 33 L. T. 187; 24 W. R. 215.

A testator appointed A. and B. his executors, and he gave them all his personal estate, "that is to say, for you to pay all as follows." He then gave several legacies, and afterwards said, "I wish all this to be paid in six months after my death":—Held, under the 1 Will. 4, c. 60, that the executors did not take the unexhausted residue beneficially, but in trust for the next of kin. *Lore* v. *Gaze*, 8 Beav. 472; 9 Jur. 910.

A testator, by his will, said, "I make H. C. J. my whole and sole executor of all the various properties I may be in possession of at my death; M. C. not to be forgotten if she holds the same position at my decease":—Held, that, under the 1 Will. 4, c. 40, the executor was a trustee of the residue for the next of kin. *Juler* v. *Juler*, 29 Beav. 34; 30 L. J., Ch. 142; 6 Jur. (N.S.) 1320; 3 L. T. 395; 9 W. R. 61.

A testator bequeathed all his residuary estate to his executrix, upon trust to pay thereout certain legacies which did not exhaust the personal estate:—Held, on construction of the will, that the executrix took the surplus personal estate beneficially, and that she did not hold such surplus in trust for the next of kin. *Williams* v. *Roberts*, 27 L. J., Ch. 177; 4 Jur. (N.S.) 18; 6 W. R. 93.

A testatrix, after directing legacies in certain events to fall into the residue, bequeathed specified articles "and other personal effects" to A. and B., in confidence that they would distribute and dispose of them as she by memorandum or otherwise might direct, and appointed A. and B. her executors. By a codicil, she directed her "executors and residuary legatees" to vary certain bequests, and empowered them to postpone legacies, the interest in the meantime "to form part of my residuary estate," and gave a legacy to "A., one of my executors and residuary legatees." By a second codicil, she gave a life interest to a legatee in a sum, which, under the former dispositions, would have fallen into the residue, and stated that the alteration would make but little difference, as the sum would ultimately fall into the residue. After authorising the executors to postpone the payment of legacies, and giving other directions, the codicil concluded thus: "These wishes written by myself, and only concern the interest of my executors, will, I feel sure, be quite sufficient for them to fulfil all herein mentioned, but will perhaps be more correct if I sign my name in the presence of two witnesses, who are also in the presence of each other":—Held, that, on the will alone, the executors would have taken the residue, subject to a trust for the next of kin; but that the word "confidence" in the will admitted of explanation, and was explained by the codicils not to amount to a binding trust. *Shepherd* v. *Nottidge*, 2 John. & H. 766; 7 L. T. 399; 1 N. R. 15.

Held, also, that, on the will, as explained by the codicils, the bequest to the executors was not limited to things ejusdem generis with those described, but included the whole residue. *Ib.*

Held, consequently, that the executors took the whole residue beneficially. *Ib.*

A. bequeathed an annuity to his wife, to be paid out of his effects, the executors to give security for the same. He then made bequests to three of his children, and expressly declared why he did not provide for three others, and, after appointing distinct trustees, he appointed three of his sons, his remaining children, to be executors. There was no disposition of the residue:—Held, that it appeared by the will that the executors were intended to take the residue beneficially, so as to comply with the 11 Geo. 4 and 1 Will. 4, c. 40. *Harrison* v. *Harrison*, 2 Hem. & M. 237; 33 L. J., Ch. 647; 10 Jur. (N.S.) 611; 10 L. T. 569; 12 W. R. 854.

A testator by will, dated 1864, directed his debts to be paid by his executors in trust, M. and B. He then gave several legacies, and amongst them a sum of money to his said trustees to be placed out at interest, and the interest to be applied for the benefit of the poor of a certain parish. He also gave his said trustees another sum to be expended on a window in a church; and directed them out of his residuary estate to palisade and keep in repair the graves of his family. He then gave certain real and leasehold hereditaments to his friends, M. and B., upon certain durable trusts. The will then contained the usual trustees' receipt clause. After giving other legacies, he gave the residue of his real and personal estate, money, securities for money, &c., unto his two friends, M. and B., share and share alike, as tenants in common, to hold to their heirs and assigns for ever. He then gave his trust and mortgage estates to M. and B., subject to the trusts and equities, and so far as he was interested as mortgagee to be disposed of for the purposes of that his will. The will contained a power of appointment of new trustees, which provided for the vesting of "all and singular the said trust estate, moneys and securities" in the new trustees upon the same trusts. The testator then appointed his "said two friends, M. and B., executors in trust" of that his will:—Held, that the trustees took the residue beneficially. *Romans* v. *Mitchell*, 15 W. R. 552.

A testator bequeathed all his property to two persons whom he appointed executors (one being a neighbouring farmer, the other a surgeon called in during his last illness to make the will) "in and for the consideration of" paying over the rents and profits to his wife for life:—Held, that they did not take beneficially, but that the estate, subject to the widow's life interest, was undisposed of. *Bird* v. *Harris*, 39 L. J., Ch. 226; L. R. 9 Eq. 204; 23 L. T. 213; 18 W. R. 374.

A father appointed two of his sons executors, and gave various legacies, but made no residuary bequest. By a codicil he directed his two executors and three of his principal legatees to pay all expenses attending the proving his will, and administration and winding up of his estate, in equal proportions, according to the nature of the property they derived under his will and codicil, it being his express desire that no part of such expenses should be borne by the residuary legatees, but that they should receive the residue free of all deductions for expenses:—Held, that the appointment of executors had no operation as to the beneficial disposition of the residue; and that being undisposed of by the will, the codicil left the matter in the same position, and there was an intestacy as to the residue. *Travers* v. *Travers*, L. R. 14 Eq. 275.

A son, owing his mother 300*l.*, "towards liquidating this" bequeathed to her some chattels, and also "for paying off this debt" bequeathed to her "all and everything not otherwise mentioned" in his will, and appointed his mother executrix:—Held, that she was not made beneficial residuary legatee. *Wright* v. *Revell*, 27 L. T. 439.

A testator after directing payment of his debts, funeral and testamentary expenses and legacies, bequeathed some legacies to charities, and gave to three persons legacies of nineteen guineas each, and appointed them executors. He then bequeathed the whole of his "estate and effects whatsoever and wheresoever absolutely" to the same three persons by name, their executors and administrators, charged, nevertheless, and he thereby charged certain parts thereof with certain payments, which did not nearly exhaust the estate; and he declared that all costs, charges and expenses which his executors or any of them should incur might be retained by them out of any moneys which might come to their hands from any part of his estate. The testator died in 1837:—Held (the

court being equally divided, and the decision below consequently affirmed) that the executors took the residue as trustees for the next of kin. *Saltmarsh* v. *Barrett*, 3 De G. F. & J. 279; 30 L. J., Ch. 853; 7 Jur. (N.S.) 813; 4 L. T. 690. Affirming 9 W. R. 564.

A testator gave the whole of his personal estate to his grandson H., his executors, administrators and assigns, "subject to the payment of debts, funeral and testamentary expenses, and legacies, and the trusts hereinafter contained." Then followed certain trusts for other people, and for H. himself. The testator appointed his grandson, with three others, executors. There was no residuary bequest:—Held, that after the performance of the trusts H. took the residue for his own benefit. *Clarke* v. *Hilton*, L. R. 2 Eq. 810; 12 Jur. (N.S.) 721; 15 L. T. 64; 14 W. R. 827.

The appointment of an executor vests in him all the personal estate of the testator, and if any part (after payment of the funeral expenses and debts) remains undisposed of by will, it vests in the executor beneficially; but where it sufficiently appears on the face of the will that the testator did not intend the executors to take the surplus, they are deemed trustees for those on whom the law would cast the surplus in case of a complete intestacy; and this is so, whether the executors are expressly called executors in trust, or any other expressions occur shewing the office only to be intended for them, and not the beneficial interest. A testator, after giving a number of pecuniary legacies, some of which involved the performance of active trusts on the part of his "executors," appointed A., B. and C. "executors and trustees of this my will." The will contained a clause providing for abatement of the legacies in case of a deficiency, and no residuary gift; but on the testator's death there was a considerable surplus:—Held, that the executors were not beneficially entitled to the undisposed-of residue. *Dillon* v. *Reilly*, 9 L. R., Ir. 57.

Observations of the Vice-Chancellor, in *Roose* v. *Chalk* (49 L. J., Ch. 625), upon *Braddon* v. *Farrand* (4 Russ. 87) commented on. *Ib.*

A testator bequeathed to his executors the sum of 300*l.* charged upon certain premises, and also a policy of insurance, and after giving certain specific legacies to one of his brothers and one of his sisters, he bequeathed all the rest and residue of his estate to his executors upon trust to sell and convert into money all his said estate and property, "save that thereinbefore specifically devised," and to pay thereout his debts and some pecuniary legacies. He bequeathed the rest, residue and remainder of his estate and property, "save that thereinbefore specifically devised," after payment of his debts and legacies, upon trust for such of his brothers and sisters as should survive him; and he bequeathed to each of his executors (by name) 50*l.* for his trouble:—Held, that the executors were beneficially entitled to the legacy of 300*l.* and the policy of insurance. Consideration of principles by which court is guided in determining whether executors take beneficially or in trust since the statute. *Caruth* v. *Parker*, 11 L. R., Ir. 18.

A testatrix, after appointing four executors, made over to them by her will "as such" all her property and effects, "but in trust always for the purposes hereinafter mentioned"; and after directing them to preserve certain houses as a family house, and giving certain specific bequests, disposed of the residue of her estate as follows:—"As regards the remainder of my real and personal property of what kind soever, not already disposed of, I direct that my executors shall receive and collect the same from all persons whatever, and in such manner as to them may seem proper, and I direct that they, their heirs, successors, representatives, or descendants, may apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them may appear just":—Held, that there was no absolute gift to the executors as individuals. The residue was not severed from the trust with which the testatrix had clothed all her property in the hands of her executors, but although a trust was intended to be created, it failed for want of adequate expression of it. *Yeap Cheah Neo* v. *Ong Cheng Neo*, L. R. 6 P. C. 381.

As against the Crown.]—Upon the construction of a will:—Held, that executors were entitled, as against the Crown claiming in default of next of kin of the testatrix, to the surplus proceeds of certain leaseholds which were bequeathed to be sold for payment of the testatrix's debts and legacies. *Russell* v. *Clowes*, 2 Coll. C. C. 648; 10 Jur. 732.

B. devised and bequeathed the residue of his freehold, leasehold and personal estates to five trustees (whom he appointed executors), four of them being ministers of the Presbyterian church in London, and the fifth being, as well as the testator, a member of that church. The answer admitted that it was the expressed wish and hope of the testator, as to his residuary property generally, that his residuary legatees would make use of the same for the benefit of the Presbyterian college, to which he had been in his lifetime a benefactor; and the trustees also admitted that they did not allege, or contend, or believe, that the testator intended them to enjoy the property beneficially. There were no next of kin:—Held, that the bequest of the leaseholds was void, and that that portion of the residuary estate belonged to the Crown. *Johnstone* v. *Hamilton*, 11 Jur. (N.S.) 777; 12 L. T. 822; 13 W. R. 961. S. P., *Middleton* v. *Spicer*, 1 Bro. C. C. 201.

The 11 Geo. 4 & 1 Will. 4, c. 40, s. 2 does not affect the rule laid down in *Middleton* v. *Spicer*, (1 Bro. C. C. 201). *Ib.*

A testator who died in 1855, by will gave all his property and the residue of his estate to three persons, upon trust to pay various legacies; he also gave legacies of unequal amounts to each of his trustees, whom he appointed executors. The trustees were also empowered to appoint new trustees in the place of those unable to act. The testator afterwards gave an additional legacy to one of his executors. He was illegitimate, and died without having ever been married:—Held, that the undisposed of residue did not belong to the executors, but lapsed to the Crown, and that it was unaffected by the 11 Geo. 4 & 1 Will. 4, c. 40. *Read* v. *Stedman*, 26 Beav. 495; 28 L. J., Ch. 481.

The 1 Will. 4, c. 40 (as to the right of executors to the undisposed of residue) merely shifts the burden of proof from the next of kin to the executor. *Ib.*

Gifts of residue to executors in trust, with equal legacies to the executors by name, do not pass a beneficial interest in undisposed of residue, which came to the Crown. *Chester* v. *Chester*, L. R. 12 Eq. 444; 19 W. R. 946.

A testatrix, by her will dated in 1878, after directing her just debts and funeral expenses to be paid by her executors, appointed her friend and medical adviser, R., and her friend, C., solicitor, her executors, and gave a number of legacies, including one of 1,000*l.*, to R., and another of 100*l.* to C., and revoked all other wills made by her. Testatrix died in 1878, without any next of kin, possessed of large personal estate:—Held, that the executors R. and C. were absolutely entitled as against the Crown to the personal estate for their own benefit. *Knowles, In re, Roose* v. *Chalk*, 49 L. J., Ch. 625; 43 L. T. 152; 28 W. R. 975.

Where personal property is given to executors upon trust they are excluded from claiming for their own benefit, and if the trust fails and there are no next of kin, the executor is trustee for the Crown. *Powell* v. *Marett*, 1 Sm. & G. 381; 22 L. J., Ch. 408; 17 Jur. 449; 1 W. R. 243.

A. devised his residuary personal estate to his executors, upon certain trusts, which failed under the Statute of Mortmain; he then devised real estates to his wife, charged with a mortgage, and also charged with the payment of his debts. The testator made his will and died in 1858, leaving a widow, but no child or next of kin:—Held, that the executors did not take the personalty for their own benefit, but as trustees for the widow and the Crown in moieties: that the general debts were to be paid out of the personalty, but that the devisee of the real estate was not entitled to have the mortgage debt discharged out of the personalty. *Dacre* v. *Patrickson*, 1 Dr. & Sm. 182; 29 L. J., Ch. 846; 6 Jur. (N.S.) 863; 8 W. R. 597, 647.

Testatrix devised real estate to A. and B. upon trust for sale. She bequeathed to them all the moneys, stocks, funds, shares and securities which should belong to her at her death, upon trust to convert such part as should not consist of money, and out of the proceeds of such conversion, and of her moneys, to pay her funeral and testamentary expenses and debts, and certain legacies. She gave the residue of the moneys produced by the sale of her real estate, and of the moneys produced by such conversion as aforesaid, and of her other moneys, after payment of such expenses, debts and legacies, unto and equally between A. and B. for their own use and benefit absolutely. She appointed A. and B. executors and trustees of her will. By a codicil, after reciting the residuary gift to A. and B., she revoked it, and instead thereof gave to each of them out of the residue of the trust moneys mentioned in her will a legacy of 500*l.* for his trouble in acting as an executor and trustee of her will. The testatrix died. Her executors sold and converted the property given by the will, and paid the debts and legacies. After doing so they had considerable balances in respect of the proceeds of both kinds of property, and also a sum arising from the sale of certain furniture which was not mentioned in the will. The testatrix had no heir-at-law or next of kin. The question was, whether the executors or the Crown were entitled to these undisposed of residues. The Crown counsel admitted that he could not claim the residue of the proceeds of sale of the real estate:—Held, that there was expressed on the face of the will and codicil an intention on the part of the testatrix to confer a benefit on her executors and trustees to the extent of 500*l.*, and no more, and, consequently, the Crown was entitled to the residue of the money of the testatrix, and the proceeds of the conversion she had directed, and also to the residue of the proceeds of the sale of the furniture. *Hudson's Trusts, In re*, 52 L. J., Ch. 789; 48 L. T. 562; 31 W. R. 778.

V. CREDITOR APPOINTED EXECUTOR.

Effect on Debt.]—The rule at law that where the obligee in a bond becomes executor of the obligor, and receives assets adequate to discharge the debt, it is extinguished, is also the rule at law where only one of two obligees is appointed one of several executors of the obligor. The same rules prevail in equity. And this is so though the obligees are trustees. *Richards* v. *Molony*, 2 Ir. Ch. R. 1.

Accordingly, where a father, on the marriage of one of his daughters, entered into a bond to A. and B. conditioned for payment of 4,000*l.*, and, on the marriage of another of his daughters, entered into a bond to A. and C. conditioned for payment of 4,000*l.*, and was a party to the marriage settlement of both daughters, whereby the sums secured by the bonds were limited upon certain trusts, and by his will directing his debts to be paid, and reciting the acknowledgment of his bonds, devised certain lands to A., and other lands to D., and bequeathed legacies to both of his daughters to be paid out of his personal estate, if sufficient, but if not sufficient out of the devised lands, and appointed A. and two other persons to be his executors, and died, and more than sufficient assets for payment of all his debts and legacies reached the hands of A:—Held, that, whether A. had or had not committed a devastavit, the cestuis qui trustent had not any equity to raise the amount of the bond debts out of the lands devised to D., although D. had personally instituted a suit against A. for indemnification of the lands devised to D. against those bond debts. To that suit the cestuis qui trustent were not parties. *Ib.*

Where one of two joint debtors makes the creditor his executor, and the latter receives assets adequate to discharge the liability, the debt is extinguished. *Crampton* v. *Walker*, 31 L. R., Ir. 437.

—— **Volunteers under Testator's Deed—13 Eliz. c. 5—Acquiescence.**]—Where a testator makes his creditor on bond (who also has a lien on all the testator's real estate for unpaid purchase-money) the executor and trustee of his will, and also a short time before his death executes a voluntary assignment of all his leasehold property, being the larger portion of his personal estate; and the bond creditor directs the preparation of the voluntary deed, and acts in the trusts of the will according to the deed, for seven years:—Held, that there being no evidence of ignorance or mistake on the part of the creditor, the deed was not void under the statute 13 Eliz. c. 5, and could not be impeached by the creditor or any one claiming under him. Creditor is not thereby precluded from enforcing payment of his claim out of all the property of the testator, including, if necessary, that comprised in the voluntary deed. *Olliver* v. *King*, 25 L. J., Ch. 427; 2 Jur. (N.S.) 312; 4 W. R. 382—L.JJ.

VI. DEBTOR APPOINTED EXECUTOR.

Effect on Debt at Law.]—If a debtor be made executor, the debt is totally extinguished; other-

wise if he be appointed administrator, whose representative will be chargeable at the suit of the administrator de bonis non, of the first intestate; on the authority of *Wankford* v. *Wankford*, 1 Salk. 299, and *Needham's Case*, 8 Co. 136. *Hudson* v. *Hudson*, 1 Atk. 461. But see *Holliday* v. *Boas*, 1 Roll. Abr. 920.

Effect on Debt in Equity.]—Where testator makes bond-debtor his executor it does not extinguish debt. *Errington* v. *Evans*, Dick. 456. And see *Philips* v. *Philips*, 1 Ch. Ca. 292; 2 Freem. 11; *Fox* v. *Fox*, 1 Atk. 463

The conusee of a judgment appointed the conusor one of his executors: the will was proved by the other executor only:—Held, that in equity the judgment debt was not extinguished, but was assets in the hands of the executor for payment of his testator's debts, and, accordingly, that lands of the conusor, sold subsequently to the condition of the judgment, were in the possession of a purchaser with notice liable to the discharge of the judgment debt. *Willock* v. *Dargan*, 1 Ch. Rep. 39.

Executor is a trustee in respect of a debt due by him to a testator. *Berry* v. *Usher*, 11 Ves. 87.

The examination of an executor under the usual decree for an account ought to contain an interrogatory whether he is indebted to the testator, the debt from himself being assets. A debt due by the executor is assets for the same reason that he may if a creditor retain. *Simmons* v. *Gutteridge*, 13 Ves. 262, 264.

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue. They were indebted to him in unequal sums; this is no release of the debts, and they are trustees for the next of kin as to the residue. *Carey* v. *Goodinge*, 3 Bro. C. C. 110.

Semble, though persons beneficially interested in an estate may elect to consider a debt owing from the executor as assets in his hands, yet, if he denies the existence of the debt, the plaintiff may treat him as any other debtor of the estate who might be brought before the court on the allegation of colliding with the executor, and would be entitled to a decree for recovering the debt against him, as from a stranger who was indebted to the estate. *Tomlin* v. *Tomlin*, 1 Hare, 247.

In a suit by residuary legatees of A. against the personal representatives of B., who was the executor of A., for payment of a debt due from B. to A., the amount of which was not admitted, and also for an account of the personal estate of A.; praying also, unless assets were admitted an account of the personal estate of B., and that being insufficient, seeking to charge his real estate:—Held, that the plaintiffs were not entitled to a declaration that a particular debt or sum constituted an item in the account to be taken; but that evidence, tending to shew that the defendants should be charged with such particular debt or sum, was admissible. *Ib.*, 236.

A. devises the residue of his real and personal estate, not before devised, to his two executors, as tenants in common, &c.; one of them is bted by bond to the testator; this bond debt not released, but shall be divided between em, and no parol evidence shall be admitted, at the testator intended to release it to the bligor, and had given instructions for that urpose to an attorney who drew his will, &c. *Brown* v. *Selwyn*, Cas. t. Tal. 240; 3 Bro. P. C. 595.

A., being possessed of a bond for 1,400*l.*, deposits it in the hands of B., who signs a proper acknowledgment for the same; A. afterwards assigns this bond to B., and takes his promissory note for the value, but the note was never paid. A., by his will, gives several legacies, and appoints B. and another executors, but makes no disposition of the residue of his estate:—Held, that the money due on this bond is part of the residue, and shall go to the executors equally, and that B.'s note is not such a debt as can be extinguished by his being made an executor: decrees affirmed, except as to costs. *Matthew* v. *Fitz-Simon*, 4 Bro. P. C. 11.

In 1839 the son of the testator borrowed of his father 300*l.* upon his promissory note. In 1842, before the same was paid, the testator died, having by his will appointed his son, with three other persons, executors. The will was shortly afterwards proved by the executors other than the son, power being reserved for him to come in and prove the same. Subsequently the proving executors all died, leaving the son surviving, who, thereupon, in 1855, proved the will. He had never been called upon by the father during his lifetime, nor by the proving executors of his will during their lives to pay the sum due on the note:—Held, that although the debt could not be recovered at law (because an executor could not sue himself) or in equity (because more than six years had elapsed between the death of the testator and the proof of his will by the son), yet, the son by proving the will had made the debt assets in his hands. *Ingle* v. *Richards*, 28 Beav. 366; 6 Jur. (N.S.) 117; 8 W. R. 697.

Interest on the debt allowed at the rate of 4*l.* per cent. from the date of the probate granted to the executor until payment. *Ib.*

A testatrix bequeathed a leasehold estate to trustees and executors, in trust for sale, and gave one of such executors a beneficial interest for his life in one fourth part of the estate. The latter executor, being at the time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to secure a private debt which he owed to a creditor, and deposited the title deeds with the creditor:—Held, on a bill by his co-executors, to recover the title deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee; and the court decreed the title deeds to be delivered up, with a declaration that they belonged to the three trustees. *Cole* v. *Muddle*, 10 Hare, 186; 22 L. J., Ch. 401; 16 Jur. 853.

A., by parol, let certain mills to B., his son, at a rent of 1,000*l.* a year, payable each in August. In 1879 B. represented to A. that the business of the mills had fallen off, and that he could not make any profit if he continued to pay the rent, and A. stated he would charge him no more rent till further arrangement. A., by his will, which was confirmed by a codicil dated in 1881, devised and bequeathed all his property in equal shares among such of his sons and daughters as should survive him, and directed that no legatees should, by virtue of his or her bequest, be exonerated from any debt due to testator at his death, and entered against such legatee in testator's books, and A. appointed B. executor of his will, and died in September, 1881,

The rent had been paid by B. up to August, 1876. In the testator's books the rent was entered against B. down to August, 1879, and no rent was entered against him after that date :—Held, that, as the circumstances shewed an intention on the part of the testator to forego his claim to the rent subsequent to August 1879, B. was not liable in equity to any rent after that date. *Hamilton* v. *Todd*, 11 L. R. Ir. 178.

Mrs. W. made her daughter, Mrs. P., her sole executrix and universal legatee. At the death of Mrs. W., her son-in-law, P., was indebted to her on a bond conditioned for payment of a sum of money by yearly instalments, some of which did not become due till after her death ; but others which became due before her death remained unpaid. Mrs. P. proved the will, and about twelve months after her mother's death passed the residuary account, shewing that the debts were all paid. P. took the bond into his possession and kept it till his death, which took place more than six months after passing the account, and applied to his own use all the other personal estate of Mrs. W. After the death of P., a decree having been made for administration of his estate, Mrs. P., as executrix of her mother, sought to prove as a creditor on the bond :—Held, that as the debts of Mrs. W. had been paid, and the residue had become a clear fund in the lifetime of P., the liability of P. on the bond was extinguished, and the proof could not be allowed. *Price* v. *Price*, 48 L. J., Ch. 478 ; 11 Ch. D. 163 ; 40 L. T. 668 ; 27 W. R. 698.

A. borrowed 1,100*l.* from his step-mother, upon an agreement that the debt should be paid by deductions of 100*l.* from each quarterly payment which she made him for her board. After two deductions had been made she declared she would make no more, and thenceforward continued to pay the quarterly sums in full. She appointed him sole executor of her will, which contained no disposition of her residuary estate : —Held, that although in order to have an effectual release in equity of a debt there must be an actual legal release or transfer of the property, that in this case the debt was satisfied on two grounds. First, because the appointment of the debtor as executor operated as a release at law, and all claim in equity to recover the debt was prevented by the intention of the testatrix to release it : and, secondly, because the testatrix by making the full quarterly payments had actually completed the gift of the instalments she was entitled to retain. *Strong* v. *Bird*, 43 L. J., Ch. 814 ; L. R. 18 Eq. 315 ; 30 L. T. 745 ; 22 W. R. 788.

Testatrix, who was a member of the plaintiff's congregation, during her life paid to him or on his behalf various sums of money, and by her will she bequeathed legacies to him and appointed him joint executor with the defendant, to whom she bequeathed her residuary estate. By a codicil she gave additional legacies to the plaintiff, he being then considerably indebted to her. The defendant alone proved the will, and he refused to pay the plaintiff's legacies, on the ground that at the date of her death the plaintiff was indebted to the testatrix to an amount exceeding the value of such legacies. The plaintiff alleged that the sums paid to him by the testatrix were intended by her to be gifts. There was evidence that the defendant was a party to the making of the codicil, and was aware of the testatrix's intention that the plaintiff's legacies should be paid to him in full :—Held, first, that notwithstanding the plaintiff had not proved the will, his appointment as executor was sufficient to release the debt at law, and that any claim in equity was rebutted by the presumption of the testatrix's intention to forgive the debt ; secondly, that evidence of such intention was admissible ; and, thirdly, that even if the debts were not released, yet under the circumstances the defendant could not be allowed to set them up as against the plaintiff. *Applebee, In re, Leveson* v. *Beales*, 60 L. J., Ch. 793 ; [1891] 3 Ch. 422 ; 65 L. T. 406 ; 40 W. R. 90.

—— **Letter of Instructions Cancelling Debt.**]—An executor is liable in equity to account for a debt due from him to his testator's estate, although in a letter of instructions addressed but not communicated to him it is stated by the testator to be cancelled. *Strong* v. *Bird* (L. R. 18 Eq. 315) distinguished. *Hyslop, In re, Hyslop* v. *Chamberlain*, 64 L. J., Ch. 168 ; [1894] 3 Ch. 522 ; 8 R. 680 ; 71 L. T. 373 ; 43 W. R. 6.

—— **Proof of Will.**]—A testator died in 1842, having appointed R. and others his executors. R., who owed the testator 300*l.* on a promissory note, did not prove the will until 1855 :—Held, that he could not then set up the Statute of Limitations in respect of the debt ; that the act of proving had relation to the testator's death, and that he must be considered as having the 300*l.* in his hands as assets, and he was charged therewith with interest from 1855. *Ingle* v. *Richards*, 28 Beav. 366 ; 6 Jur. (N.S.) 117 ; 8 W. R. 697.

VII. EXECUTOR DE SON TORT.

a. Constitution of.

Generally.]—What acts make a person liable as an executor de son tort is a matter of law for the judge to decide ; but it is for the jury to say whether the acts are sufficiently proved. *Padget* v. *Priest*, 2 Term Rep. 97 ; 1 R. R. 440.

Almost any intermeddling after the death of the party makes a person so intermeddling liable as an executor de son tort. *Edwards* v. *Harben*, 2 Term Rep. 587 ; 1 R. R. 548.

If a person sets up in himself a colourable title to the possession of the goods of the deceased, though he may not be able to establish a completely strict and legal title, it is sufficient to exempt him from being charged as executor de son tort. *Femings* v. *Jarrat*, 1 Esp. 335.

A person who is permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and there is no legal personal representative, either of the testator or of the executor, retains the assets, and acts in the execution of the trusts of the will, is not executor de son tort to the original testator. *Tomlin* v. *Beck*, Turn. & R. 438 ; 24 R. R. 95.

A person, whose sole act of intermeddling is possession of assets of a deceased person in a foreign country, cannot be sued as executor de son tort in England. *Beavan* v. *Hastings (Lord)*, 2 Kay & J. 724 ; 2 Jur. (N.S.) 1044 ; 4 W. R. 785.

Held, secondly, that the peculiar liability imposed by the Belgian law on persons taking possession of the assets of deceased persons, being a legal right in Belgium, and requiring no aid

from a court of equity, was equally invalid to support the suit; and the bill was therefore dismissed with costs. *Ib.*

Receipt of Money belonging to Estate.]—If A., the servant of B., sells the goods of C., an intestate, as well after his death as before, though by the orders of C., and pays the money arising therefrom into the hands of B., the latter may be sued as an executor de son tort. *Padget* v. *Priest*, 2 Term Rep. 97; 1 R. R. 440.

If a person has money belonging to an intestate in his hands at the time when an action is brought against him as executor for a debt due from the intestate, he is liable as an executor de son tort. *Ib.*

—— **As Agent of Executor de son tort.**]—The agent of an executor de son tort, collecting the assets, knowing them to belong to the testator's estate, not knowing that his principal is not the legal representative, makes himself liable to account as executor de son tort, notwithstanding he has duly accounted for his rents to his principal, on the ground that the doctrine that the receipt of the agent is the receipt of the principal, does not apply to the acts of a wrongdoer. *Sharland* v. *Mildon*, 5 Hare, 469; 15 L. J., Ch. 434; 10 Jur. 771. And see *Mountford* v. *Gibson*, 4 East, 441; 1 Smith, 129.

Sale of Goods belonging to Estate.]—If a creditor takes an absolute bill of sale of the goods of his debtor, but agrees to leave them in his possession for a limited time, and in the meantime the debtor dies, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor de son tort for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. *Edwards* v. *Harben*, 2 Term Rep. 587; 1 R. R. 548.

—— **Payment of Price to Executor.**]—The manager of some ironworks, and who as such lived in a house in the neighbourhood, died intestate and insolvent on the 22nd of June, 1877. Shortly after his decease, and before letters of administration could be taken out, the widow was required to vacate the premises, and it became necessary to remove the furniture which belonged to the deceased. Accordingly, part of it was taken by her to a smaller house, and afterwards purchased, and the residue sold by auction. The proceeds of the auction, as well as the valuation price of the goods retained by the widow, were duly handed over to the administrator afterwards appointed. Actions having been brought both against the widow and the auctioneer, charging them respectively as executors de son tort:—Held, that they were not liable, on the ground that there had been no wrongful intermeddling with the assets, or dealing with them in such a way as denoted an usurpation of the functions of an executor. *Peters* v. *Leeder*, *Peters* v. *Borguet*, 47 L. J., Q. B. 573.

Acting as Agent of Rightful Executor.]—A person who deals with the goods of a testator, as agent of the executor, cannot be treated as executor de son tort, whether the will has been proved or not. *Sykes* v. *Sykes*, 39 L. J., C. P. 179; L. R. 5 C. P. 113; 22 L. T. 236; 18 W. R. 551.

When an executor before probate by his agent takes the goods and carries on the business of the deceased, and judgment is recovered against the agent as executor, and a fi. fa. issues thereunder directing the sheriff to levy on goods of the deceased in his hands as executor of the deceased to be administered, the sheriff is not justified, as against the executor, in seizing goods of the deceased in such agent's hands. *Ib.*

A man who possesses himself of the effects of the deceased under the authority of, and as agent for, the rightful executor, cannot be charged as an executor de son tort. *Hall* v. *Elliott*, Peake, 86.

Although a person cannot be charged as executor de son tort while he acts under a power of attorney made to him by one of several executors who has proved the will, yet, if he continues to act after the death of such executor, he may be charged as executor de son tort, though he acts under the advice of another of the executors who has not proved. *Cottle* v. *Aldrich*, 4 M. & S. 175; 1 Stark. 37; 16 R. R. 433.

Where a person appointed an executor under a will proves it, and deals with the estate, he cannot be permitted to say that he acts under a delegated power from the other executors, or in any other character than as executor. *Graham* v. *Keble*, 2 Dow, 24; 14 R. R. 96.

Providing for Funeral.]—The ordering the funeral of a deceased person is not sufficient to render a party executor de son tort, and he is entitled to collect from the debtors of the deceased such a sum of money as may reasonably be considered sufficient for that purpose; and in an action charging him as executor de son tort, the proper question to be left to the jury is, whether the sum so received by him was, under the circumstances, a reasonable one for the purpose or not. *Camden* v. *Fletcher*, 4 M. & W. 378; 1 H. & H. 361; 8 L. J., Ex. 17; 3 Jur. 57.

Auctioneer acting under Executor before Probate.]—An auctioneer who sells assets of a deceased person is liable for debts of the deceased as executor de son tort, unless he can shew that he acted under an executor who has proved the will. *Nulty* v. *Fagan*, 22 L. R. Ir. 604.

Creditor recovering Debt from Executrix de son tort.]—Action by a creditor against the widow of an intestate, who had rendered herself liable as executrix de son tort to administer the estate. The deceased at his death owed rent to S., who took over the house, including the stock-in-trade at a valuation, as a going concern in part satisfaction of her debt. The plaintiff joined her as a defendant, suing her as an executrix de son tort:—Held, that a creditor who obtains payment of a debt from an executor de son tort does not thereby become an executor de son tort. *Hursell* v. *Bird*, 65 L. T. 709.

Carrying on Trade.]—Living in the house and carrying on the trade of a deceased victualler, is a sufficient intermeddling to make an executor de son tort. *Hooper* v. *Summersett*, Wightw. 16.

The widow of a hairdresser who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof

of any articles being sold. In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued. In January, 1837, on the application of a creditor to whom he owed 240*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March she took out administration :—Held, in an action against her on the promissory note, that this was not evidence to charge her as executrix de son tort. *Serle* v. *Waterworth*, 4 M. & W. 9 ; 6 D. P. C. 684 ; 7 L. J., Ex. 202 ; 2 Jur. 745.

Two brothers were in partnership together. One of them became lunatic, when the other carried on the business ; and on the death of the lunatic intestate, he continued to do so. A bill was filed against the surviving brother, and the administrators of the intestate, to have the survivor declared executor de son tort of his brother, for the administration of the lunatic's personal estate, and for an account of the partnership assets. To that bill the brother put in an answer, not stating distinctly that the partnership had been dissolved before the lunatic's death, but that he thought the lunacy a dissolution of it ; that if it had continued till the death of the lunatic, he (the surviving brother) would be a creditor of the estate, and submitted that he was not bound to account for the partnership assets. The plaintiff excepted to the answer of insufficiency :—Held, that the exceptions must be allowed. *Leigh* v. *Birch*, 9 Jur. (N.S.) 1265 ; 8 L. T. 230 ; 11 W. R. 554.

Possession of Property belonging to Estate.]—A deed of trust conveyed the lease of a farm and all the grantor's effects, and all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demand upon him, and then to pay all such debts as were justly due from the grantor as the trustees in their discretion should think proper : the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was), as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill-usage :—Held, that such deed was not fraudulent or void as against creditors, it appearing to have been made bonâ fide at the time, and that all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts. *Nunn* v. *Wilsmore*, 8 Term Rep. 521 ; 5 R. R. 434.

Held, also, that the wife was not liable as executrix de son tort, after the death of her husband intestate, on account of her possession of this property under the deed of trust. *Ib.*

To make a man liable as executor de son tort, it is not essential that the dealing with the chattels of the deceased should be in the character of executor. *Sealy* v. *Powis*, 1 H. & W. 2.

A possession of goods which a person has received from the deceased in his lifetime under a colourable sale, may be sufficient to charge him as an executor de son tort. *Ib.*

A. pledged goods to B. for a debt. B. died, and the parish officers took the goods, and gave them to J., the carpenter who made the coffin of B., on condition of his paying B.'s rent and the funeral expenses :—Held, that by taking these goods, the parish officers became executors de son tort ; and that if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment as to revest the right of possession in A. But if the parish officers merely relinquished their possession, and let J. take possession, this would not make the parish officers liable in trover, as, in this case, a mere seizure of the goods by a stranger, who afterwards relinquished them, would not be a conversion. *Samuel* v. *Morris*, 6 Car. & P. 620.

A party who knowingly receives a chattel from an executor de son tort, and deals with it as his own, does not himself become thereby executor de son tort. *Paull* v. *Simpson*, 9 Q. B. 365 ; 15 L. J., Q. B. 382.

A declaration charging that a lease became vested in the defendant by assignment is supported, without proof of an assignment in fact, by evidence that the lease vested in the defendant as executor de son tort. *Ib.*

A creditor of an intestate, who receives goods of the intestate, after his death, from his widow, in payment of his debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one, who has, by such intermeddling, made herself executrix de son tort ; no fact appearing to give colour to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which the defendant participated. *Mountford* v. *Gibson*, 4 East, 441 ; 1 Smith, 129 ; 7 R. R. 599.

Where an executor obtained a probate of a will, with notice that the testator had made a subsequent will, appointing another executor, and he acted by taking possession of the testator's effects :—Held, that the executor under the second will, who had obtained probate, might maintain trover for the effects so taken possession of. *Woolley* v. *Clarke*, 1 D. & R. 409 ; 5 B. & Ald. 744 ; 24 R. R. 546.

If an executor de son tort hands over the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity, but he is not liable as executor de son tort. *Hill* v. *Curtis*, 35 L. J., Ch. 133 ; L. R. 1 Eq. 90 ; 12 Jur. (N.S.) 4 ; 13 L. T. 584 ; 14 W. R. 125.

—— **Abroad.**]—A person whose sole act of intermeddling is possession of assets of a deceased person in a foreign country, cannot be sued as executor de son tort in England. *Beavan* v. *Hastings* (*Lord*), 2 K. & J. 724 ; 2 Jur. (N.S.) 1044 ; 4 W. R. 735.

Transfer of Shares in English Company to Foreign Executors—Liability of Company.]—A testator, the registered owner of shares and debentures in an English company, was domiciled and died in America. By his will, made according to American law, the shares and debentures passed to his executors. At the request of the executors the company transferred into their names two of the shares and one of the debentures, and paid them the dividends and interest due thereon. The executors, to the knowledge of the company, had not obtained, and did not intend to obtain, probate of the will in England :—Held, that the company had intermeddled with the estate of the deceased so as to constitute itself an executor de son tort, and had rendered itself liable to the

payment of probate duty. *Att.-Gen.* v. *New York Breweries Co.*, 67 L. J., Q. B. 86; [1898] 1 Q. B. 205; 78 L. T. 61; 46 W. R. 193; 62 J. P. 132—C. A.

b. LEGAL POSITION OF.

Liabilities of—Generally.]—An executor de son tort is subject to all the liabilities, but entitled to none of the privileges of an ordinary executor. *Carmichael* v. *Carmichael*, 2 Ph. 101; 10 Jur. 908.

An executor de son tort cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor after the action is brought. *Curtis* v. *Vernon*, 3 Term Rep. 587; 2 H. Bl. 18; 1 R. R. 774.

Nor can he retain for his own debt of a higher nature by consent of the rightful executor, given after the bringing of the action by the creditor. *Ib.*

At law an executor de son tort cannot discharge himself, unless he hands over the property to the rightful representative before action brought. *Hill* v. *Curtis*, 35 L. J., Ch. 133; L. R. 1 Eq. 90; 12 Jur. (N.S.) 4; 13 L. T. 584; 14 W. R. 125.

If an executor de son tort hands over the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity, but he is not liable as executor de son tort. *Ib.*

The rule in equity follows the rule at law, so that if an executor de son tort can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account. *Ib.*

A person who is sued as an executor, and who pleads plene administravit, although he thereby admits that he is executor, yet that may be that he is only executor de son tort; and an executor de son tort is not liable to the amount of all the property of the testator that would pass by a will, but only for the amount of assets that come to his hands. *Yardley* v. *Arnold*, 2 D. (N.S.) 311; 10 M. & W. 141; Car. & M. 434.

A. was sued as executor of his father, and pleaded plene administravit. The father left no will, and was the owner of a leasehold house, and A., after his father's death, received some small sums which had been due to his father, and paid the expenses of his father's funeral:—Held, that A. was not liable for the value of the leasehold house, and was only liable to the extent of the sums he had actually received, against which he had a right to deduct reasonable funeral expenses. *Ib.*

To an action by a rightful executor against an executor de son tort, the latter cannot plead, by way of equitable defence, plene administravit before the grant of administration to the former. *Elworthy* v. *Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42; 10 L. T. 654; 12 W. R. 1008.

Payments made by an administrator de son tort, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, will not be allowed. *Layfield* v. *Layfield*, 7 Sim. 172; 4 L. J., Ch. 2.

A party sued as executor de son tort jointly with the rightful executor, stated by his answer that he had, before the bill was filed, accounted for his receipts and payments to his co-defendant, and paid over to him the balance:—Held, that such settlement would not be binding on the plaintiff, who was beneficially interested in the estate, and therefore the court refused to insert in the decree the usual direction as to not disturbing settled or stated accounts. Such a direction is applicable only to an alleged settlement of accounts between plaintiff and defendant, and not to one between co-defendants. *Carmichael* v. *Carmichael*, 2 Ph. 101; 10 Jur. 908.

—— **Plea of Plene Administravit.**]—Plene administravit by an executor de son tort is no defence, either legal or equitable, in bar of an action of trover, trespass, or for money received, at the suit of the personal representatives of the deceased. *Elworthy* v. *Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42; 10 L. T. 654; 12 W. R. 1008.

—— **For Debts of Testator.**]—The executor de son tort of an executor is liable at common law in respect of the debts of his original testator. *Meyrick* v. *Anderson*, 14 Q. B. 719; 19 L. J., Q. B. 231; 14 Jur. 457.

—— **Under Covenants in Lease.**]—The assignees of the reversion upon a lease sued the defendant for breach of the covenants therein. The lease had been granted to G., who held the demised premises thereunder until his death. His widow administered to his personal estate. At her death H. received the rents of the demised premises, which were let to under-tenants, and upon his death the defendant received the rents. The covenants in the lease granted to G. had been broken:—Held, that the defendant was liable as executor de son tort upon the covenants. *Williams* v. *Heales*, 43 L. J., C. P. 80; L. R. 9 C. P. 177; 30 L. T. 20; 22 W. R. 317.

—— **Of Executor of.**]—An executor of an executor de son tort is not liable for breach of contract committed by the original testator, although the executor de son tort has actually possessed himself of the particular property or effects of the testator in respect of which the contract was entered into. *Wilson* v. *Hodgson*, 41 L. J., Ex. 49; L. R. 7 Ex. 84; 20 W. R. 438.

—— **When Sued as Administratrix.**]—A bill in equity by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to her, who was "the only legal personal representative and also heir of the undisposed-of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased. Plea, that she was not, nor had ever been, administratrix with the will annexed or the legal personal representative of the deceased:—Held, that if she was not administratrix, she was executrix de son tort, and the bill could be sustained. Plea ordered to stand for an answer, with liberty to except. *Rayner* v. *Koehler*, 41 L. J., Ch. 697; L. R. 14 Eq. 262; 27 L. T. 506; 20 W. R. 859.

—— **Of Trustee holding Bond and Creditor.**]—H. W., as trustee of a marriage settlement, held a bond to secure 1,200*l.* W., his brother, who was a specialty creditor of the obligor, obtained possession of the obligor's assets, and applied them in payment of his own debt and of simple contract debts before administration, which was afterwards granted to the obligor's widow, the

sister of W., who was entirely guided by his advice and under his control. Subsequently W. represented to H. W. that only the sum of 600*l.* was forthcoming on foot of the bond. H. W., acting on this statement, retired from the trust, and a memorandum was endorsed on the trust deed, signed by the administratrix and the tenant for life of the trust fund, stating that the sum of 600*l.* only was available to pay the bond, and W. was appointed trustee of the marriage settlement in place of H. W. The assets of the obligor would have been, if properly administered, sufficient to pay the bond in full:—Held, that W. and H. W. were both liable to the full amount of the bond, but that W.'s assets (he having died) were primarily answerable, as he had received the trust fund. *Fetherstone H.* v. *West*, Ir. R. 6 Eq. 86.

Held, also, that in such a state of facts it was not necessary to take an account of the assets of the obligor. *Ib.*

Joint and Several Liability.]—The liability of one executor de son tort for the acts of another executor de son tort is not limited to the extent to which there has been an actual personal receipt of goods or money by the first named wrongful executor; but one executor de son tort may be liable for the acts of another when such acts have been authorised and directed by him. *Kenny* v. *Ryan*, [1897] 1 Ir. R. 513.

Validity of Acts of.]—The act of an executor de son tort is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration. *Buckley* v. *Barber*, 6 Ex. 164; 20 L. J., Ex. 114; 15 Jur. 63.

Where an executor de son tort really acts in the character of executor, and out of the assets in his hand makes a payment in satisfaction of a debt due from the deceased to a person who at the time might reasonably suppose that he had authority to act as executor, such payment is valid and binding upon the person who afterwards becomes the rightful administrator. *Thompson* v. *Harding*, 2 El. & Bl. 630; 22 L. J., Q. B. 448; 18 Jur. 58; 1 W. R. 468.

But acts sufficient to make the executor de son tort chargeable as such, do not necessarily make the payment good against the rightful executor. *Ib.*

Rights—To Sue.]—Semble, that an executor de son tort has a sufficient title to maintain an action against a mere wrongdoer, for the seizure of a chattel. *Oughton* v. *Seppings*, 1 B. & Ad. 241; 8 L. J. (o.s.) K. B. 394.

—— **To Repudiate Agreement on Subsequent Grant of Administration.**]—An executor de son tort, to whom administration is subsequently granted, may repudiate an agreement made by him to surrender a term of years vested in the intestate. *Doe* d. *Hornby* v. *Glenn*, 3 N. & M. 837; 1 A. & E. 49; 3 L. J., K. B. 161.

—— **Allowances.**]—An executor de son tort is entitled to retain out of the assets of the deceased come to his hands a reasonable sum for funeral expenses. *Yardley* v. *Arnold*, 2 D. (N.S.) 311; 10 M. & W. 141; Car. & M. 434.

An executor de son tort may, after action brought by a simple contract creditor, pay a specialty debt, and plead the payment of that debt in bar of the action. *Oxenham* v. *Clapp*, 2 B. & Ad. 309; 9 L. J. (o.s.) K. B. 229.

A. ordered a pair of boots of B., and paid B. for them. The boots were never delivered to A.; and being in the hands of the journeyman who made them, A. was obliged to pay the journeyman the price of making them before he could get possession of them. A. being sued as executor de son tort of B.:—Held, that he was liable for the value of the boots as executor de son tort, but that he was entitled to be allowed the sum he had paid the journeyman. *Hobby* v. *Ruell*, 1 Car. & K. 716.

A., after the death of B., obtained possession of the cattle of B. from C., with whom they were agisted. A. paying C. for the agisting. A. being sued as executor de son tort of B.:—Held, that he was not entitled to any allowance for the sum he paid to C. for the agisting the cattle. *Ib.*

An executor de son tort is entitled to payments made by him, which would have been allowed in a due course of administration by the rightful executor. *McCarthy* v. *Donovan*, 13 Ir. C. L. R. 195.

Action against—Parties.]—The legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate; and if he is not a party, no decree can be made in such a suit, even although an executor de son tort and the trustees of the real estate are before the court. *Rowsell* v. *Morris*, 43 L. J., Ch. 97; L. R. 17 Eq. 20; 29 L. T. 446; 22 W. R. 67.

A bill stated a will and codicils giving the plaintiff an annuity and appointing an executor, that the executor had proved the will and also previously meddled with the assets, and praying administration. Plea, that he had not proved the will:—Held, that the plea was good, since the only relief that could be given against an executor de son tort, in the absence of the proper executor, is the appointment of a receiver. *Cary* v. *Hills*, 42 L. J., Ch. 100; L. R. 15 Eq. 79; 28 L. T. 6; 21 W. R. 166.

A creditor of a testator brought an action against the executors, who had not proved but had got in part of the assets in Australia, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts; and also against other defendants, alleging that they had got in a portion of the assets in England, and that they threatened to dispose of such assets without regard to the debts. The plaintiff claimed, as against the executors, administration of the estate and payment of the debts; and against the other defendants he claimed an injunction to restrain them from parting with the assets:—Held, that the executors were rightly sued, although they had not proved; and that the other defendants were properly made parties as executors de son tort. *Lovett, In re, Ambler* v. *Lindsay*, 45 L. J., Ch. 768; 3 Ch. D. 198; 35 L. T. 93; 24 W. R. 982.

When a person possesses himself of the assets of a testator or of an intestate without having administered, a bill for an account, to the extent of the specific assets he has received, will lie against him as executor de son tort, though there is no legal personal representative. *Coote* v. *Whittington*, 42 L. J., Ch. 846; L. R. 16 Eq. 534; 29 L. T. 206; 21 W. R. 837.

A creditor of an intestate filed a plaint in a county court against the widow and two other

persons for administration of his estate, and for an account against them as executors de son tort. On the plaint coming on for hearing, they demurred to it ore tenus, on the ground that the legal personal representative was not before the court. The hearing was then adjourned, and shortly afterwards the plaintiff took out administration. On the case subsequently coming on again for hearing the county court judge dismissed the plaint so far as it sought relief against the defendants, but made a common administration decree, giving the plaintiff leave to amend the plaint by stating the grant of administration. On appeal:—Held, that a bill for an account against an executor de son tort was sustainable, notwithstanding the absence of the legal personal representative. *Ib.*

—— **Pleading.**]—When a person has intermeddled with the assets of a testator without authority, he may be sued by a creditor of the estate as executor de son tort, to the extent of the assets he has received; and it is not necessary, to support such an action, to charge him expressly with having acted as executor de son tort; it is sufficient to allege that he has intermeddled with the assets without authority. *Lovett, In re, Ambler* v. *Lindsay* (supra).

—— **Evidence—Admissibility.**]—In trover by an administratrix against A., who had made himself executor de son tort, evidence was received, in mitigation of the damages against A., of payments made by him, which would have been allowed in a due course of administration by a rightful executor:—Held, that such evidence was properly received. *M'Carthy* v. *Donovan*, 13 Ir. C. L. R. 195.

Other Matters.]—A., having proved the will of B., in which she supposed herself to be appointed executrix, employed C., an auctioneer, to sell the goods of B. They were sold to D., who, as an inducement to C. to let him remove them without payment, expressly promised to pay C., as soon as the bill should be made out. Probate was afterwards granted to E., the real executrix, who gave D. notice not to pay the price to C. Notwithstanding the express promise, C. cannot sue D. for the price. *Dickenson* v. *Naul*, 1 N. & M. 721; 4 B. & Ad. 638.

VIII. MARRIED WOMAN EXECUTRIX OR ADMINISTRATRIX.

Assent of Husband.]—Administration taken by a feme covert must be presumed to be taken with privity and assent of husband. *Adair* v. *Shaw*, 1 Sch. & Lef. 266.

Liability of Husband—Devastavit.]—Feme administratrix wastes the assets, then marries, and dies; husband liable to no more than the value of what came to his or his wife's hands after the intermarriage. *Sanderson* v. *Crouch*, 2 Vern. 118.

A man marries an executrix; he shall answer for so much of the personal estate as she possessed, though he took it as a portion with her. *Bachelor* v. *Bean*, 2 Vern. 61.

How far the second huband is liable to a devastavit or breach of trust of the wife and her first husband. *Norton* v. *Sprig*, 1 Vern. 309.

The defaults of a feme trustee and executrix are chargeable to her husband. *Smith's Estate, In re*, 48 L. J., Ch. 205.

The husband of an executrix or administratrix is liable for all the assets received or devastavits committed by himself or by his wife during the coverture, and his estate remains liable after his death. *Smith* v. *Smith*, 21 Beav. 385.

The husband of an executrix, who was liable for a breach of trust, made his wife and two others his executrix and executors. They possessed themselves of all his assets:—Held, that the husband's liability was not satisfied by the circumstance of his widow uniting in herself the two characters. *Ib.*

In a suit to charge the husband's assets, an inquiry as to the amount of such assets received by her was refused:—Held, that her legal personal representative was not a necessary party. *Ib.*

Husband, though parted from his wife, charged in equity with his wife's wasting of goods, which were devised to her for her lifetime. *Paget* v. *Read*, 1 Vern. 143.

—— **Admission of Assets.**]—Executrix marries, and her husband and she admit assets in answer to a bill filed against them. The assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy issued against him. *M'Williams, In re*, 1 Sch. & Lef. 173.

—— **Liability of his Estate.**]—Although the husband of an administratrix may have become liable to make good to the next of kin of the intestate the assets received by himself or his wife during the coverture, yet if the husband, at his death, makes his wife his executrix, and she possesses assets more than sufficient to answer the demands of the next of kin, after paying the other debts, the estate of the husband is discharged; and, therefore, the next of kin cannot sue an administrator cum testamento annexo of the husband. *Tyler* v. *Bell*, 2 Myl. & C. 89; 1 Keen, 826; 6 L. J., Ch. 169.

—— **Where he Participates in a Breach of Trust.**]—Where, upon administration granted to A. and B., A. being a feme covert, the fund was invested in the names of B. and the husband of A. at a banker's to be paid out upon their joint cheques; and, after the death of the husband of A., B. drew out the fund and absconded:—Held, that the husband of the administratrix, having by such deposit put it out of her control, and, on his death, enabled B. to appropriate the money without the control of his co-administratrix, had been guilty of a breach of trust, and his estate was liable to make the fund good. *Clough* v. *Bond*, 3 Myl. & C. 490; 8 L. J., Ch. 51; 2 Jur. 958.

Liability of Wife.]—A feme covert executrix answering separately from the husband, is not exempted by her coverture from rendering an account of the assets come to her hands. *Pemberton* v. *M'Gill*, 25 L. J., Ch. 49; 1 Jur. (N.S.) 1045; 4 W. R. 1.

M., being a married woman living separate from her husband, who was living abroad, was appointed executrix, and one of the residuary legatees of the testatrix. She took possession of some of the assets, sold part, and applied part to her own use, without having ever proved the will. A co-executor proved the will, and filed a bill for an account, and to carry out the trusts of the will:—Held, that the defendant was bound.

to account, not only for the articles taken possession of by her, but for the application thereof, and of the moneys arising therefrom. *Ib.*

—— **For Devastavit of Husband.**]—A married woman executrix proving the will and surviving her husband, is liable for a devastavit committed by her husband during their joint lives. *Soady* v. *Turnbull*, 35 L. J., Ch. 784; L. R. 1 Ch. 494; 12 Jur. (N.S.) 612; 14 L. T. 813; 14 W. R. 955. S. P., *Adair* v. *Shaw*, 1 Sch. & Lef. 266.

During coverture, probate was granted to a feme executrix, who was also a legatee under the will. The husband died insolvent, leaving the wife surviving, who died leaving assets:—Held, that the wife's assets were liable to make good the joint receipts of herself and her husband during coverture. *Ib.*

—— **After Decree for Payment.**]—A decree in an administration suit instituted against husband and wife, executor and executrix, directed the payment by the husband and wife of a sum of money. The husband having died, the wife surviving may be personally liable for the amount of this decree. *Dunne* v. *Doyle*, 10 Ir. Ch. R. 502.

—— **After Proof against Bankrupt Husband's Estate.**]—If the husband of a feme covert executrix commits a devastavit, and becomes bankrupt, the wife surviving is not liable. *Beynon* v. *Gollins*, 2 Bro. C. C. 323.

Payment to—Discharge of Debtor—Co-executor.]—Payment by a debtor of a testator, and delivery by a bailee of chattels bailed by a testator, to a feme covert who is appointed executrix, are valid as against her co-executor, though the husband of the executrix never assented to his wife acting as executrix, and, subsequently to the payment, refused to allow her to act, and although on that ground probate was refused to her, if the payment and delivery were made bonâ fide, at the request of the executrix as such, without knowledge by the party paying and delivering of the dissent of the husband, though with knowledge that she was a feme covert. *Pemberton* v. *Chapman*, 7 El. & Bl. 210; 26 L. J., Q. B. 117; 3 Jur. (N.S.) 339. Affirmed on appeal, El. Bl. & El. 1056; 27 L. J., Q. B. 429; 5 Jur. (N.S.) 567; 6 W. R. 769—Ex. Ch.

Other Matters.]—The husband of an administratrix is in a fiduciary position, and cannot purchase from a co-administratrix, without the consent of all the cestuis que trustent. *Pepperell, In re, Pepperell* v. *Chamberlain*, 27 W. R. 410.

Where one of such cestuis que trustent objected to such a purchase, and after a lapse of about fourteen months took legal proceedings to set it aside:—Held, that the purchaser not having been induced to change his position by reason of the plaintiff's delay, the plaintiff was entitled to have such sale set aside, notwithstanding his delay. *Ib.*

IX. INFANT EXECUTOR OR ADMINISTRATOR.

Prior to 22 & 23 Car. 11, c. 10.]—Though prior to the statute an infant might administer at seventeen, he could not commit a devastavit until twenty-one. *Whitmore* v. *Weld*, 1 Vern. 328; 2 Ch. Ca. 167; 2 Ch. Rep. 363.

Since 38 Geo. 3, c. 87, s. 6.]—Where an infant is sole executor, administration shall be granted to the guardian, or such person as the spiritual court thinks fit, till the infant is twenty-one, at which time, and not before, probate shall be granted to him. *Sergison, Ex parte*, 4 Ves. 149, note (*b*).

If letters of administration be granted to an infant, under which he receives and disposes of the assets of the intestate, an account cannot be directed in respect of his receipts during infancy. *Hindmarsh* v. *Southgate*, 3 Russ. 324; 27 R. R. 81. *And see* 1 L. J. (O.S.) Ch. 24.

Executor de son tort.]—An executor, an infant, who never proved the will, received during his infancy assets of the testator, and paid them to the tenant for life, by whom they were lost:—Held, that by reason of his infancy at the time of the receipt, he was under no liability to account for them. *Stott* v. *Meanock*, 31 L. J., Ch. 746; 6 L. T. 592; 10 W. R. 605—C. A.

X. ADMINISTRATION.

a. ASSETS.

1. Legal or Equitable.

Distinction — Generally.]—Equitable assets, when they come into the hand of the executors in money, are legal assets. *Marston* v. *Downes*, 1 A. & E. 31; 3 N. & M. 861; 6 Car. & P. 381.

That which an administrator is entitled to receive as administrator virtute officii can never be equitable assets; and in considering whether assets are legal or equitable, the question is not whether the money is recoverable through the agency of a court of equity or a court of law, but whether it is money which the personal representative is entitled to recover independently of any directions of the testator. *Att.-Gen.* v. *Brunning*, 8 H. L. Cas. 243; 30 L. J., Ex. 379; 6 Jur. (N.S.) 1083; 3 L. T. 36; 8 W. R. 362.

Distinction between legal and equitable assets, an equity of redemption of an equitable charge on real estate is legal assets because the money is recoverable by the executor, virtute officii. *Cook* v. *Gregson*, 3 Drew. 547; 25 L. J., Ch. 706; 2 Jur. (N.S.) 510; 4 W. R. 581.

A testator died in 1842, entitled in reversion to a moiety of a settled fund of personalty. His other property, consisting of real estate charged by his will with debts, was administered by the court. In 1858, the reversion fell into possession, the trustees of the settlement paid the money into court under the Trustee Relief Act, and the testator's moiety was paid out to his executors:—Held, that this fund was distributable as legal assets. *Mutlow* v. *Mutlow*, 4 De G. & J. 539.

Held, also, that the fund must bear a share of the costs of suit which had been paid out of the equitable assets. *Ib.*

Equitable—Charge.]—Charge for payment of debts makes equitable assets. *Bailey* v. *Ekins*, 7 Ves. 319. S. P., *Shiphard* v. *Lutwidge*, 8 Ves. 26. *Pope* v. *Gwyn*, Dick. 683; 8 Ves. 28, n. *Silk* v. *Prime*, 1 Bro. C. C. 138, n.; Dick. 384. *Wride* v. *Clarke*, Dick. 382.

Held, upon the construction of a will, that a primary direction for payment of all the testator's debts rendered his real property equitable assets, such direction not being controlled by a subsequent disposition of his personal estate

expressly subject to the payment of all his debts, &c. *Price* v. *North*, 5 Jur. 1147. *And see further cases under* CHARGE OR TRUST FOR PAYMENT OF DEBTS, X. *b.* 2, post., col. 1450.

—— **Devise for Payment of Debts.**]—Testator ordered his estate to be sold, and after giving a legacy to his wife, directs the remainder to be vested in the executors for the payment of debts; the money arising from the sale is equitable assets. *Lucas* v. *Culcraft*, 1 Bro. C. C. 135.

Devise to sell the residue after payment of debts, and the money to be part of the personal estate; upon a total insolvency, held to be equitable assets. *Batson* v. *Lindergreen*, 2 Bro. C. C. 94.

Where a trader devised real estate to his executor for sale, and with directions to convert all his property into personalty, and after payment of his debts to invest the residue in the funds, or in real securities:—Held, that the real estates were equitable assets for the payment of debts. *Shakels* v. *Richardson*, 2 Coll. C. C. 31.

A testator devised his real estate to trustees and their heirs, upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same, and also his stock, crops, goods and effects whatsoever, to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies and dispose of the residue. This is substantially a devise for payment of debts within the fourth section of the Statute of Fraudulent Devises, 3 & 4 W. & M. c. 14; the produce of the real estate, therefore, is equitable assets, and the specialty creditors having exhausted the personal estate, the simple contract creditors are entitled to have the assets marshalled in their favour. *Soames* v. *Robinson*, 1 Myl. & K. 500; 2 L. J. Ch., 153.

A testator devised a freehold house to his son A. (whom he appointed one of his executors), charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts and legacies:—Held, equitable assets in the hands of the executors though not available for distribution till the expiration of the twelve months. *Luce* v. *Peskett*, 16 C. B. 500; 24 L. J., C. P. 196; 1 Jur. (N.S.) 1049; 3 W. R. 481.

A. made a promissory note, payable, on demand, to his son B., and devised to B. a freehold house charged with 240*l.*, to be raised within a year after his death, and paid to his executors for the liquidation of debts or legacies; and he made B. and C. his executors. The executors proved the will, and B. took possession of the house, and afterwards indorsed the note to D., who sued the executors thereon. To this action B. pleaded plene administravit; and C. pleaded that the note was made payable to B. on demand, and that it was indorsed by B. to D. after the death of the testator, and that B., at the time of such indorsement, had assets of the testator in his hands, whereby the note was satisfied. The only assets that ever came to the hands of B. consisting of the 240*l.* charged upon the house devised to him:—Held, that the plea was not proved; for, that the allegation that B. had assets of the testator in his hands at the time of the indorsement of the note, was a material allegation, and meant legal assets presently available; and the sum of 240*l.* was not legal, but equitable assets, and not available as assets until the expiration of the year. *Ib.*

—— **For Payment of Legacies.**]—Money arising from the sale of lands devised to the executors in trust to sell for the payment of legacies, constitutes equitable and not legal assets, and cannot be sued for in the ecclesiastical court. *Barker* v. *May*, 4 Man. & Ry. 386; 9 B. & C. 489.

—— **Proceeds of Realty under Administration.**]—The proceeds of the sale of a testator's real estate, directed by him to be sold for payment of debts, the sale being made under an order of the court in an administration, are equitable assets. *Bain* v. *Sadler*, 40 L. J., Ch. 791; L. R. 12 Eq. 570; 25 L. T. 202; 19 W. R. 1077. Not following *Loregrove* v. *Cooper*, infra.

The proceeds of real estate directed by the court to be sold for payment of debts, and paid by the purchaser into court, held legal assets. *Loregrove* v. *Cooper*, 2 Sm. & G. 271.

—— **Unpaid Purchase Money.**]—A testator, having no real estate at the time of his death, but being entitled to the unpaid purchase-money of realty contracted to be sold by him during his life, made a will by which he directed all the residue of his furniture, chattels, and effects to be sold by his executors, and, after payment of his debts, funeral and testamentary expenses, he directed the balance of the proceeds of such sale, and also all other moneys or securities for money of which he might die possessed, and all other his personal property, to be divided between two persons whom he appointed his executors. The estate was insolvent, and the executor proposed to retain his own debt out of the proceeds of sale which had been paid into court:—Held, that by the words of the will the proceeds of sale were constituted equitable assets, and that the executor had no right of retainer. *Duignan* v. *Croome*, 41 L. T. 672.

—— **Amount Received on Bond.**]—A bond was given by a broker to the corporation of London, to secure the due performance of his duties. He made default:—Held, on his death, that the corporation held the amount recovered on the bond as equitable assets, and in trust for the general body of his creditors, and not exclusively for those who had suffered by his defaults. *Nuish* v. *Bryant*, 25 Beav. 533; 27 L. J., Ch. 748; 4 Jur. (N.S.) 550; 6 W. R. 573.

Money Paid into Court.]—Moneys arising under a will and paid by the executors into court in a creditor's suit, held legal assets. *Loregrove* v. *Cooper*, 2 Sm. & G. 271.

Property situate Abroad.]—The compensation fund for slaves in Jamaica is legal assets for the payment of creditors. *Lyon* v. *Colville*, 1 Coll. C. C. 449.

Although West India estates are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets. *Charlton* v. *Wright*, 12 Sim. 274.

Equity of Redemption — Freeholds.]—An equity of redemption of a mortgage in fee is not equitable assets, at least not as against judgment creditors, who have a right to redeem. *Sharpe* v. *Scarborough (Earl)*, 4 Ves. 538.

The equity of redemption of a mortgage in fee is made legal assets by 3 & 4 Will. 4, c. 104, by the proviso in the act saving the preference of a creditor by specialty in which the heirs are named. *Foster* v. *Handley*, 1 Sim. (N.S.) 200; 15 Jur. 73. But see now Hinde Palmer's Act, 32 & 33 Vict. c. 46.

—— **Chattels Real.**]—Equity of redemption of a leasehold estate is equitable assets. *Hartwell* v. *Chitters*, Ambl. 308. See also *Cox's Case*, 3 P. W. 341.

A lease which belonged to an intestate, and on which the plaintiff has a lien, is nevertheless to be considered as assets in the hands of the administrator, who has the power to redeem it, as well as to dispose of the legal estate. *Vincent* v. *Sharp*, 2 Stark. 507.

Notwithstanding the 32 & 33 Vict. c. 46, the produce of the sale of an equity of redemption in a chattel real constitutes legal assets, whether the testator has or has not charged all his property with the payment of his debts. *Hanley* v. *McDermott*, Ir. R. 9 Eq. 35.

—— **Leaseholds for Lives.**]—Surplus produce of the sale under the court of leaseholds for lives mortgaged by the testator held legal and not equitable assets. *Christy* v. *Courtenay*, 26 Beav. 140.

—— **Sub-mortgage.**]—An equity of redemption in a sum of money charged on real estate is a legal asset. *Cook* v. *Gregson*, 3 Drew. 547; 25 L. J., Ch. 706; 2 Jur. (N.S.) 510; 4 W. R. 581.

A testator died possessed of an equity of redemption of an equitable charge upon real estate:—Held, that although the testator's interest was equitable, the money was recoverable by the executor virtute officii, and it must therefore be regarded as legal, and not equitable assets. *Ib.* See also *Hue* v. *French*, 3 Drew. 716; 26 L. J., Ch. 317; 3 Jur. (N.S.) 428.

Distinction between legal and equitable assets. *Ib.*

—— **Copyholds.**]—In the case of a testator who died before the 1st of January, 1870, the equity of redemption in copyholds is to be administered as legal assets under 3 & 4 Will. 4, c. 104. *Burrell, In re, Burrell* v. *Smith*, 39 L. J., Ch. 544; L. R. 9 Eq. 443; 22 L. T. 263.

Surplus arising from Sale of Mortgage Property.]—C., in consideration of a loan of 400*l.*, mortgaged his real estate in fee to W. & Co., in trust to sell the same; and, after repaying themselves, to pay over the surplus to himself, his executors or administrators; before the sale was effected C. died, after making his will, by which he devised all his real and personal estates to trustees, whom he also appointed his executors in trust to sell the same, and pay debts and discharge incumbrances. In the lifetime of these trustees, W. & Co., the original mortgagees, sold the estate, and paid over the surplus into the hands of the testator's trustees and executors' attorney. Before the money was disposed of, the trustees and executors, and also their attorney, died; and the plaintiffs took out administration de bonis non, with the will of C. annexed, and sued the attorney's executors for money had and received:—Held, that the money in the hands of the latter was equitable and not legal assets; and, consequently, could not be recovered at law. *Clay* v. *Willis*, 2 D. & R. 539; 1 B. & C. 364; 1 L. J. (O.S.) K. B. 144.

Surplus produce of the sale under the court of leaseholds for lives mortgaged by the testator held legal and not equitable assets. *Christy* v. *Courtenay*, 26 Beav. 140.

Separate Estate of Married Women.]—In the distribution of separate property of a married woman as assets after her death, a bond not entitled to priority. *Anon.*, 18 Ves. 258.

A court of equity, having created for married women a right to separate estate, has enabled them to contract debts in respect of it; and although the persons of married women cannot be made liable to their debts, either at law or in equity, their separate estate may, in equity, be rendered so liable; and a court of equity will give execution against such separate estate, just as a court of law gives execution against the property of other debtors. There is no sound distinction, either in principle or upon the authorities, between the specialty and simple contract debts of a married woman as to the liability of her separate estate for the same respectively, semble. *Johnson* v. *Gallagher*, 3 De G. F. & J. 494; 30 L. J., Ch. 298; 7 Jur. (N.S.) 273; 4 L. T. 72; 9 W. R. 506.

—— **Married Women's Property Act, 1870.**]—The separate estate of a married woman in earnings, under the Married Women's Property Act, 1870, becomes upon her death equitable assets and divisible amongst her creditors pari passu, so that her executor has no right to retain in full his own debt thereout. *Poole, In re, Thompson* v. *Bennett*, 46 L. J., Ch. 803; 6 Ch. D. 739; 37 L. T. 119; 25 W. R. 862.

2. What Forms Part of Estate.

Funds in the Hands of Representative.]—Where an executor proves a will, probate has reference back to the death of the testator, and what was then in the hands of the executor is assets for the payment of the testator's debts. *Ingle* v. *Richards*, 28 Beav. 366; 6 Jur. (N.S.) 117; 8 W. R. 697.

Money received by an executrix for the goodwill of a public-house is assets in her hands. *Worral* v. *Hand*, Peake, 74.

As against an administrator, debts due to the intestate are not to be considered as assets till actually received, although not stated in the administrator's inventory to be desperate. *Giles* v. *Dyson*, 1 Stark. 32; 18 R. R. 743.

A remittance in bills and notes for a specific purpose, viz. to answer acceptance received by the administrator, in consequence of the death of the party to whom it was remitted:—Held, not general assets, the special purpose operating a lien, which would also be the effect upon a bankruptcy. *Hassall* v. *Smithers*, 12 Ves. 119.

Devise to trustees and their heirs during the life of A. in trust for A., and after his decease to B. in fee. The trustees recover, in his lifetime, damages for breach of covenants in a lease granted by the testatrix, and still subsisting. A. dies. The damages belong to her estate. *Noble* v. *Cass*, 2 Sim. 343; 29 R. R. 115.

—— **Fund Paid out of Court in respect of Costs.**]—A. commenced a suit in chancery for an account under a will, in which she employed as her solicitors, first B., then C., who successively gave up the suit, and then D., who continued to conduct it till her death in 1829. After her death, E., her executor, filed a bill of revivor

and D. continued to conduct the suit for him. In 1833, a decree was made, whereby it was ordered that the master should settle the costs of all the parties; and that the same, when taxed and settled, should be paid out of the fund in the following manner, viz. the plaintiff's costs (consisting of the costs both of A. and E.) to D., his solicitor; and the costs of the defendants to their several solicitors. The plaintiff's costs were taxed, and certain sums in respect of them were paid to D. C. sued E. as executor of A. for the amount of his bill, and had judgment of assets quando acciderint. He afterwards brought another action on the judgment, and had given notice of trial; and it was then agreed between them, that, on C.'s withdrawing the record, E. would then pay him 100*l.* on account of his bill, and the remainder out of the assets which should first come to his hands as executor of A.; and the record was accordingly withdrawn. A further sum was afterwards paid out of the Court of Chancery to D., in respect of the same costs:—Held, that this sum was assets in the hands of E., within the meaning of the agreement. *Smedley* v. *Philpot*, 3 M. & W. 573; 1 H. & H. 302; 7 L. J., Ex. 314.

—— **Policy of Insurance.**]—A testator, being indebted to R., deposited with him a policy of insurance on the testator's life, as security for the debt, and for a further advance then made by R., and died, leaving R. and M. his executors; R., still holding the policy, applied to the insurers for the amount due on it (200*l.*), which they refused to pay, unless R. and M. gave a receipt for it, as executors. They did so, R. making protest that he signed it as executor merely to satisfy the insurers. In an action by a judgment creditor, to which the executors pleaded plene administraverunt except as to 4*l.* (the surplus out of the 200*l.* after payment to R.):—Held, that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R. *Glaholme* v. *Rowntree*, 6 A. & E. 710; 2 N. & P. 557; 7 L. J., Q. B. 23.

—— **Inscribed Shares—Incomplete Gift.**]—This court will not assist a volunteer by making effectual an incomplete gift. *Weale* v. *Ollive*, 17 Beav. 252.

A. B. directed the certificates of some United States bank shares standing in his name to be delivered to his nephew, and in a letter to him, stated that "he made a free gift of them" to him. A. B. also executed a power for transferring the shares, but which was not acted on in A. B.'s life. The shares, being found in A. B.'s name at his death, were held to form part of his personal estate. *Ib.*

—— **Trust Fund—Mortmain Act.**]—Sums invested by the testatrix in stock, and other sums placed by her in the savings bank, were the produce of moneys which had been partly collected and partly appropriated by the testatrix for the purpose of building and endowing a church in a certain parish. The stock had been invested in the names of the testatrix and of another person. At the time of the decease of the testatrix no deed appointing or declaring the trusts of the money had been executed, and no site for the intended church had been obtained:—Held, that the money and stock were at the death of the testatrix part of her personal estate, and that the liability either of the money or the stock to any charitable use was excluded by the statute 9 Geo. 2, c. 36. *Girdlestone* v. *Creed*, 10 Hare, 480.

Exception to statute 9 Geo. 2, c. 36, in the case of a bequest of moneys to the extent of 500*l.* for building or endowing a church. *Ib.*

—— **Bona Vacantia.**]—Earl Ellenborough held the office of chief clerk of the Queen's Bench from 1811 to 1838, when the office was abolished by 1 Vict. c. 30. During that time he received the suitors' funds paid into court, and invested them in exchequer bills, and received the interest for his own benefit, but from the date of a report of a select committee of the House of Commons in 1834, the earl, in deference to the report, left the accumulations of interest standing to a separate account at his banker's. He died in 1871:—Held, that the executors were not entitled to the accumulated fund, and that it belonged to the crown. *Colchester* v. *Law*, 43 L. J., Ch. 80; L. R. 16 Eq. 253.

Mortgages and Mortgage Money.]—Mortgage money should go to executors or administrators, and not to heir; for equity follows the law. At law, if conditions of mortgages are so penned as not to mention either heirs or executors, there money shall be paid to executors for it came out of personal estate. *Thornborough* v. *Baker*, 1 Ch. Ca. 283. *S. C.*, 2 Freem. 143; 3 Swan. 628. And see *Ellis* v. *Guavas*, 2 Ch. Ca. 50; *Winne* v. *Littleton*. id. 51; *Noy* v. *Ellis*, id. 220; *Turner* v. *Turner*. 1 Ch. Rep. 115; *Pawlett* v. *Att.-Gen.*, Hardr. 467.

Where upon mortgage the money is made payable to the heir or executor, in that case, before or at the day of payment, the mortgagor may elect to pay it to either, but after the day is past, and the mortgage is forfeited at law, though equity will relieve the mortgagor on payment of the money, yet it will not revive the election, for the mortgagor must then pay it to the executor, because it came out of the personal fund; so if neither heir nor executor be named, the money shall be paid to the executor. *Rightson* v. *Overton*, 2 Freem. 20.

A forfeited mortgage in fee decreed to be personal estate, and to belong to the executor, and not to the heir. *Canning* v. *Hicks*, 1 Vern. 412; 2 Ch. Ca. 187.

If mortgage in fee is made, it will descend to heir of mortgagee in trust for executors. *Anon*, 2 Eq. Abr. 592.

Money due on a mortgage in fee, paid to the heir of the mortgagee, was recovered from him by the executor. *Tabor* v. *Tabor*, 3 Swan. 636.

Residuary legatee having been admitted to a copyhold estate, was in possession above nineteen years when the heir obtained possession by ejectment. After acquiescence for nine years, the residuary legatee filed a bill claiming estate as having been a redeemable interest in the testator; and having been treated as such, it was so decreed. *Hardy* v. *Reeves*, 4 Ves. 466.

Surrender by mortgagee of copyholds to the use of his will is no proof that he considered it irredeemable. *Ib.* 480.

Semble, that a mortgage for years, of which a testator has been in possession for upwards of twenty years, without recovering interest, and without any claim being made in respect of the equity of redemption, ought in the administration of assets to be considered as leasehold. *Hearn* v. *Wells*, 1 Coll. C. C. 323.

A. B. makes a mortgage in fee, and dies intestate and without heirs:—Held, that the equity of redemption does not escheat to the crown, but belongs to the mortgagee, subject to the debts. *Beale* v. *Symonds*, 16 Beav. 406; 22 L. J., Ch. 708; 1 W. R. 137.

A. B. died in 1831, intestate and without heirs, having mortgaged his estate in fee:—Held, that the mortgagee could not, in 1852, make a good title to the fee; for, although he took the equity of redemption as against the crown, yet he held it subject to A. B.'s debts, and there was no proof of their having been satisfied. Observations on the case of *Downe* (*Viscount*) v. *Morris*, 3 Hare, 394. *Ib.*

—— **Of Lunatic.**]—It is a rule never to change the property of a lunatic, nor to effect any alteration as to the succession to it. Money of a lunatic lent in discharge of incumbrances of his estate in Scotland shall go as personal in England. *Annandale, Ex parte*, Ambl. 81.

A representative must take his interest as fortune has directed it, and has no equity to vary it: therefore, where a lunatic dies entitled to an estate, and also to a charge upon it, the heir takes it discharged; a trust term to secure the charge makes no difference; for it remains inert, unless required to be executed for proper purposes; the trustees have no discretion. *Oxenden* v. *Compton* (*Lord*), 2 Ves. J. 260; 4 Bro. C. C. 397. And see *S. C.*, 2 Ves. J. 69; 2 R. R. 131.

—— **Of Husband and Wife.**]—Husband lends out money in the names of himself and his wife, upon mortgages and bonds, and dies. The wife is entitled to this by survivorship, if there are assets sufficient without this money to pay debts. *Christ's Hospital* v. *Budgin*, 2 Vern. 683.

A feme covert being entitled to 1,400*l.* on a mortgage in fee, husband articles to lay out this money in a purchase of land, to be settled as a provision for him and his wife, and their issue; the wife dies without issue; the husband takes out administration to her, and by will devises this money to the plaintiffs before payment of it, and dies. On a bill brought against the administrator de bonis non, &c., of the wife:—Held, that there could be no relief, the law being with the defendants. This money belonged to the administrator de bonis non, &c., of the wife, and is distributable amongst her next of kin. *Burnett* v. *Kinaston*, Pre. Ch. 118; 2 Vern. 401; 2 Freem. 239.

—— **Of Tenant for Life.**]—Tenant for life, with remainder to trustees to preserve, &c., remainder to his first and other sons in tail male, remainder to himself in fee, became entitled to a charge upon the estate, and died without issue and intestate:—Held, the charge should go to his next of kin as personalty, and not be considered as merged for the benefit of his heir, to whom the estate descended. *Wyndham* v. *Egremont*, Ambl. 753.

—— **Land Tax Redeemed.**]—A. being under a settlement tenant for life in remainder, after prior estates for life and in tail, with remainder to his own first and other sons in tail, with an ultimate remainder in fee, which afterwards became vested in the first tenant for life, redeemed the land tax upon the settled estate during the life of the first tenant for life, and took an assignment to himself under the Land Tax Act. The prior tenant for life afterwards died without issue, having devised to A. the ultimate fee; and A. being in a dying state, and having no issue, made his will and devised the fee of the settled estate without declaring any intention with respect to the land redeemed. The land tax at his death continues to be part of his personal estate. *Trevor* v. *Trevor*, 2 Myl. & K. 675.

—— **Intention, Effect of Manifestation of.**]—A man having mortgages, one of which was a mortgage in fee of lands in D., on which he had entered, devises those lands to his two daughters and their heirs, and the other mortgages to them, their executors, &c. One of the daughters dies; her share of the land in D. shall go to her heir, and not to the administrator. *Noys* v. *Mordaunt*, 2 Vern. 582. And see *Forrester* v. *Cotten*, Ambl. 388; 1 Eden, 532. But see 1 Swan. 408, n.

A man purchases absolutely of a mortgagee in fee in possession, and dies; as between his heir and executor, it shall be considered as real estate, and go to the heir. *Cotton* v. *Iles*, 1 Vern. 271; Barnard. 46.

Debt due from Executor.]—A debt due by an executor is assets. *Simmons* v. *Guttridge*, 13 Ves. 264.

—— **When Released.**]—A. borrowed 1,100*l.* from his stepmother, upon an agreement that the debt should be paid by deductions of 100*l.* from each quarterly payment which she made him for her board. After two deductions had been made, she declared she would make no more, and thenceforward continued to pay the quarterly sums in full. She appointed him sole executor of her will, which contained no disposition of her residuary estate:—Held, that although, in order to have an effectual release in equity of a debt, there must be an actual legal release or transfer of the property, in this case the debt was satisfied on two grounds: first, because the appointment of the debtor as executor operated as a release at law, and all claim in equity to recover the debt was prevented by the intention of the testatrix to release it; and, secondly, because the testatrix by making the full quarterly payments had actually completed the gift of the instalments she was entitled to retain. *Strong* v. *Bird*, 43 L. J., Ch. 814; L. R. 18 Eq. 315; 30 L. T. 745; 22 W. R. 788.

Debts due to the Testator—Release.]—Notwithstanding declaration of the testator to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets, which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will. *Byrn* v. *Godfrey*, 4 Ves. 6; 4 R. R. 155.

A legatee, son-in-law to testator, was held entitled to his legacy, discharged from debts due by him to the testator and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters, and memoranda in his handwriting. *Eden* v. *Smyth*, 5 Ves. 341; 5 R. R. 60.

Annuity.]—A. granted to B. an annuity (in consideration of purchase of trade stock) for their

joint lives, and for the life of A. and B.'s wife, unless B. should transfer it in his lifetime. It was provided that B. should have a right to sell his wife's reversionary interest as if it were payable to him in præsenti. B. was indebted at the time of the transaction, and it being determined, after B.'s death, without having alienated the annuity, that the wife's reversionary interest was assets for B.'s creditors, it was afterwards determined that it was legal assets. *Shee* v. *French*, 3 Drew. 716; 26 L. J., Ch. 317; 3 Jur. (N.S.) 428.

The 55 Geo. 3, c. 184, schedule, part 3, imposes an ad valorem duty on letters of administration where the estate is above 20*l.* in value, exclusive of what the deceased shall have been possessed of or entitled to as a trustee, and not beneficially. An intestate had granted an annuity to A., and afterwards by deed conveyed his property to B., who covenanted to indemnify him against the payment of the annuity. Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, and recovered judgment for debt and costs exceeding 20*l.* The administratrix paid this, and then sued B. on his covenant for the amount:—Held, that the right to recover this sum was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty: and that the intestate, if he had lived, could not have been considered, in respect of that sum, as a mere trustee for the annuitant, and having no beneficial interest. *Carr* v. *Roberts*, 2 B. & Ad. 905; 1 L. J., K. B. 33.

—— **Charged on Lands.**]—A testatrix bequeathed an annuity to E., her executors, administrators, and assigns, to be charged upon lands that were then held for years with a perpetual covenant for renewal. After the death of the testatrix a perpetuity grant of the lands was made to her executors. Subsequently E. died intestate:—Held, that the annuity formed part of E.'s personal estate. *Martin* v. *Haynes*, 29 L. R. Ir. 416.

—— **Insurance by Grantee.**]—By a deed dated in 1822, A., in consideration of 600*l.*, granted an annuity of 64*l.* 7*s.* 6*d.* to B. for ninety-nine years if A.'s wife should so long live. And by the same deed the wife granted the rents, issues, and profits of copyhold property to which she was entitled for her separate use to B. during her life, upon trust to pay and retain the annuity thereout, and such premiums of insurance as therein mentioned, and subject thereto to account for the residue to the wife. By this deed A. covenanted for his wife's title, for her appearance at any insurance office selected by B., and that she should not during the continuance of the annuity go beyond the seas without notice to B. to enable him to pay the additional premiums. There was a power of sale and a power for A. to repurchase the annuity upon payment of 600*l.* and all arrears of the annuity. B. insured the wife's life for 600*l.* at a premium of 16*l.* 7*s.* 6*d.* It was not in dispute that the annuity of 64*l.* 7*s.* 6*d.* was made up of this premium and 48*l.* or eight per cent. upon the 600*l.* The representatives of B. entered into possession of the copyhold hereditaments soon after the death of B. in 1824, and had remained in possession down to the present time. After the death of A. and his wife, in a suit by the wife's representative against B.'s representatives for an account of the rents and profits and for redemption of the copyholds and the policy, which had greatly increased in value by means of bonuses:—Held, that the policy did not constitute a security in which A. or his wife had any redeemable interest, and that the surplus proceeds of the policy, after payment of the 600*l.* and all arrears of the annuity, formed part of B.'s personal estate. *Preston* v. *Neele*, 12 Ch. D. 760; 40 L. T. 303; 27 W. R. 642.

Payment to Widow for obtaining Appointments.]—The widow of a surgeon, who died intestate, agreed with R., in consideration of 600*l.*, to obtain for him certain appointments held by her late husband. The widow subsequently renounced her right to take out letters of administration to her husband's estate:—Held, that the whole of the 600*l.* belonged to the intestate's estate. *Jones* v. *Jones*, 30 L. T. 254.

License for Cart.]—Benefit of license to keep a cart is personalty, and belongs to executor. *Hunt* v. *Hunt*, 2 Vern. 83.

Newspaper.]—A share in a newspaper shall be considered as the personal property of the proprietor, and the profits of printing the same, subsequent to his death, be distributed accordingly. *Gibblett* v. *Read*, 9 Mod. 459.

Office.]—The grant of a menial office in the House of Lords, for a term of years, liable to creditors, and a daily fee or allowance held to be also subject to their demands. *Schellinger* v. *Blackerby*, 1 Ves. Sen. 347.

Property in Settlement set aside for Fraud.]—A suit to set aside a settlement as fraudulent against creditors entertained where the plaintiff subsequently became a creditor by a breach of a covenant previously entered into by the settlor. Where a deed is set aside as fraudulent against creditors, the property becomes assets, and subsequent creditors are let in. *Richardson* v. *Smallwood*, Jac. 552.

Property Abroad.]—By the laws of Antigua, all deeds relating to estates within that island must be registered there, in order to make them effectual; and by the same laws all the stock, utensils, erections, and buildings, upon a plantation, are subject and liable to the payment of debts, except negroes and other slaves, which are deemed to be affixed to the freehold, and cannot be sold for that purpose, unless there is a deficiency of general assets. Order of the Lord Chancellor partly reversed, but for the most part affirmed. *Meynell* v. *Moore*, 4 Bro. P. C. 103. And see *Rucker, Ex parte* and *In re*, 3 Deac. & C. 704.

Freehold lands in Gibraltar are not assets for the payment of simple contract debts. *Jephson* v. *Riera*, 3 Knapp, 143.

—— **Confiscation.**]—The plaintiff's testator's property in America being confiscated, subject to his debts, a creditor there ought first to apply to make that property available for payment of his debt before he sues him personally here. (Sed quære. See 6 Ves. 714.) *Wright* v. *Nutt*, 3 Bro. C. C. 326.

—— **Colonial Assets — Payment of Colonial Duties.**] — A testator domiciled in England, whose assets consisted of considerable personalty in England and also of realty leaseholds and personalty in Australia, by his will, after bequeathing pecuniary legacies of considerable amount, gave his residuary real and personal estate upon trust for such of his five children as should be living at his death, in equal shares, the share of each child being settled upon him or her for life with remainder to his or her children, with power for his trustees to manage and cultivate his real and leasehold estates until sold :— Held, that the duties due to the Government of South Australia were not, like the duties of the English Government, payable out of the share of each child, but were part of the costs of realisation, and were therefore payable out of the testator's general assets before distribution. *Maurice, In re, Brown* v. *Maurice*, 75 L. T. 415. S. P. *Peter* v. *Stirling*, 10 Ch. D. 279 ; 27 W. R. 469.

And see WILL—REVENUE.

Property Appointed.] — A. had a power to charge a sum of money on land, by deed or will, and executed it by a voluntary deed. The court, in favour of the creditors of A., will consider it as personal assets and lay hold of it for their benefit. *Pack* v. *Bathurst*, 3 Atk. 269.

A general power of appointment over an estate, in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. *Townshend* v. *Windham*, 2 Ves. Sen. 1. S. P. *Thompson* v. *Towne*, 2 Vern. 319 ; Pre. Ch. 52 ; *Troughton* v. *Troughton*. 3 Atk. 656 ; 1 Ves. Sen. 86 ; *Bainton* v. *Ward*, 2 Atk. 172. *And see* 2 Ves. Sen. 2.

Power of appointment over a sum of money to be raised under a trust term executed in favour of volunteers is assets for creditors ; but the equity of purchaser from a party taking under a voluntary deed of appointment was preferred to that of general creditors having no specific charge. *George* v. *Milbanke*, 9 Ves. 190 ; 7 R. R. 157.

Where a person has an absolute and general power of appointing a fund, as well in his lifetime as at his death, and there is no gift over, yet if no appointment be made, his administrator cannot claim the fund ; and even creditors will not be entitled to the benefit of it without some step taken towards an appointment, though, where any such appointment be made, the court will arrest the fund, in transitu, for the benefit of creditors. *Harrington* v. *Harte*, 1 Cox, 131.

Distinction between a power and absolute property ; a power, unless executed, not assets for debts. *Holmes* v. *Coghill*, 12 Ves. 206 ; 7 Ves. 499 ; 8 R. R. 323 ; 6 R. R. 166.

Power of appointment by will executed ; appointee is a trustee for creditors of testator at time of his death, but not at time of making will. *Jenny* v. *Andrews*, 6 Madd. 264 ; 23 R. R. 216.

S. made his will, containing a specific bequest of property. He subsequently settled that property, reserving to himself a power of appointment by will, after which he executed a voluntary deed, attested by one witness, by which he covenanted that his devisees and executors should after his death convey, assign, and pay over, all the real and personal estate in which he had any beneficial interest, or which he should then have disposed of by his will, to trustees for certain purposes :—Held, that this instrument was a pure deed, and not a will, and was valid, though voluntary, and was not a revocation of the will. *Patch* v. *Shore*, 32 L. J., Ch. 185 ; 9 Jur. (N.S.) 63 ; 7 L. T. 554 ; 11 W. R. 142.

Held, also, that the specific bequest in the will operated in exercise of the power subsequently reserved, and that the appointed property was assets to satisfy the debt created by the voluntary deed. *Ib.*

—— **Wills Act, s. 27.**]—General pecuniary legacies are bequests of personal property described in a general manner, within the meaning of the 27th section of the 7 Will. 4 and 1 Vict. c. 26, where no particular fund is indicated for payment, and are therefore payable out of personal estate which a testatrix had power to appoint in any manner she might think proper, there being no assets of which the testatrix was possessed as her own personal estate sufficient to pay the legacies. *Hawthorn* v. *Shedden*, 3 Sm. & G. 293.

A testatrix, having a general power of appointment over personal property, by her will, made after the Wills Act, directed that her debts and funeral and testamentary expenses should be fully paid by her executor out of her personal estate ; she then gave several pecuniary legacies, with a direction that they should abate ratably if, after payment of her debts and funeral and testamentary expenses, there should not be sufficient to pay them all in full, and she gave all the residue of her estate to certain persons :—Held, that the will operated as an execution of the power in favour of the executor for the purpose of paying the testatrix's debts, funeral and testamentary expenses, and legacies, and that only so much of the property, the subject of the power, as remained after making those payments, passed by the residuary bequest. *Wilday* v. *Barnett*, L. R. 6 Eq. 193 ; 16 W. R. 961.

—— **Married Woman.**]—A married woman having a testamentary power to appoint a fund, exercised it in favour of her husband, and appointed him her executor :—Held, that if the husband claimed the fund as his wife's executor, he must pay probate duty on the fund. *Nail* v. *Punter*, 5 Sim. 563.

A woman entitled to a sum of stock settled it, on her marriage, for her separate use for life, with power to her to appoint it by will only, but no trust was declared in default of appointment. After her marriage she signed a promissory note, and then, by will, appointed the stock to her husband. Semble, that the holder of the note is not defeated thereby. *S. C.*, 5 Sim. 562.

A married woman died in 1849 possessed of savings of her separate estate amounting to 697*l.*, and having a power of appointment over 21,000*l.* consols, subject to her husband's life interest. By her will she directed, "first," that all her debts should be paid, and she then specifically bequeathed all her ready money. Her debts were paid out of the 697*l.* :—Held, on the death of her husband, in 1855, that the specific legatee was entitled to be repaid the 697*l.* out of the fund over which she had a power of appointment. *Laing* v. *Cowan*, 24 Beav. 112.

Where a feme covert has a general power to appoint property by will, and executes it in favour of a legatee, the appointed property does not (as in the case of a man) become assets for the payment of her debts. *Hobday* v. *Peters*, 28 Beav. 354.

But the case is otherwise where a feme covert has practised a fraud in her contracts; in such a case the appointed property is liable. *Ib.*

A married woman, having a life estate to her separate use in certain leasehold and personal property, with a general power of appointment by will only, appointed two children:—Held, that in the administration of her estate a tradesman supplying her with goods while she concealed her marriage, and dealt with him as a single woman, had a claim to be paid out of the appointed fund. *Vaughan* v. *Vanderstegen*, 2 Drew. 408.

A married woman, in exercising a power of appointment by will, does not make the appointed property separate estate, so as to render it liable to the payment of her debts. *Blachford* v. *Woolley*, 2 Dr. & Sm. 204; 32 L. J., Ch. 534; 9 Jur. (N.S.) 568; 8 L. T. 232; 11 W. R. 478.

In cases not within the Married Women's Property Act, 1882, the exercise by the will of a married woman of a general power of appointment, whether the power be exercisable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate. *Roper, In re, Roper* v. *Doncaster*, 58 L. J., Ch. 215; 39 Ch. D. 482; 59 L. T. 203; 36 W. R. 750.

The testatrix, a married woman, by her will dated before the Married Women's Property Act, 1882, directed her executrices (thereinafter named) to pay her debts, and, in exercise of a general power of appointment to which she was entitled over a share in the collieries and property of a coal company, appointed her share in the said company to her executrices upon certain trusts. The testatrix died in 1880:—Held, following *Tanqueray-Willaume and Landau, In re* (20 Ch. D. 479), that debts incurred by her upon credit of her separate estate were charged upon the corpus of the appointed property. *De Burgh Lawson, In re, De Burgh Lawson* v. *De Burgh Lawson*, 58 L. J., Ch. 561; 41 Ch. D. 568; 37 W. R. 797.

A married woman who had a power of appointment over certain trust funds, and was also possessed of separate estate her title to which had accrued before the Married Women's Property Act, 1882, died in 1887, having in the same year made a will, by which she exercised her power of appointment over the trust fund and appointed executors, but made no disposition of her separate property. Probate of the will was granted to the executors according to the altered practice introduced by the Probate Rules of 1887, i.e. in the ordinary form without any exception or limitation. The court decided that on the death of the testatrix the title of her husband to her undisposed-of separate estate accrued, and that the executors of her will became trustees of it for him, and not for the next of kin of the testatrix:—Held, that the expenses of proving the will, including the probate duty, must be apportioned ratably between the appointed and undisposed-of property in the same manner in which they would have been apportioned under a grant cæterorum before the change in the form of the grant; but that the costs of the proceedings in which the questions were determined must fall upon the undisposed-of property, as they were occasioned by a contest between the husband and the next of kin. *Lambert's Estate, In re, Stanton* v. *Lambert*, 57 L. J., Ch. 927; 39 Ch. D. 626; 59 L. T. 429.

A married woman having separate personal estate, and also a general power to appoint personal estate by will, bequeathed and appointed (after legacies) all her property to her executors on trust for payment of her debts, and funeral and testamentary expenses, and certain legacies, and then in trust for persons named. She survived her husband, and after his death became entitled to other personal estate, and died without re-publishing her will:—Held, that the separate personal property and the personal estate accruing after the coverture must contribute ratably, and before the appointed estate, to the payment of the funeral and testamentary expenses and any debts contracted by the testatrix after the coverture. *Williams, In re, Green* v. *Burgess*, 59 L. T. 310.

Remainders and Reversions.]—Reversion in fee, after tail spent, held assets to pay debts. *Warwick (Countess)* v. *Edwards*, Dick. 51.

A reversion expectant upon an estate for life, and upon estates tail limited to unborn children:—Held, to be assets for the payment of specialty debts, and decreed to be sold for that purpose. A reversion expectant upon an estate tail may be sold for payment of specialty debts, semble. *Tyndale* v. *Warre*, Jac. 212.

In case of judgment recovered against an heir who has a reversion in fee which is only assets cum acciderit, court will not decree a sale of the reversion, but the creditor must wait till it falls. *Fortrey* v. *Fortrey*, 2 Vern. 134.

W. after marriage, in consideration of 2,000*l.* portion, in his father's lifetime, settled certain lands on himself and his wife, and their issue, and after his father's death he suffered a recovery, revoked the former uses, and conveyed the estate to trustees to the use of himself for life; then he created a term for raising daughter's children's portions, remainder to his first, &c., son in tail male, remainder to himself in fee. On a bill by a bond creditor for a sale of part of the real estates if the personal should fall short, Lord Chancellor held, that the real estate never having been assets in the hands of W., the lands comprised in the settlement were not liable to his debts by specialty, for they are not specific liens on his estate. *Brown* v. *Durston*, 3 Atk. 631.

A person on marriage settled an estate on himself for life, on his wife for life, remainder to trustees to preserve, &c., remainder to his first and every other son in tail male, remainder to himself in fee. A son was born; the father died indebted by bond: the son afterwards died without issue, but by his will devised the estate to the defendant in fee:—Held, the reversion, being come into possession, was assets to pay the father's debts, notwithstanding the devise by the son. *Kinaston* v. *Clark*, 2 Atk. 204.

The defect in 13 Eliz. c. 5, of fraudulent conveyances is remedied by 3 Will. & M. c. 14. *Ib.*

It is an inaccurate expression to say a reversion after an estate tail is not assets, for there is a liability which makes it assets in futuro. *Ib.*

The son's recovery would have barred the creditors; a fine would not have done it, for the reversion in fee would still have been liable. *Ib.*

The estate now come into possession is liable to the specialty debts of the father, and by circuity the simple contract creditors are to stand in the place of satisfied bonds. *Ib.*

Other Interests in Real Estate—Copyholds.]—Trust of a copyhold in hands of heir is assets by descent. *Helley* v. *Helley*, 2 Eq. Abr. 509.

Copyhold estates are not liable to debts further than subjected; but when charged with other estates, court will marshal them. Copyhold estate not assets for specialty debts, not even debts to the crown. *Aldrich* v. *Cooper*, 8 Ves. 393; 7 R. R. 86.

—— **Advowsons.**]—An advowson descending to an heir is real assets, and may be sold for payment of debts. *Tong* v. *Robinson*, 1 Bro. P. C. 114; 2 Stra. 879.

And is extendible on an elegit. *S. C.*, 3 P. W. 401.

An advowson in gross will not pass by the word "lands," but will by the words "tenements and hereditaments." *Westfaling* v. *Westfaling*, 3 Atk. 460.

An advowson in gross is assets by descent to satisfy bond creditors. *Ib.* 456.

—— **Leaseholds for Lives.**]—A leasehold for lives, limited to one and his heirs, was devised to trustees in trust for A. and his heirs. A. died intestate and without heirs:—Held, that the leaseholds pur autre vie passed under s. 6 of the 7 Will. 4 & 1 Vict. c. 26, to A.'s administrator, and did not belong to the trustees. *Reynolds* v. *Wright*, 25 Beav. 100; 27 L. J., Ch. 392; 4 Jur. (N.S.) 198; 6 W. R. 301.

—— **Rent-charge pur autre vie.**]—A. devises to B. rent out of a lease for years, determinable on lives, to be paid half-yearly if the cestuis que vient lived so long. B. dies during their lifetime. Decreed, the rent was not determined, but should be paid to the executors of B. during the term. *Gifford* v. *Goldsey*, 2 Vern. 35.

A rent-charge pur autre vie, if the grantee dies, leaving cestui que vie, goes to the grantee's executor, though not named in the grant. *Bearpark* v. *Hutchinson*, 7 Bing. 179; 4 M. & P. 848; 9 L. J. (O.S.) C. P. 1.

—— **Windfalls.**]—A testator devised estates upon which there were plantations of larch trees. At the time of his death a great number of the larch trees had been more or less blown down by extraordinary gales:—Held, that having regard to the maxim "quicquid plantatur solo, solo cedit," the principle applicable was that if a tree was attached to the soil it was real estate, and if severed, personalty; that the life and manner of growth of any particular tree was no test of its attachment to the soil, and that the degree of attachment or severance was a question of fact in the case of each particular tree. If the tree was severed from the soil it belonged to the executors, if otherwise, to the inheritance. *Ainslie, In re, Swinburne* v. *Ainslie*, 55 L. J., Ch. 615; 30 Ch. D. 485; 53 L. T. 645; 33 W. R. 910; 50 J. P. 180—C. A.

—— **Where appropriated.**]—A., on the marriage of B., his son, settles a lease on B. for life, to the wife for life, and then to the issue of the marriage; and B. covenants from time to time to renew the lease, and assign it on the same trusts; B. renews the lease, but does not assign it, and dies indebted. This lease is bound by the marriage articles, and is not assets for the payment of debts. *Plowman* v. *Plowman*, 2 Vern. 289.

A., on his marriage, demises land to B., who redemises them to A. for a lesser term, paying peppercorn rent during the life of A., and after his death an annual sum for the life of his wife for her jointure, and a peppercorn for the remainder of the term. A. dies indebted; the redemised term shall not be assets to pay any debts but what affect the inheritance, the term redemised being raised for a particular purpose. *Baden* v. *Pembroke (Earl)*, 2 Vern. 52.

A. purchases a lease of a house in the name of B., and takes a declaration of trust to permit A. to enjoy for life, and then in trust for one who lived with him as his wife, and was so reputed. This lease is not assets of A., nor liable to his creditors after his death. *Fletcher* v. *Sedley*, 2 Vern. 490.

—— **Rents and Royalties.**]—Where G. C. made a lease for lives renewable for ever, reserving the yearly rent of 20*l.*, and thereby covenanted that if the lessee, his heirs or assigns, should be minded to fine down the said rent, it should be released on payment of 300*l.*:—Held, that the said sum of 300*l.* being paid after the death of G. C. was personalty, and should go not to his heir but to his executor. *Crofton, In re*, 1 Ir. Eq. R. 204.

In a mining lease, besides an annual surface rent, certain half-yearly payments, described as further consideration money, and depending upon the rate of working the mines, were reserved to the lessor, his heirs, and assigns:—Held, on the death of the lessor intestate, that these payments were not purchase money passing to the personal representative of the lessor, but in the nature of rent, to which therefore the heir became entitled as incident to the reversion. *Barrs* v. *Lea*, 33 L. J., Ch. 437; 10 L. T. 567; 12 W. R. 525; 3 N. R. 635.

—— **Term attendant on Inheritance.**]—A term vested in trustees is not assets to pay debts; otherwise if the term be in the party himself, and the inheritance in trustees. *Thruxton* v. *Att.-Gen.*, 1 Vern. 341.

A purchaser takes a term in a trustee's name, and the inheritance in his own; this term, unless declared to attend the inheritance, will be assets in equity. If he takes the inheritance in a trustee's name, and the term in his own, it will be assets at law. *Chapman* v. *Bond*, 1 Vern. 188. *But see now* 8 & 9 Vict. c. 112.

Land converted into Money.]—Creditors of vendor cannot insist that estate, contracted to be sold, has been converted into personal assets, unless the title be such that court will compel purchaser to take it. *Johnson* v. *Legard*, Turn. & R. 281; 18 R. R. 234, 301.

Where trustees have a power of selling real estate, and turning it into money, or keeping it in land, at their option, it will be subject to the same trust as the personal estate is applied to, whether sold or kept as real estate. *Cook* v. *Duckenfield*, 2 Atk. 562.

Where real estate is given to a devisee of personal, for payment of debts, it is assets. *Ib.* 566.

Where testator says, "I will my heir shall sell the land," he is not obliged to sell, but if he appoint his executors to sell, it is turned into personal assets. *Ib.* 568.

Money converted into Land.]—Suppose a direction by which to purchase an estate, which is afterwards swallowed up by an inundation, the money so devised shall not go to an executor, but as the rent would have done when the land was purchased. *Coventry* v. *Coventry*, 2 Atk. 369.

Money articled to be laid out in land and settled is not assets even at law. *Lechmere* v. *Carlisle*, 3 P. W. 211.

Money, by marriage articles, is agreed to be laid out in land, and settled on the husband and wife and their issue, remainder to the right heirs of the husband. Though the money at first is bound by the articles, yet when the husband and wife are dead without issue, the money is in the disposal of the husband, and will be assets, and go to his executor or administrator, and a portion to his residuary legatee. *Chichester* v. *Bickerstaff*, 2 Vern. 295.

Real Estate Descended—3 & 4 Will. 4, c. 104.]—The act 3 & 4 Will. 4, c. 104, charges the real estate of any person dying seised of such estates, not only with his debts of every description actually due at his death, but also with all liabilities which may result out of obligations entered into during his life. *Hamer's Devisees' Case*, 2 De G. M. & G. 366; 21 L. J., Ch. 832; 16 Jur. 555.

Where a person dies seised of land which he has not by will charged with his debts, the stat. 3 & 4 Will. 4, c. 104, makes the lands themselves, and not merely the estate or interest of such person in the lands, assets for the payment of his debts. *Downe* (*Viscount*) v. *Morris*, 3 Hare, 399.

The act of 3 & 4 Will. 4, c. 104, which renders freehold estates liable to the payment of all debts, applies only to real estates not charged with payment of debts. *Ball* v. *Harris*, 4 Myl. & C. 264; 8 L. J., Ch. 114; 3 Jur. 140.

An estate escheated is, under the 3 & 4 Will. 4, c. 104, liable in the hands of the lord to the debts of the person last seised; but quære whether it is liable pari passu with lands devised. *Evans* v. *Brown*, 5 Beav. 114; 11 L. J., Ch. 349; 6 Jur. 380.

The rights of simple contract creditors of an ancestor as against the descended estates are not defeated by judgments entered up against the heir, for his personal debts, before suit. *Watts* v. *Porter* (3 El. & Bl. 743) observed upon. *Kinderley* v. *Jervis*, 22 Beav. 1; 25 L. J., Ch. 538; 2 Jur. (N.S.) 602; 4 W. R. 579.

The 3 & 4 Will. 4, c. 104, makes real estate assets to be administered in courts of equity for payment of simple contract debts of the deceased; and the 1 & 2 Vict. c. 110, s. 13, makes a judgment a charge on any lands of which the judgment debtor is seised, or over which he shall have any disposing power, for his own benefit; and it makes such judgment an equitable mortgage thereon:—Held, that judgments entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over the simple contract creditors of the intestate, in respect of the descended estate. *Ib.*

It was not the object, nor is it the operation of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate; but as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that bonâ fide purchaser of the lands from the heir or devisee is bound to see to the application of the purchase money as he would be in the case of a particular mortgage on any portion of the lands themselves. *Ib.*

The real estate of a deceased person constitutes assets, to be administered in a court of equity, according to the priorities specified by the statute, and all the incidents of assets attach to it; and, consequently, such assets are liable, in the first place, to pay the debts of the deceased debtor, and, subject thereto, they belong to his devisee or heir-at-law: but the devisee or heir-at-law takes no beneficial interest therein, except subject to and after payment of the debts of the deceased testator or ancestor. *Ib.*

Real Estate Devised—3 & 4 Will. & M. c. 14, &c.—Devise for Payment of Debts.]—Devising an estate for payment of debts takes it out of the Statute of Fraudulent Devises. *Lingard* v. *Derby*, 1 Bro. C. C. 311.

If a devise for payment of debts does not provide for such payment in a practicable manner, it is within the Statute of Fraudulent Devises. *Hughes* v. *Doulbin*, 2 Cox, 170; 2 Bro. C. C. 614.

A direction in a will to pay simple contract creditors before specialty ones, is not void, being within the exception in the Statute of Fraudulent Devises. *Millar* v. *Horton*, G. Coop. 45.

The Statute of Fraudulent Devises would prevent a devise for legacies to the prejudice of creditors by specialty, but not devise for debts generally, though that might be the effect. *Kidney* v. *Coussmaker*, 12 Ves. 154; 2 R. R. 118.

Devise for payment of debts by rents and profits, out of the Statute of Fraudulent Devises; but a gross sum for that purpose will not be limited to annual rents, but is to be paid with all convenient speed. Distinction between debts, and legacies, and annuities, but the same provision for all is evidence, although not conclusive, that all are to be paid in the same way. The same inference as to costs, directed to be paid in the same manner, exonerating the fund generally liable in the first instance. *Bootle* v. *Blundell*, 19 Ves. 528; G. Coop. 236; 15 R. R. 93.

A testator devised his real estate to trustees and their heirs upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same, and all his stock, crops, goods, and effects whatsoever, to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies and dispose of the residue. This is substantially a devise for payment of debts within the fourth section of the Statute of Fraudulent Devises. The produce of the real estate, therefore, is equitable assets, and the specialty creditors having exhausted the personal estate, the simple contract creditors are entitled to have the assets marshalled in their favour. *Soames* v. *Robinson*, 1 Myl. & K. 500; 2 L. J., Ch. 153.

The owner in fee of two freehold estates, largely indebted by specialty and simple contract, devises one to A. B. in fee, charged with the payment of one-fifth, but only one-fifth of all his debts, and devises the other to C. D. in fee, charged with the payment of the other four-fifths, but no further part of those debts. These devises are not within the proviso of the Statute of Fraudulent Devises. *Lyon* v. *Colville*, 1 Coll. C. C. 449.

—— **What Devise Invalid.**]—The statute 3 & 4 Will. & M. c. 14, does not require proof of

an intent to defraud, hinder or delay creditors, but makes the devise ipso facto void as against creditors. *Coope* v. *Cresswell*, 35 L. J., Ch. 496; L. R. 2 Eq. 106; 14 L. T. 262; 14 W. R. 568. On appeal, 36 L. J., Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.

—— **Heir Devisee.**]—The stat. 3 & 4 Will. 4, c. 106, s. 3, which provides that land devised to the heir of the testator, shall be considered to have been acquired by such heir as a devisee, and not by descent, applies for all purposes; and therefore a demurrer by the heir, who was also devisee of the lands, to a bill by a legatee seeking to marshal the assets of the testator, with reference to such lands, as against the heir, was allowed. *Strickland* v. *Strickland*, 10 Sim. 374; 9 L. J., Ch. 60.

Alienation by Heir or Devisee.]—The devisee aliens; the land is not subject to the specialty debts of the devisor. *Mathews* v. *Jones*, 2 Anstr. 506.

The 3 & 4 Will. & M. c. 14, and 47 Geo. 3, c. 74, make the heir or devisee personally liable to the amount of the assets devised or descended, and do not charge the real estate with the debts of the ancestor. *Spackman* v. *Timbrell*, 8 Sim. 253; 6 L. J., Ch. 147.

Observations on the practical consequences, in possible cases, of the doctrine established in *Spackman* v. *Timbrell* (8 Sim. 253; 6 L. J., Ch. 147), that an heir or devisee may, by alienation of the descended or devised estates, place them out of the reach of the ancestor's or devisor's creditors, while he remains personally liable to them for the value of the estates. *Pimm* v. *Insall*, 1 Macn. & G. 449; 1 H. & Tw. 487; 19 L. J., Ch. 1; 14 Jur. 357.

A covenant by an infant heiress and her intended husband, in marriage articles, to settle the descended estate on the issue of the marriage, though effectual to defeat any alienation by the husband and wife during the coverture inconsistent with the articles, is not in itself an alienation of the estate, and therefore has not the effect of withdrawing it from the claims of the ancestor's creditors in a suit subsequently instituted by them for payment of his debts. *Ib.*

Whether a settlement executed pursuant to such articles after the institution of such suit would have that effect, quære. *Ib.*

A bankrupt, being entitled to one-third of freehold property in his own right, and to another third as heir-at-law to his brother, deposited the title-deeds of the property with his bankers to secure advances. The personal property of the brother was insufficient to discharge his debts, and his third of this property was under 11 Geo. 4 & 1 Will. 4, c. 47, s. 9, assets for the payment of his debts:—Held, nevertheless, that the lien of the bank extended to the two thirds of the estate in preference to any claims of the brother's creditors. *Baine, Ex parte, Boden, In re*, 1 Mont. D. & D. 492; 10 L. J., Bk. 16; 5 Jur. 105.

Settlement by the heir, upon his marriage, of the ancestor's estates, supported against the claims of the specialty creditors of such ancestor. Sir W. H. died indebted in specialty. After his death, on the marriage of his heiress, a settlement was executed whereby (after reciting the insufficiency of the personal estate to pay the debts, and that a considerable sum was due on that account) a part of the estates was conveyed to provide a fund to pay the debts, and the remainder was settled on the heiress, her intended husband, and their issue. Many years after, the produce of the estates appropriated to the payment of the debts was found insufficient:—Held, that the circumstances did not afford any proof of fraud, or any want of bona fides in the execution of the settlement; that the settled estates were not liable to the specialty debts; and that even if a want of bona fides had appeared, relief could only be obtained in a suit putting the mala fides properly in issue. *Richardson* v. *Horton*, 7 Beav. 112; 13 L. J., Ch. 186; 7 Jur. 1144.

The liability, under the act 11 Geo. 4 & 1 Will. 4, c. 47, of the devisee of land, who alienates the land, to the unpaid debts of the testator, is such that on the alienation the debts become his own debts to the extent of the value of the land alienated. Consequently, when a woman to whom land had been devised settled it on her marriage, after the passing of the Married Women's Property Act, 1870, the first trust being for herself absolutely until the marriage, and after its solemnization on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—Held, that the testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of the testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage," within the meaning of s. 12 of the Married Women's Property Act, 1870. *Sanger* v. *Sanger* (L. R. 11 Eq. 470) and *London and Provincial Bank* v. *Bogle* (7 Ch. D. 773) followed. *Hedgely, In re, Small* v. *Hedgely*, 56 L. J., Ch. 360; 34 Ch. D. 379; 56 L. T. 19; 35 W. R. 472.

A court of equity, in dealing with the real assets of a testator, never considered whether they were legal or equitable. The alienation of the assets by the heir or devisee prevented the creditors of the executor or testator from following the assets in the hands of a bonâ fide purchaser where the alienation was a legal one; and by analogy the court ought to treat an equitable alienation of equitable assets as having the same effect. *British Mutual Investment Co.* v. *Smart*, 44 L. J., Ch. 695; L. R. 10 Ch. 567; 32 L. T. 849; 23 W. R. 800.

An equitable deposit with a memorandum of charge by a devisee is an alienation which, pro tanto, prevents a creditor of the testator from subsequently obtaining a charge on the estate as assets under 3 & 4 Will. 4, c. 104. *Ib.*

Equitable estates are within 3 Will. & M. c. 14. An alienation to new trustees, those appointed by the will having renounced, is not such an alienation as can defeat the claims of the testator's creditors under 3 Will. & M. c. 14, nor was mortgage by equitable tenant for life such an alienation. *Coope* v. *Cresswell*, 36 L. J., Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.

Real estate cannot be charged with simple contract debts as against a purchaser for valuable consideration from a devisee, although the purchaser had notice of the debts, if there be no fraud on his part, and it is immaterial that the devise was of a residue. *Roche* v. *Roche*, 7 Ir. Eq. R. 436.

—— **Bankruptcy.**]—A specialty creditor has the same right under the bankruptcy of the heir of the debtor as if he had not become bankrupt; and may, therefore, follow the real assets or their specific produce in the hands of the assignees. *Morton, Ex parte*, 5 Ves. 449.

—— **Injunction against Purchaser.**]—Injunction against purchaser, on behalf of creditor, to restrain payment to heir. *Green* v. *Lowes*, 3 Bro. C. C. 217.

b. ORDER AND CONTRIBUTION.

By the Land Transfer Act, 1897, *s.* 2 (3), *In the administration of the assets of a person dying after the commencement of this act, his real estate shall be administered in the same manner, subject to the same liabilities for debts, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing therein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.*

1. Generally.

Principles.]—Held, that not only an heir, but a devisee or hæres factus shall have the benefit of the personal estate, though a widow, who claimed by the custom of York, be thereby prejudiced, sed quære. *Popley* v. *Popley*, 2 Ch. Ca. 84.

Hæres factus or devisee shall have the personal estate applied in ease of the real. *Pockley* v. *Pockley*. 1 Vern. 36; 2 Salk. 449. And see *Galton* v. *Hancock*, 2 Atk. 436.

If an heir pays the bond debt of his ancestor, the executor shall reimburse him so far as he has personal assets (*Armitage* v. *Metcalfe*, 1 Ch. Ca. 74); for by what means soever the heir became indebted as heir, the personal estate had the benefit of the debt contracted. *Anon.*, 2 Ch. Ca. 5.

The order of application to debts: 1st, the personal estate, unless exempted expressly, or by plain implication; 2ndly, estates devised for the particular purpose of paying debts; 3rdly, estates descended; 4thly, estates devised. *Manning* v. *Spooner*, 3 Ves. 117; 3 R. R. 67.

In the administration of assets, ordinarily the first fund applicable is the personal estate not specifically bequeathed; then land devised or ordered to be sold for payment of debts, not merely charged; then descended estates; then lands charged with the debts; the distinction is between a mere charge upon the real estates, and proposing the mode in which the debts are to be paid. *Harwood* v. *Oglender*, 8 Ves. 124.

The court always primarily takes the account of the personal fortune, and when the trust is clear to pay all debts generally, it does not intermeddle with the real estate, until the insufficiency of the personal appears; but if there be a doubt which fund is first to be applied, the court takes care immediately to preserve both. *Fingal* (*Earl*) v. *Blake*, 2 Moll. 50.

The general direction in a decree to apply the assets in a course of administration applies to equitable as well as legal assets. *Hartwell* v. *Chitters*, Ambl. 309.

The cases on, and the distinction between contribution and marshalling assets, reviewed. *Toombs* v. *Roch*, 2 Coll. C. C. 490; 15 L. J., Ch. 308; 10 Jur. 534. *And see* 2 Coll. C. C. 509, n.

Application of Lands — General Power of Appointment — Exercise by Will.]—Freehold estates over which a testator has a general power of appointment, and which he appoints by his will, are assets for payment of his simple contract debts, but are only applicable for that purpose after all the testator's own property has been previously so applied. *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; 22 L. J., Ch. 886.

A testator was seised of real estate in fee simple, and was possessed of personal estate, and had also a general power of appointment over other real estate; he executed his will, by which he devised his fee simple estate and bequeathed his personalty, and also executed his power of appointment over the other estate. The personal estate was insufficient for the payment of the testator's debts:—Held, that the devised real estate was primarily liable to the payment of the debts; and if insufficient, then that the appointed real estate was liable, whether the debts were by specialty or by simple contract. *Ib.*

—— **Devised for Debts.**]—Though a general charge of debts upon a devised estate will not prevent the previous application of an estate descended, yet if the devised estate is selected and appropriated to the debts, it is liable before the estate descended; but this arrangement does not bind the creditor. *Manning* v. *Spooner*, 3 Ves. 114; 3 R. R. 67.

Where the will, going beyond a mere charge, creates a particular fund for payment of debts, that shall be first applied in exoneration of descended estates, whether acquired after the date of the will or not, and of the personal estate even in favour of the next of kin taking it for want of disposition. Devise upon several limitations for life and in strict settlement, with a direction that incumbrances shall remain charged upon the estates respectively, until discharged by the several tenants for life, to whom they are respectively limited; all the rents and profits during the estate for life are to be applied to the incumbrances, principal as well as interest. *Milnes* v. *Slater*, 8 Ves. 295; 7 R. R. 48. And see *Powis* v. *Corbet*, 3 Atk. 556.

The rule as to the exoneration of estates descended by a devise for the payment of debts, holds even though the estate devised may be equitable assets, and the descended estates legal assets. *S. C.*, 8 Ves. 304.

Although generally descended estate shall be applied in exoneration of a devised estate, though under a charge for payment of debts, yet it shall not be so if the devised estate be expressly pointed out in aid of another fund provided for that purpose. *Donne* v. *Lewis*, 2 Anstr. 257.

A testator devised an estate (X.) to trustees, upon trust to raise (in aid of his personal estate) sufficient to satisfy his debts and the mortgages on his estate (Y.), which he devised to his daughters; and he declared that the incumbrances on Y. should be payable out of X. in exoneration of Y. On the testator's death, a real estate (Z.) descended to his heir-at-law:—Held, that as between X. and Z. the former was primarily liable to pay the mortgage and other debts. *Phillips* v. *Parry*, 22 Beav. 279.

—— **Charged with Debts.**]—Testator devised certain estates subject to a general charge for

payment of debts: he afterwards purchased another estate, which descended: this shall exonerate the devised, if the personal be insufficient to pay the debts. *Davies* v. *Topp*, 1 Bro. C. C. 524.

T. P., in 1832, devised and bequeathed all his real and personal estates to the use of his mother A. P. for life (subject to the payment of debts, &c.); and after her decease, he gave and bequeathed the farming stock, &c., upon the farm at F. unto his sister; and as to all his real estate, and the residue of his personal estate, the testator devised and bequeathed the same to the use of his three sisters E., J. and M. equally, absolutely. E. died unmarried in the lifetime of the testator. The debts of the testator, who died in November, 1838, greatly exceeded his personal estate. After the date of the will, the testator purchased other real estate, which he had not devised:—Held, that the estates which had descended must first be applied in payment of the debts charged upon the estate devised to A. P. for life: that if the descended estates were not sufficient to discharge the debts, then a sufficient part of the devised estate must be applied for that purpose; and that the lapsed remainder in one-third of the estate devised was liable to the charge of debts, on the same footing as the other two-thirds of the same estate. *Wood* v. *Ordish*, 1 Jur. (N.S.) 584.

Where freehold, copyhold and leasehold estates are devised, subject to a general charge for the payment of debts, and the freeholds and leaseholds are subject to mortgages, and there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts, as far as it will extend, and the surplus of simple contract debts is to fall proportionately on the freehold, copyhold and leasehold estates devised; then the specialty debts, including all mortgage debts, are to be satisfied out of the descended freehold estate, as far as it will extend, and the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold and leasehold estates devised. *Irvin* v. *Ironmonger*, 2 Russ. & M. 531.

Where testator charges some of his estates with the payment of judgment and bond debts, and charged another estate with a legacy for younger children, the estates charged with the debts failing to satisfy them:—Held, that they had priority over the legacy against the estate charged therewith. *Bourerie* v. *Norbury*, 3 Cl. & F. 247; 9 Bli. (N.S.) 611.

—— **Lands Descended.**]—General pecuniary legatees are to be preferred to an heir-at-law; a fortiori, a specific legatee of land; for it is a rule of law, every devisee is in nature of a purchaser. *Galton* v. *Hancock*, 2 Atk. 430; Ridgw. P. C. 301.

Assets descended on the heir must be applied to pay debts before the lands can be charged which are specifically devised. *Powis* v. *Corbet*, 3 Atk. 556. S. P., *Palmer* v. *Mason*, 1 Atk. 505; *Chaplin* v. *Chaplin*, 3 P. W. 367; *Reeves* v. *Newenham*, 2 Ridg. P. C. 11.

A mere charge upon a devised estate will not protect a descended estate from being applied first. *Milnes* v. *Slater*, 8 Ves. 304; 7 R. R. 48. S. P., *Davies* v. *Topp*, 1 Bro. C. C. 524.

Real estate devised, held liable to simple contract debts, under a direction in the beginning of the will that debts and funeral expenses should be first paid; that which descended to the heir by the failure of the devise to be first applied. *Williams* v. *Chitty*, 3 Ves. 546; 3 R. R. 71.

A. devised part of a freehold estate (the whole of which was subject to a mortgage), upon trust, to pay his widow an annuity, and out of the surplus income to apply so much as the trustees thought fit for the benefit of his children, and to apply the surplus in paying off the principal and interest of the mortgage debt, and after the death of the wife, and when the whole of the mortgage should be paid off, upon trust for his children. The rest of the property, subject to the mortgage, descended to the heir:—Held, that, against a purchaser from the heir, the descended estate must bear the burden of the mortgage in exoneration of the devised estates. *Waterhouse* v. *Clout, Booker, Ex parte*, 41 L. J., Ch. 223; 20 W. R. 277.

Bill against executor and heirs of obligor to be paid out of personal assets, and if not sufficient, out of real assets descended, decreed. *Walter* v. *Goring*, Dick. 299.

Bill by single bond creditor, for payment of what was due out of real assets descended. *Robinson* v. *King*, Dick. 297.

Testator devises all his real estate in trust for the payment of the debts. At the time of making his will, he is tenant in fee of several estates and tenant in tail, with remainders over, with remainder to himself in fee, of an estate called B., of which he afterwards suffers a recovery, and dies without republishing his will. Quære, whether, in the administration of his assets, the estate B. is applicable to the payment of his specialty creditors before the devised estates. *Vickers* v. *Oliver*, 1 Y. & C. C. C. 211; 11 L. J., Ch. 112; 6 Jur. 273.

In a creditors' suit, respecting the assets of a testator who died before the passing of the 3 & 4 Will. 4, c. 106, it was held that land devised to the heir was not, as between him and other devisees, applicable in payment of debts in priority to the land devised to the others. *Biederman* v. *Seymour*, 3 Beav. 368; 10 L. J., Ch. 177.

A testator died without heirs, seised of freehold which he had not charged with his debts:—Held, that as against the lord claiming by escheat they were assets for the payment of the testator's debts. *Evans* v. *Brown*, 5 Beav. 114; 11 L. J., Ch. 349; 6 Jur. 380.

Quære, whether such freeholds are liable to the debts in priority to, or pari passu with, lands specifically devised. *Ib.*

A testator gave all and every part of his real and personal property to his executors and trustees, to be disposed of by them according to the directions contained in his will. He directed his executors and trustees, as soon as possible after his death, to pay all his debts, funeral and testamentary expenses; he then gave all his personal estate to his brother absolutely, and he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts:—Held, that the specifically devised estates and the descended estates were liable ratably to the payment of debts. *Stead* v. *Hardaker*, 42 L. J., Ch. 317; L. R. 15 Eq. 175; 21 W. R. 258.

A father devised his freehold property at M. and at T. to his two children equally. He never had freehold property at M., but he had a share in real estate at R., which adjoined M., and in

the parish in which M. was situate :—Held, that the real estate at R. did not pass by the will, but descended to the heir-at-law, and that such descended estate was primarily liable, on the insufficiency of the personal estate, to the payment of debts to the exclusion of the devised estate at T. *Barber* v. *Wood*, 46 L. J., Ch. 728 ; 4 Ch. D. 885 : 36 L. T. 373.

The plaintiff, acting as solicitor of a banking firm, in order to prevent the taking out of circulation notes, issued in the lifetime of the testator, who was at the head of the banking concern, induced the mother and guardian of the testator's heir to forego proceedings to compel the application of the primary funds to the payment of the testator's debt, in exoneration of certain descended estate, by representing that such proceedings were wholly unnecessary, and that the property principally liable was abundantly sufficient for the payment of the testator's debts. The plaintiff afterwards filed a creditors' bill against J. W., the executor and devisee of the testator, and against the heir ; and, upon the bankruptcy of J. W., his assignees were brought before the court by a supplemental bill :—Held, that the plaintiff was entitled to the common decree against the personal and devised real estate of the testator ; but the bill, as against the heir, was dismissed with costs. *Jones* v. *Waters*, 2 Myl. & K. 610.

Where settlement was made on wife after marriage in bar of dower, &c., and by wife's waiving it, the lands would go to the heir to the prejudice of creditors ; she was decreed to have the estate for life, according to settlement, but that she should assign it over in trust for the creditors, who should convey to her a third for dower. *Mills* v. *Eden*, 10 Mod. 487.

General Legacies.]—Pecuniary and demonstrative legatees, with a deficient fund on which their legacies are charged, have a right to throw simple contract creditors on descended estates, so as to marshal the assets in their favour. *Sellon* v. *Watts*, *Smith* v. *Watts*, 28 Beav. 519 ; 9 W. R. 847.

A pecuniary legatee has no right to call upon a residuary devisee to contribute to the payment of debts. *Dugdale* v. *Dugdale*, 41 L. J., Ch. 565 ; L. R. 14 Eq. 234 ; 27 L. T. 706. S. P., *Collins* v. *Lewis*, L. R. 8 Eq. 708.

A testator, after giving a pecuniary legacy, devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts :—Held, that the real estate was not bound to contribute ratably with the legacy to meet the deficiency. *Ib.*

A testator made a general and absolute bequest of his personalty, followed by a specific devise of realty for payment of his debts. The realty so specifically devised being insufficient for the payment of debts :—Held, that the residuary real estate must contribute with the personalty. *Powell* v. *Riley*, 40 L. J., Ch. 533 ; L. R. 12 Eq. 175 ; 19 W. R. 869.

When the personal estate is insufficient for the payment of debts and legacies, pecuniary legatees and the residuary devisee contribute ratably to the payment of the debts which the general personal estate is insufficient to satisfy. *Hensman* v. *Fryer*, 37 L. J., Ch. 97 ; L. R. 3 Ch. 420 ; 17 L. T. 394 ; 16 W. R. 162.

It is still the rule in administering assets that when the residuary personal estate is insufficient to pay the costs of a suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees. *Tomkins* v. *Colthurst*, 1 Ch. D. 626 ; 33 L. T. 591 ; 24 W. R. 267.

When there is a bequest of pecuniary legacies and devises of real and residuary real estates, and an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to, to make up the deficiency. *Farquharson* v. *Floyer*, 45 L. J., Ch. 750 ; 3 Ch. D. 109 ; 35 L. T. 355.

Specific Legacies.]—It is the duty of executor, as far as possible, to preserve articles specifically bequeathed, according to the testator's wish ; and unless compelled, they ought not to apply them to the payment of debts. *Clarke* v. *Ormond* (*Earl*), Jac. 108 ; 23 R. R. 8.

When real estate is devised for payment of debts, and articles of personalty exempted, if the executors, to preserve the latter from the creditors, delay selling them, and in consequence a loss happens, it may be thrown on the real estate, semble. *Id.* 115.

A testator gave various annuities for lives, with bequests over of them, and charged them upon his freehold and leasehold estates. He gave all his real and personal property to trustees in trust to pay the rents of his freehold, copyhold and leasehold estates ; and the interest of all his stock in the public funds, with the interest of all mortgages, annuities and other securities of which he might die possessed, to his son for life, with a disposition in favour of the son's children, and after his death without any (which happened) the testator gave his freehold, leasehold and copyhold estates to one daughter and her issue, and all his funded property and other personal estate to another daughter and her issue :—Held, that the gift of the leasehold estates to the one daughter was specific, but that the gift of the funded property to the other was not, and that the latter was consequently chargeable with the annuities, in priority to the former. *Fielding* v. *Preston*, 1 De G. & J. 438 ; 5 W. R. 851.

A testator directed all his debts in the first place to be paid out of his personal estate, except his leaseholds, if sufficient ; if not, he charged his real estate therewith :—Held, that the specific legacies were liable to the payment of the debts in priority to the real estate. *Bateman* v. *Hotchkin*, 10 Beav. 426 ; 16 L. J., Ch. 514 ; 11 Jur. 809.

Specific legacies held to be exonerated from the payment of debts by devised real estates. *Plenty* v. *West*, 22 L. J., Ch. 185 ; 17 Jur. 9 ; 1 W. R. 3.

A specific legacy is not discharged from its liability to pay the testator's debts, although the personalty not specifically bequeathed is more than sufficient for that purpose, and although the specific legacy has been in consequence assigned and delivered by the executor to the specific legatee. *Davies* v. *Nicholson*, 2 De G. & J. 693 ; 27 L. J., Ch. 719 ; 5 Jur. (N.S.) 49 ; 6 W. R. 790.

A testator bequeathed leasehold property specifically to A., and he gave to B. the residue of his estate, which included other leasehold property. The leaseholds specifically bequeathed were assigned by the executor to A., who entered into possession. A debt having subsequently arisen in respect of a breach of the covenants in a lease which was included in the residuary

bequest, a bill was filed by the lessor of the premises comprised in such lease for the purpose of making the leaseholds specifically bequeathed liable to the payment of the debt due to him. There were no assets of the testator in the hands of his executor:—Held, that the leaseholds specifically bequeathed were liable to the payment of the debt. *Ib.*

A testator possessed of leasehold estates, some of which were mortgaged and others not specifically bequeathed the latter to the plaintiff, and the former to other parties, and after making other specific and pecuniary bequests, gave the residue of his personal estate to his wife, and directed his trustees and executors to receive the rents of all his property, and to apply the same in payment of his debts, together with the principal money and interest owing upon the mortgage of his property, and of the legacies and annuities given by his will, until the whole should be fully paid:—Held, that the bequest of the incumbered leaseholds was not a bequest of the equity of redemption only; that the relative values of all the leaseholds should be ascertained, and that the plaintiff was not entitled to be let into possession before she had contributed her ratable proportion in discharge of all the debts and legacies. *Harper* v. *Munday*, 7 De G. M. & G. 369; 2 Jur. (N.S.) 1147; 5 W. R. 62.

A., the executor of B., dealt with canal shares which had belonged to B., as his own property, and ultimately bequeathed them to C.; and he gave certain other chattels, which always had been his own property, to D., and died possessed of but very little other property, leaving some of B.'s debts unpaid, and a balance due from him in respect of his receipts and payments on account of B.'s estate. At his death the canal shares remained standing in B.'s name:—Held, that those shares were not exclusively applicable to pay B.'s unsatisfied debts; but that A.'s general personal estate must be applied first; and that C. and D. must contribute to make up the deficiency in proportion to the value of the articles bequeathed to them respectively. *Ibbetson* v. *Ibbetson*, 13 Sim. 545; 7 Jur. 1033.

Where, in a suit for payment of legacies, a contribution was directed, and one legatee afterwards became insolvent, rendering the fund through his default insufficient, a further contribution amongst the solvent ones directed. *Conolly* v. *Farrell*, 10 Beav. 142.

A testator directed that every legatee under his will and codicils should contribute 1 per cent. out of their legacies to A. and her children:—Held, that specific and residuary legatees and annuitants were liable to contribute. *Ward* v. *Grey*, 5 Jur. (N.S.) 948; 7 W. R. 569.

The testator directed a sum not exceeding 3,000*l.* to be applied by the trustees in rebuilding, enlarging and refurnishing his mansion house:—Held, that the amount was not liable to contribute. *Ib.*

Held, also, that A. took a life estate in the fund, with power of appointment among her children; and in default to the children equally. *Ib.*

Specific and Residuary Devises and Specific Legacies.]—A testator having two properties, Blackacre and Whiteacre, subject to one mortgage, made a specific devise of Blackacre, and a residuary devise of Whiteacre:—Held, that Whiteacre must exonerate Blackacre from the mortgage debt. *Brownson* v. *Lawrance*, 37 L. J., Ch. 351; L. R. 6 Eq. 1; 18 L. T. 143; 16 W. R. 926.

A. devised real estate upon trust for B. for life, and after B.'s death specifically devised part, and gave the residue to B. in fee:—Held, that B.'s life estate in the residue was applicable in payment of the testator's debts, in preference to the specifically devised estate. *Hibon* v. *Hibon*, 1 N. R. 532.

One seised in fee of some lands, and possessed by lease for years of other lands, devises the fee to A. and the lease to B., and dies indebted by bond. On a deficiency of assets, both the devisees shall contribute to the payment of the bond. *Long* v. *Short*, 1 P. W. 403; 2 Vern. 756. *And see* 9 Ir. Eq. R. 650.

A testator having made a particular devise of all his real estates, and having bequeathed several specific legacies, dies indebted by specialty and simple contract. His personal estate not specifically bequeathed is more than sufficient to pay his simple contract debts, but not sufficient to pay his specialty debts:—Held, that the amount necessary to complete the payment of the specialty debts must be contributed ratably by the specific legatees and devisees. *Toombs* v. *Roch*, 2 Coll. C. C. 490; 15 L. J., Ch. 308; 10 Jur. 534. *And see the cases cited*, 2 Coll. C. C. 509, n. S. P., *Gervis* v. *Gervis*, 14 Sim. 654; 16 L. J., Ch. 422; 11 Jur. 578; overruling *Cornewall* v. *Cornewall* (12 Sim. 298; 10 L. J., Ch. 364; 5 Jur. 744), contra.

—— **Heir Devisee.**]—Though the creditors of testator have a right to resort to the estates devised to the heir in priority to the other devised estates, yet the heir is entitled to contribution from the other devisees to the extent to which his estate may be exhausted by debts. *Biederman* v. *Seymour*, 3 Beav. 368; 10 L. J., Ch. 177.

Whether Residuary Devise Specific—Before the Wills Act.]—Every devise of land must be of necessity specific, whether in particular or general terms: otherwise as to personal property. *Howe* v. *Dartmouth* (*Earl*), 7 Ves. 147; 6 R. R. 96.

Devise of real estate, though in form residuary, is specific. *Hill* v. *Cock*, 1 Ves. & B. 175.

—— **Since the Wills Act.**]—Since the 7 Will. 4, & 14 Vict. c. 26, a residuary devise is still to be regarded as specific, the previous rule to that effect being unaffected by the act. *Hensman* v. *Fryer*, 37 L. J., Ch. 97; 3 L. R., Ch. 420; 17 L. T. 394; 16 W. R. 162. Reversing 12 Jur. (N.S.) 681.

A residuary devise of land is specific as well since as before the Wills Act, 7 Will. 4, & 1 Vict. c. 26, and consequently devised estates specifically mentioned in the will are subject, equally with residuary devised estates, to the payment of debts, which the personal estate is insufficient to satisfy. *Lancefield* v. *Iggulden*, 44 L. J., Ch. 203; L. R. 10 Ch. 136. Reversing 30 L. T. 156; 22 W. R. 726. S. P., *Pearman* v. *Twiss*, 2 Giff. 130; 29 L. J., Ch. 802; 6 Jur. (N.S.) 337; 8 W. R. 329. *Clark* v. *Clark*, 4 Giff. 702; 34 L. J., Ch. 477; 11 Jur. (N.S.) 820; 12 L. T. 485; 13 W. R. 735. *Eddels* v. *Johnson*, 1 Giff. 22; 27 L. J., Ch. 302; 4 Jur. (N.S.) 255; 6 W. R. 401. Contra, *Barnewell* v. *Iremonger*, 1 Dr. & Sm. 242; 30 L. J., Ch. 13; 8 W. R 740. *Daly* v. *Hartridge*, 1 Dr. & Sm. 236. *Rotherham* v. *Rotherham*, 26 Beav. 465; 5 Jur. (N.S.) 402. *Bethell* v. *Green*, 34 Beav. 302.

When the residuary personalty, after payment of the testator's debts, proved insufficient to pay the costs of a suit to administer the trusts of his will :—Held, that the deficiency must be borne by the specifically bequeathed personalty, the specifically devised realty and the residuary realty, ratably, according to value. *Jackson* v. *Pease*, L. R. 19 Eq. 96.

Capital and Income — Income during First Year.] — In administering an estate a proportionate amount of capital and the income actually made in the first year are to be applied in payment of debts, legacies, funeral and testamentary expenses and costs, and the profits made in a business are to be treated as income. The rule that in adjusting the accounts of a testator's estate between the tenant for life and the remainderman, the debts and legacies are to be taken as having been paid, not out of capital only, but with such portion of the capital as together with the income of that portion for one year is sufficient for the purpose, is not affected by the circumstance that the debts and legacies have been paid before the expiration of a year from the testator's death, and that the income from the continuance of the estate in the business carried on by the testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life. *Lambert* v. *Lambert*, 43 L. J., Ch. 106 ; L. R. 16 Eq. 320 ; 21 W. R. 748.

Where a testator has bequeathed legacies, and given his residue to a tenant for life, with remainder over ; executors, though, as between themselves and the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts and legacies, yet will be treated by the court, in adjusting the accounts between tenant for life and remainderman, as having paid the debts and legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for that purpose. *Allusen* v. *Whittell*, L. R. 4 Eq. 295.

—— **Application as between Principal and Interest of Debts.**]—Upon taking the accounts in a suit to administer real and personal estate, if a question arises between the tenant for life and the remainderman as to the proper mode of applying the personal estate, the court will, if the justice of the case requires it, for the purpose of seeing to what extent and in what form the real estate is to be exonerated by means of personalty, investigate the application of the personal estate, and proceed, as a general rule, upon the principle of applying the capital of the personal estate to pay the principal of debts, and the income of the personal estate to pay the interest of debts. *Shore* v. *Shore*, 26 L. J., Ch. 386 ; 5 W. R. 250.

Rents and Profits.]—Rents and profits of real estate descended are to be accounted for, and applied before inheritance sold and applied. *Rowe* v. *Beavis*, Dick. 178.

—— **Account—When Directed by Court.**]—In a suit for the administration of the real and personal estate of a deceased party, an account of rents and profits received since the deceased's death is never directed at the original hearing. *Schomberg* v. *Humfrey*, 1 Dr. & War. 411.

Such an account is only directed when, upon the cause coming back, the necessity for it is apparent. *Ib.*

In a creditors' suit, an account of the rents and profits received since the death, is never directed until the produce of the sale of the real estate proves insufficient for the payment of the debts. *Stratford* v. *Ritson*, 10 Beav. 25 ; 16 L. J., Ch. 176 ; 11 Jur. 177.

H., the husband of the testator's daughter, was one of the trustees and executors of his will, and also entitled to a life estate under a settlement, the funds subject to which consisted almost entirely of a large debt due from the testator. H. received the rents of the devised estates for a number of years. At the testator's death, the corpus of the estates was sufficient to pay debts and legacies. H. paid more than he received in respect of the personal estate, and treating him as having received the rent in right of his wife, and as only bound to keep down the interest on the debts and legacies as tenant for life, there was nothing due from him to the estate. The estate having become insufficient to pay the debts and legacies :—Held, that an account of rents had been properly directed against H., and that what was coming to him in respect of his life interest under the settlement was liable to be applied in payment of what was found due on such account, and that such liability had priority over the claims of judgment creditors of H., who had obtained a charging order on his life interest, and that it had priority over the claims of the trustees of his settlement for part of the settled fund received by him. *Stronge* v. *Hawkes*, 4 De G. & J. 632.

Where an estate was devised to I. subject to several charges, to one of which the devisee was entitled, it was held, that a sum for slave compensation which he received as "devisee" of his father, must, as between the several charges, be applied in reduction of the first charge of 10,000*l.*, and that the personal representative of I. or his father, must account for interest on that sum during the life of I. *Clarendon* (*Earl*) v. *Barham*, 1 Y. & C. C. C. 688 ; 12 L. J., Ch. 215 ; 6 Jur. 962.

Lapsed Interests.]—When there is a charge of debts, a share of realty which lapses to the heir will bear only its proportion of the charge. *Ryves* v. *Ryves*, 40 L. J., Ch. 252 ; L. R. 11 Eq. 539.

Real estate devised subject to payment of debts to one for life, with remainder to three persons as tenants in common where one of the shares in remainder lapsed :—Held, that the lapsed share was applicable for payment of debts in the same order as the devised estates, and not till after real estates, which descended as having been purchased after the will. *Wood* v. *Ordish*, 3 Sm. & G. 125. S. P., *Fisher* v. *Fisher*, 2 Keen, 610.

A lapsed share of a residue of real and personal estate devised, subject to the payment of debts, funeral and testamentary expenses, is not liable to the debts of the testator in exoneration of the rest of the residuary estate, but ratably with it. *Rathborne, In re*, 11 Ir. Ch. R. 141.

A testatrix, after directing payment of her just debts, funeral and testamentary expenses, gave her residuary and personal estate amongst four persons by name, one of whom died in her lifetime :—Held, that the lapsed share was not primarily liable for the cost of an administration suit, but that the costs must be paid before the

residue was divided. *Trethewy* v. *Helyar*, 46 L. J., Ch. 125; 4 Ch. D. 53. S. P., *Fenton* v. *Wills*, 47 L. J., Ch. 191; 7 Ch. D. 33; 37 L. T. 373; 26 W. R. 139. Contra, the dictum in *Gowan* v. *Broughton*, 44 L. J., Ch. 275; L. R. 19 Eq. 77; 23 W. R. 332.

The rule that a descended estate must exonerate a devised estate from the payment of the testator's debts and costs of an administration suit equally applies, whether the descended estate has been left undisposed of at the time of making the will, or whether it has become undisposed of through lapse. *Scott* v. *Cumberland*, 44 L. J., Ch. 226; L. R. 18 Eq. 578; 31 L. T. 26; 22 W. R. 840.

Paraphernalia.]—Where a man's real and personal estate are charged by his will with the payment of his debts, and afterwards turn out insufficient, his wife's jewels and paraphernalia should be sold towards making good the deficiency. *Parker* v. *Harvey*, 4 Bro. P. C. 609; 14 Vin. Abr. 458.

A real estate charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia. *Boyntun* v. *Boyntun*, 1 Cox, 106.

Jewels of the wife, though given by husband's will to her for life, shall not be sold for payment of husband's debts charged on a real estate in aid of personalty. *Boynton* v. *Parkhurst*, 1 Bro. C. C. 576.

Where husband's personal estate is not sufficient to pay his debts, wife cannot set up any claim to jewels, rings, pictures, dressing plate and other trinkets given her before marriage. *Ridout* v. *Plymouth* (*Earl*), 2 Atk. 104.

A. is principal in recognizance of 5,000*l*., and B. and C. are sureties. A. afterwards jointures his wife before marriage in some lands, without notice either to the wife or her friends of this recognizance, and devises his real and personal estate to B., one of his sureties, and dies: first, the personal estate of A., the principal, shall be applied towards this recognizance, then his land devised, the devisee being a volunteer, the paraphernalia of the wife of A., the principal, and lastly, the two sureties shall contribute to make up the deficiency. *Tynt* v. *Tynt*, 2 P. W. 542.

Assets Abroad.]—English subject, resident and dying in England, where his will was proved, but having debts and chose in action in Scotland:—Held, that the latter were distributable as the rest of his effects; debts follow the person of the creditors, not of the debtor. As to debts due to a freeman of London. *Thorne* v. *Watkins*, 2 Ves. Sen. 35.

Where a testator dies, leaving creditors and assets in England as well as in India, the creditors in England are not entitled to be satisfied out of the assets in England in priority of the Indian creditors. *Reynolds* v. *Lewis*, *Brett*, *In re*, 29 L. J., Ch. 296; 8 W. R. 272.

A testator domiciled in England died possessed of personal estate and also of real estates in Scotland. His will purported to deal with the Scotch real estates, but was inoperative to pass them, and they descended to the Scotch heir. A suit having been instituted for the administration of the testator's estate against the executors, one of whom was the Scotch heir, he elected to take the descended estates in opposition to the will, and gave up the legacy which had been bequeathed to him by the will:—Held, first, that the liability of the Scotch real estates to the payment of debts, as between the heir and the pecuniary legatees, must be determined by the law of Scotland, and not by the law of the country where the testator's estate was being administered. *Harrison* v. *Harrison*, 42 L. J., Ch. 495; L. R. 8 Ch. 342; 28 L. T. 545; 21 W. R. 164, 490.

Held, secondly, that as the law of Scotland threw the general debts primarily on the personal estate, and did not permit them to fall, directly or indirectly, on the real estate until the personal estate was exhausted, there could be no marshalling in the English court against the Scotch heir in favour of the pecuniary legatees. *Ib.*

Held, thirdly, that no part of the general costs of the suit could be thrown on the Scotch estates; and that the heir was entitled to his costs out of the personal estate except the extra costs occasioned by his election. *Ib.*

Where a party domiciled in England, but possessed of real estate in Scotland, died intestate, being indebted on bonds which were paid by the heir out of the proceeds of the real estate in Scotland:—Held, that the right which the heir in Scotland paying movable debts has there against the personal estate, may be made available in England, where the personal estate is primarily liable for the payment of all debts. *Winchilsea* (*Earl*) v. *Garetty*, 2 Keen, 293; 7 L. J., Ch. 99; 2 Jur. 367.

—— **Confiscated.**]—The plaintiff's testator's property in America being confiscated, subject to his debts, a creditor there ought first to apply to make that property available for payment of his debts before he sues him personally here. (Sed quære. *See* 6 Ves. 714.) *Wright* v. *Nutt*, 3 Bro. C. C. 326. *And see* ASSETS, X. *a*, 2, ante, col. 1428.

Personal Estate insufficient—Adjustment of Accounts between Tenant for Life of Real Estate and Remaindermen.]—A testator devised all his real estate (except two specified estates) to trustees, upon trust for his son for life, with remainder in strict settlement, and he devised the two specified estates upon similar trusts in favour of his two daughters respectively for life, with remainders to their respective issue. By a deed executed on the marriage of his son, the testator covenanted to pay to the son or his wife during their joint lives an annuity of 700*l*. The testator's personal estate proved insufficient to provide for the annuity:—Held, that the three real estates ought to contribute towards payment of the annuity ratably according to their respective values; and that each tenant for life would have a charge upon the corpus of the estate in respect of the proportion of the annuity paid by him or her, but would have to keep down the interest on the amount so charged. *Harrison, In re, Townson* v. *Harrison*, 59 L. J., Ch. 169; 43 Ch. D. 55; 61 L. T. 762; 38 W. R. 265. And see *Muffett, In re, Jones* v. *Mason*, 57 L. J., Ch. 1017; 39 Ch. D. 534.

2. Charge or Trust for Payment of Debts.

Charge of Debts—General Directions.]—A mere desire expressed by a testator in his will that his debts shall be paid, creates a charge on his real estate for their payment. *Wrigley* v. *Sykes*, 21 Beav. 337; 25 L. J., Ch. 458; 2 Jur.

(N.S.) 78 ; 4 W. R. 228. S. P., *Parker* v. *Marchant*, 1 Y. & C. C. C. 290 ; 11 L. J., Ch. 223 ; 6 Jur. 292.

The words "Imprimis, I will that all the debts that I shall owe at the time of my decease be discharged and paid," are sufficient to make the real estate liable, in case of a deficiency of personal assets. *Legh* v. *Warrington* (*Earl*), 1 Bro. P. C. 511.

Where a testator by his will had ordered his trustees to possess themselves of his estates and substance, and to pay debts, it was held that this was a charge on the real estate, and that the assets should be marshalled for the legatees, to let them in so far as the personal estate had paid towards the debts. *Foster* v. *Cook*, 3 Bro. C. C. 347.

Devise, after a direction that all the debts shall be paid, amounts to a charge. *King* v. *Denison*, 1 Ves. & B. 260 ; 12 R. R. 227. S. P., *Williams* v. *Chitty*, 3 Ves. 545 ; 3 R. R. 71 ; *Shalleross* v. *Finden*, 3 Ves. 738 ; 3 R. R. 75 ; *Withers* v. *Kennedy*, 2 Myl. & K. 607 ; 3 L. J., Ch. 29.

The words "I will and direct that my just debts, &c., be paid and satisfied" in the introductory part of a will, amount to charge of debts on real estates. *Clifford* v. *Lewis*, 6 Madd. 33 ; 22 R. R. 228.

Testator, by his will, confined exclusively to real estate, after devising same among the several members of his family, concluded by "desiring that all his just debts should be paid as soon as convenient after his decease" :—Held, that the debts were charged upon the real estate of the testator. *Harding* v. *Grady*, 1 Dr. & War. 430 ; 4 Ir. Eq. R. 371.

A testator began his will by directing that all his just debts, funeral and testamentary expenses should be fully paid and satisfied. He then devised all his real estate to his daughter and her issue in strict settlement ; and, after giving one specific and pecuniary legacy, he gave all the residue of his personal estate (after and subject to the payment of all his just debts, funeral and testamentary expenses, and the legacies before bequeathed) to his said daughter :—Held, that the concluding clause of the will was not sufficient to rebut the presumption arising from the first, of an intention to charge the real estate in aid of the personalty with the debts, and that, consequently, the real estate was equitable assets. *Price* v. *North*, 1 Ph. 85 ; 11 L. J., Ch. 68 ; 5 Jur. 1147. Reversing 4 Y. and C. 509.

A testator directed his debts to be paid by his executrix, and he devised his real estate to her for life, with power to mortgage it as far as should be needful for her maintenance and comfort :—Held, on a sale by the executrix for payment of the debts, that the title was too doubtful to be forced on the purchaser. *Cook* v. *Dawson*, 29 Beav. 123 ; 30 L. J., Ch. 311 ; 7 Jur. (N.S.) 130 ; 3 L. T. 801 ; 9 W. R. 305. Affirmed 3 De G. F. & J. 127 ; 30 L. J., Ch. 359 ; 4 L. T. 226 ; 9 W. R. 434.

Where a testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally upon the real estate, at least where the real estate is afterwards disposed of by the will. But an exception obtains, where the direction that the debts shall be paid is coupled with the direction that they must be paid by the executor. In that case, it is assumed that the testator meant that the debts should be paid only out of the property which by law passes to the executor. *Ib.*

Simple contract debts not charged on real estate, by will first directing that all his debts, &c. might be paid by his executors, all the real estate being specifically devised. *Powell* v. *Robins*, 7 Ves. 209.

A will began as follows : "In the first place I will, that all my debts and funeral charges be paid and discharged by my executors hereinafter named ; and I give and bequeath unto my eldest son Richard William, my estate at Shap, on condition that he make up the deficiency in the payment of the two legacies which I have left to my younger son and daughter" :—Held, that the testator's debts were not charged on the estate at Shap. *Willan* v. *Lancaster*, 3 Russ. 108 ; 27 R. R. 25.

A testator after directing that all his just debts should be paid by his executors, devised to his eldest son certain houses, subject, nevertheless, to his paying off the mortgage thereon, and then having devised to his other sons other houses which he had encumbered, and to his daughters certain houses which were free from encumbrance, empowered his executors to receive all rents due to his estate and pay his debts, and to use such means as should be necessary for recovering all money due to his estate, and also to grant possession to his devisees, and to reimburse themselves :—Held, not a general charge of debts on the whole of the real estate. *Wisden* v. *Wisden*, 2 Sm. & G. 396 ; 18 Jur. 1090 ; 2 W. R. 616.

—— **Express.**] — There is no substantial difference between case of real estate being charged with payment of debts, and where it is directed to be sold for that purpose. *Inchiquin* v. *French*, Ambl. 38 ; Ridgw. 230 ; 1 Cox, 1.

Distinction between a devise charged with debts, and on trust to pay debts. The former is a beneficial devise, subject to the particular purpose ; the latter limited to the particular purpose ; and therefore the interest, not exhausted, is a resulting trust for the heir. *King* v. *Denison*, 1 Ves. & B. 272 ; 12 R. R. 227.

Distinction between the expression of a desire that all debts shall be paid, followed by a gift of a particular estate for their payment, and a general charge of the real estate with the debts, followed by a particular provision for their payment. In the former, the general charge is qualified and limited to the particular estate, but in the latter it is not. *Wrigley* v. *Sykes*, 20 Beav. 337 ; 25 L. J., Ch. 458 ; 2 Jur. (N.S.) 78 ; 4 W. R. 228.

Whenever debts are directed to be paid they become a primary charge on the fund out of which they are so directed to be paid, unless there is something in the will to confine the generality of the charge. *Harding* v. *Grady*, 1 Dr. & War. 430 ; 4 Ir. Eq. R. 371.

Distinction between a charge on real estate for a specific purpose which fails, and a devise of real estate, with something in the nature of a charge excepted out of it. A charge of 4,000*l.* part of a larger charge on a devised estate towards paying the testator's sister a debt due to her on a note of hand. The testator only owed her 3,800*l.* on the note, but owed her besides 200*l.* :—Held, on the context of the will, that the whole was payable ; secus, on the mere language, unaided by the context. *Sutcliffe* v. *Cole*, 3 Drew. 135 ; 24 L. J., Ch. 486 ; 3 W. R. 265.

A testator devised certain equitable real estates to his executor as such, in trust for his wife and children, and bequeathed everything else to his wife, and he stated as follows, "My executors are charged with the payment of my

just debts, of which I shall leave an account with the letter to my wife" :—Held, that the testator's debts were charged on these real estates; and, secondly, that the charge was general, and not limited to those enumerated in the account. *Dormay* v. *Borradaile*, 10 Beav. 263; 16 L. J., Ch. 337.

A son died before his father, leaving a widow, to whom he gave all his property. The son's estate being insufficient for the payment of his debts, the father, by a codicil to his will, directed his trustees and executors to pay his son's debts, and named the son of his son residuary devisee and legatee. The true construction of the father's codicil is that he intended only the payment of such portion of the debts of the son, as his son's estate would be insufficient to pay. *Walker* v. *Lodge*, 3 Russ. 452.

—— **Specific Devises—Specific Bequest of Property charged by Testatrix in her Lifetime.**]—A testatrix, after directing that her debts should be paid as soon as conveniently might be after her decease, specifically devised all her real estate, and specifically bequeathed certain personalty which in her lifetime she had specifically charged with a debt :—Held, that such personalty must be applied in payment of the debt before the real estate could be resorted to, notwithstanding that the direction to pay debts was a constructive charge of debts on the latter. *Butler, In re, Le Bas* v. *Herbert*, 63 L. J., Ch. 662; [1894] 3 Ch. 250; 8 R. 504; 43 W. R. 190.

—— **Where Executors are Devisees.**]—Where there is a direction that the executors shall pay the testator's debts, followed by a gift of all the real estate to them, either beneficially or on trust, all the debts will be payable out of all the estate so given to them, unless upon the whole will a contrary intimation is clear. The same rule applies whether the executors take the whole beneficial interest, or only a life interest, or no beneficial interest at all. *Tanqueray Willaume and Landau, In re*, 51 L. J., Ch. 434; 20 Ch. D. 465; 46 L. T. 542; 30 W. R. 801—C. A. S. P., *Bailey, In re, Bailey* v. *Bailey*, 48 L. J., Ch. 628; 12 Ch. D. 268; 41 L. T. 157; 27 W. R. 909. *Henrell* v. *Whittaker*, 3 Russ. 343; 5 L. J. (O.S.) Ch. 158. *Finch* v. *Hattersley*, 3 Russ. 345, n. *Bridgen* v. *Lander*, 3 Russ. 346, n. *Dover* v. *Gregory*, 10 Sim. 393; 9 L. J., Ch. 81. *Dormay* v. *Borradaile*, 10 Beav. 263; 16 L. J., Ch. 337. *Hartland* v. *Murrell*, 27 Beav. 204. *De Burgh Lawson, In re, De Burgh Lawson* v. *De Burgh Lawson*, 58 L. J., Ch. 561; 41 Ch. D. 568; 37 W. R. 797.

Where a testator directs that his debts and funeral expenses are to be paid by his executors, it is prima facie to be considered that he means the payment to be made by them out of the funds which come to their hands as executors. Whether he intends that all property which he gives to his executors shall be subject to the payment of his debts and legacies, must be gathered from the whole will. *Wasse* v. *Heslington*, 3 Myl. & K. 495; 3 L. J., Ch. 221.

A preliminary direction by the testator that all his debts should be paid by his executors as soon as conveniently could be done :—Held, upon the intention, as shewn by the whole will, not to have the effect of charging the real estate therewith, whether devised to the executors or not. *Symons* v. *James*, 2 Y. & C. C. C. 301.

Testator devises to A. and B. (whom he appoints his executors), upon trust, to sell for such purposes as he shall hereafter appoint, and then directs his debts to be paid by his executors. Under this devise A. and B. are authorised to sell for payment of debts. *Barker* v. *Devonshire (Duke)*, 3 Mer. 310.

A testator devised all his property, real and personal, to A., B. and C., on trusts thereinafter mentioned; he then directed that his just debts should be paid by his executors thereinafter named, as soon as conveniently might be after his decease, and nominated A., B. and C. his executors :—Held, that there was a trust created for the payment of debts. *Bentley* v. *Robinson*, 10 Ir. Ch. R. 287.

A testator directed his debts and funeral expenses, and the charge of proving his will, to be paid by his executor thereinafter named, and then devised all his copyhold lands, &c., to his son, without any words of inheritance, and appointed him his sole executor and residuary legatee :—Held, that the son took the inheritance of the said copyhold lands charged with the testator's debts in the event of the personal estate being insufficient. *Doner* v. *Reynolds*, 4 Jur. 362.

In a suit for foreclosure, the executrix of a deceased mortgagor, who had devised the mortgaged premises, subject to the payment of debts, to his executrix for life, with remainder to his issue, has a power of sale, available for the plaintiffs in a creditor's suit, but not in a suit for foreclosure. *Bolton* v. *Stannard*, 27 L. J., Ch. 845; 4 Jur. (N.S.) 576; 6 W. R. 570.

—— **Where Executors are Devisees—Effect of Authority to Adjust and Pay all Claims upon Testator's Estate.**]—Testator, who died on the 7th of November, 1889, by his will, gave certain real estate, and also the residue of his estate of whatever nature, to two persons upon certain trusts, and he authorised his said trustees or trustee to release or compound any debts owing to him or his estate, or to give time, or take security for payment, "and to adjust and pay all claims made upon my estate." The two trustees were appointed executors of the will :—Held, that the will did not create a charge of debts upon the real estate. *Head's Trustees and Macdonald, In re*, 59 L. J., Ch. 604; 45 Ch. D. 310; 63 L. T. 21; 38 W. R. 657—C. A.

—— **Where one of the Executors is not Devisee.**]—Where introductory words in a will, directing payment of all the testator's just debts, were followed by specific devises to two of the executors, it was held, upon the whole context of the will, that the testator had not charged his real estate generally with the payment of debts. *Braithwaite* v. *Britain*, 1 Keen, 206.

A testator in the first place directs the payment of his debts and legacies by his executors afternamed. He afterwards devises a real estate to his son T. D. in fee, and in a subsequent part of his will names T. D. and another person, his executors, who both prove the will. The estate devised to T. D. not being a devise to the executors after-named, is not charged with debts and legacies. *Warren* v. *Davies*, 2 Myl. & K. 49; 2 L. J., Ch. 203.

A testator ordered his debts to be paid by his executors, and, after giving legacies, he gave the residue of his real and personal estate, subject as aforesaid, to A., and he appointed A. and B. executors :—Held, that if the legacies were

charged on the real estate, the debts must also be charged thereon, and that therefore A. was able to give valid receipts for the purchase-money of the real estate, which relieved a purchaser from the necessity of seeing to its application. *Dowling* v. *Hudson*, 17 Beav. 248.

Order made against trustees of a term, who did not object. *Fletcher* v. *Houghton*, 5 Ves. 550.

—— **Interest.**]—A provision by will for payment of interest of debts held not to extend to a debt by simple contract. *Tait* v. *Northwick* (*Lord*), 4 Ves. 816; 4 R. R. 358.

Devise in trust to sell and apply money to such persons as trustees should think had a just demand, &c., on A. at his death in equal degree and proportion, according to principal sum, as far as the money would extend, the securities would be delivered up, but the money should be received in no other way than as a voluntary bounty. The fund being more than sufficient is liable to interest of bonds to extent of penalties. *Aston* v. *Gregory*, 6 Ves. 151.

Charge by will on real estate of simple contract debts of another person, considered as a legacy carrying interest from the death of the testator at 4 per cent. *Shirt* v. *Westby*, 16 Ves. 393; 10 R. R. 210. S. P., *Spurway* v. *Glynn*, 9 Ves. 483; 7 R. R. 279.

Estate devised with direction that the executors should pay interest of a mortgage upon it out of the rents until the mortgage should be paid off, and that such mortgage should be the first which his executors should discharge from other sources mentioned in his will: the estate is liable to such interest for one year only from testator's death. *Beanland* v. *Hallewell*, C. P. Cooper, 344.

A testator directed his real estate to be sold "immediately, or as soon as conveniently might be," and applied in aid of his personal estate in payment of his debts; but until the settlement should be made as after directed, the rents were to be applied in keeping down the mortgages, and the residue to be paid to the persons entitled under the settlement. He then directed the unsold hereditaments to be settled on A. for life, with remainder over. The testator was greatly indebted on bonds, and his personal estate was largely deficient. More than a year elapsed before the sale of the real estates:—Held, that the interest on all the debts for the first year was payable out of the corpus of the real estate, but that the tenant for life was bound to keep down the subsequent interest. *Greisley* v. *Chesterfield* (*Earl*), 13 Beav. 288.

Direction in a will to pay and discharge all the just and lawful debts owing by a deceased brother at the time of his death:—Held, upon the terms of the will, and looking to the circumstance that the brother had been dead about forty years at the date of the will, to comprise debts, but not interest. *Askew* v. *Thompson*, 4 Kay & J. 620.

Extent—As regards Property Charged.]—A general charge of debts and legacies upon all the real estates of the testator, not annulled by a subsequent power to sell a particular estate only, and to apply the produce to the same purpose; but that estate was first applied. *Coxe* v. *Basset*, 3 Ves. 155.

Upon the construction of a will:—Held, that the effect of general words of charge at the commencement was not cut down by subsequent words. *Jones* v. *Williams*, 1 Coll. C. C. 156; 8 Jur. 373.

Testator having first directed his debts to be paid out of his real and personal estate, afterwards by a separate clause provided, that if his personal estate should fall short of paying his debts, then his executor should enter into possession of the real estate, and apply the rents in payment of the debts. The personal estate was sufficient:—Held, nevertheless, that such a trust had been created for payment of the debts out of the realty as to prevent the Statute of Limitations from running against the debts, and that the real estate remained liable to pay a simple contract debt left unpaid after distribution of the residuary personal estate. *Crallan* v. *Oulton*, 3 Beav. 1; 9 L. J., Ch. 319.

Direction to pay debts, then legacies to B., then devise of lands to A. and B., who were appointed residuary legatees and executors, and A. was directed to pay out of the rents and profits a particular charge:—Held, that this did not exempt the lands from liability to the other debts. *Forster* v. *Thompson*, 2 Con. & L. 568; 4 Dr. & War. 303; 6 Ir. Eq. R. 168.

Testator, after directing all his debts to be fully paid, devised his real estates to several different persons, and charged certain of them with specific sums:—Held, that those estates, as well as the others, were charged with the debts. *Taylor* v. *Taylor*, 6 Sim. 346.

A testator gave a life estate in his realty to his wife, subject to the payment of his debts, in exoneration of his personal estate, and gave her a life interest in his personalty, subject to the payment of his funeral and testamentary expenses; and he gave her a power of appointing the personalty by will among his sons, as she should think fit; and, in default of appointment, he gave the personalty to his sons in equal shares. He devised the realty, after the death of his wife, as to one part, to his eldest son, subject to the payment of half the debts left unpaid at the death of the wife; as to another part, to his second son, subject to the payment of one-third of the debts left unpaid at the same time; and as to another part, to his third son, subject to the payment of one-sixth of the debts left unpaid at the same time; and as to the remainder, to his fourth son. The widow, during her life, received more than enough from the rents for payment of the debts, but did not pay them all. After her death, on a bill filed, it was held that she took the life estate subject to the payment of the debts, and that her estate was liable to account for the money received by her during her life. *Jones* v. *Jones*, 10 Jur. 960.

R. N., by his will, gave all his personal estate to R. N. and J. N., that is to say (he then enumerated several particulars), in trust for the following purposes: that the same be not liable or resorted to for the payment of mortgages or bond debts, and charges thereinafter mentioned should be satisfied; and as soon as that could be effected, the same was to be resorted to in relief of his real estate. The testator then gave several legacies to his wife and children; and bequeathed the residue, after the respective charges thereby made thereon, to his eldest son:—Held, that the residue, as well as the enumerated articles, were subject to the charges in the will mentioned. *Nicholas* v. *Nicholas*, Taml. 269.

A. devised his estates to trustees for a term of

years, thereout to pay off all incumbrances for the time being secured on his "settled and unsettled estates." At the date of his will, amongst the settled estates was a renewable leasehold, which was settled upon the testator for life, remainder to his eldest son absolutely. The testator subsequently purchased the reversion expectant upon the determination of the lease, and he and his eldest son joined in a mortgage thereof to secure a part of the purchase-money, the equity of redemption being limited to the testator and his eldest son as joint tenants; and the surplus moneys, in case of sale under the power, were directed to be paid to the testator and his son according to their interests therein: —Held, that the estate was to be considered as one of the testator's "settled" estates, and that the mortgage debt was raisable by the trustees under the term of years. *Hastings* (*Lord*) v. *Ashley*, 30 Beav. 260; 8 Jur. (N.S.) 225; 10 W. R. 73.

A testator, by his will, made a general devise of his real estates to his nephews, charged with his debts and legacies. By a codicil, he devised a freehold house to A. B., it being his wish that she should reside therein if she should think fit: —Held, that the house was exempt from the charge of debts and legacies. *Wheeler* v. *Clay-don*, 16 Beav. 169.

A testator directed that the lands of C. should, as soon after his death as possible, be sold in the Incumbered Estates Court; and, after the payment of all his just debts, be equally divided between A. and B.; and he left legacies, and appointed B. residuary legatee and devisee of all his real, personal estate, and effects:—Held, that the will was an express dedication of the lands of C. for payment of debts. *West* v. *Lawday*, Ir. R. 2 Eq. 517; 16 W. R. 916.

Testator charged his real estate with 1,000*l.*, to be applied as the residue of his personal estate was thereinafter directed. He then gave the residue of his personal estate, after his debts, legacies and funeral expenses were paid, to certain trustees for the benefit of his relations in manner therein mentioned. The personal estate was deficient for payment of his debts. The 1,000*l.* is payable to the trustees for the relations, without being subject to the claims of the creditors. *Killet* v. *Ford*, 1 Cox, 442.

A testator devised an estate, H., and other estates, to A., charged with annuities; and an estate, Y., and his residuary real and personal estate to B., subject to the payment of his debts, funeral expenses and legacies; he afterwards revoked so much of the second devise as included Y., and devised it, subject to the same annuities, and in the same manner, as the estate H.:—Held, that the charge of debts, &c., on Y. was revoked. *Ravens* v. *Taylor*, 4 Beav. 425.

A testator being seised and possessed of certain freehold and chattel leases, devised as follows: "I give, devise and bequeath my farm of B. to my grandson M., and every kind of stock thereon, together with one-third of every other property that I now possess and am entitled to." He then made similar devises of others of the farms, and the remaining two-thirds of the residue to two other grandsons respectively. He then left 18*l.* a year to his wife, "to be paid to her during her life by my said three grandsons, share and share alike, or by their heirs or executors." He then directed 300*l.* to be invested on a certain event, "the said sum to be deducted equally from and out of the property herein first bequeathed to my said three grandsons, who, or their heirs, on the fall of any lease, are to be equal sufferers pursuant to their respective proportions." The testator, at the date of his will, was seised of the farm of G., but did not devise it by name:—Held, that either there was to be no contribution, but that each was to bear his own loss, or that the lands devised nominatim were those only which were to be contributory, and that, consequently, the farm of G. was not liable. *Spunner* v. *Dwyer*, 2 Con. & L. 432; 4 Dr. & War. 477.

Semble, that in the above case the claim was bad for uncertainty. *Ib.*

—— **Particular Estate Charged after General Directions.**]—A testator directed all his debts, legacies and funeral expenses to be paid as soon as conveniently might be after his decease. He then gave certain legacies, directing the legacy duty to be paid out of his estate and effects, and he also gave some specific legacies, which he declared should not be subject to the payment of his debts, legacies and funeral expenses. He then devised a particular estate in trust to pay his debts, legacies and funeral expenses, so far as his personal estate should not be sufficient:—Held, that, nevertheless, all his real estates were charged with his debts. *Graves* v. *Graves*, 8 Sim. 43; 5 L. J., Ch. 270.

The testator began his will by declaring that all his just debts, funeral and other incidental expenses should be paid with all convenient speed after his decease. By a codicil he devised a particular estate, upon trust in the first place to pay the annuity to his wife, and after certain payments to apply the surplus to the discharge of his simple contract debts:—Held, that the real estate was not charged with the payment of debts. Quære, whether the introductory words, without more, would have charged the real estate. *Dance* v. *Torrington*, 2 Myl. & K. 600.

The testator commenced his will with the words, "In the first place I direct my just debts, funeral expenses and the charge of proving this my will, to be duly paid." He then made several devises, and he gave to J. G. a small quantity of plate, together with the rents and profits of his freehold and leasehold premises, due and accruing up to the quarter's day next after his decease; which rents and profits he charged with the payment of his said debts, funeral expenses and the charges of proving his will:—Held, that real estates generally were not charged with payment of debts. *Palmer* v. *Graves*, 1 Keen, 546; 1 Jur. 164.

—— **Copyholds.**]—Where a testator, having both freehold and copyhold estates, charges his real estate with payment of his debts, if he has surrendered the copyhold to the use of his will, the freehold and copyhold shall be applied ratably; but if he has not surrendered the copyhold, it shall not be applied until the freehold is exhausted. *Growcock* v. *Smith*, 2 Cox, 397. S. P., *Rowley* v. *Eyton*, 2 Mer. 128; 16 R. R. 157. *Ronalds* v. *Feltham*, Turn. & R. 418.

Introductory words, referable to all testator's worldly estate, amounting to a charge, copyhold lands are liable as well as freehold. In this case there was a copyhold which had not been surrendered, this was also declared liable. *Coombes* v. *Gibson*, 1 Bro. C. C. 273. S. P., *Kentish* v. *Kentish*, 3 Bro. C. C. 257.

Devise by general words, viz., messuages, lands, tenement, and hereditaments, for payment of

debts, will include copyholds if required; and the want of a surrender will be supplied. *Kidney* v. *Coussmaker*, 12 Ves. 136; 2 R. R. 118.

After a general direction that debts, funeral and testamentary charges shall be paid, and a bequest of the personal estate subject to the payment of those charges, the testator, in case his personal estate should not be sufficient to discharge "the same," charged his freehold estate with payment "thereof" and "subject thereto," gave all his freehold and copyhold estates which he had surrendered, or intended to surrender, to the use of his will. The copyhold estates charged. *Noel* v. *Weston*, 2 Ves. & B. 269; 13 R. R. 79.

A testator by his will gave to his daughter A., so long as she should continue unmarried, all his copyhold estates situate at P., and also all his live and dead stock, furniture, moneys, and securities for money, after payment of his just debts, funeral expenses, and the costs of proving his will; and declared that, if A. should be married after his death, or die unmarried, the whole of the estates, with the live and dead stock, furniture and goods whatsoever, should be sold, and the proceeds arising therefrom be divided between B., C., and D.:—Held, that the testator had charged his copyhold estates with the payment of his debts. *Moores* v. *Whittle*, 22 L. J., Ch. 207.

—— **When Restricted to Income.**]—A direction in a will to pay debts out of rents and profits of real estate primâ facie charges the debts on the corpus, unless the will contains a context showing that annual rents and profits only are meant. *Metcalfe* v. *Hutchinson*, 45 L. J., Ch. 210; 1 Ch. D. 591. S. P., *Wragg* v. *Morley*, 14 W. R. 949.

Devise of freeholds of inheritance to trustees for 500 years, and subject to that term to the use of various persons successively for life, with remainder to the first and other sons of such several persons successively in tail male, with remainder to the daughters of such several persons successively in tail general, with remainders over. The trusts of the 500 years' term were declared to be, that the trustees of the term should, out of the rents, &c., of the hereditaments comprised therein, pay the several annuities mentioned in the will, and, subject thereto, should out of the residue of the rents and profits of the premises comprised in the said term, raise such sums, not exceeding 8,000*l.* in the whole, as should be necessary to pay such debts as might be owing by her late husband or by herself, and all which she directed the trustees to pay out of the said rents and profits as they should think fit, and as soon as convenient after her decease; and, subject to the several trusts of the said term, upon trusts to pay the residue of the net rents, &c., of the premises comprised therein unto the persons who for the time being should be next entitled to the reversion or remainder of the premises expectant thereon, under the foregoing limitations:—Held, that the testatrix did not intend the debts to be raised out of the corpus of the estate, but only that they should be discharged out of the annual rents and profits. Per Lord Chief Baron. This is a question of intention only. The cases shew that where the remainderman takes an estate of inheritance, unless there be something demonstrating a contrary intention, the court, in favour of the person entitled to the charge, if it be a gross sum, will raise it by sale or mortgage. The controversy becomes more important and critical where the remainderman is tenant for life only. It is a question materially affecting the interest of the devisee, whether the corpus of the estate is to bear the charge, or the devisee is to lose all benefit of his estate until the charge is satisfied. *Heneage* v. *Andover* (*Lord*), 3 Y. & J. 360.

A testator devised his freehold estates to trustees for 120 years upon trust that they should enter into possession of and manage them, and out of the rents and profits pay such of his debts as the personal estate should be insufficient to pay, and also pay thereout the interest on incumbrances, and 50*l.* a year to each of the acting trustees, and 200*l.* a year to B. for life, and should accumulate the residue of the rents and profits for twenty years after the death of the survivor of five persons named in the will, and apply the fund in discharge of the incumbrances on the estates. Subject to the term of 120 years he devised his said estates to B. for life, with remainder to his sons in tail male, with remainder to the plaintiff for life, with remainder to his sons in tail male, with remainders over. By a codicil the testator revoked the devise of his freehold estates for the 120 years' term, and instead, devised them to his trustees for 200 years, upon trust that they should raise out of the rents and profits such sums as they should in their discretion think necessary to be raised in aid of his personal estate for payment of his debts (other than his mortgage debts) and the legacies bequeathed by his will, and should pay the moneys to be raised accordingly: and should also out of the rents and profits raise 1,000*l.* annually until the death of B., and invest the same and accumulate the interest, and apply the trust fund in payment of incumbrances on the estates. Subject to the term of 200 years he devised his estates to B. for life, and after his death to the trustees for 120 years upon trust that they should enter into possession of and manage the estates, and out of the rents and profits pay the expenses of management, and invest and accumulate the residue of the rents and profits for twenty years after the death of the survivor of the five persons named therein, and apply the last-mentioned trust funds in payment of incumbrances. Subject to these charges the testator confirmed the dispositions made by his will. The personal estate was insufficient to pay the debts. B. survived the testator and died without issue. The plaintiff then became tenant for life in possession:—Held, that, according to the ordinary legal construction of the words in the codicil, the testator intended the deficiency between the personal estate and the amount of the debts to be raised by an assignment of the 200 years' term. *Fitzherbert* v. *Weld*, 24 W. R. 43.

The court accordingly declared that the debts other than mortgage debts, so far as the personalty was insufficient, were primarily charged on the corpus of the estate in exoneration of the income, and were raisable out of the corpus. *Ib.*

—— **Liability of Executrix Tenant for Life to recoup Corpus out of Income.**]—A testator bequeathed to his wife, subject to the payment of his debts, all the cash in his house at the time of his death, and directed that in case such money should be insufficient for such payment, the deficiency should be paid out of the rents,

dividends, and annual proceeds of all his estate. He also specifically bequeathed property to his wife during her life, and appointed her his executrix, and she paid his debts in part out of the corpus of his estate:—Held, that the words, "rents, dividends, and annual proceeds," were, having regard to the context, equivalent to "annual rents, dividends, and proceeds," and that the direction for payment of debts thereout did not create a charge upon the corpus of the estate; but, held, that as the debts had been in fact partially paid out of corpus, and the testator had not provided for such an event, the executrix could not be called upon to recoup the corpus out of the income of her specifically bequeathed property. The principle of *Tewart* v. *Lawson* (L. R. 18 Eq. 490) adopted and followed. *Green, In re, Baldock* v. *Green*, 58 L. J., Ch. 157; 40 Ch. D. 610; 60 L. T. 225; 37 W. R. 300.

What Debts included.]—The whole will must be looked to for the intention of the testator; and though there is a direction to pay all debts or legacies, yet, if there is an intention shewn to throw a particular debt or legacy upon the real estate, the court is bound to give effect to it. *Bateman* v. *Roden* (*Earl*), 1 Jo. & Lat. 356; 7 Ir. Eq. R. 240.

The expression in a will, "all my just debts," includes all the testator's debts whenever and wherever contracted, and therefore includes a debt contracted by him after the making of the will, and contracted in a country other than that of his domicil, and secured upon property situated in that other country. *Maxwell* v. *Maxwell*, 39 L. J., Ch. 698; L. R. 4 H. L. 506; 23 L. T. 325; 19 W. R. 15.

The burden of shewing that the words have a less extensive meaning lies on him who asserts their restricted operation. *Ib.*

Real estate under a charge by a will duly attested, liable to debts afterwards contracted, and legacies by an unattested instrument, even to the witnesses to the will. *Sheddon* v. *Goodrich*, 8 Ves. 481.

—— **Debts under Bankruptcy—Unpaid Balance of.**]—A. and B. having been bankrupts in 1822, B. the survivor, in 1851, by his will directed his executors and trustees to pay his just debts, including the unpaid in full debts proved under the bankruptcy; and he directed his executors to pay to the official manager of the bankruptcy, or to some authorised person to be appointed by the Court of Chancery, in trust for all the creditors under the commission, so much money as would make the dividend on the estate equal to 20*s.* in the pound on all the debts so proved:—Held, that the direction to pay must be regarded as a bounty, not only in favour of those creditors who survived B., but of the representatives of those who predeceased him, and that the official assignee, and the joint estate, was entitled to receive the amount found due to all the creditors, less the amount of legacy duty. *Turner* v. *Martin*, 7 De G. M. & G. 429; 26 L. J., Ch. 216; 3 Jur. (N.S.) 397; 5 W. R. 277.

—— **Landlord and Tenant — Covenant for Quiet Enjoyment.**]—A lessor covenanted with his lessee for quiet enjoyment of the devised premises, and afterwards devised his real estate, subject to and charged with the payment of his debts. After the death of the lessor, the lessee was evicted, and brought his action of covenant against the executors of the lessor, who pleaded plene administravit, whereupon the lessee took out judgment of assets quando, &c., and procured the damages to be assessed upon a writ of inquiry. He then filed his bill against the devisees of the lessor for satisfaction of the damages and costs out of the real estate of the lessor devised by his will:—Held, that although damages recovered in an action of covenant, brought in respect of breaches of covenant happening after the death of the testator, were not a debt within the Statute of Fraudulent Devises, 3 & 4 Will. & M. c. 14, yet they were a debt payable out of the real estate of the testator under the charge of debts thereon created by his will. *Morse* v. *Tucker*, 5 Hare, 79; 15 L. J., Ch. 162; 10 Jur. 173. S. P., *Bermingham* v. *Burke*, 2 Jo. & Lat. 699; 9 Ir. Eq. R. 86.

—— **Mortgage Debts.**]—A father, having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money. By his will, he directed his debts to be paid, first out of the residue of his personal estate, then out of his money in the funds, and lastly out of his residuary real estates:—Held, that the mortgaged estate was not to be exonerated, from the portion, out of the personal estate. *Graves* v. *Hicks*, 6 Sim. 398; 4 L. J., Ch. 239.

Estate devised, with direction that the executor should pay the interest of a mortgage upon it out of the rents until the mortgage should be paid off, and that such mortgage should be the first which the executors should discharge: the estate is liable to such interest for one year only from testator's death. *Beaulaud* v. *Hallewell*, C. P. Cooper, 344.

And see further, EXONERATION OF PERSONALTY (Real Estate Charges Acts), post, col. 1505.

—— **Adoption of Debt.**]—A., who had a life interest in certain estates, gave a bond to a creditor, and a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets real or personal. B., his son, the first tenant in tail of the estates, entered into possession, and expressed, in letters to the creditor, a wish to pay his father's debts, but would not give any security for them. B. made a will, in which reciting his own wish, and a promise in conformity with it, made by him to his father and mother, he said, "And in case I should not be able to fulfil my intentions during my lifetime, and that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, and also all the debts of my late father A., which remain unpaid at the time of my decease, upon all my real estates wheresoever," &c. He then directed his trustees to stand seised of all his estates, "subject, in manner aforesaid, to the payment of all my just debts, and to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustees under the son's will:—Held, that the debts of the father which were not barred by the Statute of Limitations at the death of the father, were charges on the real estates of the son. *O'Connor* v. *Haslam*, 5 H. L. Cas. 170.

A testator directed his trustees to raise, by mortgage of all or any part of his hereditaments thereinbefore devised, any sum or sums of money, not exceeding 20,000*l*., and to apply the same in liquidation of the debts or engagements of another, as to them should seem expedient or proper. The trustees refused to raise the money without the sanction of the court:—Held, first, that the trustees had not by their refusal to raise the money without the sanction of the court abandoned their power of selection among the creditors; secondly, that the power of selection was not confined to debts in existence at the death of the testator; thirdly, that creditors whose debts, at the time of the testator's death, were barred by the Statute of Limitations, were excluded from the benefit of the trust. *Joel* v. *Mills*, *Hervey* v. *Mills*, 30 L. J., Ch. 354; 7 Jur. (N.S.) 389; 3 L. T. 882; 9 W. R. 298.

A rector of a parish died insolvent, leaving the rectory house dilapidated. He was indebted to W., who, with other creditors, received a composition for their debts from the widow and administratrix of the deceased rector, and they executed a general release by signing their names against the amount stated in a schedule. W. succeeded to the rectory, and he made a further claim of 200*l*. against the estate of the insolvent for dilapidations. The insolvent's widow afterwards, by her will, charged her real and personal estate with payment of her husband's debts. In a suit in equity for the administration of her estate:—Held, that the release discharged all the claims of W. against the estate of the insolvent, and that the claim for dilapidations was not payable under the will of the testatrix. *Bissett* v. *Burgess*, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur. (N.S.) 1221.

A testator, as surety for his sons A. B. and C. D., mortgaged a particular estate to secure to E. F. the payment of 2,500*l*. due from his sons to E. F., and A. B. and C. D. gave the testator a bond to indemnify him in respect of the mortgage. The testator, by his will, devised this particular estate by name to A. B., and gave the residue of his estate to trustees, on trust to pay his funeral and testamentary expenses and all his debts, and, in particular, all sums which might be charged upon the property devised to A. B.:—Held, that the testator took the debt on himself, and that the 2,500*l*. was payable out of his estate, so as to exonerate the principal debtors, his sons A. B. and C. D. *Musket* v. *Cliffe*, 2 De G. & Sm. 243; 17 L. J., Ch. 269; 12 Jur. 739.

Contribution.] — Testator devised an estate to trustees upon trust to raise thereout one moiety of the legacies given by his will, and one moiety of such sums as might be requisite, with his personal property, to pay his debts; and, subject thereto, to convey the same to his eldest son, and his issue in the manner therein mentioned. In like manner he devised three other estates to trustees, upon trust, to raise thereout respectively, one-fifth, one-tenth, and one-tenth of his debts and legacies; and, subject thereto, to convey the same respectively to his second, third, and fourth sons and their issue. He then devised another estate to trustees, upon trust, to raise thereout one-tenth of his legacies; and, subject thereto, to convey same to his fifth son and his issue, as therein mentioned; and he directed that his personal estate, not specifically bequeathed, should be applied in payment of his debts; and that such further sum as might be requisite to pay his debts should be raised out of his landed property in the proportions above mentioned:—Held, that the estate devised to the fifth son was charged with one-tenth of the deficiency of the personal estate to pay the debts. *Purcell* v. *Blennerhassett*, 3 Jo. & Lat. 24; 9 Ir. Eq. R. 103.

A testator by an imperfect passage referred to a trust deed for payment of his debts; and his desire that said deed, notwithstanding his death before payment of all his debts, out of the produce of his estates, should contribute ratably to the payment of his debts in proportion to the annual profits now arising from each part respectively, and confirmed the deed, and charged all his estates with the debts then, or which should thereafter be due by him, and, subject to said debts in manner aforesaid, gave the estates to different devisees. He subsequently executed a mortgage for the same purposes as the trust deed, and after that republished his will by a codicil, giving the estates to the same uses, intents, and purposes mentioned in his will:—Held, that the estates should contribute in proportion to the annual profits at the date of the will, and not in proportion to their value at the testator's death. *O'Dell* v. *Harte*, Beat. 449.

Testator devised lands to each of his sons, F., J., S., and P., and directed one-half of his debts to be paid by J., S., and P. equally, and the other half by F.; and he charged the lands devised to them with his debts in these proportions. A creditor of the testator filed a bill in 1818 for the administration of his estate. By the report it appeared that J. had overpaid his share of the debts; S. had paid his share, with the exception of a small sum, which was shortly afterwards paid; and large sums were still due by F. and P. By the final decree in 1822, F. and P. were directed to complete the payments to be made by them, or in default, that their lands should be sold. The present supplemental bill was filed in 1839, and in the prosecution of that suit, it appeared that F.'s share of the lands never was sufficient for the payment of his portion of the debts:—Held, that the lands devised to J., S., and P. are liable to contribute ratably to make up the deficiency occasioned by the original insufficiency of F.'s estate to answer the demand on it, and also to the costs of the suit. *Newby* v. *Drew*, 1 J. & L. 445; 7 Ir. Eq. R. 49.

Statute of Limitations — Debts barred as against Testator.]—A devise in trust for payment of debts does not revive a debt upon which the Statute of Limitations had taken effect by the expiration of time, before the testator's death. *Burke* v. *Jones*, 2 Ves. & B. 275; 13 R. R. 83.

Prior to the statute 37 & 38 Vict. c. 57, s. 10, a testamentary charge of debts upon land was equivalent to a trust for payment of such debts. *Hargreaves* v. *Michell*, 6 Madd. 326; 23 R. R. 231.

Costs.]—Where a testator devises an estate subject to a charge, he not only gives the money charged, but the costs of raising it. *Buckley's Trusts*, *In re*, 22 L. J., Ch. 934; 17 Jur. 478.

On a devise of copyhold to trustees to permit A. to receive the rents, &c., for life, and afterwards to sell and divide the proceeds amongst his

children; the testator then disposed of his residuary estate, "charged with debts, costs, and charges of proving and executing the will": —Held, that the payments on the admission of the trustees, were a charge on the copyhold, and not part of the costs, &c., expressed in the will. *Cole* v. *Jealous*, 5 Hare, 51.

A. devised his real estate to F., under the burden of his just debts due at his decease, which debts were not to diminish his personal estate. F. was also appointed executor, and as such paid debts of the testator, but incurred costs amounting to a considerable sum in defending the personal estate against unjust demands of creditors:—Held, in D. P. by a majority, that F. could not charge the costs on the real estate, because costs incurred in resisting unfounded claims of debts were not comprehended in the description of just debts of the testator due at his decease. *Lovatt (Lord)* v. *Fraser*, L. R. 1 Sc. App. 24; 15 L. T. 77.

Held, by Lord Kingsdown, dissent., that such costs as were properly incurred by the executor in such litigation were chargeable on the real estate, for the debts include the costs of ascertaining their amount. *Ib.*

A testator devised two estates in different ways, and he charged one only with the payment of his debts, funeral and testamentary expenses. In a creditors' suit, both estates were sold for payment of the debts:—Held, that the charged estate was primarily liable for the costs of suit. *Wilson* v. *Heaton*, 11 Beav. 492.

The general personal estate not specifically bequeathed applied first in payment of all the costs, except of inquiries as to a guardian and maintenance for a specific legatee, and then to the general legacies. *Barton* v. *Cooke*, 5 Ves. 461.

Mixed Fund.] — Where a testator forms a mixed fund of real and personal estate by a direction that the real estate shall be sold, and that the surplus proceeds shall go with and be considered part of his residuary personal estate, such surplus proceeds are charged with the payment of his debts, and semble with all other payments to which the personal estate is liable. *Kidney* v. *Coussmaker*, 1 Ves. J. 436; 2 R. R. 118. Affirmed, 7 Bro. P. C. 573.

Where a testator not only makes a common charge of debts and legacies upon his real and personal estate, but also directs that his real estate shall be sold, and the proceeds be deemed part of his personal estate, the real and personal estate shall, as between the heir-at-law and the next of kin, bear the charges pari passu. *Simmons* v. *Rose*, 6 De G. M. & G. 411; 25 L. J., Ch. 615; 2 Jur. (N.S.) 73. Affirming 21 Beav. 37.

Semble, it makes no difference in the above proposition whether the question arises in a case of intestacy as to residue, or in a case of lapse. *Ib.*

The heir is not entitled to an inquiry as to the relative value of the real and personal estates, with a view to ascertain the amount for which he is liable to contribute, but a sale of such real estate must be made. *Ib.*

Where a testator creates a mixed and general fund from the real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estates must contribute in proportion to their relative amounts to the payment of the debts and legacies; and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, and as far as it is composed of personal estate, to the next of kin. *Roberts* v. *Walker*, 1 Russ. & M. 752. S. P., *Att.-Gen.* v. *Smithgate*, 12 Sim. 77; 12 L. J., Ch. 148. *Robinson* v. *London Hospital Governors*, 10 Ha. 19; 22 L. J., Ch. 754.

If a testator blends the proceeds of his real and personal estate into one fund, and makes a charge upon the mixed fund, and a devastavit of the personal estate occurs, or the testator, by a codicil, devises the real estate to another person free from the charge, the charge does not fail proportionably, but must be raised out of the remaining estate. *Tatlock* v. *Jenkins*, 1 Kay, 654; 23 L. J., Ch. 767; 18 Jur. 891.

Testator gave all his real and personal estate to his executors in trust to pay legacies, and after a particular disposition, gave the residue of his property in trust for his next of kin, directing his executors to pay any debts upon any evidence they think proper, except the claims mentioned in the margin: — Held, a general conversion into a mixed fund, applicable to all the debts, none being mentioned in the margin, on evidence satisfactory to the executors, although not strictly legal. *Mildred* v. *Robinson*, 19 Ves. 586.

—— **What Words will Create.**]—Real and personal estate devised to the executor in trust, to pay debts and legacies, the rest and residue to himself, the only purpose of devising the real appearing to be to insure payment of the debts, without any intention to disinherit the heir: it was held only a charge, and that the heir was entitled to the surplus of the real estate. *Halliday* v. *Hudson*, 3 Ves. 210.

Testator being possessed of real and personal estate, directed the latter to be invested in government securities, the interest whereof, with all the rents and profits from freehold, copyhold, or leasehold property, after payment of all his debts, &c., he gave and devised upon certain trusts: — Held, that this did not evidence a sufficient intention to create a mixed fund, so as to exempt the application of the personal estate in the first instance from the discharge of his debts. *Tidd* v. *Lister*, 3 De G. M. & G. 857; 23 L. J., Ch. 249; 18 Jur. 543.

A testator gave and devised to his executors his freehold house, and all his other property he might die possessed of, in trust for the purposes of his will:—Held, that he had not created a mixed fund. *Ellis* v. *Bartrum*, 25 Beav. 110.

Where a testator creates for purposes of disposition a mixed fund of the proceeds of realty directed to be converted and personalty, the personalty is not exempted from its primary liability to debts, &c., unless these are directed expressly or by necessary implication to be paid out of the mixed fund. The mere fact that the will contains a constructive charge of debts upon real estate will not amount to such a direction. *Luckcraft* v. *Pridham*, 48 L. J., Ch. 636.

The costs of an action for executing the trusts of a will which bequeaths realty and personalty together as a mixed fund by a disposition that fails as to part, are borne (according to *Eyre* v. *Marsden*, 4 Myl. & C. 231) ratably by the part effectually given and that which lapses, and this

notwithstanding that the whole may be vested in trustees. *Ib.*

—— **Payment out of Personal Estate—Contribution by Realty—Interest.**]—A testator by his will declared in effect that his debts, legacies, funeral and testamentary expenses, and the costs, charges, and expenses incidental to the execution of the trusts of his will, should be paid ratably out of all his estate, real and personal. In the administration of his estate by the court, the debts, &c., were paid out of the personalty, but without prejudice to the liability of the realty. On the further consideration of the action:—Held, that the real estate must make good to the personal estate its ratable proportion of the amount paid out of the personal estate for debts, &c., with interest. *Ashworth* v. *Munn*, 56 L. J., Ch. 451; 34 Ch. D. 391; 56 L. T. 86; 35 W. R. 513.

—— **Resulting Trust.**]—Where a testator creates a mixed and general fund from the real and personal estate, and directs that fund to be applied in payment of debts and legacies, the real and the personal estates must contribute in proportion to their relative amounts to the payment of the debts and legacies; and if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to the heir, and as far as it is composed of personal estate, to the next of kin. *Roberts* v. *Walker*, 1 Russ. & M. 752.

A testator devised his real estates to A. and B., in trust to sell and pay off all incumbrances thereon, and stand possessed of the residue "as part of his personal estate." He bequeathed his personal estate to the same persons, in trust to convert, and with the produce thereof, and of the sales of his real estates, to pay his debts, &c., and the legacies, and to pay the residue to whom he should give the same by codicil. He made no gift of the residue:—Held, first, that the incumbrances were payable out of the real estate; secondly, that the debts and legacies were payable pari passu out of the mixed fund composed of the produce of realty and personalty; and, thirdly, that of the surplus, the part arising from realty belonged to the heir, and that from the personalty to the next of kin. *Shallcross* v. *Wright*, 12 Beav. 505.

A direction that the proceeds of the real and leasehold estate should be considered as part of the personal estate does not take away the right of the heir: nor does the addition to that direction that the real estate should be taken to be personal estate, "to all intents and purposes," take away that right. *Robinson* v. *London Hospital*, 10 Hare, 19; 22 L. J., Ch. 754.

And see further cases under CONVERSION AND RE-CONVERSION, ante.

Other Matters.]—Devise for payment of debts, the trustees convey to A. for the purpose of the trust; A. mortgages to several persons who have notice of the trust; these mortgages are good. *Hardwick* v. *Mynd*, 1 Anstr. 109; 3 R. R. 562.

3. Exoneration of Personalty.

(a) *Apart from Statute.*

Generally.]—Personal estate primarily liable to testator's debts, however strongly the real estate is charged for the purpose, unless a clear intention is manifest to exempt it. *Ancaster (Duke)* v. *Mayer*, 1 Bro. C. C. 454. S. P., *Noke* v. *Darby*, 1 Bro. P. C. 506. *Tait* v. *Northwick (Lord)*, 4 Ves. 816; 4 R. R. 358. *Hartley* v. *Hurle*, 5 Ves. 540; 5 R. R. 113. *Bridges* v. *Phillips*, 6 Ves. 567. *Watson* v. *Brickwood*, 9 Ves. 447. *Aldridge* v. *Wallscourt (Lord)*, 1 Ball & B. 312. *Stapleton* v. *Stapleton*, 2 Ball & B. 523. *Greene* v. *Greene*, 4 Madd. 148; 20 R. R. 284. *Driver* v. *Ferrand*, 1 Russ. & M. 681. *Walker* v. *Hardwick*, 1 Myl. & K. 396; 2 L. J., Ch. 104. *Henry* v. *Henry*, Ir. R. 6 Eq. 286. *Inchiquin (Lord)* v. *French*, Ambl. 33; 1 Cox, 1; Ridgw. P. C. 230. *Samwell* v. *Wake*, 1 Bro. C. C. 144; 2 Dick. 597.

In order to exonerate personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention; a declaration plain, or necessary inference tantamount to express words. It is impossible to define what circumstances will be sufficient to shew this intention, which must arise in every case, from the context of the will. It is not required that the intention should be so manifested as that all persons cannot fail to agree with respect to it, but so as to convince the mind of the judge deciding the particular question. It must be an intention, not only to charge the real estate, but to discharge the personal. Circumstances from which an inference has been ordinarily raised, as that of the same person being constituted trustee of the real estate and executor, the personal estate being given as a residue, or as a personal estate generally, or after an enumeration of particulars, the residuary legatee being also devisee of the real estate, or of part, for life, or otherwise, &c., are circumstances entitled to consideration only in reference to the context of every particular will in which they occur. The amount of the personal estate is not a circumstance to be inquired into, so as to furnish a ground for construction. *Bootle* v. *Blundell*, 1 Mer. 193; 19 Ves. 517; 15 R. R. 93.

Personal estate may be exempted from the payment of debts, and without express words to that effect, upon the clear intention of the testator. *Dawes* v. *Scott*, 5 Russ. 32.

In order to exonerate personal estate it is not necessary that there should be a gift over. *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; 13 L. T. 83; 13 W. R. 985.

The personal estate, being the proper and primary fund for the payment of debts and legacies, can be exempted only by express declaration, or plain and unequivocal manifestation of intention, and neither a charge, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate. *Tower* v. *Rous (Lord)*, 18 Ves. 132; 11 R. R. 169.

The circumstance that the residuary legatee is the first taker of the real estate, sometimes held a ground for exempting the personal. *Id.* 140.

Testator gave to his wife the third part of all his property, that should become due to him after his decease: then, after giving some legacies, he gave all the residue of his estate, in general words, subject to the payment of all his debts, funeral expenses, and legacies, upon trust to collect the same. The wife entitled to a third of the personal estate, subject to the debts, but not to the legacies. *Reed* v. *Addington*, 4 Ves. 575, 576.

A., by will, gives all his personal estate to his three sisters, equally to be divided between them, and (being indebted by simple contract, bond, and mortgage) gives his real estate to four sons,

chargeable with his just debts; and makes his sisters his executrixes. The personal estate shall be applied in exoneration of the real, especially as one of these funds must be exhausted. *Bromhall* v. *Wilbraham*, Cas. t. Talb. 274.

Devise of real estate to testator's wife, her heirs and assigns, in trust, by sale of so much and such part of the premises as should be necessary to advance and raise so much money as would pay off and satisfy all his just debts and funeral expenses, and all the residue to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco-box, and the residue of his personal estate whatever to his wife for ever, and appointed her executrix:—Held, the personal estate not exonerated from the payment of debts. *Stephenson* v. *Heathcote*, 1 Eden, 37.

Testator gave his real and personal estate to persons whom he afterwards appointed his executors, in trust in the first place to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient, then to raise the deficiency by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not expressly declare any trust of his personal estate:—Held, that the personal estate was primarily applicable to the payment of the testator's debts. *Rhodes* v. *Rudge*, 1 Sim. 79; 5 L. J. (o.s.) Ch. 17.

Testator gave to his wife certain articles of his personal estate, which he mentioned specifically, and also certain portions of his real estates, free from the mortgages thereon, and the benefit of certain contracts which he had entered into for the purchase of other real estates to A. B. in trust to sell, and out of the proceeds to pay, in the first place, his funeral and testamentary expenses, his debts due on the mortgages of the estates devised to his wife, the sums due on the contracts, and all his other debts; and, in the next place, he directed certain sums to be paid out of the proceeds to different persons, and gave the residue to C. D., and appointed his wife sole executrix:—Held, that the personal estate was exonerated from the debts. *Blount* v. *Hipkins*, 7 Sim. 43; 4 L. J., Ch. 13.

A testator devised all his real property to trustees, upon trust, in the first place, subject to the payment of his funeral expenses, of any debts, and of the annuities and pecuniary legacies thereinafter bequeathed, for his son for life, &c. And, after giving certain annuities and legacies, and after giving his furniture, wines, and stores to his wife for life, and an annuity of 440*l.* out of his real and personal estate, he bequeathed to his son "all his personal property, after his mother's decease, except" some plate:—Held, that the personal estate was not exonerated from the payment of the debts, &c. *Ouseley* v. *Anstruther*, 10 Beav. 453.

Devise to A., B., and C., of real and personal estate, upon trust to pay debts, and then the legacies bequeathed by any codicil, and the residue to A., B., and C., her executors. By a codicil, the testatrix devised her Fradswell estate to her sister for life, and, after her death, to be sold for the payment of legacies; and she then bequeathed legacies to a considerable amount:—Held, that the personal estate was not exonerated so as to make the Fradswell estate primarily applicable to the payment of the legacies. *Whieldon* v. *Spode*, 15 Beav. 537; 21 L. J., Ch. 913; 16 Jur. 281.

A testator, by a testamentary paper not admitted to probate, but held effectual as regarded his real estate, directed his trustees, to whom he had devised his real estate, in the first place, out of the rents and profits of his said estate, to pay all his just debts, funeral and testamentary expenses, and all costs, &c.:—Held, that this not only charged the real, but exonerated the personal estate. *Plenty* v. *West*, 16 Beav. 173; 22 L. J., Ch. 185; 17 Jur. 9; 1 W. R. 3.

A testator bequeathed personal property to his wife specifically, and he devised his real and personal property to trustees for sale, and out of the produce, in the first place, to pay his debts, funeral expenses, and legacies; and in the next place, to invest the surplus; and, subject to the trusts aforesaid, to pay the income to his wife for life, with remainder over. By a codicil he gave all his personal estate to his wife:—Held, that the widow was entitled to the personal estate, exonerated from the debts and legacies, and that they were primarily charged on the real estate. *Lance* v. *Aglionby*, 27 Beav. 65; 5 Jur. (N.S.) 561.

A testator bequeathed his leasehold and personal property, except plate, to his wife absolutely, and he devised his real estate to sell, and out of the produce to pay his funeral and testamentary expenses and debts, and to invest the residue and pay the income to his wife for life, with remainders over:—Held, that the funeral and testamentary expenses and debts were primarily payable out of the produce of the real estate. *Gilbertson* v. *Gilbertson*, 34 Beav. 354; 12 L. T. 816; 13 W. R. 765.

The cost of a special case to determine this question are nevertheless payable out of the personal estate. *Ib.*

A testatrix gave the residue of her estate and effects, whatsoever and wheresoever, after conversion into money, to the trustees of a charity, and declared that the legacies which might savour of charitable gifts should, if necessary, be paid and discharged out of such parts of her personal estate as might be lawfully applied for the purpose, "in which event my real estate, if any, shall be first charged with and be liable to the payment of my debts and legacies not savouring of charitable gifts." She never had any real estate, but left leasehold property and pure personalty:—Held, that there was a sufficient direction to exonerate the pure personalty from payment of the debts and legacies, but that, testamentary expenses not being mentioned, the cost of administration must be borne ratably by the pure and impure personalty. *Fitzgerald, In re, Adolph* v. *Dolman*, 26 W. R. 53.

Subject to the payment of his debts, and certain legacies previously given, a testator devised "all his real estate," and bequeathed "all the residue of his personal estate" to trustees in trust for A. A. died in his lifetime:—Held, that the personal estate was the primary fund for the payment of debts and legacies, the testator not having manifested any intention to discharge it. *Wells* v. *Row*, 48 L. J., Ch. 476.

Under a covenant that if the covenantor's wife married him, he, his heirs, executors, or administrators, would pay her a specified annuity for life, and that for better securing it, he or his heirs would grant and secure the same out of a sufficient part of the real estates devised to him by a particular will:—Held, that the real estates were only secondarily liable, and that the

personal estate of the covenantor was the primary fund. *Field* v. *Moore*, 7 De G. M. & G. 691.

After a devise of a freehold and leasehold interest charged with incumbrances that affected the testator's real estate, he bequeaths to the same devisee all the rest of his real and personal estates, adding, "And I do hereby order and direct my said son to pay off my just debts." This is an obligation on the son to pay all the debts of testator in respect of the property given him, and discharge a chattel interest bequeathed to another. *Cary* v. *Cary*, 2 Sch. & Lef. 188.

B. devised her freehold estate to trustees, whom she also appointed executors, in trust immediately after her decease to sell and dispose of the same to the best advantage, the money arising from such sale to be applied in the first place in discharge of her funeral expenses and debts; secondly, she ordered and directed several sums (mentioned in the will) to be paid to several persons named, "who were all creditors of her late husband"; then she gave pecuniary legacies to several relations, and 20*l.* each to her executors, "in compensation of trouble," the said several sums to be paid by her executors and trustees out of the money arising from the sale of her said lands, which she ordered "to be sold with all convenient speed after her decease"; and such of the said purchase-money as should remain after paying the said legacies she disposed of by her will, "the said several legacies to be paid by her executors, as soon as they should sell and dispose of the said land." B. died possessed of some personal property:—Held, that there is not enough on this will to found a presumption that the testatrix intended to exonerate the personal estate. *M'Cleland* v. *Shaw*, 2 Sch. & Lef. 538.

The general personal estate of a testator is the primary fund for the payment of arrears of rent due by him at his death; and the devisee of the lands out of which the arrears are due is entitled to have the personal estate so applied, even when he himself is also the legatee of all the rents due by the under-tenants of the same lands. *Barry* v. *Harding*, 1 Jo. & Lat. 475; 7 Ir. Eq. R. 313.

D. devised estates to trustees for a term of years, in trust to raise money for payment of all his debts and legacies, and subject to that term he limited the estates in strict settlement, with the ultimate remainder to his own right heirs. By the falling in of the intermediate limitations, A. and B. became entitled to the estates as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died. These bonds are not debts of A., to which his personal estate is primarily liable, but they must be borne in the first instance by the devised estate. *Bassett* v. *Percival*, 1 Cox, 268.

Where one devised a rectory for lives, subject to a charge, although the lease be charged by adding new lives, and a bond given by the owners of the lease to the devisee, it continues a charge on the church lease, not on personal estate of the obligor in the bond. *Billinghurst* v. *Walker*, 2 Bro. C. C. 604.

A., by several deeds, charges different parts of his real estates with portions for his younger children, and afterwards by will confirms the charges, and then gives the residue of his personal estate, after payment of debts, &c., to trustees, in trust to lay out same in land to be settled, &c. The eldest son brings bill controverting validity of deeds, and insisting that personal estate was liable to charges:—Held, that personal estate was exempt, and that each particular estate should bear the specific charge made upon it. *Ferrers* (*Earl*) v. *Ferrers* (*Countess*), 6 Bro. P. C. 97.

—— **Parol Evidence.**]—To exempt the personal estate under a devise for payment of debts, the intention must appear plainly on the will, and the court cannot look to extrinsic circumstances. *Brummell* v. *Prothero*, 3 Ves. 111. S. P., *Stephenson* v. *Heathcote*, 1 Eden, 37. *Aldridge* v. *Wallscourt* (*Lord*), 1 Ball & B. 312.

—— **Heir.**]—A person who is master of both funds, charges a debt which was personal by a mortgage of specific real estate; his heir shall not have it onerated by the personal estate. *Hamilton* v. *Worley*, 4 Bro. C. C. 199. *S. C.*, 2 Ves. J. 62.

A testator devised his real estate to trustees in trust for sale, and out of the proceeds and out of the rents, till sale, to pay his debts and trustees' costs, charges, and expenses, and then upon trust to pay three legacies of 500*l.* each; and, as to all his personal estate and effects, the testator gave the same to T. R., his executors, administrators, and assigns:—Held, first, that the will did not give to T. R., nor dispose of, the surplus of the beneficial interest in the produce of the testator's real estate, after paying the charges which ought to be considered as imposed thereon; and that such surplus belongs to the heir-at-law:—Held, secondly, that, as between the heir and T. R., the personal estate is the fund first applicable to the payment of the testator's debts. Semble, that the 3 & 4 Will. 4, c. 104, ought to have some influence in favour of the exoneration of the personal estate. It was conceded, arguendo, that funeral expenses and costs of probate were not included in the costs, charges, and expenses of a testator's trustees. *Callis* v. *Robins*, 1 De G. & Sm. 131; 16 L. J., Ch. 251; 11 Jur. 362.

Charge of Particular Debt.]—Devise in trust to sell and pay off mortgage, and to raise another sum which the testator gave to his daughters. The personal estate, though bequeathed after payment of debts and legacies, is exempted from payment of those two sums, without express words upon the plain intention. *Hancox* v. *Abbey*, 11 Ves. 179; 8 R. R. 124.

The general rule requiring express words in a will to exonerate general personal estate from debts has comparatively little application where a testator has directed that a particular debt shall be paid out of a particular part of his estate. The intention to make that part of the estate the primary fund for the particular debt may be established without requiring express words for the exoneration of the general personal estate from such debt. *Ib.*

Testator devised a part of his real estate to trustees, in trust to sell and pay certain debts mentioned in a schedule, and then devised all his personal estate to his wife, fully and clearly exonerated from all the debts in the schedule, specified; and he settled the residue of his real estate on his wife and child in manner therein mentioned. The trust estate not being sufficient to pay the scheduled debts, the settled estates must be applied in exoneration of the personal estate. *Morrow v. Bush*, 1 Cox, 185.

By settlement, in consideration of wife's fortune, N., the settlor, conveyed lands in trust upon usual limitations, with terms for raising portions for younger children, with proviso for cesser of terms on satisfying, &c. It then declared that the lands shall be charged with the several sums due for the portions of brothers, &c., of N. (according to his father's settlement), and with judgments and bonds set forth in a schedule to the deed, and amounting to 12,700*l.* The deed contained the usual covenants for title. In covenant against incumbrances were the following exceptions: "other than and except the jointure of 700*l.* for N.'s mother," and "the several sums due by judgments," &c., the 12,700*l.*, "and also, except the 15,000*l.* (above mentioned), of all and every of which the said lands are hereby charged." Some of the debts in the schedule were those of N. and some of his father. N., by will, directed that a judgment on bond to A. B. (mentioned in above schedule) should be satisfied by his executors, the same having been paid. He died in 1828, having paid off part of the 15,000*l.*, and some of his father's debts, and of his own, in ease of his settled estates:—Held, reversing decree below, that debts in schedule, and residue of the 15,000*l.*, were a charge on lands, which were declared to be a primary fund for payment thereof, and that personal estate was exempt. *Vandeleur* v. *Vandeleur*, 9 Bli. (N.S.) 157; 3 Cl. & F. 82; Ll. & G. t. Sugd. 241, n.

Upon the construction of a will:—Held, that a particular freehold estate of the testator was the primary fund for the payment of a mortgage debt which had been charged thereon by the testator in his lifetime, in exoneration of the personalty and other estates. *Evans* v. *Cockeram*, 1 Coll. C. C. 428; 8 Jur. 903.

Testator directed that his simple contract debts should be immediately paid; in the first instance, out of his personal estate, and if that were not sufficient, out of the produce of the sale of the lands of C. He then gave all his real and personal estate, including C., upon trust to pay out of his personal estate, in six months after the decease, all his debts and legacies, and to raise out of the lands of C. 2,000*l.*, to be invested upon certain trusts for his daughter B. and her issue, and upon failure of the trusts to sink into and become part of the residue of his personal estate. And after reciting that on the marriage of his daughter H. he had perfected two bonds to the trustees of her settlement for the sums of 4,000*l.* and 2,000*l.*, payable the day after his death, and that it was his intention that the 2,000*l.* bequeathed to the use of B. and her issue, and the 6,000*l.* so due to the trustees of H.'s settlement, should be paid out of the lands of C., he directed same to be sold, and the produce to be applied in payment thereof; and if C. should not produce a sum sufficient to pay off "said respective sums of 2,000*l.*, 4,000*l.*, and 2,000*l.*, making in the whole 8,000*l.*," he directed the deficiency to be raised by sale or mortgage of his Cavan estates. And he bequeathed all the residue of his personal estate, after payment of his debts, in trust for B. for life, and then upon the trusts before declared as to the 2,000*l.*:—Held, that the bond debts of 4,000*l.* and 2,000*l.* were charged on C. and the Cavan estates, in exoneration of the personal estate of the testator. *Bateman* v. *Roden* (*Earl*), 1 Jo. & Lat. 356; 7 Ir. Eq. R. 240.

There being a provision in marriage settlement to raise 8,000*l.* for a child at twenty-one, the father by will adds 8,000*l.* more, and charges the whole specifically on residuary real fund, which he had also by the same will made liable to debts and legacies in aid of his personal estate; the charged estate shall not be exonerated by the personal estate, for the charge is considered as a real devise and cannot fall on the personal estate. *Dudley and Ward* (*Lord*) v. *Ward*, 7 Bro. P. C. 566. *S. C.*, nom. *Ward* v. *Dudley*, 2 Bro. C. C. 316; 1 Cox, 438.

Payment directed out of Particular Estate or Fund—Primary Liability of Personalty discharged.]—Testator contracts for the purchase of a house, and afterwards, by a codicil to his will, gives to A., his executor, "the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down." This amounts to a direction that the purchase-money for the house shall be so provided for; and evidence was admitted to show what was the order given by the testator with reference to the cutting of timber. *Sandford* v. *Raikes*, 1 Mer. 646.

A testator directed the sum of 2,000*l.* to be raised out of a certain freehold estate, and paid in satisfaction of certain specified debts, and all such other debts as he should owe at his decease; and he gave the rest, &c., of his estate and effects, real and personal, to his wife, her heirs, &c.:—Held, that the 2,000*l.* was the primary fund for the payment of the debts. *Clutterbuck* v. *Clutterbuck*, 1 Myl. & K. 15; 2 L. J., Ch. 113.

A testator directed his executors to pay his funeral expenses and debts, except a mortgage thereinafter provided for, out of certain parts of his personal estate; and in a subsequent part of his will he recited, that his T. estate was subject to a mortgage of 6,000*l.*, which he was intending to pay off; and he directed any balance of the debt which should remain unpaid at his death to be paid by sale of timber on other property, and also of part of the timber on the T. estate. The testator also gave certain annuities, which he charged on his N. estate, giving to one annuitant 10*l.* a year, or 5*l.* and his tenement at the lodge on the N. estate. The testator did not pay off any part of the 6,000*l.* mortgage:—Held, that his personal estate was not exonerated from payment of the mortgage debt, but that it was exonerated from payment of the annuities. *Lomax* v. *Lomax*, 12 Beav. 285; 19 L. J., Ch. 137; 13 Jur. 1064.

A testatrix gave her real estate in trust for her two daughters, I. M'Carty and M. Streffi, for life, and afterwards each moiety to go to the sons of each of her daughters and their families; and after giving various legacies, she left the residue of her estate to her granddaughters. By a codicil, she directed that certain debts incurred by her for her son-in-law, J. M'Carty, should be exclusively, and in the first instance, borne by and paid out of the M'Carty moiety of her real estate, exempting the Streffi moiety from payment of such debts:—Held, that the codicil amounted to an express exoneration of the personal estate; and that the moiety of her real estate devised to the M'Carty family was primarily liable to the debts. *Forrest* v. *Prescott*, L. R. 10 Eq. 545; 18 W. R. 1065.

Testator by will limited his estate in E. to several persons in succession; he then devised his estate in S. to trustees, in trust to sell, and out of the purchase-money to pay all his debts, legacies, and funeral expenses; but in case the

S. estate should be deficient for those purposes, then the deficiency should be made good out of the E. estate. He then gave several specific and pecuniary legacies, and all his personal estate, not before disposed of, to his wife A.; after making this will the testator sold the S. estate and received the purchase-money:—Held, that the debts, legacies, and funeral expenses should be raised out of the E. estate in exoneration of the personal estate. *Williams* v. *Llandaff* (*Bishop*), 1 Cox, 254.

Testator devised all his real and personal property in Ireland to trustees upon trust, after payment of all his just debts and funeral and testamentary expenses, to raise out of the rents, by sale or mortgage, an annuity for his wife for her life, and subject thereto in trust for A. and his heirs; and having directed his executors to pay certain legacies, he devised and bequeathed all his real and personal estate in England to such uses as his wife should by deed or will appoint, and in default of appointment to the use of his wife for life, and after her decease to the use of the trustees upon the same trusts as were declared concerning his Irish estates; and declared it to be his will, that, in case his personal estate in Ireland should be insufficient for payment of his debts and legacies, his trustees should raise sufficient to pay same by sale or mortgage of his real estates in Ireland, which he thereby charged with the same, it being his intent to exempt his real and personal estate in England from payment thereof. The testator died in England, and his will was proved in England and Ireland:—Held, that all his funeral and testamentary expenses were exclusively charged on the real and personal estate in Ireland. *Coote* v. *Coote*, 3 Jo. & Lat. 175; 9 Ir. Eq. R. 197.

W., by his will, devised his real estate to trustees in trust to sell and to apply the purchase-money, in the first place, in payment of all the charges, and all other his debts and legacies, and as to the residue of the purchase-money, to pay one moiety to his daughter M., and to lay out the other moiety in Government securities, and to pay the dividends for the maintenance of the three sons of his daughter A. until they should attain their respective ages of twenty-four years, and when they should have attained that age he gave that moiety equally to be divided amongst them; but if they all should die under twenty-four, then he directed that such moiety should sink into and be deemed part of the residue of his personal estate, and be applied in such manner as his personal estate was thereinafter given and disposed of. He then gave several specific legacies; and all the residue of his personal estate he gave to his daughter A., and to H., equally, to be divided between them. The debts and legacies are payable in the first instance out of the purchase-money of the real estate. *Webb* v. *Jones*, 1 Cox, 245; 2 Bro. C. C. 60; 1 R. R. 29.

Charge on specific bequest of debts and legacies. *Browne* v. *Groombridge*, 4 Madd. 495; 20 R. R. 326.

Testatrix, having made several specific bequests of stock, gave the residue of her funded property, after payment of her debts and legacies, to A.; she gave the residue of her real and personal estates to others, and directed one particular legacy to be paid out of the stock:—Held, that the residue of the stock was the primary fund for the payment of the debts and legacies. *Choat* v. *Yeats*, 1 Jac. & Walk. 102; 20 R. R. 239.

Testator having bequeathed "all the outstanding debts owing to him for tithe, or otherwise, subject to his debts and legacies," and having appointed general residuary legatees:—Held, that the outstanding debts, and not the residuary fund, should be applied, in the first instance, to the payment of the debts and legacies. *Phillips* v. *Eastwood*, Ll. & G. t. Sugd. 270.

A testator directed, that, after payment of his debts, all his money should be divided between his three children. All his other personal property he devised to his eldest son:—Held, that the debts were primarily payable out of the money specifically bequeathed. *Vernon* v. *Manvers* (*Earl*), 31 Beav. 623; 32 L. J., Ch. 246.

Specific bequest of personalty to trustees for certain persons, "subject to the provisions hereinafter made." Then followed a proviso, that these trust funds "should be liable to and applicable," by the trustees, to the payment of the debts, &c. There was a residuary bequest to other persons:—Held, that the specific legacy was primarily liable to the payment of the debts, &c. *Webb* v. *De Beauvoisin*, 31 Beav. 573.

A testator bequeathed his personal estate to his wife, "discharged from the payment of his debts." He then devised his real estate at H. in trust to sell and pay "all his just debts, funeral and testamentary expenses," in exoneration of his personal estate; and he devised his real estate at N. without any express trust for payment of his debts. The produce of the estate at H. being insufficient to pay the debts:—Held, that the estate at N. was next liable to pay them in exoneration of the personal estate. *Young* v. *Young*, 26 Beav. 522.

—— **Deed charging Debts on Real Estate.**]—S. conveyed all his lands to trustees for the purpose of paying his debts, legacies and funeral charges; and by his will gave all his personal estate to his wife, and made her executrix:—Held, that the security upon the lands did not discharge the personal estate, but that the same still continued liable, and ought to be taken in aid of the real estate. *French* v. *Chichester*, 2 Vern. 568; 3 Bro. P. C. 2nd ed. p. 16.

—— **Settlement giving Charge of Debts on Specific Real and Personal Estate.**]—The rule that a charge of debts on real estate does not of itself exonerate the personal estate applies to a case where a charge for payment of debts after the grantor's death is created by deed. But no such rule applies to specific personal estate given on similar trusts; in such a case the specific personal estate will be the primary fund for the payment of the debts. *Trott* v. *Buchanan*, 54 L. J., Ch. 678; 28 Ch. D. 446; 52 L. T. 248; 33 W. R. 339.

A testator by a deed executed in his lifetime conveyed and assigned real and personal estate to trustees, in trust for himself during his life, and after his death to sell and convert the property, and to stand possessed of the proceeds on trust, after payment of costs, to pay all the debts which should be due from him, and his funeral expenses, and, after such payment as aforesaid, upon trust for his sons and their children. By his will, the testator, after reciting the deed, devised and bequeathed all and every the residue of his real and personal estate not comprised in and subject to the trusts of the deed to his wife for her life, with remainders over, and he appointed his wife and one of the trustees of the deed executors of his will, which was proved by

the widow and one of the trustees :—Held, that, as regarded the real estate comprised in the deed, the testator's general personal estate was not exonerated from its primary liability to pay his debts. But held, that the personal estate comprised in the deed was the primary fund for the payment of the debts. *French* v. *Chichester*, supra, discussed and explained. *Ib.*

—— **Primary Liability not displaced.**]—A specific legacy cannot, in a subsequent part of the will, be charged with payment of debts or legacies. *Joy* v. *Campbell*, 1 Sch. & Lef. 339 ; 9 R. R. 39. And see 3 Bli. (N.S.) 111.

A will restrained in point of extent to a partial disposition by a particular enumeration, and a reference to other instruments, notwithstanding the general words "personal estate" ; specific disposition by will subject to annuities and legacies held auxiliary only, the general personal estate to be applied in the first instance. *Holford* v. *Wood*, 4 Ves. 76.

Bequest of specific chattels in trust to sell, in the first place to pay the debts and then to divide the residue amongst five persons. There was no residuary gift :—Held, that the debts were primarily payable out of the general residue. *Newbegin* v. *Bell*, 23 Beav. 386.

A testator, after mentioning specific portions of his personal estate, bequeathed them to several persons, and the remainder of these effects (all his debts being paid), if any remained, he left to his sister ; there was no general residuary bequest :—Held, that the undisposed-of residuary personal estate was the primary fund for payment of the debts. *Corbet* v. *Corbet*, Ir. R. 8 Eq. 407.

A testator bequeaths specific chattels charged with the payment of a pecuniary legacy, and of all the testator's just debts and funeral and testamentary expenses ; and he bequeaths other specific and pecuniary legacies, but makes no residuary bequest :—Held, that, notwithstanding the charge, the general undisposed-of residue was first applicable. *Hewett* v. *Snare*, 1 De G. & Sm. 333.

A testator devised an estate (which he had mortgaged) freed and discharged from all his debts and all his annuities, legacies and bequests. He afterwards devised and bequeathed other property, with similar words of exemption, and then devised and bequeathed certain specified property, upon trust to pay, in the first place, the mortgage debt on the estates first devised, and, in the next place, all the testator's other debts, funeral and testamentary expenses, debts, annuities and legacies. In another passage the testator expressed his intention to be that the estate in mortgage should be held free from all charges created by him ; and he bequeathed all his residuary personal estate freed and discharged from all his debts and liabilities, and the legacies thereby bequeathed. On the specified fund proving insufficient to pay the mortgage debt :—Held, that the devisees of the mortgaged estate were entitled to have it exonerated out of the residuary personalty. *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm. 425 ; 1 Hall & Tw. 142 ; 18 L. J., Ch. 137 ; 12 Jur. 912.

Testator gave 1,500*l.* to his illegitimate son, to be paid, with interest, within twelve months next after his decease, and he charged that sum upon his farm called L., which, he added, was then rented for 100*l.* a year, and which he purchased before his marriage, and was not, in settlement or otherwise, incumbered. And he gave other legacies, and directed, as to some of them, that they should be paid by his executors ; and he charged his real estates with the payment of his funeral and testamentary expenses and debts, in aid of his personal estate. By a codicil he confirmed to his illegitimate son all devises and gifts, by his will made to him, and desired, that all his (the testator's) debts, annuities, and legacies (except two annuities thereby given to A. E. and S. D.) should be paid, in the first place, out of any moneys he might die possessed of in the 3 per cent. consols, as far as they would extend, and he charged his farm called R. with the payment of all such debts, annuities, and legacies (except as aforesaid), in aid of his moneys in the 3 per cents. :—Held, that the 1,500*l.* was not charged on the farm called L. exclusively, and in exoneration of the testator's personal estate ; but that the consols were to be applied first, the farm called R. next, the testator's general personal estate next, and the farm called L. last, in payment of it. *Evans* v. *Evans*, 17 Sim. 102 ; 14 Jur. 383.

A testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate ; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children ; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children :—Held, 1st, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages ; 2ndly, that pecuniary legatees were entitled to stand in the place of the mortgagees, against the estates so devised, to the extent to which the mortgages had been paid out of the personal estate ; and, 3rdly, that such pecuniary legatees were not entitled to stand in the place of a vendor to the testator, part of whose purchase-money remained unpaid at the testator's death, to the extent to which the purchase-money had been paid out of the personal estate. *Wythe* v. *Henniker*, 2 Myl. & K. 635 ; 3 L. J., Ch. 24.

A testator, by his will, directed that his debts and funeral and testamentary expenses should be paid out of the fund thereinafter provided for the payment thereof. He then devised his real estate to trustees for sale, and directed them out of the proceeds to pay his debts and funeral and testamentary expenses, and to hold the residue on certain trusts. He then bequeathed his personal estate after and subject to the payment of his debts and funeral and testamentary expenses : —Held, that the personal estate was the primary fund for the payment of debts ; held, also, that the doctrine of marshalling was applicable in favour of legatees and annuitants, and that they might stand in the place of the creditors as against the real estate devised in trust for sale and payment of debts. *Paterson* v. *Scott*, 1 De G. M. & G. 531 ; 21 L. J., Ch. 346 ; 16 Jur. 898.

Testator gave his real and personal estate to persons whom he afterwards appointed his executors, in trust, in the first place, to sell an advowson, and apply the proceeds in discharge of his debts and legacies, and if they should be insufficient, then to raise the deficiency by sale or mortgage of his real estates, and directed his executors to retain their expenses, but did not

expressly declare any trust of his personal estate:—Held, that the personal estate was primarily applicable to the payment of the testator's debts. *Rhodes* v. *Rudge*, 1 Sim. 79; 5 L. J. (o.s.) Ch. 17.

Testator, by his will, bequeathed as follows:—"I direct, in the first place, all my debts to be paid; I then give and bequeath to my wife 60,000*l.* 3 per cent. consols, part of a larger sum standing in my name in the Bank of England; also I bequeath to A. 10,000*l.*, other part of the aforesaid 3 per cent. consols; also I give to B. 500*l.* and to C. 100*l.*; also I give to D. and E. all the rest and residue of my ready money, securities for money, and moneys in the funds upon trust to invest, etc., and to pay the dividends to my wife for life, and after her decease to divide the capital amongst F., G., H. and I." The testator then, after devising his real estate to the same trustees upon certain trusts, gave all his residuary personal estate to his wife:—Held, that the testator's debts were payable out of his personal and real estate according to the usual order of administering those estates, the general residuary personal estate being first applicable, but that his pecuniary legacies were primarily, if not solely, payable out of the "ready money securities for money and moneys in the funds." *Parker* v. *Marchant*, 1 Y. & C. C. C. 290; 11 L. J., Ch. 223; 6 Jur. 292.

Devise to Trustees who are not Executors.]—Under a devise to trustees, who were not the executors, upon trust to sell and pay debts and funeral expenses, the personal estate was exempted, without express words, on the evident intention that the legatee thereof should take all that was not specifically bequeathed by the will. *Burton* v. *Knowlton*, 3 Ves. 107; 3 R. R. 62.

Devise in trust to sell for payment of debts and funeral expenses, with a particular disposition of the surplus money, the personal estate not being otherwise disposed of than by the appointment of an executor, who was not one of the trustees, is first liable to the debts, etc., especially as the produce of the sale was not sufficient for them. *Gray* v. *Minnethorpe*, 3 Ves. 103.

Executrix Residuary Legatee.]—Under a will charging lands with all debts and making the executrix residuary legatee, and after payment of legacies bequeathing to her the personal effects as a specific legacy:—The court held, that the personal property was first applicable to discharge the legacies, and then the landed property, if that proved deficient. *Gleed* v. *Gleed*, 2 Ken. Ch. 14.

Lapse—Effect on Exoneration of Personalty.]—Bequest of personal estate exempt from debts by mortgage; the benefit of the exemption was confined to that legatee and failed, the bequest having lapsed by the death of the legatee in the life of the testator. *Waring* v. *Ward*, 5 Ves. 670; 5 R. R. 130.

Where a real estate is charged with payment of debts, &c., in exoneration of the personal estate, in order to favour the residuary legatee, and such residuary legatee dies in life of testator, so that bequest lapses:—Held, on construction of the whole will, that the real estate becomes re-exonerated, and the personal liable. *Noel* v. *Henley* (*Lord*), 7 Price, 241. *S. C.*, Daniell, 211, 332; 12 Price, 213; 26 R. R. 660.

The testator having two estates in mortgage, orders the debt upon one to be paid out of his personal estate, and charges the other upon the mortgaged premises, and gives the residue of his personal estate to persons by whose death it afterwards lapses; the mortgage debt, upon the mortgaged premises, shall be paid out of the personalty. *Hale* v. *Cox*, 3 Bro. C. C. 322.

A direction to exonerate the general personal estate out of a specific fund of personalty held to enure for the benefit of persons who took by lapse. *Browne* v. *Groombridge*, 4 Madd. 495; 20 R. R. 326.

A charge of debts, funeral and testamentary expenses, on a particular real estate, assuming it to exonerate personal estate in favour of a particular legatee, does not exonerate the person who, on failure of that legacy by means of the Mortmain Act, takes it. *Ducre* v. *Patrickson*, 1 Dr. & Sm. 186; 29 L. J., Ch. 846; 6 Jur. (N.S.) 863; 8 W. R. 597, 647. S. P. *Meere, In re*, *Kilford* v. *Blaney*, 55 L. J., Ch. 185; 31 Ch. D. 56; 54 L. T. 287; 34 W. R. 109—C. A., dissenting from *Browne* v. *Groombridge*, supra.

A testator devised his real estates to six devisees, and he declared his freehold estates should be the primary fund, and his leasehold estates the secondary fund, for the payment of his debts, and he bequeathed his personal estate to A. exonerated from his debts. One of the devisees died in the testator's lifetime, whereby his share lapsed:—Held, that as between the heir at law, the next of kin, and the devisees and residuary legatee, the lapsed share of the real and personal estate ought to be applied in the same order as if the devisee had survived. *Fisher* v. *Fisher*, 2 Keen, 610; 7 L. J., Ch. 176.

Specific Legacy—From Pledge or Charge.]—Where a specific legacy is pledged or charged by the testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the executor, and, if the executor fail to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of the testator. *Knight* v. *Davis*, 3 Myl. & K. 358; 3 L. J., Ch. 81.

A specific legatee is entitled to have his legacy redeemed from charges created by the testator (as distinguished from charges incidental to the property) at the expense of the testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy. *Bothamley* v. *Sherson*, L. R. 20 Eq. 304; 33 L. T. 150; 23 W. R. 848.

Accounts of personal estate not specifically bequeathed had been directed in an administration suit. Ultimately the costs of all parties, as between solicitor and client, were paid out of a specific legacy in the absence of the specific legatee. In a subsequent suit, instituted by the specific legatee for her legacy, liberty was given to her to surcharge and falsify the accounts, and the plaintiff's costs were directed to be allowed as between party and party. *Walrond* v. *Walrond*, 29 Beav. 586.

Mortgage Debt.]—Personal estate is always primarily liable to pay mortgage money; land is only a collateral security. *Cope* v. *Cope*, 2 Salk. 449.

Every mortgage, though no covenant or bond to pay the money, implies a loan, and every loan implies a debt; therefore an heir of a mortgagor shall compel an application of the personal estate to pay off a mortgage, notwith-

standing there was no covenant, &c., from the mortgagor. *King* v. *King*, 3 P. W. 358; Mos. 192.

Money due on mortgage is a debt of mortgagor, to payment of which his personal estate is primarily liable, as between heir, devisee and executor; unless exempted by express or implied declaration of mortgagor. *Belvidere* v. *Rochfort*, 5 Bro. C. P. 299.

A testator, being the owner of several estates, subject to mortgages, devised one of them to trustees for sale, the proceeds to be applied in exoneration of the personal estate, in payment of certain mortgages, debts and legacies. This estate proved insufficient for the purpose of paying the mortgages. Upon the question whether the respective mortgaged estates, or the personal estate, were primarily liable to the payment of the mortgages:—Held, that though there was a clear intent to exonerate the personal estate, yet, that as there were no words of exemption, the personal estate was primarily liable to pay to the extent that the estate devised for sale was found deficient. *Colvile* v. *Middleton*, 3 Beav. 570; 4 Jur. 1197.

Mortgage in fee is made redeemable on payment of 300*l.* and interest, upon any Michaelmas Day, on six months' notice. Mortgagor dies, having devised his personal estate to his wife: personal estate is liable to pay the mortgage. *Howell* v. *Price*, 1 P. W. 291; 2 Vern. 701; Pre. Ch. 423, 477.

One mortgages his lands, and by will appoints them to be sold for payment of the mortgage-money; and afterwards, in another part of his will, devises a moiety of the mortgaged premises to A. B. The personal estate shall be applied to pay off the mortgage in favour of devisee. *Johnson* v. *Milksopp*, 2 Vern. 112.

Testator, after bequeathing his personal estate, gave his real estate upon trust to raise, in exclusion of his personal estate, sufficient to satisfy his just debts (except debts secured by mortgage) and legacies and expenses of the trust:—Held, that the personal estate was the primary fund to pay the mortgage debts, which exceeded in amount the whole personalty. *Briggs* v. *Davies*, 4 W. R. 696.

The personal estate given to the next of kin must be applied in discharge of testator's mortgages, not being expressly exempted, although it will be thereby exhausted. *Philips* v. *Philips*, 2 Bro. C. C. 273.

Testator exempts personal estate from payment of mortgages on real estate, which he devises to C., subject to the incumbrances:—Held, that descended estates are liable to mortgages. *Barnewell* v. *Cawdor* (*Lord*), 3 Madd. 453.

A testator had mortgaged his estate S. By his will he directed his debts, other than the mortgage, to be paid out of a specified part of his personal estate; he recited his intention of forthwith paying off a great part of the mortgage debt, and he directed that "the balance" of such mortgage should be paid by sale of timber on the S. estate. He made no bequest of his general personal estate:—Held, that the mortgage was payable, first, out of the general personal estate; secondly, out of the descended real estate; and thirdly, out of the timber money. *Lomax* v. *Lomax*, 12 Beav. 285; 19 L. J., Ch. 137; 13 Jur. 1064.

W. directed his trustees to pay simple contract debts, and a mortgage of 10,000*l.* secured on his estates called S. and N., out of the moneys to arise from his personal estate, and the sale of an estate called "The Hennells." He then devised part of the S. estate, including the mansion-house, to his wife for life or during widowhood, freed from any mortgage: and the residue of the estate, and the mansion-house and grounds, after his wife's death or marriage he devised to the use of his eldest son, J., subject to the payment of two mortgages of 5,000*l.* and 2,200*l.* secured thereon, it being his wish that the hereditaments devised in trust for his wife should be exonerated from the payment of those sums so far as they affected the devisees under his will. The testator then devised the estate N. to the use of his son, A., discharged from any principal sums charged thereon by way of mortgage. The fund provided by the testator for the payment of the mortgage of 10,000*l.*, and the simple contract and other debts, was insufficient:—Held, that as between the devisees of the estates, S. and N., the whole of the proceeds of the sale of the former was applicable to the payment of the mortgage of 10,000*l.* in exoneration of estate N. *Woodward* v. *Woodward*, 5 Jur. (N.S.) 1281.

A testator gave certain portions of his real and personal estate to trustees for payment of his debts; and he specifically gave several portions of his real and personal estate to different parties, "freed from his debts," and also bequeathed his residuary personal estate "freed from his debts." One of the devised estates was subject to a mortgage. The funds primarily applicable being insufficient to discharge all the debts, the property which passed under the residuary clause was held to be the next fund which ought to be resorted to for that purpose; and the devisee of the mortgaged estate was declared to be entitled to have the mortgage paid off out of the residuary estate. *Brooke* (*Lord*) v. *Warwick* (*Earl*), 2 De G. & Sm. 425, 1 Hall & Tw. 142; 18 L. J., Ch. 137; 13 Jur. 547.

G., by articles, settling in strict settlement real estate, subject to mortgage of 1,500*l.*, which had been borrowed to pay fines of certain leasehold interest, and subject also to other incumbrances, covenanted to exonerate real estate from 1,500*l.*, and to charge it on leasehold. Afterwards G., by will, reciting articles, devised leasehold to his eldest son, "in order to exonerate his said real estates from said sum of 1,500*l.*, and to enable his said son to pay same and other debts and incumbrances affecting the same," and will proceeded, "And I do hereby charge and incumber said leasehold interest so bequeathed with payment of said sum of 1,500*l.*" Testator also, by his will, confirmed articles, with exception of certain directions therein made as to rents and profits of settled lands, which he thereby limited in a manner different from articles:—Held, 1st, that words "in order to exonerate," &c., and "to enable," &c., amounted to direction, and that devisee was trustee, to pay out of leaseholds not only 1,500*l.* but all other debts and incumbrances affecting real. 2ndly, that G., by charging such debts and incumbrances on leasehold, meant to purchase power of disposing of rents and profits of settled estate, as he did by his will differently from provisions in articles. 3rdly, testator's eldest son, who was tenant in tail of settled estates, not having applied leasehold property in exoneration thereof, in pursuance of will, and having died without suffering recovery, held that remainder-

man in tail had a right to compel exoneration of settled estate out of leasehold. *Cary* v. *Cary*, 2 Sch. & Lef. 173.

R. seised in fee of estates in C., which were mortgaged to a considerable amount, and also of an estate in the Isle of Wight and other property, devised the mortgaged lands to several uses, and inter alia to the plaintiff for life, remainder to her sons in tail, remainder to her daughters as tenants in common; he devised the estate in the Isle of Wight to his executors as trustees for twenty-one years, among other uses, to pay his bond and book debts, if his personal estate should not be sufficient; and by a further clause to pay all his debts: the trust term, after the personal estate, shall exonerate the mortgaged estate. *Tweedale* v. *Coventry*, 1 Bro. C. C. 240. *And see* 3 Term Rep. 83.

I. A. B. by his will directed that his son should repay to his executors by instalments a mortgage debt borrowed for the use of the son upon a leasehold house of the testator. The instalments were to be invested, and to sink into the residuary estate, to a share of which the son would be entitled. The testator by an indenture settled upon his wife this leasehold house subject to the mortgage, and directed that as between himself and the leasehold premises they were to be the "primary security and ultimate fund" for the payment of the debt:—Held, as between the widow and the son, that the leasehold house was only liable to pay the debt in case the son's share in the residuary estate were insufficient. 2. The testator, after giving one moiety of his stock-in-trade to his widow, absolutely gave her the use of the remaining moiety for carrying on his business:—Held, that the widow's estate was not liable to make good any deficiency in the remaining moiety. *Quartermaine* v. *Cuff*, 1 W. R. 76.

In a suit for redemption by the heir of a mortgagor against the assignee of the mortgagee, who was also the personal representative of the mortgagor, the court, besides the usual decree for redemption, declared the plaintiff entitled to have the balance which should be found due from him, and paid by him to the defendant as mortgagee, repaid to him out of personal estate of the mortgagor in a due course of administration, and decreed accordingly, the bill being properly framed with a view to such relief. *Lloyd* v. *Wait*, 1 Ph. 61; 6 Jur. 456.

A mortgagor, by his will, created a trust for the payment of, amongst others, the mortgage debt. In a suit to foreclose:—Held, that the mortgagee was entitled to have his mortgage paid, in the first instance, out of the general personal estate of the mortgagor, and, in default of payment thereout, to have the mortgaged lands sold, and, in case the fund so produced should prove deficient, that then the mortgagee was entitled to come in as a specialty creditor, and avail himself of the trust in the will of the mortgagor, and the decree was so made. *Marshall* v. *M'Aracey*, 3 Dr. & War. 232.

—— **Right of Devisee or Heir.**]—H. gave bond and mortgage, and afterwards devised mortgaged estates to his wife, whom he appointed executrix; other estates descended to his heirs:—Held, that wife must take with the burden of the mortgage. *Galton* v. *Hancock*, 2 Atk. 424; Ridgw. 301.

Afterwards held, that wife was entitled to have the mortgage upon the estate devised to her, exonerated out of the real assets descended upon the heirs, and former decree totally reversed as to this point. *S. C.*, 2 Atk. 430; Ridgw. 301.

Where will sets out with a desire that debts may be paid in the first place, the wife, with respect to creditors, must have taken the estate cum onere devised to her, but it is not sufficient to fix the burden upon legatee, so as to make a variation with regard to the different funds out of which the debts are to be paid, or transpose the order in which they are to be applied for that purpose. *Ib.*

In equity, to satisfy a specialty debt, personal assets must be first applied, and if deficient the real assets descended. *Ib.*

In *Pitt* v. *Raymond*, Lord Talbot directed, if the personal were not sufficient, an account was to be taken of the descended, and if that were deficient, then of the devised estate. *Ib.*

A mortgage is a debt by specialty, and the land is only regarded in equity as a pledge; therefore, a mortgagee may take his remedy either against the heir or executor, but his election does not vary his right, or determine which ought properly to be charged. *Ib.*

Testator devised to A. lands in mortgage, and devised other lands to B. subject to payment of his debts, in case his personal estate should not prove sufficient. The mortgage debt must be paid out of the personal estate, and if deficient, out of the real estate devised to B. *Bartholomew* v. *May*, 1 Atk. 487.

A mortgage is looked upon as a general debt, and the land only as a security, and, therefore, personal estate shall be applied in discharge; but if the contest lay between the devisee and creditors of a deceased mortgagor, it would have been otherwise. *Ib.*

The testator borrowed 2,000*l.* to enable him to pay the purchase-money of estate W., and that sum was found by the master to be a lien on the estate at the testator's death:—Held, that the Wills Act did not alter the course of administering the assets, but that the devisee had a right to have the personal estate of the testator applied towards the discharge of the lien; and that, failing that, he had a right to have descended real estate so applied; but that both these resources failing, the devisee was not entitled to have contribution from estates of the testator, comprised either in a particular or a residuary devise. *Emuss* v. *Smith*, 2 De G. & Sm. 722.

One, seised in fee of the manors of A. and B., mortgages A. for 4,000*l.*, and by will charges all his real estate with payment of his debts, and devises A. to C., and B. to D., and dies: the devisee of A. shall compel the devisee of B. to contribute to pay the mortgage on A.; but if the will prove void, then no contribution. *Carter* v. *Barnardiston*, 1 P. W. 505.

A testator devised his E. estate, subject to debts, &c., to his wife for life, with remainders over, and he devised his C. estate, subject to his debts, &c., to his wife absolutely. He afterwards mortgaged his E. estate:—Held, on a deficiency of the personal estate, that the estates E. and C. ought to contribute ratably towards payment of the mortgage. *Middleton* v. *Middleton*, 15 Beav. 450.

A testator, seised of real estate, subject to mortgage which he had covenanted to pay, by a will, made in 1829, bequeathed pecuniary legacies, and directed that all his chattel property

whatever (except as before bequeathed) should be sold; and, in the first place, the produce thereof to be applied to the payment of his just debts and funeral expenses, and, in the next place, in discharge of his legacies. The mortgaged estate descended to the heir-at-law:—Held, that he was entitled to have the mortgage paid out of the personal estate, in preference to the legacies. *Burley* v. *Armstrong*, 12 Ir. Ch. R. 270.

A testator, carrying on business in co-partnership, by his will "gave and bequeathed his moiety in the partnership stock, crop, goods and chattels, to be valued at a fair valuation, to his four brothers and sister, to be divided share and share alike, paying all his just debts which he owed." The testator, at the time of his death, besides being possessed of the partnership property mentioned in the will, was also seised of real estates, which were subject to certain mortgages which he had created in his lifetime. Upon bill filed by the heir-at-law:—Held, that he was entitled as against the legatees to have the personal estate of the testator applied in payment of the mortgage debt in exoneration of the real estate descended. *Chester* v. *Powell*, 7 Jur. 389.

A testator devised an estate X. to trustees, upon trust to raise (in aid of his personal estate) sufficient to satisfy his debts and the mortgages on his estate Y., which he devised to his daughters; and he declared that the incumbrances on Y. should be payable out of X. in exoneration of Y. On the testator's death, a real estate (Z.) descended to his heir-at-law:—Held, that as between X. and Z., the former was primarily liable to pay the mortgage and other debts. *Phillips* v. *Parry*, 22 Beav. 279.

A testator having two estates, L. and F., subject to a mortgage for 1,200*l*., and two other estates, S. and T., devised estate L. to A., subject to the payment of 200*l*., part of the 1,200*l*.; and estates F. and S. subject to the payment of 1,000*l*., being the remainder of the said sum of 1,200*l*. charged thereon, he devised to A. and B.; and he gave all his residuary personal estate to trustees, upon trust to pay his debts, whether on mortgage, bond, or otherwise, &c. Estate T. descended on A. as the heir-at-law of the testator:—Held, affirming the decision of the court below, that the personal estate being insufficient to pay the mortgage debt, the descended estate was liable. *Goodwin* v. *Lee*, 1 Jur. (N.S.) 948—L.JJ. Affirming *S. C.*, post, col. 1497.

—— **Rights of Legatees.**]—One, having mortgaged his fee simple estate, devises his leasehold to A., and his fee simple to B., and dies, leaving no other personal estate. The devisee of the fee simple must take it cum onere, and shall not charge the leasehold estate specifically devised with the mortgage. *O'Neal* v. *Mead*, 1 P. W. 693.

A., by his will, bequeathed to S., his partner in trade, certain leasehold premises where the trade was carried on, for the residue of the term and interest of the testator therein. These premises, together with other premises at H., were subject to mortgages for moneys which had been raised and charged upon them by the testator, who had also given his bond for the debt. Upon a bill filed by pecuniary legatees against the executors, to carry the trusts of the will into execution, and a decree for taking the accounts of the estate, it appears that S., who was one of the executors, had paid off the sums due upon the mortgage of the premises at T. and H., out of the personal estate, which was insufficient to satisfy all the debts and pecuniary legacies. This payment was allowed by the master in his report. The report in this respect was confirmed by order upon further directions, and upon appeal the decision was affirmed. *Davies* v. *Bush*, 4 Bli. (N.S.) 305.

An estate in mortgage was devised to A., and several legacies given to others; the mortgage shall be first satisfied out of the personal estate, and if that falls short the legatees must abate in proportion. *Warner* v. *Hawes*, 3 Bro. P. C. 21.

An estate being considerably mortgaged, was devised to A., and several specific legacies were left to others. The surplus is not sufficient to discharge the debt. All the specific legatees shall contribute towards the discharging the mortgage before the mortgage premises shall be affected; for the covenant to pay the money makes it a personal debt, and the real estate shall never be put in average with the personal. *S. C.*, W. Kel. 3.

A., by will, computing the surplus of his personal estate, after debts and legacies paid, would amount to 5,800*l*., gives the 5,800*l*. to some of his grandchildren in several proportions; and wills, if the surplus fell short they should abate in proportion; if it amounted to more, it should be divided between them in the same proportions. Decreed, that a mortgage on an estate devised to two of her grandchildren should be paid out of the personal estate, although by this means the personal estate would fall short of the 5,800*l*. *S. C.*, nom. *Hawes* v. *Warner*, 2 Vern. 477; 3 Ch. Rep. 206.

An express devise shall not be defeated by applying the personal estate to pay off a mortgage in favour of an heir-at-law. *Ib.*

—— **Rights under Marriage Settlement.**]—Settlement, on marriage, of estates, leasehold and others, subject to incumbrances not created by settlor, the issue of the marriage not entitled to have them discumbered out of their father's assets in prejudice of his creditors. *Clarke* v. *Samson*, 1 Ves. Sen. 100.

—— **Charge not created by Testator or Intestate.**]—A man purchases an equity of redemption and dies; the mortgage shall not be paid out of the personal estate for the benefit of the heir, it not being the ancestor's debt. *Pockley* v. *Pockley*, 1 Vern. 37. *See* 2 Salk. 449; 2 Ch. Ca. 84.

By the established rules of equity, the personal estate of a testator, whose will does not require such an application of it, is not to be applied in favour of those who claim his real estate for the purpose of exonerating it from debts not originally contracted by him; courts of equity distinguishing between debts of testator, and of his estate. Testator charges his real estate, which was subject to a mortgage contracted by his ancestor, and also all his personal estate, with his debts and legacies; the mortgage shall be borne by the estate originally liable, not paid out of his estates, and the executrix having paid it out of the personal estate shall be repaid the money. *Lawson* v. *Hudson*, 1 Bro. C. C. 58. Affirmed, 3 Bro. P. C. 424.

Mortgagor of copyhold devises it to wife,

together with personal estate, and appoints her his executrix; she dies without paying off mortgage:—Held, heir is not entitled to have mortgage paid out of personal estate of mortgagor. *Scott* v. *Beecher*, 5 Madd. 96.

Notwithstanding a charge upon a term, for payment of debts, a leasehold estate purchased by the testator, subject to a mortgage, shall bear the burden of that mortgage, it not being properly the debt of the testator. *Ancaster (Duke)* v. *Mayer*, 1 Bro. C. C. 454.

A. purchased an estate subject to a mortgage; the personal estate shall not exonerate the real for payment of the mortgage debt. *Tweddell* v. *Tweddell*, 2 Bro. C. C. 101. Affirmed, 2 Bro. C. C. 152.

P. H. purchased the lands of R., which, at the time, were subject to a mortgage for a term of years. The deed of conveyance, in which the mortgagee (who did not execute it) was named as a party, recited the mortgage, and that P. H. had agreed with the mortgagor to purchase all his estate, interest and equity of redemption in and to the lands of R.; and also all the estate and interest of the several other parties of the deed therein; and, in consideration of a sum of money paid, and an annuity granted to the mortgagor, and of the sum due on foot of the mortgage, therein expressed to be paid to the mortgagee, the mortgagor and mortgagee conveyed the lands to P. H. and his heirs, freed and discharged of the mortgage term. The mortgage-money remained unpaid at the death of P. H.:—Held, that the devisee of the lands was not entitled to have the mortgage paid off out of the general personal estate of P. H. *Barry* v. *Harding*, 1 Jo. & Lat. 475; 7 Ir. Eq. R. 313.

Decreed, on the authorities, but against the opinion of the court, that, in administering the estate of the executor and devisee of a mortgagor, whose personal estate was not deficient, the mortgaged estate was primarily liable to the debt. *Clarendon (Earl)* v. *Barham*, 1 Y. & C. C. C. 688; 12 L. J., Ch. 215. *And see* 6 Jur. 962.

Where real estate, subject to a mortgage, descended to a lunatic, and the mortgage was paid off out of his personal estate, the amount so applied was ordered to be raised out of the real estate, and paid to the lunatic's administratrix. *Leeming, In re*, 3 De G. F. & J. 43; 30 L. J., Ch. 263; 7 Jur. (N.S.) 115; 3 L. T. 686; 9 W. R. 403.

A testator devised his real estate, which was mortgaged, and his personal estate, to A. absolutely. A. died immediately after the testator, and before the 17 & 18 Vict. c. 113:—Held, that the heir of A. was not entitled to have the mortgage paid out of the personal estate, but that he took the real estate cum onere. *Swainson* v. *Swainson*, 6 De G. M. & G. 648; 26 L. J., Ch. 119; 3 Jur. (N.S.) 145; 5 W. R. 187.

S. devised and bequeathed all his real and personal estate to his wife E. absolutely. One of the estates was subject to a mortgage debt, for payment of which two policies of insurance had been assigned. S. died on the 19th December, 1854, and E., two days afterwards, intestate, leaving her two sons, the plaintiff and the defendant, her surviving. The defendant, the elder son, obtained grants of letters of administration to both S. and E. He received the proceeds of the policies, and applied them in payment of the mortgage debt, and the chief clerk certified that such application was correct. The plaintiff moved to vary the certificate, on the ground that it had been decided, on the hearing of the cause, that the defendant was not entitled to have the mortgage debt paid out of the personal estate of the mortgagor; but the court held that the application of the proceeds was proper, and the finding of the chief clerk correct, such proceeds being no part of the assets of E. *S. C.*, 4 Jur. (N.S.) 1011.

James E. mortgaged real estate, and died in 1850, intestate, leaving his father Edward E. his heir at law and sole next of kin. Edward E. died intestate, and without having obtained letters of administration of the personal estate of James:—Held, that the personal estate of James was liable, as between the heir and personal representative of Edward and James, to be applied in discharge of the mortgage debt in exoneration of the real estate. Observations upon the conflict of authorities on the subject of exoneration. *Bond* v. *England*, 2 K. & J. 44; 24 L. J., Ch. 671; 1 Jur. (N.S.) 918; 3 W. R. 648.

—— **Adoption of, by Purchasers.**]—Two persons buy estates subject to a mortgage made by the former owners, take upon them different mortgages, and covenant with each other for payment of them; they do not by that means make their personal estate liable. *Forrester* v. *Leigh*, Ambl. 173.

Where an estate descends subject to a mortgage, if nobody will take an assignment of the mortgage, without the heir covenant to pay, such covenant only subjects his estate collaterally. *Ib.*

One agrees to buy an estate which was in mortgage for a gross sum, of which he covenants to pay 86*l.* to the mortgagee, and the rest, being 44*l.*, to the owner of the estate; the purchaser dies; his heir-at-law has a right to have the mortgage-money paid out of his personal estate. *Parsons* v. *Freeman*, Ambl. 115.

Mortgaged estate descends: the mortgagee pressing, the security is assigned; a mere covenant by the heir upon that occasion for payment does not make it his personal debt. A mere covenant by the purchaser of a mortgaged estate to indemnify the vendor does not make it his personal debt. *Woods* v. *Huntingford*, 3 Ves. 131.

Upon the purchase of an equity of redemption, the agreement of the purchaser with the vendor to pay the mortgage without any communication with the mortgagee, not sufficient to make it the personal debt of the purchaser. *Butler* v. *Butler*, 5 Ves. 534.

Heir of purchaser exonerated by ancestor's personal assets from a mortgage, the result of the transaction being a personal contract, and the personal assets, therefore, the primary fund. *Waring* v. *Ward*, 7 Ves. 332; 5 R. R. 130.

No exoneration of heir by personal assets of a party who never personally contracted, or not originally, but only as a further security in a subsequent transaction, not intended to disturb the order of charge, as the transfer of mortgage or the purchase of an equity of redemption; even though the interest is raised, the excess follows the subject of the original contract. *Id.* 336.

Though upon the purchase of an equity of redemption, the incumbrance is not, as between the representatives of the purchaser, his personal debt, even by his covenant to pay, which is considered as only for indemnity of the vendor, it is, if beyond that he enters into a new contract with the mortgagee, as for different times and

modes of payment, &c. *Oxford* (*Earl*) v. *Rodney* (*Lord*), 14 Ves. 417.

Where a feme sole makes a mortgage, or takes an estate subject to a mortgage, and afterwards upon a transfer her husband covenants to pay the money, his personal estate shall not be liable; secus, where the husband has received the money himself. *Bagot* v. *Oughton*, 1 P. W. 348; Fortesc. 332; Sel. Ch. Ca. 20.

—— **Adoption by Heir or Devisee.**]—Where heir inherits a mortgaged estate, if he executes a new covenant and bond, with a new equity of redemption, he makes the debt his own, and his personal estate shall be primarily liable. *Donisthorpe* v. *Porter*, 2 Eden. 162; Ambl. 600.

Mortgaged estate descends; the mortgagee pressing, the security is assigned. A mere covenant by the heir upon that occasion for payment, does not make it his personal debt. A mere covenant by the purchaser of a mortgaged estate to indemnify the vendor, does not make it his personal debt. *Woods* v. *Huntingford*, 3 Ves. 131.

If an estate descends subject to a mortgage, and the heir creates a new mortgage for securing the old debt, and also one contracted by himself, and fixes a new day of payment, he makes himself liable to both, notwithstanding he exempts in the new security his person and his property, except what is comprised in the new mortgage from liability in respect of the debts. *Lushington* v. *Sewell*, 1 Sim. 435.

S. was devisee of an estate which had been mortgaged to A. by the testator, which mortgage carried interest at 5 per cent. S. joined in an assignment of the mortgage from A. to B., discharged from the former proviso of redemption, and subject to redemption on payment of principal and interest at the rate of 4 per cent. only; and S. covenanted for payment of such principal and interest: afterwards S. agreed to raise the interest to 5 per cent., and covenanted to pay interest at that rate. Then S. died, leaving an arrear of interest due on the mortgage: this not being originally the debt of S., his covenants are only collateral, and his personal estate is not primarily liable to discharge any part either of principal or interest due on the mortgage. *Shafto* v. *Shafto*, 1 Cox, 207.

Where there was a mortgage on two estates, A. and B., and estate A. was specifically devised by the mortgagor, and estate B. descended upon his heir, to whom the mortgagor devised and bequeathed all other his real, and the whole of his personal estate, subject to the payment of his debts. The heir afterwards covenanted with the devisee that he would exonerate estate A., and, by consent of the mortgagee, estate A. was afterwards exonerated, and the whole debt thrown upon estate B.; and the heir afterwards devised specifically estate B., and gave all other his real and personal estate to his eldest son, "subject to the payment of his debts, and the fulfilment of all his contracts and obligations": —Held, that the covenant did not amount to an adoption by the heir of the debt as his own, and, therefore, estate B. was not exonerated by the second will. *Ilchester* (*Earl*) v. *Carnarvon* (*Earl*), 1 Beav. 209; 8 L. J., Ch. 245; 3 Jur. 239.

The equity of redemption of an estate in mortgage, subject to the usual proviso for redemption, for securing 3,000*l.*, devolved, by devise and conveyance, on several persons as tenants in common, in unequal shares. The mortgagee having required his money, an indenture was made between the mortgagee of the first part, the tenants in common of the equity of redemption of the second part, and new mortgagees of the third part, whereby, in consideration of 2,000*l.* to the old mortgagee paid by the new mortgagees, at the request of one of the tenants in common, and of 1,000*l.* in like manner paid at the request of two other of the tenants in common, in equal moieties, making 3,000*l.*, the mortgaged hereditaments were conveyed to the new mortgagees, subject to new distinct provisoes for redemption at the end of six months on payment of the 2,000*l.*, for re-conveyance of two-third parts to one tenant in common, and on payment of 1,000*l.* for re-conveyance to the two others, the tenants in common of the one-third part in equal moieties as between themselves; the tenants in common covenanted to pay their respective proportions, with interest, at the end of the six months. They, at the same time, executed a mortgage bond with a condition avoiding the same on payment of the 3,000*l.* and interest, as stipulated for by the proviso for redemption, and according to their covenants:—Held, that neither the form of the new proviso for redemption, nor the new covenant to pay, shewed an intention to change the nature of the mortgage-debt; and that the personal estate of one of the tenants in common was not liable, in exoneration of the mortgaged estate, to pay the proportion of the mortgage debt. *Hedges* v. *Hedges*, 5 De G. & Sm. 330; 21 L. J., Ch. 858; 16 Jur. 634.

An estate descended from A. to B., subject to a mortgage: A. died considerably indebted by a simple contract. B. made a further mortgage of the premises for payment of the simple contract debts of A. This is not a debt to which the personal estate of B. is primarily liable, but both the mortgages are charges in the first instance on the land. *Tankerville* (*Earl*) v. *Fawcett*, 1 Cox, 237; 2 Bro. C. C. 57.

Incumbrances of an ancestor are not a primary charge on the son's personal estate; although the latter had covenanted to pay them. *Leman* v. *Newnham*, 1 Ves. Sen. 51.

Testator desires all his debts may be discharged by his executors, adding, "I mean those only of my own contracting, not those heavier debts by my family"; gives his personal estate to his mother, whom he makes executrix, desiring her to pay all his just debts exactly. Long after his making the will, the mother buys in mortgages charged on his estate by his ancestors, and the son covenants to pay the money. The personal estate is still exempted from the principal and interest due on those mortgages, which are still a charge on the real. *Ib.*

D. devised estates to trustees for a term of years in trust to raise money for payment of all his debts and legacies, and subject to that term he limited the estates in strict settlement, with the ultimate remainder to his own right heirs. By the falling in of the intermediate limitations, A. and B. became entitled to the estates as right heirs of the testator. The testator's debts and legacies remaining unsatisfied, A. and B. executed joint bonds for the amount of them, and then A. died. These bonds are not debts of A., to which his personal estate is primarily liable, but they must be borne, in the first instance, by the devised estate. *Basset* v. *Percival*, 1 Cox, 268.

A mortgage is made of the manor and lands of S. and other valuable estates, to secure a debt of 80,000*l.* and interest. The mortgagor dies intestate, leaving the debt wholly unpaid; and his heir, being pressed to pay off 30,000*l.*, part of the 80,000*l.*, procures a person to advance the sum required for the purpose, and the original mortgagee thereupon joins with the heir of the mortgagor in a deed conveying the manor and lands of S. to the person making the advance, subject to a proviso for redemption at the end of five years, being an equity of redemption altogether different from the prior equity of redemption, and the interest reserved being 5 per cent. instead of 4½ per cent., which was the rate reserved in the original mortgage. This is, in effect, a new mortgage by the heir, and the 30,000*l.* is thereby constituted his personal debt. *Barham* v. *Thanet* (*Earl*), 3 Myl. & K. 607; 3 L. J., Ch. 228.

The same mortgagor made another mortgage of gavelkind lands, which, upon his death intestate, descended to his two brothers as co-parceners. The elder brother, who was the common-law heir of the mortgagor, purchased of the other brother his moiety of the gavelkind lands, and covenanted with him to pay the whole mortgage-money. He did not thereby make the mortgage-money his personal debt. *Ib.*

An estate was devised to the eldest son of the testator, in fee, charged with four portions of 5,000*l.* each, for younger children. The eldest son, on his marriage, settled the estate to the use of his intended wife after his decease, for her life, if she should survive him, with remainder to himself in fee, and covenanted within six months to pay off the four sums of 5,000*l.*, and release the estate therefrom. He paid off one sum of 5,000*l.*, and died intestate:—Held, that the husband was not a purchaser under the settlement, and that the covenant in the settlement could not be taken to have been for indemnity only, but that, so far as the wife and younger children were concerned, the husband had adopted the portions as his own debt, and that he had also made them his debt as between his real and personal representatives. *Barham* v. *Clarendon* (*Earl*), 10 Hare, 126; 22 L. J., Ch. 1057; 17 Jur. 336; 1 W. R. 96.

When a man covenants upon his marriage to lay out money in the purchase of land, and to settle the land, when purchased, in favour of his wife and children, with remainder to himself in fee, the money is converted into land, not only in favour of the wife and children, but in favour of the heir also, and the heir may enforce the covenant where any of the uses of the settlement subsist at the death of the covenantor. *Ib.*

A testator having mortgaged an estate for 1,500*l.*, for payment of which his eldest son was surety to the mortgagee, devised the estate to his eldest son in tail, with remainders over, under which the plaintiff became tenant in tail. The testator devised another estate to trustees, upon trust to sell, and out of the proceeds to pay his mortgage and other debts, and gave the residue to his eldest son, whom he appointed executor and residuary legatee. The trustees did not act, but the son entered into possession of all the testator's estate and property. The mortgage was transferred, the son entering into a new covenant for payment of 1,500*l.*, and the interest at a different rate, with a new proviso for redemption; and he covenanted for payment of the 1,500*l.* and interest accordingly. The son having died:—Held, that the plaintiff was entitled to have the entailed estate exonerated from the mortgage out of the son's personal estate. *Bruce* v. *Morice*, 2 De G. & Sm. 389.

In 1775 A. became owner in fee of estates W. and L. The W. estate was subject to mortgages amounting to 5,344*l.*, and the L. estate to a mortgage amounting to 2,200*l.*, all of which were created by A.'s ancestor. In 1787 A. mortgaged the L. estate for 8,000*l.*, reserving the equity of redemption to himself, and personally covenanting to pay the money out of this sum. He paid off the three mortgages on the W. estate. A. died in 1806:—Held, as between the representatives of A., that the mortgage was primarily payable out of A.'s personal estate. *Bagot* v. *Bagot*, 34 Beav. 134; 10 Jur. (N.S.) 1169; 13 W. R. 169.

—— **Incumbrances under Powers and Settlements.**]—There being a borrowing and lending in the case of a mortgage, the real estate is considered only as a pledge, and the personal liable in the first place. *Lanoy* v. *Athol* (*Duke*), 2 Atk. 446.

But this rule has never been carried so far as to extend to a provision in a settlement. *Ib.*

A feme covert, tenant for life, with power of charging, and with the ultimate limitations to herself in fee, makes a charge, and covenants for payment. She survives her husband, and the intermediate limitations having failed, the estate on her death descends to her heir. He is not entitled to exoneration out of her general personal estate. *Digby* (*Earl*), *Ex parte*, Jac. 235.

In general, if a tenant for life, with power of charging, makes a charge, his personal estate is not liable to exonerate the land. *Ib.*

A father having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted to pay the money. By his will he directed his debts to be paid, first, out of the residue of his personal estate, then out of his money in the funds; and, lastly, out of his residuary real estates:—Held, that the mortgaged estate was not to be exonerated from the portion out of the personal estate. *Graves* v. *Hicks*, 6 Sim. 398; 4 L. J., Ch. 239.

A testator had, before his marriage, limited lands to trustees for a term, to secure a debt, and subject thereto to other trustees for another term, to secure an annuity of 100*l.* per annum to his intended wife for life, with a proviso for determining the latter term, on his investing a sufficient amount to secure an equal annuity. He died without having made such an investment, having by his will directed payment out of his personal estate of his debts, including what might be charged upon the settled lands; and he bequeathed his residuary estate to his widow. Before his death, he had paid off the debt secured by the first of the above-mentioned terms, which had consequently determined, and the annuity was the only charge upon the estates:—Held, that the tenant of the estates was not entitled to have them exonerated as against the widow out of the residue. *Reeve* v. *Reeve*, 3 De G. & Sm. 714; 14 Jur. 264.

A., by ante-nuptial settlement, covenanted that if the marriage should take effect, and his wife survive him, his heirs, executors, or administrators should pay to her an annuity of 200*l.* for her life, and that for better securing the annuity he and his heirs would grant and secure the same

out of a sufficient part of the real estates devised to him by the will of his father:—Held, that the real estates were to be exonerated from the annuity out of the personal estate of A. *Field* v. *Moore*, 25 L. J., Ch. 66; 2 Jur. (N.S.) 145; 4 W. R. 187.

A., by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was mentioned, and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for his intended wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts; and he reserved to himself power to raise 10,000*l*. by mortgage of the estates, the mortgage to be made redeemable by the person for the time being entitled to the freehold. A. exercised the power, reserving the equity of redemption to himself, his heirs, executors, &c., or the person for the time being entitled as aforesaid, and covenanted for payment of the mortgage-money. He then died without issue, having by his will charged his real and personal estate with his debts, and bequeathed the residue of his personal estate after payment of his debts to B., and having devised his remainder in fee expectant on the failure of his issue male to his brother and his brother's sons:—Held, that they were not entitled to have his personal estate applied to exonerate the devised estates from any mortgage debts. *Ibbetson* v. *Ibbetson*, 12 Sim. 206.

A testator in his lifetime mortgaged certain estates to secure a sum borrowed for the purpose of paying portions charged upon the same estates by the marriage settlement of his father, under whose will the testator claimed:—Held, this was not the personal debt of the testator, and therefore where the testator had devised other estates to be sold, and the produce applied inter alia, to discharge the mortgage debt in exoneration of the mortgaged property, and gave the residue to the respondents, and bequeathed his personal estate to his wife, who died in his lifetime, it was held that the mortgage debt was, notwithstanding the failure of the bequest to the wife, to be paid out of the produce of the real estate directed to be sold. One of the sums directed to be paid out of the produce of the estate directed to be sold was a sum of 5,000*l*., in satisfaction of a similar sum settled upon the wife in the event of her surviving her husband; and it was held that this sum sunk for the benefit of the persons entitled to the residue of money arising from the sale, and was not a resulting trust for the heir. *Noel* v. *Henley* (*Lord*), Daniell, 211, 332; 7 Price, 241: 12 Price, 213; 26 R. R. 660.

The owner in fee simple of certain hereditaments settled them by a voluntary deed to such uses as he should appoint, and subject thereto, to himself for life, with remainders over. Subsequently he exercised his power of appointment by a deed mortgaging the estate for 15,000*l*., and he covenanted in that deed for payment of the mortgage debt and interest. He then died, having made his will, reciting the settlement so as to shew the power of appointment, and exercising it by making some further charges upon the estate; expressly confirming the settlement and subjecting his residuary personal estate to the payment of his debts:—Held, that the settled estate, as between the persons entitled thereto, and the personal representatives of the settlor, was the primary fund for payment of the mortgage. *Jenkinson* v. *Harcourt*, 1 Kay, 688; 23 L. J., Ch. 785; 2 W. R. 688.

A testator had, after mortgaging an estate, settled it, subject to the mortgage, upon trusts for himself for life, with remainders over, leaving in himself the ultimate reversion in fee, which he devised by his will (before the 17 & 18 Vict. c. 113):—Held, that the estate was by this settlement made the primary fund for payment of the mortgage debt; and that, after the determination of the particular estates which took place after A.'s death, the estate was liable, in the hands of his devisees, to exonerate his personal estate from that debt. *Langdale* (*Lady*) v. *Briggs*, 8 De G. M. & G. 391; 26 L. J., Ch. 27; 2 Jur. (N.S.) 982; 4 W. R. 703.

By a deed of compromise between U. and L., the former conveyed a certain fee simple estate to a trustee, "charged and chargeable with all leases, mortgages, gifts, conveyances, judgments, and incumbrances, theretofore made by him, of all or any part of the said estate," upon trust to permit him, U., during his life, to receive the rents, and after his decease to convey the said estate to L. and his heirs. Previous to the execution of this deed, U. had confessed several judgments, and mortgaged the whole estate. U. afterwards died, leaving considerable personal property:—Held, that the real estate, so conveyed by him, was the primary fund for the payment of those incumbrances. *Alen* v. *Hogan*, Ll. & G. t. Sugd. 231.

By a settlement dated in 1821 copyhold lands, which had been conditionally surrendered for securing certain mortgages, were settled by the testator, subject to the mortgages, he at the same time covenanting to pay off the same; and there was a proviso, that as between the testator, his heirs, executors and administrators, and the persons entitled under the settlement, the lands were to be the primary fund for payment of the same mortgage debts. In 1826 the testator paid off the debts out of his own moneys, and satisfaction was duly entered on the court rolls of the conditional surrender. In 1831 the lands were, under a power in the first settlement, re-settled by the testator and his wife, but no notice was taken of the fact of repayment of the mortgages. By his will the testator directed all his debts, &c., to be paid out of the personalty only:—Held, that a charge to the amount of the mortgage debts was to be considered as kept on foot as part of the testator's personal estate. *Pears* v. *Weightman*, 2 Jur. (N.S.) 586.

—— **Devise cum onere.**]—Where a testator gives to three different persons three leasehold estates, one of which is mortgaged, and directs that the mortgage shall be paid out of his residuary personal estate, which proves insufficient for that purpose, the legatee of the mortgaged leasehold takes it cum onere, and the legatees of the two other leaseholds shall not contribute towards the payment of the mortgage debt. *Halliwell* v. *Tanner*, 1 Russ. & M. 633.

Upon the construction of a will:—Held, that a particular freehold estate of the testator was the primary fund for the payment of a mortgage debt which had been charged thereon by the testator in his lifetime, in exoneration of the personalty and other estates. *Evans* v. *Cockeram*, 1 Coll. C. C. 428; 8 Jur. 903.

Devise of estate cum onere, out of what fund mortgage debt payable. *Sargent* v. *Roberts*, 17 L. J., Ch. 117; 12 Jur. 429.

In what case the devisee of land in mortgage shall pay the incumbrance on it. *Freeman* v. *Freeman*, Romilly's Notes of Cases, 157.

M. C., by his will, gave two leasehold estates (each of which was subject to a distinct mortgage), and all the residue of his estate, subject to the payment of his debts, to trustees, for his wife E. C., for life, with remainder as she should appoint. E. C. paid off both mortgages, and took an assignment of each to a trustee, "to the end and intent that the same might be kept on foot for her benefit." She afterwards executed her power of appointment over both estates; over the one by a deed poll, by which she annexed to the gift a condition that her appointees should release a certain claim which might have been enforced against the estate; and over the other by her will, by which, after reciting her power of appointment over the premises (describing them), she appointed the same to trustees, upon trust to pay the rents, &c., to certain of her children:—Held, that it was E. C.'s intention to keep these charges on foot, and therefore, that her appointees took subject to them. *Cole* v. *Stutely*, 6 Jur. 314.

M. C.'s general assets being insufficient to pay off the mortgage debts:—Held, that the leasehold premises passed to his wife's appointees cum onere. *Ib.*

By an ante-nuptial settlement, a sum of 7,356*l.*, the property of the wife, was vested in trustees, upon trust that, in case the husband should within six months, by covenant and by a mortgage of certain hereditaments belonging to him, secure payment to them of 4,000*l.*, they should pay 4,356*l.* to him out of the trust money; as to the mortgage debt of 4,000*l.*, it was declared that the trustees should stand possessed thereof, and of the securities for the same, upon trust to pay the interest to the husband for life, and after his decease to the wife for life, and after the decease of the survivor, upon the same trusts, as to the principal of the mortgage debt, as were declared of the residue of the trust money, for the benefit of the children of the marriage, and, if no children, upon trust for the husband, absolutely. Shortly after the marriage, the husband executed a mortgage of Whiteacre for the sum of 4,000*l.* to the trustees, who thereupon paid over to him the sum of 4,356*l.* By his will the husband gave to certain other trustees all his property, real and personal, upon trust, to hold the lands of Whiteacre and Blackacre, first, to fulfil the trusts of his settlement. The testator having died without issue:—Held, that by the devise of Whiteacre and Blackacre, upon trust, to fulfil the trusts of the settlement, the testator onerated both those estates with the mortgage debt, but that he did not devise them upon the same limitations as were contained in regard to the mortgage debt in the settlement; and, accordingly, that neither the wife of the testator took, nor would the children of the marriage, if there had been any, have taken any estate or interest in those lands under that devise, save as securities for the mortgage debt, but were excluded in favour of devisees. *O'Reilly* v. *Smith*, 1 Ir. Ch. R. 349.

W. devised the whole of his real estate (some parts of which were subject to mortgages) specifically to his nine sons and daughters and granddaughter. The personal estate was found to be insufficient to pay his debts. The representatives of one of the sons filed a bill praying for the administration of the real and personal estate; and they submitted that one of the devises had lapsed; that the whole of the real estate was charged with payment of the debts, and that the three daughters took only life estates. They failed in all points, the court holding that there was no descended estate, that the real estates devised to the sons were alone charged with debts, in exoneration of the daughters' estate, and that the daughters took an estate in fee. The court declared that the houses devised to the sons were primarily liable to pay and discharge the mortgage debts ratably, and in proportion to the respective values of the houses. Minutes of a decree were drawn up whereby (the houses having been sold) the proceeds were ordered to be carried to a single account to the credit of the cause, and, after payment of a simple contract debt, the residue was directed to be apportioned amongst the sons ratably, according to the amount of their devises (5 Jur. (N.S.) 86). On motion to vary the minutes by the insertion of a direction that the residue should be first apportioned in two parts, in proportion to the values of the two sets of houses, and each part apportioned to the devisees of such parts ratably, according to their respective devises:—Held, that as there were no words of exoneration, and no words which amounted to making the gross proceeds of the mortgaged estates a common fund to pay the gross amount of the mortgages ratably, the latter construction must prevail; and the motion was allowed, the costs to be costs in the cause. *Wisden* v. *Wisden*, 5 Jur. (N.S.) 455.

A testator who died in 1874, bequeathed three leaseholds, A., B. and C., to his wife, and directed that "should there be at the time of my death any incumbrances on C., I desire the said incumbrances to be paid off." A. and B. were subject to mortgages at the time of his death, but C. was unincumbered:—Held, that the above direction did not raise an implication that A. and B. were not to be exonerated out of the general estate of the testator. *Bull, In re, Catty* v. *Bull*, 49 L. T. 592; 31 W. R. 854.

—— **"Subject to Mortgage."**]—Distinction between testamentary dispositions of mortgages and of leaseholds, in reference to the use of words "subject, &c.," as connected with the question of the legatee taking the property bequeathed cum onere. *Hickling* v. *Boyer*, 3 Mac. & G. 635; 21 L. J., Ch. 388; 16 Jur. 137.

One devises his lands in D. to A. (his cousin), an infant, at her age of twenty-one, subject to the incumbrances thereupon and the rents during the infancy to be paid to her father, and devises all his other lands to trustees to pay his debts, the lands in D. being mortgaged, the mortgagee shall be discharged by moneys arising from the sale of other lands. *Serle* v. *St. Eloy*, 2 P. W. 386.

Devise of a copyhold subject to a mortgage not sufficient to exonerate the personal estate from the payment of the mortgage-money. *Astley* v. *Tankerville (Earl)*, 1 Cox, 82; 3 Bro. C. C. 545.

Husband and wife levy a fine of the wife's estate, and settle the same, with a power to them to revoke and declare new uses. They afterwards join in a mortgage term to secure a sum redeemable on payment by the husband or the persons to whom the freehold should belong. The mortgage was paid off, and the term assigned to a trustee to such uses as the husband should appoint. He afterwards (without the wife)

borrows a further sum, and makes the term a security, and the trustee joins in the assignment. The husband, by will, orders his personal estate to be applied in payment of debts, except those secured upon mortgaged estates. This is the husband's debt, and shall be paid by his personal estate, not by the mortgage term. *Ib.*

Devise of lands, subject to 1,000*l.* to be raised for the testator's daughters, to an annuity of 37*l.* 10*s.* to his widow, and to all such incumbrances as might happen to be thereon, does not exempt the personal estate from the payment of a mortgage thereon. *Phillips* v. *Parker*, Taml. 136.

A testator devised his three houses in N., part of his real estate, together with several other houses, "the whole subject to the payment of the mortgage debt of 2,900*l.* borrowed on mortgage of the houses in N.," to C. and H. in fee. He then devised and bequeathed the residue of his real estates, and all his personal estate and effects whatsoever, subject, nevertheless, as to his personal estate, to the payment of his debts, except such debts as were therein excepted therefrom, to trustees, in trust, as to the particular estates therein specified, and, among others, as to his four messuages therein described, subject to the mortgages made on the same, and from the payment of which he thereby exempted his personal estate, and as to all the residue and remainder of his said real and personal estates, in trust for the persons therein mentioned:—Held, that the testator's personal estate was the primary fund for the payment of the mortgage debt of 2,900*l.* *Bickham* v. *Cruttwell*, 3 Myl. & C. 763; 7 L. J., Ch. 198; 2 Jur. 342.

An estate was subject to mortgages of 7,000*l.* created by a testator, and of 13,000*l.* created by his ancestor; but the testator had consolidated them into one mortgage for 20,000*l.*, which he had covenanted to pay. The testator directed his debts to be paid out of his personal estate, but if insufficient he charged them on his real estate. He devised his real estate "subject nevertheless to the mortgages affecting the same"; and he died in 1840:—Held, that the devisee of the estate did not take cum onere, but was entitled to have the whole mortgage debt paid out of the personal estate. *Townshend* v. *Mostyn*, 26 Beav. 72.

A devise to A. of land at L., subject to the payment of 200*l.*, part of 1,200*l.* charged thereon (together with the testator's estate at F.), and a devise to B., subject to the payment of 1,000*l.*, being the remainder of the 1,200*l.* charged thereon (together with the estate at L.), of land at F., and also of the testator's estate at S.:—Held, not to exonerate the testator's descended real estate from its primary liability to payment of the mortgage debt; held, also, that the terms of the devise did not create any charge upon the estate at S., although the value of the land at L. was not more than 560*l.* *Goodwin* v. *Lee*, 1 Kay & J. 377; 24 L. J., Ch. 306; 1 Jur. (N.S.) 226; 3 W. R. 336. Affirmed 1 Jur. (N.S.) 948—L.JJ.

A., the owner of a freehold estate, subject to a mortgage in fee to secure 1,300*l.*, devised and bequeathed his real and personal estate to B., the mortgagee. B., in his residuary account, stated that he had retained 467*l.* out of the personal estate towards payment of his mortgage debt. Afterwards B. devised the property to three relatives of A., "provided they undertake to receive the same with all the liabilities attaching thereunto":—Held, first, under the circumstances, that the mortgage had not merged in the fee; and, secondly, that the three took the estate subject to the payment of the balance of the mortgage debt. *Hatch* v. *Skelton*, 20 Beav. 453.

—— **"He paying the Mortgage."**]—A testator, having an estate subject to a mortgage of 4,460*l.* created by himself, devised it to A. B. in fee, "he paying the mortgage thereon"; and he devised his residuary real and personal estates to trustees for the payment of his debts, and he gave to the mortgagee, through the medium of his executors, 2,000*l.* to exonerate the estate:—Held, that although, if the devise had been simply "of the estate" or "of the estate subject to the mortgage thereon," the mortgage would have been payable out of the testator's general estate, yet that the words "he paying the mortgage thereon" imposed a duty on the devisee, and amounted to a direction or condition that he should pay the mortgage, or take the estate subject to the burden upon it, so far as the same exceeded the 2,000*l.* *Lockhart* v. *Hardy*, 9 Beav. 379; 10 Jur. 728.

—— **Lapse of Time — What bars Right.**]—Devisee in tail of real estate claiming to be exonerated out of the descended moiety from a mortgage, filed his bill against the heir more than thirty years after testator's death, and more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained, under a decree of the court:—Held, that the devisee was entitled to a decree for exoneration against the heir with costs. *Newhouse* v. *Smith*, 2 Sm. & G. 344.

A. became bankrupt, and of his estate sufficient to pay all his creditors was possessed by the assignees. Some of the creditors never claimed their dividends, which remained in the hands of one of the assignees. A. died in 1819, leaving real estate, which was subject to mortgages created by himself. In 1849, the person entitled to A.'s residuary personal estate by proceedings in bankruptcy obtained the payment of the surplus moneys, then in the hands of the assignee, to the executor of A. In 1852 the suit of *Smith* v. *Bridger* was instituted by a person claiming to be entitled to the equity of redemption of A.'s mortgaged estates, praying that the recovered fund might be applied in paying off the mortgages. *Mellersh* v. *Bridger* was a suit by the person entitled to A.'s residuary personalty for payment of the fund to him:—Held, that the right to exoneration was not barred by lapse of time. *Mellersh* v. *Bridger*, 17 Jur. 908.

—— **Contribution.**]—A testator devised his E. estate, subject to debts, etc., to his wife for life, with remainders over, and he devised his C. estate, subject to his debts, etc., to his wife absolutely. He afterwards mortgaged his E. estate:—Held, on a deficiency of the personal estate, that the estates E. and C. ought to contribute ratably towards payment of the mortgage. *Middleton* v. *Middleton*, 15 Beav. 450.

A testator before 17 & 18 Vict. c. 113, having two estates subject to the same mortgage, made a specific devise of one and a residuary devise of the other:—Held, that the residuary devise being specific, both estates must bear the mortgage debt ratably. *Gibbins* v. *Eyden*, 38 L. J., Ch. 377; L. R. 7 Eq. 371; 20 L. T. 516; 17 W. R. 481. Contra, *Brownson* v. *Lawrance*, 37 L. J., Ch. 351; L. R. 6 Eq. 1; 18 L. T. 143; 16 W. R. 926.

A. mortgaged freeholds and leaseholds together

and died intestate in 1857:—Held (as between the heir and administrator), that the freeholds must bear the burden ratably. *Evans* v. *Wyatt*, 31 Beav. 217.

J. B., being entitled to the lands of P. and K., mortgaged the same, and, by his will having given to his son H. B. all his interest in the lands of P., he devised thus: "I give, devise, and bequeath unto my son A. B., but in trust to and for the sole use and behoof of my daughter H., without the control of her husband, all my interest in and to my lands of K., to her sole use and behoof, over and above any provision made for her by her marriage settlement, with full power for said A. B., by consent of H., to let, sell, or dispose thereof, in any manner he or she may think proper, and also all my household furniture, etc., and all other my real, freehold, and personal property, of what nature or kind soever, not otherwise disposed of by me, but subject to and chargeable with all my debts, legacies, and funeral expenses." After his father's death, H. B. took an assignment of the mortgage, and went into possession of all the mortgaged premises. On a bill filed by H. and her husband against H. B. and A. B., praying a redemption, and charging that the mortgage was then paid off by the perception of the rents and profits:—Held, that the lands of K. were not bound to exonerate the lands of P., but that both should contribute ratably to the payment of the mortgage; but the bill having been filed before the mortgage was paid off, the costs of the mortgagee should be borne by the lands of K. exclusively. *Clarke* v. *Brereton*, 1 Jones, 165.

O'S. being seised in fee of W., and possessed of a charge of 2,000*l.* affecting K., mortgaged them, in 1817, to B. At the same time, certain old judgments affecting W. were assigned to a trustee for B., as collateral securities. In 1824 O'S. mortgaged the equity of redemption of W. to L., and other old judgments affecting the lands, subsequent to those assigned in trust for B., were assigned to a trustee for L. as collateral securities. Prior to the mortgage of 1817, O'S. confessed a judgment to X., which was puisne to the judgments assigned in trust for L. In 1825 he confessed another judgment to Y., and died in 1827. In a suit for the administration of his assets, W. was sold, and the produce thereof applied in payment of the sum due to B., and in part payment of the sum due to L. Those payments were made, not on foot of the mortgages of 1817 and 1824, but on foot of the collateral securities. The charge of 2,000*l.* was afterwards paid into court:—Held, that the charge of 2,000*l.* was the primary fund for payment of B.'s mortgage; and that, not having been so applied, the money in court was to be considered as part of the real estate, and ought to be applied accordingly. *Kirby* v. *O'Shee*, 4 Ir. Eq. R. 307.

A person having devised estates A. and B., deposited the title-deeds of A. with his bankers to secure any balance that might be due from him, and being largely indebted and unable to satisfy the debt, and requiring further small advances, deposited with the bank the title-deeds of B. The debt remaining due at his death:—Held, that the amount due up to the time of the second deposit was payable out of A., and the amount accrued subsequently out of A. and B. ratably, the value of A. to be computed after payment of the previous mortgage. *De Rochefort* v. *Dawes*, 40 L. J., Ch. 625; L. R. 12 Eq. 540; 25 L. T. 456.

A testator had borrowed money from his bankers from time to time, depositing securities with them upon the occasion of each advance, and on one occasion by memorandum charged a specific freehold property with the payment of a specific advance and money due, depositing the title-deeds. Some of the stocks and shares were sold by the bankers in the testator's lifetime, and the proceeds applied in reduction of the debt, which at his death stood at 28,625*l.* It appeared from a memorandum book kept by the testator and from his ledger, that the successive deposits were treated by him as forming one running account. By his will he devised his Caterham property to certain persons, and devised and bequeathed his residuary real and personal estate in trust for sale, and to divide the proceeds, after payment thereout of his debts, among certain other persons:—Held, that the debt due at the testator's death, and the interest thereon from that date, must be borne by the various properties then held by the bankers, ratably, according to their respective values at the death. *Leonino* v. *Leonino*, 48 L. J., Ch. 217; 10 Ch. D. 460; 40 L. T. 359; 27 W. R. 388.

A testator held shares in a banking company by whose deed of settlement it was provided that if any shareholder did not on demand pay all moneys due from him to the company, the directors might declare his shares forfeited, and that nevertheless he should still be liable to pay the debt, and it was also provided that a shareholder must have paid all moneys due from him to the company before he could transfer his shares. The testator borrowed money from the company, and deposited the deeds of certain real estate with them as security. By his will he gave the above estate to his son A., and his residuary property to his other sons. A. claimed that the testator's shares in the bank should contribute ratably to the payment of the debt:—Held, that the provisions of the deed of settlement did not create a charge or lien on the shares for a debt due from the holder, and that no case for contribution arose. *Dunlop, In re, Dunlop* v. *Dunlop*, 21 Ch. D. 583; 48 L. T. 89; 31 W. R. 211.

Held, also, that if the deed of settlement had charged the shares with all debts due from the shareholder to the company, a debt for which real estate had been specifically mortgaged would still have been payable out of the mortgaged estate before resorting to the shares, which were only subject to a general lien. *Ib.*

—— **Collateral Security.**]—A testator raised money on a legal mortgage of one estate, with an equitable mortgage of another estate as collateral security for part of the debt. He made his will in 1855, and died shortly afterwards:—Held, on administration, that the testator showed an intention to make the estate, subject to the legal mortgage, primarily liable to the whole debt, and that the 17 & 18 Vict. c. 113 did not apply. *Stringer* v. *Harper*, 26 Beav. 38; 4 Jur. (N.S.) 1009; 6 W. R. 763.

L. mortgaged real estate for 1,500*l.* By a subsequent deed, reciting the transfer of the previous mortgage, L. charged the premises subject thereto, together with other real and personal estate, with the payment of the original debt, and a further sum of 950*l.* in which he was indebted to the transferee, all the mortgaged property being subject to one proviso for redemption upon payment of the whole debt. Upon

the death of L., intestate:—Held (as between the heir at law and administrator), that the 950*l.* must be apportioned ratably between the real and personal estate comprised in the second deed; but that there was no merger of the first mortgage, the real estate comprised therein remaining primarily liable for the 1,500*l.* *Lipscomb* v. *Lipscomb*, 38 L. J., Ch. 90; L. R. 7 Eq. 501; 17 W. R. 252.

The purchaser of an estate, A., in order to secure the payment of the purchase-money, executed a deed, by the first part of which another estate, B., was mortgaged for the whole sum, and by the latter part of which the estate A. was also mortgaged, as a further and collateral security. Afterwards the two estates became the property of two different persons, who respectively derived title from the purchaser:—Held, upon the words of the deed and the circumstances of the transaction, that the estate B. was the primary security, and that, as between the owners of the two properties, the estate A. was not to be resorted to for payment of any part of the mortgage debt till the estate B. was exhausted. *Bute* (*Marquis*) v. *Cunynghame*, 2 Russ. 275.

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission, and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee, a primary mortgage of both estates, and the freehold not first applicable. *Aldrich* v. *Cooper*, 8 Ves. 382; 7 R. R. 86.

A mortgagor conveyed freeholds by way of mortgage by an indenture which recited an agreement by the mortgagees to advance him the principal moneys upon having the repayment thereof with interest secured "as hereinafter mentioned, and by a collateral security or indenture intended to bear even date with" those presents. On the same day the mortgagor demised leaseholds by way of mortgage to the same mortgagees to secure the same advance by an indenture which recited the mortgage of the freeholds, and that on the treaty for the advance "it was agreed that the same principal and interest should be further secured by these presents." Each of the two indentures contained a covenant for the payment of the mortgage debt and interest. In an action to administer the estate of the mortgagor:—Held, both on the frame of the deeds themselves and upon the evidence as to the circumstances attending the advance, that the leasehold security was not "collateral" in the sense of "secondary"; and accordingly that, as between the real and personal representatives of the mortgagor, the mortgage debt was payable ratably out of the freeholds and leaseholds comprised in the two securities, and not primarily out of the freeholds. Observations upon *Bute* (*Marquis*) v. *Cunynghame* (2 Russ. 275) and upon the meaning of the words "collateral security." *Athill, In re, Athill* v. *Athill*, 50 L. J., Ch. 123; 16 Ch. D. 211; 43 L. T. 581; 29 W. R. 309—C. A. S. P. *Early* v. *Early*, 49 L. J., Ch. 826; 16 Ch. D. 214, n.

Lien for Unpaid Purchase-money — Before Real Estate Charges Acts.]—Where one articles to purchase an estate, and dies before the purchase completed, the heir is entitled to have the purchase-money paid out of the personal estate. *Forrester* v. *Leigh*, Ambl. 116, 171. S. P. *Parsons* v. *Freeman*, Ambl. 116.

A. having agreed to purchase a real estate, the purchase-money for which exceeded the amount of his personal estate, by his will, made a few days afterwards, attested by three witnesses, as to "all the worldly goods that it had pleased God to bless him with," gave and bequeathed to his wife and two sons all his goods, cattle, chattels, personal estate, and effects whatsoever; and in case they died without issue, &c., gave the children's share of the personal estate and effects over; testator dying before the purchase could be completed:—Held, that the agreement ought to be specifically performed, and that, the words of the will being insufficient to comprehend real estate, the estate ought to be conveyed to the eldest son and his heirs, &c. *Cave* v. *Cave*, 2 Eden, 139.

—— **Where Title Defective.**]—When after making a will a person agrees for the purchase of land, if a good title cannot be made, as the heir cannot have the land, he shall not have the money to be laid out. *Green* v. *Smith*, 1 Atk. 572.

Devisee claiming benefit of contract for purchase of estate directed to go to uses of will, the title proving defective, has no claim upon personal estate, either to have purchase-money, or another estate purchased, or the purchase completed, notwithstanding defects. *Broome* v. *Monck*, 10 Ves. 597; 8 R. R. 48.

—— **Where no Binding Contract.**]—To entitle heir to performance of agreement for purchase out of personal estate, the agreement must have been binding upon the parties contracting, so that the property was converted in equity before the death. *Buckmaster* v. *Harrop*, 7 Ves. 341. *S.C.*, on appeal, 13 Ves. 456; 6 R. R. 132.

A trustee for sale bought the trust estate at an auction, and died:—Held, that his heir at law had no right, as against his next of kin, to have the contract completed for his benefit. *Ingle* v. *Richards*, 28 Beav. 361; 6 Jur. (N.S.) 1178; 8 W. R. 697.

Where an heir at law seeks to have a contract, entered into by his ancestor, carried into effect for his benefit, he must show that there was a binding contract at the death of the ancestor, and one which could be enforced against an unwilling purchaser. *Garnett* v. *Acton*, 28 Beav. 333.

A. agreed to purchase some real estate, but he died intestate before the completion of the purchase. It turned out that part of the property had been held for twenty-seven years under a parol exchange entered into by a mere tenant for life; but after A.'s death the exchange was confirmed by the trustees:—Held, that the contract could have been enforced against A. in his lifetime, and that his heir at law was entitled to have it completed for his own benefit, at the expense of A.'s personal estate. *Ib.*

Where contract for the purchase of an estate is not complete in the lifetime of the ancestor, the terms of it not being ascertained, heir is not entitled to have the personal estate applied to payment of the purchase-money. A reference or issue will not be granted to ascertain the terms of the contract. The application of the personal estate by the heir in completing the contract for purchase by the ancestor, but not binding on him, raises no trust in the lands for the next of kin. The money so laid out is a charge on the purchased lands. *Savage* v. *Carroll*, 1 Ball & B. 265; *see* 12 R. R. 32.

To entitle the heir to an application of the personal estate in completing a contract for a purchase of lands by the ancestor, it must be such as he could have been compelled to perform. *Ib.* 281.

A person contracted to purchase real estate, subject to a condition that if he made any requisition which the vendor was unable or unwilling to comply with, the vendor should be at liberty to rescind the contract. He made several requisitions and died intestate without completing the contract, and after his death the vendor rescinded it on account of his alleged inability to comply with one of the requisitions, which if not complied with might have given the purchaser a right to compensation, but would not have entitled him to annul the contract:—Held, that the heir at law of the purchaser was entitled to have the amount of the purchase-money paid to him out of the intestate's personal estate. *Hudson* v. *Cooke* or *Cook*, 41 L. J., Ch. 306; L. R. 13 Eq. 417; 26 L. T. 180; 20 W. R. 407.

Testator contracts for a particular estate, but dies before the purchase is completed; afterwards, from the state of his affairs, the contract is dissolved, yet the purchase-money shall not be sunk into his personal estate, but shall be laid out in other lands to the same uses as he had devised the land contracted for. *Whitaker* v. *Whitaker*, 4 Bro. C. C. 31.

A testator having instructed C. to purchase a site on which it was his intention to build schools, C. entered into negotiations for the purchase of a piece of land, and after the testator's death paid the purchase-money, and took a conveyance, in which he (C.) covenanted that schools, and no other buildings, should be erected on the land:—Held, that, as the evidence failed to shew a valid contract for purchase during the testator's lifetime, there was nothing to bind his assets, and the claim of C. against the estate in respect of the purchase-money was disallowed. *Woodward* v. *Humpage*, 5 L. T. 382.

An executor by his testator's direction, having negotiated for the purchase of a site for schools in common with a new church, to which the testator had largely contributed, but there being no binding contract at the death, subsequently completed, and took a conveyance to himself:—Held, not entitled to charge the purchase-money against the estate. *Inskip, In re*, 3 Giff. 359; 8 Jur. (N.S.) 256.

—— **Express Provision.**]—Testator contracts for the purchase of a house, and afterwards, by a codicil to his will, gives to A., his executor, the house which he had given a memorandum of agreement to purchase, and which was to be paid for out of timber which he had ordered to be cut down. This amounts to a direction that the purchase-money for the house shall be so provided for, and evidence was admitted to shew what was the order given by the testator with reference to the cutting of timber. *Sandford* v. *Raikes*, 1 Mer. 646.

The purchaser of an estate, subject to incumbrances, retained part of the purchase-money till they were discharged, and gave a bond for it; he deposited in a bank, in his own name, the amount of such bond, informing the obligees that he had so done; they, on the release of some of the incumbrances, received part of the money:—Held, on his death, that, under the circumstances, the balance of the money in the bank had been sufficiently appropriated for the payment of the residue of the purchase-money in ease of the parties taking the estate. *Yates* v. *Thomson*, 3 Cl. & F. 544.

—— **Purchase in Names of Husband and Wife.**]—An agreement for the purchase of land was entered into in the names of husband and wife, and the husband died before the whole of the purchase-money had been paid. Upon an inquiry in an administration suit as to the real property of the husband:—Held, that it did not include the purchased estate, that the purchase enured for the benefit of the widow, and that the unpaid purchase-money was payable out of the husband's personal estate. *Drew* v. *Martin*, 2 Hem. & M. 130; 33 L. J., Ch. 367; 10 Jur. (N.S.) 356; 10 L. T. 291; 12 W. R. 547; 3 N. R. 637.

—— **Heir, Rights of Purchaser's.**]—Where confirmed purchaser of estate under decree died before conveyance made, having in meantime devised his interest therein to trustees, court ordered conveyance to trustees without consent of heir at law, who was an infant. *King* v. *Gregory*, 4 Price, 380.

A. purchased for B., but without authority, an estate sold under a decree; B. died without adopting the purchase; the order nisi was nevertheless obtained. The court refused to order B.'s executor to pay the purchase-money, and, on the heir declining to purchase, discharged the order nisi and directed a resale. *Lord* v. *Lord*, 1 Sim. 503.

If the executors of a purchaser under a decree refuse to pay the purchase-money, they cannot be compelled to pay it unless a suit be instituted by the heir. *Ib.*

—— **Sale set aside at Suit of Vendor's Heir.**]—The vendor's heir at law, who has obtained a decree setting aside the sale on repayment of the purchase-money to the purchaser, has no equity to resort to the personal estate to recoup him, not even to a portion of it identified as part of the purchase-money. *Ryder* v. *Ryder*, Ir. R. 8 Eq. 86.

—— **Not within 17 & 18 Vict. c. 113.**]—Upon a contract for purchase of real estate, a deposit was made, and the balance of the purchase-money made payable at a future day, before the arrival of which the purchaser died intestate:—Held, that the lien for such balance upon the estate was not a charge thereon within the meaning of the 17 & 18 Vict. c. 113, and that, consequently, the heir at law was entitled to have such balance paid out of the personal estate of the deceased purchaser. *Hood* v. *Hood*, 26 L. J., Ch. 616; 3 Jur. (N.S.) 684; 5 W. R. 747.

—— **Other Matters.**]—A. purchases land of B., and mortgages back those lands for part of the purchase-money, and gives a note to B. for 200*l.*, the other part thereof; A. devises those lands to be sold for payment of his debts. This 200*l.* note, though for part of the purchase-money, shall not be preferred to other debts, nor be a charge on the land in equity. *Bond* v. *Kent*, 2 Vern. 281.

Where the date of a deed was subsequent, by a few days, to that of a will, and the testator's heiress had treated the property as having passed by the will, but was not shewn to have been aware of her rights, and forty years had elapsed, but without any adverse possession:—Held, that

the court would not presume a binding contract for purchase to have been entered into by the testator before the date of the will. *Cathrow* v. *Eade*, 4 De G. & Sm. 527.

Where the court had declared that certain devised estates were devised subject to incumbrances charged thereon, and a vendor had a lien for unpaid purchase-money on one of such estates:—Held, that the vendor's lien stood precisely in the same position as any other incumbrance, and that it must be paid out of the particular estate on which it attached. *Barnewall* v. *Iremonger*, 1 Dr. & Sm. 255; 3 L. T. 462; 9 W. R. 88.

Judgment—Lands delivered in Execution under Elegit.]—Lands to which a testator was believed to be entitled in fee simple, but of which he was in fact tenant in tail under a settlement, were in his lifetime delivered in execution, under a writ of elegit, to judgment creditors. The testator devised these lands to W. H. A., who survived the testator and died intestate, leaving H. W. A. his heir-at-law. H. W. A. was tenant in tail in possession of these lands under the limitations of the settlement:—Held, that the charge created by the judgment, though enforceable against the estate tail of H. W. A., was not so enforceable in exoneration of the testator's personal estate. *Anthony, In re, Anthony* v. *Anthony*, 62 L. J., Ch. 1004; [1893] 3 Ch. 498; 3 R. 671; 69 L. T. 300; 41 W. R. 667.

Liability under Building Contract.]—A., having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject as to the latter to the payment of his debts, to trustees, for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part:—Held, that his general personal estate was liable to the performance of the covenant. *Marshall* v. *Holloway*, 5 Sim. 196.

A person contracted with a builder to erect a house on a piece of freehold land belonging to him, and died intestate before the house was finished:—Held, that the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate. *Cooper* v. *Jarman*, 36 L. J., Ch. 85; L. R. 3 Eq. 98; 12 Jur. (N.S.) 956; 15 W. R. 142.

(b) *Real Estates Charges Acts.*

17 & 18 Vict. c. 113—To what Documents Applicable.]—A will executed before the time fixed for the commencement of the 17 & 18 Vict. c. 113, but not coming into operation until after that date, is, as between claimants under it, "a will already made" within the meaning of the proviso in the act, which reserves the rights of claimants under or by virtue of such a will. *Rolfe* v. *Perry*, 3 De G. J. & S. 481; 32 L. J., Ch. 471; 9 Jur. (N.S.) 853; 8 L. T. 441; 11 W. R. 674.

The re-publication of such a will at a time subsequent to the time fixed for the commencement of the act does not, as between the same persons, deprive it of its character of being "a will already made" within the meaning of the proviso. *Ib.*

The proviso that nothing in the 17 & 18 Vict. c. 113, contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made, or to be made, before the 1st January, 1855, held not to apply to the case of the heir of an intestate where the intestate, before the 1st January, 1855, executed a mortgage, reserving the equity of redemption to himself and his heirs. *Piper* v. *Piper*, 1 John. & H. 91; 29 L. J., Ch. 719; 6 Jur. (N.S.) 1026; 8 W. R. 543.

—— **Heir.**]—The proviso at the end of the 17 & 18 Vict. c. 113, that it shall not affect the rights of any person claiming under any deed or document made before the 1st January, 1855, does not save a right to the heir to be exonerated from a mortgage debt out of the personal estate bequeathed to a legatee by a will made before that date. *Power* v. *Power*, 8 Ir. Ch. R. 340.

In 1834 A. made his will, by which he devised to B. all his right, title, and interest to real estate, and he also devised and bequeathed to B. all his personal property, together with all other real, freehold, and chattel property of every nature and kind whatsoever, of which he might be seised or possessed at the time of his death; and he appointed C. his executor. After his will, A. granted mortgages, for the purpose of securing which he executed a disentailing deed, which was held to be a revocation of the will as to the real estate. A. died in 1856:—Held, that the 17 & 18 Vict. c. 113, applied, and that the heir was not entitled, as against the legatee of the personal estate, to be exonerated from the mortgage. *Ib.*

An heir-at-law and customary heir of a testator, taking by descent an estate which has been the subject of a lapsed devise in the will, is not a person claiming "under or by virtue of a will" within the meaning of the proviso contained in 17 & 18 Vict. c. 113, s. 1. *Nelson* v. *Page*, 38 L. J., Ch. 138; L. R. 7 Eq. 25; 19 L. T. 447; 17 W. R. 27.

—— **Copyholds.**]—The 17 & 18 Vict. c. 113, applies to copyholds. *Piper* v. *Piper*, 1 John. & H. 91; 29 L. J., Ch. 719; 6 Jur. (N.S.) 1026; 8 W. R. 543.

—— **Leaseholds.**]—Leaseholds are not within 17 & 18 Vict. c. 113. *Wormsley, In re, Hill* v. *Wormsley*, 46 L. J., Ch. 102; 4 Ch. D. 665; 25 W. R. 141. S. P., *Solomon* v. *Solomon*, 33 L. J., Ch. 473; 10 Jur. (N.S.) 331; 10 L. T. 54; 12 W. R. 540. *Gall* v. *Fenwick*, 43 L. J., Ch. 178; 29 L. T. 822; 22 W. R. 211.

—— **Share of Proceeds of Sale.**]—An estate was by deed settled in favour of A. and his wife for their respective lives, and after the death of the survivor, in trust, after the expiration of three months from such death, for sale and investment of the proceeds, the fund to be held in trust for the children of the wife as to sons on attaining twenty-one, or dying under that age leaving issue, and as to daughters on attaining twenty-one or marrying. The wife died leaving three children, who attained twenty-one. One of them, a daughter, died leaving her father her heir-at-law and next of kin. Her father devised the one-third of the settled estate to which he became entitled on his daughter's death to trustees, for sale and investment, and to hold the same for one of his sons. And he devised and bequeathed all his residuary estate to his trustees, after payment of his debts, for another of his sons. Shortly after the date of his will he mortgaged his life interest in the settled estate, and also his reversionary one-third of such estate:—Held, that the one-third was not an "interest in land," within 17 & 18 Vict. c. 113, Locke King's

Act, and that the mortgage debt was not payable thereout, but out of the testator's residuary personal estate. *Lewis* v. *Lewis*, 41 L. J., Ch. 195 ; L. R. 13 Eq. 218 ; 25 L. T. 555 ; 20 W. R. 141.

—— **Mortgages.**]—Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons ; and the devisees must contribute according to the value of their respective portions. *Newmarch, In re, Newmarch* v. *Storr*, 48 L. J., Ch. 28 ; 9 Ch. D. 12 ; 39 L. T. 146 ; 27 W. R. 104—C. A.

Where an estate is conveyed to A. in consideration of his covenanting to pay off a mortgage on another estate, the liability must primarily be satisfied by A.'s personal representative and not by A.'s heir. *Day* v. *Day*, 13 L. T. 625 ; 14 W. R. 261.

—— **Mortgage by Deposit.**] — An equitable mortgage by deposit and memorandum is within the 17 & 18 Vict. c. 113. *Pembrooke* v. *Friend*, 1 John. & H. 132 ; 2 L. T. 742.

An equitable mortgage by deposit is not taken out of the operation of the 17 & 18 Vict. c. 113, because it is unaccompanied by a memorandum. *Davis* v. *Davis*, 24 W. R. 962.

A sum of 400*l.* borrowed by an intestate on his promissory note, but secured also by a memorandum and deposit of even date of title-deeds of real estate in terms as collateral security, is within 17 & 18 Vict. c. 113. *Coleby* v. *Coleby*, L. R. 2 Eq. 803 ; 12 Jur. (N.S.) 498 ; 14 L. T. 697.

The heir-at-law, who paid the debts and funeral expenses out of his own moneys as a matter of bounty, but afterwards claimed to be allowed such payment out of the personal estate, is not entitled to be repaid. *Ib.*

—— **Other Charges.**]—The 17 & 18 Vict. c. 113, only applies where there is a defined and specified charge on a specified estate ; and a general charge on real estate by a testator in aid of his personal estate does not come within the definition of a mortgage on the real estate in the hands of the devisee, unless and until the amount has been accurately defined, and the devisee has expressly taken the estate subject to such ascertained charge. *Hepworth* v. *Hill*, 30 Beav. 476.

A testator bequeathed a legacy of 4,000*l.*, payable by his trustees out of his personal estate, and, if that should be deficient, out of his real estate. The trustees, having provided for all claims except this legacy, put H. (who was entitled to the residue) into possession of the real and personal estate. He died many years after, having continued to pay interest on the legacy, and questions then arose, between persons claiming under him, as to the fund out of which the legacy ought to be paid :—Held, on the assumption that the first testator left sufficient personal estate, that his personal estate remaining in specie was first liable, and that the deficiency must be provided out of H.'s assets ; and secondly, on the assumption that the first testator's personal estate was deficient, then that his personal estate in specie was first applicable, and that his real estates not alienated for value were liable ratably for the deficiency. *Ib.*

By a deed between the trustees and H. (the residuary legatee and devisee), a particular estate was reserved by the former as a security for a legacy which had not been provided for when the personal estate was handed over to H. :—Held, that the operation and effect of the deed was confined to the parties to the instrument. *Ib.*

A charge of debts, funeral and testamentary expenses on a particular real estate, assuming it to exonerate personal estate in favour of a particular legatee, does not exonerate the person who, on failure of that legacy by means of the Mortmain Act, takes it. Where there was also a charge of a mortgage debt on the particular real estate devised :—Held, that under the 17 & 18 Vict. c. 113, the devisee was not entitled to have the debt paid out of the personal estate which passed, by failure of the legacy, to the crown. *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186 ; 29 L. J., Ch. 846; 6 Jur. (N.S.) 863; 2 L. T. 761; 8 W. R. 647.

—— **Contribution.**]—A. mortgaged freeholds and leaseholds together, and died intestate in 1857 :—Held (as between the heir and administrator), that the freeholds must bear the burden ratably. *Evans* v. *Wyatt*, 31 Beav. 217 ; 8 Jur. (N.S.) 499 ; 10 W. R. 813.

When real and personal estate belonging to a testator are comprised in the same mortgage, Locke King's Act has not the effect of throwing the whole mortgage debt upon the real estate, but such mortgage debt must, as between the devisees of the testator's real estate and the legatees of his personal estate, be borne ratably by the mortgaged realty and the mortgaged personalty. *Trestrail* v. *Mason*, 47 L. J., Ch. 249 ; 7 Ch. D. 655 ; 26 W. R. 260.

—— **"Contrary Intention."**—A trust for payment of all the testator's debts out of personal estate was a sufficient indication of a contrary intention within the 17 & 18 Vict. c. 113, and entitled the devisee of an estate to have the property exonerated from a mortgage debt out of the personal estate. *Moore* v. *Moore*, 1 De G. J. & S. 602 ; 32 L. J., Ch. 605 ; 8 L. T. 562 ; 11 W. R. 790.

But see now 30 & 31 Vict. c. 69, and cases thereon, col. 1514, post.

A direction in a will that all the testator's just debts, funeral and testamentary charges and expenses, should be paid and discharged by his executors as soon as convenient after his decease out of his estate, followed by a gift of all the testator's real and leasehold estates (which were subject to a mortgage) to trustees who, with his wife, were named also executors of his will :—Held, not to be such an expression of contrary intention as to bring the case within the saving of the 17 & 18 Vict. c. 113, and consequently that the cestui que trust under the will of the real estate and leaseholds took them cum onere. *Woolstencroft* v. *Woolstencroft*, 2 De G. F. & J. 347 ; 30 L. J., Ch. 22 ; 6 Jur. (N.S.) 1170 ; 3 L. T. 388 ; 9 W. R. 42. S. P., *Pembrooke* v. *Friend*, 1 John. & H. 132 ; 2 L. T. 742 ; *Brownson* v. *Lawrance*, 37 L. J., Ch. 351 ; L. R. 6 Eq. 1 ; 18 L. T. 143 ; 16 W. R. 926.

In collecting a testator's "contrary or other" intention under 17 & 18 Vict. c. 113, which, in the absence of such intention, renders a mortgaged estate primarily liable to the payment of the mortgage debt, the court must do so from the document from which the intention is to be collected according to the ordinary mode of construing instruments. *Eno* v. *Tatham*, 3 De G. J. & S. 443 ; 32 L. J., Ch. 311 ; 9 Jur. (N.S.) 481 ; 8 L. T. 127 ; 11 W. R. 475.

A testator, by his will dated in 1857, appointed his wife to be his executrix, and gave her all his personal estate, subject to the payment of his debts, funeral and testamentary expenses ; and

he devised his real estate to trustees, who were to let the estate and pay the rents, after deducting repairs and insurances, to his wife for life. On her death they were to sell and apply the proceeds, after deducting their costs and expenses, for the benefit of the testator's brothers and sisters, and nephew and nieces. By a codicil the trustees were directed to hold the estate for the testator's children, and apply the income for their maintenance; but the trusts of the will were left in force, in the event of all the children dying under twenty-one. The real estate was subject to a mortgage created by the testator before the date of his will:—Held, that his intention was plain, that his mortgage debt was to be paid as a debt out of his personal estate, and that the mortgaged estate was not primarily liable to the payment of it under the provisions of the 17 & 18 Vict. c. 113. *Ib.*

A testator devised a messuage or dwelling-house and premises to his daughter E. in fee, and he bequeathed the residue of his personal estate to three trustees (of whom E. was one), all of whom he appointed executors, and declared that they should, out of the moneys to arise from the sale and conversion of his personal estate, pay his funeral and testamentary expenses and debts, and the legacies. The property was subject to a mortgage debt and interest:—Held, that the property was by the operation of 17 & 18 Vict. c. 113, exonerated, the testator having expressed "a contrary or other intention." *Smith* v. *Smith*, 3 Giff. 263; 31 L. J., Ch. 91; 7 Jur. (N.S.) 1140; 5 L. T. 302.

A testator gave one-third of the rents of his real estate to his widow for life, and he devised an estate at B., in thirtieth parts, to his children as tenants in common. The residue of his real and personal estate, "after paying his mortgage and other debts, he left to be divided into thirtieth parts, and to be taken by the same and in the same proportions as the estate at B.":—Held, that the widow took no interest in the personalty, and that the mortgages were payable primarily out of the residue, and not out of the mortgaged estate, under 17 & 18 Vict. c. 113. *Greated* v. *Greated*, 26 Beav. 621.

Under a direction in a will to pay debts, mortgage debts are included. *Stone* v. *Parker*, 1 Dr. & Sm. 212; 8 W. R. 722.

Therefore where a testator directed his trustees to stand possessed of his residuary estate, "subject in the first place to the payment of my just debts, funeral and testamentary expenses," and in a subsequent part of his will empowered his trustees "to satisfy any debts owing or claimed to be owing by me or from my estate, and any liabilities to which I or my estate may be liable":—Held, that this was a sufficient indication of an intention to exonerate a mortgaged estate, and that the mortgage debt charged thereon must be paid out of the residuary estate, under the 17 & 18 Vict. c. 113. *Ib.*

A testatrix devised two farms to trustees. These farms were subject to a mortgage of 1,600*l.* She gave the residue of her real estate (including, by name, another farm, which was subject to a mortgage of 4,000*l.* not created by her) and the residue of her personal estate to her two sons, and directed that the mortgages or other incumbrances which might be charged upon or specifically affect any part or parts of her residuary real or personal estate should be exclusively borne by the premises charged therewith; and, subject thereto, she directed that all her debts, and funeral and testamentary expenses, should be paid out of her residuary real and personal estate, and she charged the same therewith accordingly. Upon a bill by the persons interested in the proceeds of the two farms:—Held, that the word "debts" included "mortgage debts," and that there was a sufficient declaration of intention that the two farms should not bear the burden of the mortgage upon them, to satisfy the requisitions of the 17 & 18 Vict. c. 113. *Allen* v. *Allen*, 30 Beav. 345; 31 L. J., Ch. 442; 8 Jur. (N.S.) 758; 5 L. T. 737; 10 W. R. 261.

A direction in a will for the payment of debts out of the personal estate is not such an expression of a "contrary or other intention" within the meaning of the 17 & 18 Vict. c. 113, as to relieve a mortgaged estate from the burden of the mortgage debt. *Rawson* or *Rowson* v. *Harrison*, 31 Beav. 207; 31 L. J., Ch. 818; 8 Jur. (N.S.) 875; 10 W. R. 705.

A bequest of personalty, "subject to the payment thereout of all the testator's just debts," is a sufficient indication of intention, within the words of 17 & 18 Vict. c. 113, to make the personal estate the primary fund for the payment of mortgage debts. *Mellish* v. *Vallins*, 8 Jur. (N.S.) 864; 6 L. T. 215; 10 W. R. 421.

Devisees of a real estate which had been mortgaged by the testator, held entitled to have the mortgage paid out of the other real and the personal estate devised for payment of debts, notwithstanding the 17 & 18 Vict. c. 113. *Newman* v. *Wilson*, 31 Beav. 33.

A testator gave his residuary personal estate upon trust to pay thereout all his funeral expenses, legacies, and debts, including specialty debts, which he enumerated. One of the real estates devised was subject to a mortgage debt, which was not mentioned among the specialty debts:—Held, that there was sufficient intention to take the case out of the operation of 17 & 18 Vict. c. 113, notwithstanding the omission of the mortgage debt by the testator in the enumeration of his specialty debts. *Porcher* v. *Wilson*, 10 L. T. 714; 12 W. R. 1001.

A testator devised his personalty and an estate, K., and other real estates, upon trusts for payment of debts, and subject thereto to certain devisees, and afterwards purchased the H. estate, as to which he died intestate. The testator deposited the deed of the H. estate to secure 1,000*l.*, and was subsequently found lunatic. Under an order in lunacy a mortgage was made of the H. & K. estates, to raise a sum of money to pay off the 1,000*l.*, and other debts of the lunatic; and a proviso was inserted, that as between the lunatic, his heirs and devisees, the H. estate should be considered as the primary security for the mortgage debt. The lunatic having died:—Held, that the proviso did not have the effect of exonerating the devised estates at the expense of the H. estate, and the devised estates were ordered to be first applied in payment of the mortgage debt. *Freeman* v. *Ellis*, 1 Hem. & M. 758; 3 N. R. 248.

A testator made a specific devise of real estate, which was subject to a mortgage debt, and he declared that his personal estate should be liable for debts. He then made a general devise of residuary real estate. The personal estate of the testator was not sufficient to cover the debts:—Held, that having regard to the 17 & 18 Vict. c. 113, the mortgaged estate was only exonerated to the extent of the express intention of the

testator, but the residuary real estate was not liable for the mortgage debt. *Rodhouse* v. *Mold*, 35 L. J., Ch. 67; 12 L. T. 629; 13 W. R. 854.

L. being seised in fee of real estate, mortgaged it for 2,000*l.*, and subsequently settled it on himself for life, with limitations to his children. He then, by his will, gave all his personalty to his son J., subject to the payment of his debts, funeral and testamentary expenses (except such as were charged on any real estate by way of mortgage or otherwise). L. had insured his life for 5,000*l.*, and deposited the policy with his bankers to secure a loan from them; and soon after his death, J. received the 5,000*l.* on the policy, and paid off both mortgages, and claimed to be entitled to have the mortgage for 2,000*l.* paid out of the real estate:—Held, that he was entitled. *Lawson* v. *Meynell*, 18 L. T. 174.

A testator, after directing his debts to be paid, devised his real estate in strict settlement. During minorities the trustees were out of the rents and profits to keep down the interest on any mortgage debts. He bequeathed his residuary personal property to his next of kin:—Held, that the real estates were not to be exonerated from the mortgages on them at his death at the expense of the personalty. *Coote* v. *Lowndes*, 39 L. J., Ch. 887; L. R. 10 Eq. 376; 23 L. T. 42; 18 W. R. 1019.

A testator having two estates mortgaged, with judgments collateral to the mortgages, by a will made after 1854, devised them in strict settlement to two of his sons; and he bequeathed several pecuniary and specific legacies, and directed that his debts and legacies should be paid out of the residue of his personal estate and property, which he bequeathed to his sons:—Held, that the mortgage debts should be paid out of the personal estate, in preference to the pecuniary legacies. *Smith* v. *Smith*, 10 Ir. Ch. R. 89.

A charge of debts on a part of a testator's real estates in exoneration of the rest without specially referring to his mortgage debts, is not a sufficient expression of an intention contrary to the rule established by Locke King's Act (17 & 18 Vict. c. 113) to exonerate the mortgaged estate. *Newmarch, In re, Newmarch* v. *Storr*, 48 L. J., Ch. 28; 9 Ch. D. 12; 39 L. T. 146; 27 W. R. 104—C. A.

Locke King's Act applies to a mortgaged estate, different portions of which are devised to different persons; and the devisees must contribute according to the value of their respective portions. *Ib.*

A father, nearly the whole of whose real estate was subject to a mortgage debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate and in exoneration of his other real estate with the payment of all his just debts," and he devised another part of his real estate to his daughter:—Held, that there was no sufficient declaration of a contrary intention under Locke King's Act, and that both the devisees must contribute ratably to payment of the mortgage debt. *Ib.*

A husband, who was entitled to an estate subject to a mortgage, devised part of it for the benefit of his widow for life, and the remainder to his residuary devisee, and bequeathed his personal estate subject to debts, and directed that the deficiency should be charged on his residuary real estate:—Held, that no contrary or other intention was shown within the meaning of 17 & 18 Vict. c. 113, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mortgage. *Sackville* v. *Smyth*, 43 L. J., Ch. 494; L. R. 17 Eq. 153; 22 W. R. 179.

A testator, by will made in 1866, after specifically disposing of certain parts of his property, and giving certain real estate to his wife during widowhood, gave the rest and residue of his real and personal estate to trustees upon trust to convert the same into money and thereout pay his debts, including debts due on mortgage of the property given to his wife during widowhood, and his funeral and testamentary expenses, and the costs of proving and executing his will. He directed his trustees to pay the income of the fund to his wife during widowhood, and after her death or second marriage he gave so much of the fund as consisted of pure personalty to charitable purposes, and bequeathed the rest of it to his wife. In a subsequent part of his will he appointed executors, and gave a legacy to each of them who accepted the trusts. At his death part of the residuary real estate was subject to mortgages:—Held, that the will did not indicate any such "contrary intention" as to exclude the mortgages on the residuary real estate from the operation of Locke King's Act, and that they must be paid out of the proceeds of the mortgaged estate. *Elliott* v. *Dearsley*, 16 Ch. D. 322; 44 L. T. 198; 29 W. R. 494—C. A.

Held, by Fry, J., that the executor's legacies were charged on the real estate, and that as there was a mixed fund they must be paid pro ratâ out of the different parts of it. But held, by the court of appeal, that the legacies were charged on the real estate, but only in aid of the personalty, the principle of pro ratâ payment only applying to payments which the testator had expressly directed to be made out of the mixed fund. *Ib.*

The testator directed that, after payment of an annuity of 50*l.* a year to his nephew, the rents of his Dublin property (which, upon the construction of the will, was held to mean the testator's chattels real in Dublin) should be applied in providing a fund for the payment of all charges affecting his Dublin property at his decease, and that if the fund so provided should be insufficient for the purpose, his said Dublin property should be charged with the payment of the balance of such charges. Two mortgages had been granted by the testator, one of which included fee simple property and chattels real of the testator at Dublin, and personal estate, part of which was specifically bequeathed; the second affected the same property, except premises at Wood Quay, being part of the Dublin fee simple property:—Held, that the Dublin chattel property was constituted by the will a primary fund for the payment of the mortgages, to that extent excluding the operation of Locke King's Act, but that after its exhaustion the deficiency should be apportioned among the remaining subjects of the mortgages. *Corballis* v. *Corballis*, 9 L. R. Ir. 309.

A domiciled Englishman executed a trust disposition and settlement, in the Scotch form, of an estate in Scotland. He then made an English will, declaring that it should not affect the previous settlement of his Scotch estate, and charged his residuary real and personal estate with payment of his debts. He subsequently charged the Scotch estate with 14,000*l.*, by means of a Scotch heritable bond:—Held, that the residuary estate was liable to payment of the 14,000*l.*, in exonera-

tion of the Scotch estate. *Maxwell* v. *Hyslop*, L. R. 4 Eq. 407 ; 16 L. T. 660.

M. granted a Scotch estate to his son, under the burden of the payment of a mortgage debt secured upon another estate belonging to M. in England. The grantor died domiciled in England. By his will he appointed executors ; directed payment of his just debts, as soon as conveniently might be after his death ; and devised the mortgaged estate to the grantee of the Scotch estate :—Held, that the grantee must bear the burden of the mortgage debt in question ; and that the testator's general personalty was exonerated therefrom. *Smith* v. *Moreton*, 37 L. J., Ch. 6.

A testator who had mortgaged his realty in order to secure consols which had been transferred to him by the trustees of a settlement :—Held, to have shewn an intention in his will and subsequent deeds that his realty should be exonerated from payment of the mortgage debt. *Campbell* v. *Campbell*, *Campbell*, *In re*, 62 L. J., Ch. 594 ; [1893] 2 Ch. 206 ; 3 R. 331 ; 68 L. T. 851.

A testator directed his private debts to be paid out of the proceeds of certain life policies ; he bequeathed his residue, subject to the payment of his trade debts ; after the date of his will he deposited the title-deeds of real estate with his bankers to secure an overdrawn trade account : —Held, that this amounted to a declaration of intention contrary to Locke King's Act, and that the devisee of the real estate was entitled to have it exonerated from the banker's lien. *Fleck*, *In re*, *Colston* v. *Roberts*, 57 L. J., Ch. 943 ; 37 Ch. D. 677 ; 58 L. T. 624 ; 36 W. R. 663.

A testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely, to do with as she thinks proper" ; and he requested his executors to sell and convert into money whatever freehold or other property he possessed, and to collect all debts due to him, and to apply the proceeds in the payment of certain legacies. The testator's real estate was all subject to one mortgage :—Held, that the will did not shew any "contrary or other intention" within the meaning of Locke King's Act, and that consequently the widow took the house subject to its ratable proportion of the mortgage debt. *Brownson* v. *Lawrance* (L. R. 6 Eq. 1) dissented from. *Sackville* v. *Smyth* (L. R. 17 Eq. 153) and *Gibbins* v. *Eyden* (L. R. 7 Eq. 371), followed. *Smith*, *In re*, *Hannington* v. *True*, 55 L. J., Ch. 914 ; 33 Ch. D. 195 ; 55 L. T. 549 ; 35 W. R. 103.

—— **Marshalling.**]—A testator, seised and possessed of real and personal estate, after bequeathing some pecuniary legacies (amongst others 250*l.* to his son C. E.), directed by his will that his trustees should, in the first place, pay out of his personal estate all debts of every kind, including specialty debts, in full exoneration of his real estate. He devised to his wife an annuity for life, and to his daughter and his five sons respectively perpetual annuities, which he directed to be first, second, third and fourth charges on his real estate, and two small annuities to others. He appointed his son C. E. and another trustees and executors of his will. The testator's real estate produced 660*l.* a year. It was subject to two mortgages of 6,000*l.* and 1,500*l.*, and was sufficient to pay the annuities charged thereon by the will if the mortgages were paid out of the personal estate (8,000*l.*), which was more than sufficient to pay the mortgages and other debts. But if the mortgages were primarily payable out of the real estate, and the personal estate applied in exonerating the real estate therefrom, it might not reach the legacy of 250*l.* to C. E. :—Held, on the construction of the will, that the mortgages were primarily payable out of the lands mortgaged ; that the annuities were charged by the will on the real estate alone ; and also, that the application of Locke King's Act and the acts amending it did not preclude the annuitants from their equity to marshal the assets. *Buckley* v. *Buckley*, 19 L. R. Ir. 544.

—— **Lien for Unpaid Purchase-Money.**]—Upon a contract for the purchase of real estate, a deposit was paid, and the balance of the purchase-money made payable at a future day, before the arrival of which the purchaser died :—Held, that the lien for the balance upon the purchased estate was not a charge thereon within the meaning of 17 & 18 Vict. c. 113. *Hood* v. *Hood*, 26 L. J., Ch. 616 ; 3 Jur. (N.S.) 684 ; 5 W. R. 747.

30 & 31 Vict. c. 69—Lien for Unpaid Purchase-Money.]—A lien for unpaid purchase-money is not a charge by way of mortgage, under 30 & 31 Vict. c. 69, where the purchaser dies intestate. *Harding* v. *Harding*, 41 L. J., Ch. 523 ; L. R. 13 Eq. 493 ; 26 L. T. 656. And see *Hudson* v. *Cook*, 41 L. J., Ch. 306 ; L. R. 13 Eq. 417 ; 26 L. T. 180 ; 20 W. R. 407.

The word "testator" in s. 2 of the 30 & 31 Vict. c. 69, applies to any deceased person who has made a will ; even where such will has not disposed of the testator's beneficial interest in the lands upon which the lien for unpaid purchase-money exists. *Dowdall* v. *McCartan*, 5 L. R. Ir. 313.

A testator devised his real estate to his trustees and executors, but made no disposition of the beneficial interest therein. Previous to his death he entered into a contract for the purchase of a freehold estate, and paid part of the purchase-money, but died before the purchase was completed, and his executors and trustees had, out of the personal estate, paid the balance of the purchase-money, and obtained a conveyance of the estate to themselves. The testator's death occurred before the 31st December, 1877, the date of the coming into operation of the 40 & 41 Vict. c. 34. The testator's heir-at-law claiming to be entitled to have the estate so purchased conveyed to him free of incumbrances : —Held, that the case was within s. 2 of the 30 & 31 Vict. c. 69, and that therefore the personal estate was entitled to be recouped out of the lands the sums paid thereout for the balance of the purchase-money. *Ib.*

—— **Conversion—Mortgage.**]—The 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69, only apply to an interest in land taken as land, and property converted in equity does not come within these acts. *Lewis* v. *Lewis*, 41 L. J., Ch. 195 ; L. R. 13 Eq. 218 ; 25 L. T. 555 ; 20 W. R. 141.

—— **Contrary Intention.**]—The 30 & 31 Vict. c. 69, amounts to a legislative declaration that the court of chancery had put a wrong interpretation on the 17 & 18 Vict. c. 113 (Locke King's Act), and though it only expressly enacts that a direction for payment of debts out of personalty shall not be held to indicate a contrary intention to the rule that a mortgage is to be paid primarily out of the estate subject to it, it really overthrows the whole reasoning on which the former

cases had proceeded. *Gall* v. *Fenwick*, 43 L. J., Ch. 178; 29 L. T. 822; 22 W. R. 211.

A testator, seised of an estate partly leasehold and partly freehold subject to a mortgage, devised it specifically, and also created a mixed fund consisting of personalty, the proceeds of sale of some realty and annuities to be raised out of the mortgaged estate and other estates, and directed his debts to be paid out of this mixed fund:—Held, that he did not manifest a contrary intention to the rule laid down by Locke King's Act, but as leaseholds were not within that act the mortgage ought to be apportioned between the freeholds and leaseholds according to their values at the testator's death and the part apportioned in respect of the leaseholds paid out of the mixed fund. *Ib.*

The 30 & 31 Vict. c. 69, has in effect enacted that the word "debts" shall not include mortgage debts unless there are words shewing an intention that it should do so. *Newmarch, In re, Newmarch* v. *Storr*, 48 L. J., Ch. 28; 9 Ch. D. 12; 39 L. T. 146; 27 W. R. 104—C. A.

A testator, by his will dated in 1877, directed his executors "to pay all my just debts, funeral and testamentary expenses, out of my personal estate in exoneration of my real estate":—Held, that a debt due from the testator at the time of his death on a mortgage of part of his real estate must be borne primarily by the mortgaged estate. *Rossiter, In re, Rossiter* v. *Rossiter*, 49 L. J., Ch. 36; 13 Ch. D. 355; 42 L. T. 353; 28 W. R. 238.

40 & 41 Vict. c. 34—Lien for Unpaid Purchase-Money.]—A testator who had contracted to purchase real estate, and paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without shewing any intention that the purchase-money should be paid out of his personal estate; and he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, and without having completed the purchase or paid any further part of the purchase-money. After his death an action by the vendor against the executor and trustee of the will for specific performance of the contract was compromised by the defendant thereto, and the contract was put an end to upon the terms that the vendor should retain the deposit money and have his costs; and this compromise was confirmed by the court by an order made by consent in an administration action in the presence of the tenant for life of the real estate and the trustee, all the remainder being infants. Upon the further consideration of the administration action, the devisees contended that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by the testator of his personal estate to that extent, and that Locke King's Acts had not altered the law in that respect:—Held, that there was a vendor's lien, and that Locke King's Acts Amendment Act (1877) applied; that, accordingly, all the devisees were entitled to was the real estate charged with the unpaid purchase-money, and therefore on the facts to nothing; but held, moreover, that the order of compromise would be fatal to their claim, if otherwise good. *Cockcroft, In re, Broadbent* v. *Groves*, 52 L. J., Ch. 811; 24 Ch. D. 94; 49 L. T. 497; 32 W. R. 223.

A building agreement provided for leases with ground rents up to 180*l.* a year; and, at the option of the lessor, for further leases on payment by her of twenty-two years' purchase of the further ground-rents. She executed the option, and died before completion:—Held, that her devisees took the land included in the agreement subject to discharging the amount payable in respect of the further leases. *Kidd, In re, Brooman* v. *Withall*, 63 L. J., Ch. 855; [1894] 3 Ch. 558; 71 L. T. 481; 43 W. R. 51.

—— **Leaseholds.**]—Locke King's Acts Amendment Act, 1877 (40 & 41 Vict. c. 34), s. 1, applies to leaseholds. A testator by his will, made in 1884, bequeathed to his wife the leasehold house "in which I now reside." At the date of the will he was residing in a leasehold house. In 1887 he entered into a contract with his lessor to purchase the reversionary ground lease, but died before the purchase was completed. His widow accepted the bequest:—Held, that all the testator's interest in the house passed to the widow, subject to her liability to pay the purchase-money. *Kershaw, In re, Drake* v. *Kershaw*, 57 L. J., Ch. 599; 37 Ch. D. 674; 58 L. T. 512; 36 W. R. 413.

—— **Judgment.**]—Land upon which a judgment has become a charge by virtue of the Judgment Acts is land charged with the payment of a sum of money "by way of mortgage or other equitable charge" within the meaning of Locke King's Amendment Act; and therefore a devisee of land so charged is not, in the absence of a contrary intention signified by the testator, entitled to have the judgment satisfied out of the personal estate of the testator. *Anthony, In re, Anthony* v. *Anthony*, 61 L. J., Ch. 434; [1892] 1 Ch. 450; 66 L. T. 181; 40 W. R. 316.

—— **Contrary Intention.**]—Testator, a trader, by will in 1885 gave his trade property (which included real and leasehold estate) and business to his son, subject to and charged with, in exoneration of the rest of his estate, the payment of all debts and liabilities owing at the time of testator's death in connection with his trade. Testator included in this property freehold premises situated at Acton, which he had purchased and intended for his business, subject as to such estate to the purchase or other moneys payable in respect thereof at testator's death. The residue of testator's real and personal estate was given on trust to convert and pay thereout debts other than those thereinbefore provided for. Testator at his death owed trade debts not secured by mortgage, and private debts which were secured by mortgage of the real and leasehold estates used in his business, and also of real and leasehold estates not so used:—Held, that the testator had, as to his trade debts, clearly indicated a contrary intention within the meaning of Locke King's Act and the Amendment Acts, and that it must be implied he had the same intention in dealing with his private debts, and that the mortgage debts, therefore, were primarily payable out of the proceeds of sale of the residuary real and personal estate. *Nevill, In re, Robinson* v. *Nevill*, 59 L. J., Ch. 511; 32 L. T. 864.

c. Debts, Liabilities and Priorities.

1. Rights of Creditors.

Generally.]—Debtor cannot by will or other act prefer one creditor out of the general assets. *Townsend* v. *Windham*, 2 Ves. 6.

After creditors have joined in a bill, and obtained a decree for payment of their debts out of legal and equitable assets, none of them shall be permitted to obtain a preference of the others, by obtaining judgment against the executors. *Sheppard* v. *Kent*, 2 Vern. 435; Pre. Ch. 190.

Though executors have a year to pay legacies, yet that does not extend to debts, but they are liable to be sued from the moment after the testator's death. *Nicholls* v. *Judson*, 3 Atk. 301.

When there is a clear debt the court will not consider the interest of the debtor's estate in considering what steps should be taken for enforcing it, at least if there be any conflict of interest between the debtor and creditor. *Woods* v. *Sowerby*, 14 W. R. 454.

Payment to a creditor who has proved his debt ought not to be suspended for the purpose of adjusting the equities between the parties jointly liable to him. *Micklethwait* v. *Winstanley*, 34 L. J., Ch. 281; 11 L. T. 582; 13 W. R. 210.

Payment to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. *Newcastle Banking Co.* v. *Hymers*, 22 Beav. 367.

The testator's heir-at-law who opposed the will, as to part of the lands devised thereby to pay debts, yet being a creditor, was let into the residue of the fund raised by the will for the payment of debts. *Deg* v. *Deg*, 2 P. W. 418.

A plaintiff in a creditors' suit held not entitled to set up at the hearing a vendor's lien in respect of his debt, without having adapted the frame of his bill to such a case. *Olliver* v. *King*, 8 De G. M. & G. 110; 25 L. J., Ch. 427; 2 Jur. (N.S.) 312; 4 W. R. 382.

A person who has received money belonging to an estate, against whom he seeks to prove as a creditor, must, if his claim is disputed, pay into court what he admits having received before his claim can be heard. *Stevenson* v. *Marriott*, 39 L. J., Ch. 568.

—— **As against Purchaser from Beneficiary or Executors.**] — The purchaser of a reversionary interest in a fund in court in an administration suit takes, subject to the claim of any creditor who may prove his debt at any time before the fund is paid out, the fund being available for creditors so long as it remains in court. *Hooper* v. *Smart*, 45 L. J., Ch. 99; 1 Ch. D. 90; 33 L. T. 499; 24 W. R. 152.

On a sale by the executors of the book debts of their testator, the debtors to the estate being also creditors, both on trade and also private debts, but claiming no right of set-off:—Held, the purchaser entitled only to the balance remaining due after deducting both trade and private debts due from the testator's estate. *Chick* v. *Blackmore*, 2 Sm. & G. 274; 23 L. J., Ch. 622; 2 W. R. 488.

2. Debts Generally.

a. *Accrued before Death.*

Promise by Executor—Personal Liability of Executor.]—A promise by an administrator to pay the debts of the intestate is nudum pactum if there are no assets. *Pearson* v. *Henry*, 5 Term Rep. 6; 2 R. R. 523.

A parol promise to pay a debt is sufficient to ground a judgment against the assets of the testator; but where by such promise it is attempted to charge the executor personally, it must be shown to be in writing, otherwise it is void. *Rann* v. *Hughes*, 4 Bro. P. C. 27; 7 Term Rep. 350, n.

And even under a written agreement, he is not personally liable, unless a sufficient consideration is shown. *Ib.*

Mortgagees having offered to give the executor of the mortgagor time for payment of the mortgage money, provided 1,500*l.* should be made up on a day fixed, the executor, on the 18th of December, wrote them a letter stating his present inability to pay, and asking for a year's time, but saying he had 100*l.* which he would pay over, and that he would engage by the beginning of April he would have another 100*l.* ready, and other sums afterwards. The letter contained other statements, and a further request for time. On the 3rd of January, the mortgagees sent the executor an answer saying that they considered that 200*l.* would be paid by the 1st of April, but could not promise further time unless the amount was made up to 1,500*l.* The 200*l.* not having been paid by the 1st of April, an action was brought by the mortgagees against the executor, seeking to charge him personally on a promise to pay that sum, made in consideration of forbearance to the 1st of April:—Held, by Jervis, C.J., Williams, J., and Talfourd, J., that there was no sufficient promise in writing to bind him personally under the Statute of Frauds, the correspondence not showing any unqualified promise by him. *Hamilton* v. *Terry*, 11 C. B. 954; 21 L. J., C. P. 132.

Held, by Maule, J., dissentiente, that the letter of the 18th December was separable into two parts; the first of which contained an unqualified offer as to the 200*l.* in consideration of forbearance till the 1st of April, which was accepted in the letter of the 3rd of January, and that, therefore, the Statute of Frauds was satisfied. *Ib.*

A., at his death, left among his papers two letters sealed, and directed to the plaintiff (who had been his housekeeper for some years, but had left his service after giving birth to a child of which he was the father), containing two promissory notes for 400*l.* and 200*l.* In one letter the note was said to be "in consideration of the long and faithful services of the plaintiff." In the other he had written, "In addition to any sum I owe you, I inclose 200*l.* as a mark of my respect." His executors paid 200*l.* after his death, on account of these notes, to the plaintiff, and promised, in writing, to pay the residue, but subsequently declined to do so, and the plaintiff brought an action against them, in which were counts upon the notes, and a count upon an account stated with them as executors:—Held, that the testator's estate was not liable in respect of the notes, as they had not been delivered by him to the plaintiff, and could not operate as testamentary dispositions because not in conformity with the 7 Will. 4 & 1 Vict. c. 26. *Gough* v. *Tindon*, 7 Ex. 48; 21 L. J., Ex. 58.

Held, also, that the executors were not liable upon the account for an account stated, because the payments and promise had been made under a mistake as to the liability of the testator's estate, and without consideration. *Ib.*

A. declared against B. and his wife, administratrix of C. deceased; for that C. died intestate, possessed of South Sea stock, which she held in trust for A., and upon which certain dividends were due, and that in consideration that A., at

his own expense, would procure administration to be granted to the wife of B., as next of kin to C., and would furnish evidence to enable B. and his wife to receive the dividends, B. and his wife, as such administratrix, promised to pay over to A. the amount of the dividends when received :—Held, that the consideration stated was insufficient to support the promise. *Parker* v. *Baylis*, 2 Bos. & P. 73.

An attorney having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which he was then carrying on, is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there are assets or not. *Hamilton (Duchess)* v. *Incledon*, 4 Bro. P. C. 4.

A parol agreement was entered into between the executors of L. & T., that various old accounts between the testators should be settled without reference to the time that they had been running, and that a balance should be struck. The accounts were accordingly settled, and the executors of L. were allowed the value of a promissory note, which, but for the agreement, would have been barred by the Statute of Limitations. The executors of T. afterwards discovered a note from L. to T., which, but for the same reason, would have been barred by the statute :—Held, that the agreement was one for valuable consideration, on both sides, to waive the benefit of the statute, and ought to be enforced. *Lade* v. *Trill*, 6 Jur. 272.

B. having died indebted to G. for work and labour done, his executors signed the following memorandum on the back of G.'s account : "Mr. G. being contented to wait for the payment of the within account, we, as the executors of B., engage to pay Mr. G. interest for the same at 5*l.* per cent., until the same is settled" :—Held, that the executors were personally liable to pay the debt and interest. *Bradley* v. *Heath*, 3 Sim. 543 ; 30 R. R. 217.

Promise of Testator.]—Distinction between a mere voluntary promise (nudum pactum) that will not maintain an action ; and a promise upon the faith of which another does some act, as entering into engagements, or paying money ; forming a consideration that will support an action, and, therefore, establish a debt against assets. *Crossbie* v. *M'Donal*, 13 Ves. 148 ; 9 R. R. 161.

A feme covert, having an estate settled to her separate use, gave a bond for repayment by her executors of money advanced at her request on security of that bond to her son-in-law. After her husband's decease, she wrote, promising that her executors should settle the bond :—Held, that assumpsit would lie against the executors on this promise of the testatrix. *Lee* v. *Muggeridge*, 5 Taunt. 36.

A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action in assumpsit against the executor ; and in such action it is neither necessary to aver assets, nor a promise by the executor. *Powell* v. *Graham*, 7 Taunt. 580 ; 1 Moore, 305 ; 18 R. R. 593.

A physician attended the testator for many years without having obtained any remuneration. He stated "that the testator had promised to pay him for his services, or leave him an equivalent." He did neither :—Held, that the physician had no claim against the estate, and a payment made to him by the executor was disallowed. *Shallcross* v. *Wright*, 12 Beav. 558 ; 19 L. J., Ch. 443 ; 14 Jur. 1037. S. P., *Packman* v. *Vivian*, 24 Beav. 290. And see *Maddison* v. *Alderson*, 52 L. J., Q. B. 737 ; 8 App. Cas. 467 ; 49 L. T. 303 ; 31 W. R. 820 ; 47 J. P. 821—H. L. (E.)

—— **Implied.**]—An infant, who was entitled to personal property, on her coming of age, as a residuary legatee, joined her father in a bond to secure to the plaintiff a sum due to him for the rent of apartments occupied by her and her father, and after she became of age employed the defendant to take out administration de bonis non of the assets of the testator (the executor being dead), which the defendant accordingly did, and became possessed of the property. She afterwards gave the plaintiff an order on the defendant to pay the amount of her father's bill, due to the former, and on its being presented to the defendant, he acknowledged that he possessed adequate funds, and that a person would be safe in advancing money on the security of the bond, but, before the order was executed or the sum paid under it by the defendant, the daughter countermanded it :—Held, that as he had consented to appropriate a sum sufficient the pay the plaintiff's demand, he was liable to an action for money had and received, in which the plaintiff might not only recover the amount of the bond, but an acceptance given by the father of the infant before she became of age, and which she afterwards requested the defendant to pay. *Robertson* v. *Fauntleroy*, 8 Moore, 10 ; 1 L. J. (O.S.) C. P. 55.

Contingent on Survivorship.]—A settlement made by H., on the marriage of his son, T., provided 500*l.* per annum for T. for the life of H. ; the rest of the property to belong to H. for life, and after his death to T. ; 200*l.* for T.'s wife, if she should survive T. ; and 500*l.* among the issue of the marriage after T.'s death ; and the settlor covenanted "that the yearly profits of the premises, and other the property to which the said T. will be entitled after the death of H., exceed 1,000*l.* per annum, and shall continue to be of that value during the life of the survivor of T. and wife" :—Held, that this was a continuing covenant only during the life of T. and wife, if they survived H. ; and that H. having survived them no right of suit accrued to T.'s representative to have satisfaction out of H.'s personal estate, although the properties did not amount to the 1,000*l.* *Wood* v. *Jamieson*, 6 Ir. Eq. R. 420 ; 1 Jo. & Lat. 3.

On Promissory Note.]—In a legatee's suit a promissory note by the testator in renewal of a previous note for which there was no consideration, to secure a sum of money to a godchild, the testator having paid interest on the note, and the executor having also paid interest on the note, constitutes a debt against the testator's assets in priority to legatees, but not to the prejudice of the creditors. *Dawson* v. *Kearton*, 3 Sm. & G. 186 ; 25 L. J., Ch. 166 ; 2 Jur. (N.S.) 119 ; 4 W. R. 222.

Where two makers of a promissory note gave it to a creditor of their testator, whereby, "as executors, they severally and jointly promised to pay on demand with interest ;" and, in an action upon the note, they pleaded that they were executors, and made the note as such, and plene administraverunt præter ; and the plaintiff

demurred specially, assigning for causes that they had thereby made themselves personally liable, and admitted that they had assets for the payment of the note, and that it might have been given for their own debt; and that, having promised to pay with interest, they could not become liable for it in their representative character:—Held, that they were personally liable; and that the plea was bad, and afforded no answer to the action. *Childs* v. *Monins*, 5 Moore, 282; 2 Br. & B. 460; 23 R. R. 513. And see *Ashby* v. *Ashby*, 7 B. & C. 444; 1 Man. & Ry. 180; 6 L. J. (o.s.) K. B. 41; 31 R. R. 242.

A having lent B. 1,000*l.* without taking any security for it, states to C. and his family that the money had been held by him (A.) in trust for C. Afterwards B. becoming embarrassed in his circumstances, and unlikely to repay the money, A. at the urgent solicitations of C., gives the latter his promissory note for the amount. Subsequently B. dies insolvent, and without having repaid the money. Then A. dies. In a suit for the administration of A.'s assets (there being no evidence to rebut the trust):—Held, that C. may prove the note against A.'s estate as a valuable security. *Burkett* v. *Ransom*, 2 Coll. C. C. 395; 15 L. J., Ch. 174; 10 Jur. 193.

A testator gave a voluntary promissory note, and referred to it in her will. Quære, whether this constituted a good debt, or whether it was a legacy. *Longstaff* v. *Rennison*, 1 Drew. 28; 21 L. J., Ch. 622; 16 Jur. 559.

No difference between indorsement of a note by the party, and one by his personal representative. *Watkins* v. *Maule*, 2 J. & W. 243.

Executor in trust for infants, having paid under a written obligation executed abroad, though in possession of a counter obligation to repay part with interest at the death of the party, acknowledging that to be so much more than the debt, and neither instrument having been transferred, was charged as having paid incautiously, though innocently, and therefore he was permitted to try the question at law. *Vez* v. *Emery*, 5 Ves. 141.

On Bill of Exchange.]—In a suit for the administration of the estate of a deceased person, a claim was made by the holder of a bill of exchange to be admitted as a creditor; but it being proved that the holder, who was indorsee of the bill, was aware of the fact of the acceptance being in blank, he must be taken to have had as full knowledge of the circumstances of the origin of the bill as he might have acquired if he had made proper inquiry, and therefore affirming the certificate and the decision of the vice-chancellor refusing to disturb the same, the claim was disallowed, no value having been given for the acceptance. *Hatch* v. *Searles*, 24 L. J., Ch. 22; 3 W. R. 49—L.JJ. Affirming, 2 Sm. & G. 147.

In respect of Suretyship.]—A covenant by a surety for payment of a debt at a future day is not a contingent, but an actually existing debt, and must be provided for before simple contract creditors are paid. Observations on *Norman* v. *Baldry* (6 Sim. 621). *Atkinson* v. *Grey*, 1 Sm. & G. 577; 18 Jur. 282.

L. P. L. as principal, and G. D. as surety, covenanted with W. R. M. and T. B. to pay them or the survivor the sum of 2,000*l.* in two instalments, 1,000*l.* in May, 1853, and 1,000*l.* in 1858, with interest. G. D. died insolvent, and his estate was administered by the court. W. R. M. having also died, T. B., as survivor claimed to have a fund set aside by the executors of G. D. for the purpose of providing for the debt which would become due in 1858:—Held, that the executors of G. D. ought to provide a fund for the payment of the 1,000*l.* payable at a future time. *Ib.*

B. became surety for S. by bond and several judgment of 1807; and S. afterwards became surety for B. to nearly the same amount by bond of 1814. A suit for the administration of B.'s assets having been instituted by a judgment creditor of 1816, decrees to account, and for a sale, were pronounced in 1822. S., having in 1821 been obliged to pay the debt for which he was B.'s surety, procured the creditors of 1807 to prove their debt under the decree:—Held, that they were entitled to be paid the sum reported due to them, but that they should assign their judgment against S. to a trustee for B.'s creditors. *Peoples* v. *Stewart*, Hayes, 90. And see *Scott* v. *Lowry*, id. 95, n.

Poor Rate.]—An administrator is not liable to pay the poor-rate for his intestate; nor can he be distrained upon for it without a summons. *Stevens* v. *Evans*, 2 Burr. 1152; 1 W. Bl. 284.

And see *Heywood, In re, Parkington* v. *Heywood*, 67 L. J., Ch. 25; [1897] 2 Ch. 593; 77 L. T., 423; 46 W. R. 72.

For Dilapidations and Waste.]—Equitable waste by tenant for life is a breach of trust, and his assets after his death are answerable for the same. *Ormonde (Marquis)* v. *Kynnersley*, 5 Madd. 369; 21 R. R. 313.

Account against the representatives of tenant for life, without impeachment of waste of dilapidations, permitted by him in and about the mansion house, refused. *Lansdowne* v. *Lansdowne*, 1 J. & W. 522; 1 Madd. 116; 21 R. R. 227.

—— **Claim whether in time.**]—Where a testator gives successive interests, and adds to them a direction that the person who takes shall do a particular thing, and the devisee accepts the estate, there is a personal liability, capable of being enforced in equity, to perform the directions imposed by the testator. A testator gave his real estate to trustees upon trust for his widow for life, with remainder over, in events which happened, to A. for life, and, in events which happened, to B. for life, with remainder to his children, if any, in tail, with remainders over. The will contained a direction that each tenant for life or in tail of any of the hereditaments should, during her or his estate, keep the buildings thereon in substantial repair; and if any such person should neglect to effect such repairs within six months after being thereunto requested by the trustees, the trustees should be at liberty to effect such repairs. The widow of the testator was in possession of the hereditaments until her death in June, 1883. Her will was proved in February, 1884. She had omitted to repair the buildings. More than six months after her death, but within six months after probate of her will, a claim was carried in against her estate, in an administration action in respect of the omission to repair, the claimants being the trustees of the will and the then equitable tenant for life:—Held, that the estate

of the deceased tenant for life was liable for such omission to repair. Held, also, that the claim was properly made by the trustees of the will, and that the remedy being in equity, the 3 & 4 Will. 4, c. 42, s. 2 did not apply. *Williames, In re, Andrew* v. *Williames*, 54 L. T. 105—C. A.

—— **Of deceased Incumbent—Before 34 & 35 Vict. c. 43.**]—The claim of an incumbent against the representatives of his predecessor, for dilapidations, will be paid out of equitable assets, pari passu with other creditors, though at law it would be postponed to simple contract creditors. *Bissett* v. *Burgess*, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur. (N.S.) 1221.

The executor of a deceased incumbent is bound to pay all his testator's simple contract debts before he pays for the dilapidations in the time of his testator. *Bryan* v. *Clay*, 1 El. & Bl. 38; 22 L. J., Q. B. 23; 17 Jur. 276; 1 W. R. 20.

Therefore, to an action founded upon the custom of England in that respect, against the executor of an incumbent, by the successor, for dilapidations, it is a good plea to say that the defendant, since the action, has paid simple contract debts, so as to leave no assets to meet the claim for dilapidations. *Ib.*

—— **Since 34 & 35 Vict. c. 43.**]—Where the bishop has, under s. 34 of the Ecclesiastical Dilapidations Act, 1871, made an order stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is under s. 36 a debt payable to the new incumbent out of the assets of the late incumbent pari passu with the debts of his other creditors. *Monk, In re, Wayman* v. *Monk*, 56 L. J., Ch. 809; 35 Ch. D. 583; 56 L. T. 856; 35 W. R. 691; 52 J. P. 198.

And see further cases under ECCLESIASTICAL LAW.

Gaming and Wagering.]—Moneys which had been deposited with a testator to abide the result of bets between himself and the depositors, were, after his death, returned to the depositors by his administratrix who, at the same time, paid the amount of such of the bets as were not pending at his death, but had been decided against him in his lifetime:—Held, that in respect of the deposits so returned upon bets not decided in his lifetime, the administratrix was entitled to credit in her accounts against the general estate; but not so in respect of the sums paid for bets decided before his death, and for the deposits upon such bets. *Manning* v. *Purcell*, 7 De G. M. & G. 55; 24 L. J., Ch. 522; 3 W. R. 273; 3 Eq. R. 387.

The amount of a bet lost at a horse race was paid by the loser into the hands of a third party, upon the faith of the promise of the latter to pay it to the winner. The person who received the money died before he had paid it to the winner. A claim filed in equity by the winner to be paid the amount out of the assets of the deceased was disallowed. *Beyer* v. *Adams*, 26 L. J., Ch. 841; 3 Jur. (N.S.) 709; 5 W. R. 795.

On illegal Consideration.]—Where, in consideration of the wife proceeding no further in the prosecution of an indictment for an assault, the husband agreed to secure her an annuity:—Held, an illegal contract, though approved of by the court in which the indictment was preferred, and that, in a creditor's suit, she was not entitled to come in as a creditor. *Garth* v. *Earnshaw*, 3 Y. & C. 584.

A lessee of a house which, to his knowledge, had for many years been used as a brothel, assigned the lease absolutely, knowing that the assignee intended to use the house for the same purpose. The original lease contained covenants to deliver up at the end of the term, in good repair, and not to use the house as a brothel; and the assignment contained a covenant to indemnify the lessee from the covenants in the lease. The lessee, having been compelled to pay for dilapidations at the end of the lease, sought to recover the amount from the estate of the assignee, which was being administered in equity:—Held, that the assignment, and everything arising out of it, were so tainted with the immoral purpose, that the lessee could not recover. *Smith* v. *White*, 35 L. J., Ch. 454; L. R. 1 Eq. 626; 14 L. T. 350; 14 W. R. 510.

Other Debts and Liabilities.]—A. B., an heir, elected to take against the will, and required the executors to complete a contract entered into by the testator for the purchase of a freehold estate, and it was conveyed to him. He nevertheless received great benefits under the will:—Held, that the parties disappointed by the election had no lien on the estate for the amount received; but that they were entitled to prove against the estate of A. B. for the whole amount received by him under the will. *Greenwood* v. *Penny*, 12 Beav. 403.

The name of a plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record:—Held, that the solicitors to the record who had purported to act for the said plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein. *Nurse* v. *Durnford*, 49 L. J., Ch. 229; 13 Ch. D. 764; 41 L. T. 611; 28 W. R. 145.

It appearing that the solicitors had inserted the plaintiff's name through the fault of a deceased co-plaintiff:—Semble, they would have a right of proof for the costs they were ordered to pay against his estate. *Ib.*

Notices to sewer and pave roads having been, in 1872, served by a board of health on an owner, he took no notice during his lifetime, and the works having been executed by the board, notices to pay apportionments were on the 30th July, 1875, served on the tenant for life under the will of the owner, and on the owner, and on the executors, who within the statutory three months served counter-notices on the board, disputing the amount of the apportionments, and alleging that the roads were public roads. The board then commenced proceedings by arbitration, which the owners refused to attend, and in their absence an award was made in favour of the board on the 9th August, 1877. On the 19th January, 1878, the award was made a rule of the queen's bench division. On the 12th February notices of demands were served by the board on the owners, and on the 9th July, 1878, proceedings in the queen's bench division to enforce the award were commenced and subsequently abandoned. On the 1st August, 1878, proceedings were taken in the queen's bench with reference to the costs of the award,

and these, on the 23rd January, 1879, were transferred to the chancery division, in which an administration action was pending:—Held, that a summons by the board for leave to prove in the administration action for the amount awarded must be refused, on the ground that the remedy of the board was by a summary proceeding before justices, and had become barred. *West* v. *Downman*, 14 Ch. D. 111; 42 L. T. 340; 29 W. R. 6.

A testator, by will, settled estates, and declared that the same should be forfeited and go over in the event of the party entitled for the time being to possession not repairing a column which he was building, but which he left in an incomplete state at his death. Upon a bill for the administration of the estate:—Held, that the party entitled to possession of the estates was not liable to complete the column, and that no contract could be implied to make the residuary estate liable to the expenses of completing it; and though all questions, except those relating to the column and the payment of costs, had been settled by agreement between parties, that the suit remained an administration suit, and that the costs must be paid out of the residuary estate. *Joliffe* v. *Twyford*, 28 L. J., Ch. 93; 4 Jur. (N.S.) 1165.

Waiver.]—A letter from an attorney of a creditor of a testator, to the attorneys of his executrix W., stating that his clients do not claim from W. payment of the debt as executrix of B. W. (the testator), but claimed from her individually, she having become liable, by payment of interest from time to time, to the debt:—Held, that this was no waiver of the creditor's right to sue W. as executrix, nor did it justify her executor in discharging a specific legacy before the debt. *Richards* v. *Brown*, 4 Scott, 262; 3 Bing. (N.C.) 493; 3 Hodges, 27; 6 L. J., C. P. 95.

b. *Accrued since Death.*

Personal Liability.] — An executor cannot be charged as such, either for money had and received by him, money lent to him, or on an account stated of money due from him as such, as those charges make him personally liable. *Rose* v. *Bowler*, 1 H. Bl. 109. And see *Ellis* v. *Bowen*, Forrest, 98.

And in an action against an executor, on an account stated of moneys due from him as such, he is personally liable; but if the account is stated with him, as executor, of money due from the testator, he is liable in his representative character only. *Powell* v. *Graham*, 1 Moore, 305; 7 Taunt. 580; 18 R. R. 593.

In an action against an administrator, on promises of the intestate, an account stated with the administrator as such, of money due from the intestate does not make him personally liable. *Segar* v. *Atkinson*, 1 H. Bl. 102.

Semble, an executor may be charged as such for money paid to his use. *Ashby* v. *Ashby*, 7 B. & C. 441; 1 Man. & Ry. 180; 6 L. J. (O.S.) K. B. 41; 31 R. R. 242.

And a count on an account stated with him, as executor, for moneys due by him, as executor, charges him in his representative character. *Ib.*

Duties on Wines in Port—Entry after Testator's Death.]—A legatee, under a bequest of wines, which arrived in the port of London in a ship before the death of a testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of the testator, is not subject to the payment of the duties; the executor being bound to pay them out of the assets. *Sewart* v. *Denton*, 2 Chit. 456; 4 Doug. 219.

Money Lent.]—A testator devised 400*l.* to his daughter Mary, and, in the event of her dying without issue, the same to be divided amongst such of his other children as should be then living. Mary died without issue, the testator's other children having died in her lifetime. Edward, the son and executor of the testator, covenanted with the defendant, another son, that the latter should apply the share of Mary, viz. 400*l.*, towards the purchase of an estate, which Edward, the executor, had sold to him; that that sum should continue in his, the defendant's, hands, and be payable, with interest, to Edward, the executor, or to Mary, and that the defendant should be chargeable with such principal money as ought to become payable agreeably to the will of the testator. The deed then witnessed, that in consideration of 400*l.* trust money, by these presents lent to the defendant, the latter covenanted with the executor for payment to him, for the use of Mary, of so much of the principal money as might become payable agreeably to the will. The plaintiff was the administrator of Edward, the executor:—Held, that this was money lent, and that the defendant was bound to repay it to the plaintiff, and was not entitled to delay payment for the purpose of paying it to the administrator de bonis non of the original testator as soon as he should be appointed. *Dodd* v. *Dodd*, 24 L. J., Ex. 162; 10 Ex. 878.

—— To Executor—Right of Proof against Estate.]—An executrix kept an executorship account with a bank, and having a power, under the will, to mortgage the real estate in aid of the personalty, she deposited with the bank the title deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn by the executrix, and the moneys to a great extent misapplied, but without the bank having notice of the misapplication. The security having proved insufficient to pay the balance, the bank applied to prove as creditors against the testator's estate for the difference:—Held, that they were not entitled to prove; for that a person cannot, by contract with an executor, acquire a right to prove as a creditor against the estate, though the executor has power to give him a lien on specific assets. *Farhall* v. *Farhall*, L. R. 7 Ch. 123; 25 L. T. 685; L. R. 12 Eq. 98.

Debitum in præsenti solvendum in futuro.]—E. covenanted that he in his lifetime or his heirs, executors, or administrators, within three months after his death, would pay 3,000*l.*, and died without having paid in 1823:—Held, that the money was a debt within the meaning of the Statute against Fraudulent Devises (3 & 4 W. & M. c. 14). *Coope* v. *Cresswell*, 36 L. J., Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.

To Executor for Advances — Priority.]—Where on taking an account a balance was found due to an executor for moneys advanced, the estate being insolvent:—Held, that the executor was entitled to be paid in full in priority to the

creditors. *Spackman* v. *Holbrook*, 2 Giff. 198 ; 2 L. T. 367.

A testator authorised his executor to advance any part, "not exceeding one-half, of the presumptive share" of his children, towards their maintenance and advancement. The estate being very small, the executor advanced more than the whole. The estate being insufficient to repay the amount to the executor, the court, in a suit by a child for administration, gave priority to the costs of suit, but gave the surplus to the executor in part payment of his advances. *Robison* v. *Killey*, 30 Beav. 520.

—— **Interest.**]—By the will of a trader, the residue of his real and personal estate, including his stock-in-trade and effects used therein and the goodwill of the business, was bequeathed to a trustee and executor, upon ordinary trusts for sale and conversion. The executor had from time to time out of his own moneys advanced various sums in excess of the balance in his hands. The court allowed the executor 4*l.* per cent. on the balances appearing due to him at the end of each year, without including any interest in the computation of such balances. *Finch* v. *Prescott*, 43 L. J., Ch. 728 ; L. R. 17 Eq. 554 ; 30 L. T. 156 ; 22 W. R. 437.

Other Matters.]—The executor of a deceased shareholder in a banking company held not liable to make good, out of his testator's assets, debts contracted by the company subsequently to the testator's death, though the shares were registered in the executor's name, and he received the dividends in his character of executor, the debts due at his testator's death having been subsequently discharged by the company. *Labouchere* v. *Tupper*, 11 Moore, P. C. 198 ; 5 W. R. 797.

A statute which incorporated a company, provided that every judgment obtained against the company might be enforced by execution against the person, property, and effects of any former shareholder, in his natural or individual capacity, provided such former shareholder was a shareholder at the time of the making of or entering into the contract in respect of which such judgment has been obtained:—Held, that an executrix of a shareholder, who was such at the time a debt was incurred, but died before judgment obtained against the company, was not liable on a scire facias against the goods of the deceased. *Poole* v. *Knott*, 28 L. J., Q. B. 322 ; 5 Jur. (N.S.) 1393 ; 7 W. R. 527.

3. Joint and Several Debts.

The several liability of the estate of a deceased partner for his firm's debts, subject to prior payment of his separate debts, is provided for by s. 9 *of the Partnership Act*, 1890.

Liability Joint and Several.]—Every joint loan, whether contracted in relation to mercantile transactions or not, is in equity to be deemed joint and several ; therefore, where four persons had opened a joint account with certain bankers who had advanced to them money on such joint account:—Held, that upon the decease of one of the joint contractors, the bankers had a right in equity to immediate relief out of his assets without claiming any relief against the surviving joint contractors, or showing that the latter were unable to pay by reason of their insolvency. *Thorpe* v. *Jackson*, 2 Y. & C. 553.

Joint bond held several against creditors in the administration of assets. *Burn* v. *Burn*, 3 Ves. 573.

Bond by three obligors, whereby they bound themselves "jointly," and their heirs, &c. "respectively," to pay, which was conditioned to be void, if they or either of them, their or either of their heirs, paid :—Held, that it was a joint and several obligation, and one having died, that his assets were liable. *Tippins* v. *Coates*, 18 Beav. 401.

Liability Joint but not Several.]—A. and B. were obligors in a joint bond ; A., who was alleged to be the principal debtor, died :—Held, that his assets were not in equity liable upon the bond, but that the liability survived to B. *Richardson* v. *Horton*, 6 Beav. 185 ; 12 L. J., Ch. 333.

A. and B. desiring to borrow money of a bank, the bank refuses unless C. would join to secure them ; C. agreed to join, and A., B. and C. drew a cheque, and the money was paid to them :—Held, that this was a joint and not a joint and several liability ; that C. was in the nature of a surety only, and a bill against his estate, after his death, could not be supported. *Other* v. *Iveson*, 3 Drew. 177 ; 24 L. J., Ch. 654 ; 1 Jur. (N.S.) 568 ; 3 W. R. 332 ; 3 Eq. R. 562.

Joint Judgment—Right of Proof in Administration Suits.]—A joint judgment against two cannot be proved under a decree to account in a suit instituted to administer the real assets of the conusor who died first, the surviving conusor not being a party to the suit as such. The case does not fall within the twenty-eighth general rule of March, 1843. *Hatchell* v. *Sutton*, 2 Jo. & Lat. 21.

Joint Creditors—Remedy against separate Estate of deceased Debtor.]—In a creditors' suit for administering the assets of B., a joint creditor of A. and B. was permitted to prove, A. having become bankrupt, and it appearing that there were no joint assets of A. and B. *Cowell* v. *Sikes*, 2 Russ. 191 ; 26 R. R. 46.

Under decree obtained by separate creditor, for satisfaction out of assets, the surviving partner a bankrupt, and the joint estate insolvent, the joint creditors not entitled pari passu with the separate creditors to the separate estate, but can only claim the surplus after satisfaction of the separate debts. *Gray* v. *Chiswell*, 9 Ves. 118 ; 7 R. R. 151.

Where an intestate and another had mortgaged a leasehold estate, of which they were tenants in common, to secure payments in respect of shares held by them in a benefit building society, and had entered into a joint covenant to make the payments, but were not partners, and had no joint estate, and the intestate's co-debtor was sworn to be in insolvent circumstances :—Held, that the covenantee was not entitled to prove as a specialty creditor under a decree for the administration of the intestate's estate. *Crossley* v. *Dobson*, 2 De G. & Sm. 486.

The estate of the survivor of two partners had been administered in bankruptcy. Joint creditors, who had received a dividend under the bankruptcy, claimed to be paid the balance due to them out of the estate of the deceased partner, pari passu with his separate creditors :—Held, that they might prove, but could not be paid until the separate creditors had been satisfied. *Lodge* v. *Pritchard*, 4 Giff. 294 ; 11 W. R. 532.

—— **Release of separate Estate of deceased Debtor.**]—A banking firm, consisting of A., B. and C., were indebted to the plaintiff. A. died:—Held, that the estate of A. was not released from the plaintiff's demand, by his receipt of interest from the surviving and a new partner. *Harris* v. *Farwell*, 13 Beav. 403; 15 L. J., Ch. 185.

A. was co-partner with B., C. and D. as banker, and was partner in another banking firm with B. and C. A. died, and E. was admitted a partner in the first bank alone. The two firms became bankrupt, and under an order of the court the estates of the two firms were consolidated. The plaintiff (a creditor of the first bank in A.'s life) received a dividend out of the consolidated estate:—Held, that A.'s estate was not thereby released. *Ib.*

Indulgence as to time of payment granted by the obligee of a bond to the surviving obligor without the consent or concurrence of the executors of the deceased obligor, was held to have discharged them. *Oakeley* v. *Pasheller*, 4 Cl. & F. 207; 10 Bli. (N.S.) 548. But see *Rouse* v. *Bradford Banking Co.*, 63 L. J., Ch. 890; [1894] A. C. 586; 6 R. 349; 71 L. T. 522; 43 W. R. 78—H. L. (E.)

—— **Where Account continued by Survivors of Joint Debtors—Further Debts—Liability of Estate of Deceased Debtors.**]—A., B. and C. jointly incurred a debt. After the death of A. the account was continued by B. and C., and further debts incurred. Leave had been given to prove the whole debt against the estate of A., and dividends were received from all three estates to an amount exceeding in the aggregate the debt proved against A.'s estate. No special appropriation was made on the receipt of these dividends:—Held, that A.'s estate had no right to have the dividends from the estates of B. and C. wholly or ratably appropriated to the earlier debt, and that the creditors were at liberty to avail themselves of the proof against A.'s estate until either the whole debt was paid, or A.'s estate had contributed the full amount of the proof against it. *Denison* v. *Avison*, 2 Hem. & M. 647; 12 L. T. 340.

Creditor against two Estates for same Debt.]—A creditor against two estates, for the same debt, is entitled to receive dividends on the full amount from both estates, until he has been satisfied of his debt. *Bonser* v. *Cox*, 6 Beav. 84.

4. Specialty Debts.

What are—Administration Bond.]—Where no proceedings have been taken to put an administration bond in suit, a sum due from the administrator at his death to the estate of the intestate is not a specialty debt. *Parker* v. *Young*, 6 Beav. 261; 12 L. J., Ch. 335.

—— **Covenant of Indemnity.**]—Under covenant to retiring partner to pay debts, and indemnify against them, broken by death, leaving debts unpaid; they, being paid by covenantee, become a specialty debt against the administrator. *Musson* v. *May*, 3 Ves. & B. 194.

—— **Covenant to pay Rent.**]—Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and, as to rent previously due, is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender. *Att.-Gen.* v. *Cox*, 3 H. L. Cas. 240.

—— **Annuity.**]—A grant of an annuity to the grantor's sister though expressed to be made for natural love and affection, may be proved to have been made in consideration of her marriage, and will entitle her to rank as a specialty creditor of the grantor. *Tanner* v. *Byne*, 1 Sim. 160; 5 L. J. (O.S.) Ch. 125.

Where a testator has entered into a voluntary covenant to pay an annuity, the annuitant is a specialty creditor on his real estates, although the annuity did not become in arrear till after the testator's death. *Jenkins* v. *Briant*, 6 Sim. 603; 3 L. J., Ch. 169.

When an annuity is secured by a covenant and warrant of attorney, and all the arrears have been paid, the court will not restrain the executors of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out. *Read* v. *Blunt*, 5 Sim. 567.

—— **Annuity, Liability for—Tenant for Life—Remainderman.**]—A testator purchased hereditaments in consideration of the payment by him of an annuity secured by his covenant, and a charge upon the hereditaments purchased. Upon the death of the testator certain persons became under his will entitled to his real and personal estate for life, with remainders over to other persons:—Held, that the annuity ought to be capitalised and paid out of the corpus of the testator's estate, and that past and future payments of the annuity ought to be adjusted on that footing as between the tenants for life and the remaindermen. *Muffett, In re, Jones* v. *Mason*, 57 L. J., Ch. 1017; 39 Ch. D. 534; 59 L. T. 499; 37 W. R. 9. And see *Harrison, In re, Townson* v. *Harrison*, 59 L. J., Ch. 169; 43 Ch. D. 55.

—— **Voluntary Settlement.**]—Creditors by specialty, who are mere volunteers, are not entitled to compete with creditors on simple contract for valuable consideration, but as against the devisees of the debtor have a right to stand in the place of mortgagees who have exhausted the fund provided by the testator for the payment of debts. *Lomas* v. *Wright*, 2 Myl. & K. 769; 3 L. J., Ch. 68.

Where, upon agreement for separation, the husband covenanted to pay the wife an annuity, but there were no trustees to indemnify him against her debts, and the annuity becoming in arrear after his death:—Held, that there being no obligation on the face of the deed, the covenant might be enforced against his executors, but, as a voluntary one, not against his creditors. *Clough* v. *Lambert*, 10 Sim. 174; 3 Jur. 672.

The court, in the administration of assets, enforced against the estate voluntary assignments made by the testator of annuities, mortgage debts, and policies of assurance, of which assignments no notice had been given in his lifetime to the mortgagors or grantors, such assignments containing covenants for further assurance by the testator, his executors, and administrators. *Cox* v. *Barnard*, 8 Hare, 310.

Where the covenantee in a voluntary settlement for further assurance, which the executor of the covenantor refused to perform, sought to prove under a decree in a creditor's suit for administration, the petition refused, with leave to bring such action as the petitioner might be advised. *Hervey* v. *Audland*, 14 Sim. 531; 9 Jur. 419.

In 1832 Sir R. R. transferred 2,197*l.* stock into the names of trustees, and executed a voluntary deed, declaring the trusts in favour of his daughter and her children. In 1840 he executed a second deed, which, without noticing the first deed, recited that he had transferred a sum of 2,197*l.* stock into the names of these trustees, and proceeded to declare trusts somewhat different, and gave a life interest to his wife:—Held, first, that the stock intended to be settled by the two deeds was the same; secondly, that the trusts of the first deed could not be altered by the second; and, thirdly, that the second deed, failing to operate, gave no right against the assets of the settlor. *Newton* v. *Askew*, 11 Beav. 145.

—— **Voluntary Bond.**]—Voluntary bond given by a person to a common woman, after he had kept her two years, not relieved against upon a bill by the executor of the obligor. *Hill* v. *Spencer*, Ambl. 641.

In the administration of assets a voluntary bond is to be preferred to interest upon debts not by law carrying interest, payable under the 46th order of August, 1841. *Garrard* v. *Dinorben* (*Lord*), 5 Hare, 213; 15 L. J., Ch. 439; 10 Jur. 772.

—— **Assignee for Value.**]—An assignee for value of an equitable interest in money payable under a voluntary bond, is entitled to rank as a specialty creditor for value against the assets of the obligor. *Payne* v. *Mortimer*, 4 De G. & J. 447; 28 L. J., Ch. 716; 5 Jur. (N.S.) 749; 7 W. R. 646.

—— **Bond to Wife before Marriage.**]—Bond given to wife before marriage to leave her son 100*l.*, though extinguished in law, yet good in equity, and shall bind the real assets: and decreed, the wife after the husband's death to redeem a mortgage, and to hold over, though copyhold as well as freehold included in the security. *Acton* v. *Pearce*, 2 Vern. 480.

—— **Bond by Married Woman.**] — In the distribution of separate property of a married woman as assets after her death, a bond not entitled to priority. *Anon.*, 18 Ves. 258; 11 R. R. 194.

—— **Marriage Settlements.**]—Covenant by a father in his son's marriage settlement, by will or otherwise, in his lifetime to settle 3,000*l.* to be charged upon all real and personal property of which he should at or immediately before his death be seised or possessed, so as immediately after the decease of the survivor of himself and wife, to become well and effectually vested in the trustees of the settlement, upon trust for the son's widow and the issue of the marriage:—Held, to create a specialty debt, to be proved accordingly in the administration of his father's estate. *Lyre* v. *Monro*, 3 Kay & J. 305; 26 L. J., Ch. 757; 3 Jur. (N.S.) 584; 5 W. R. 870.

A. assigned to the trustees of his marriage settlement an equitable interest in copyholds, and covenanted for further assurance. A. afterwards got himself admitted, and sold the copyholds, and received the purchase moneys, and applied the same to his own use:—Held, that the trustees were entitled under the covenant to prove against A.'s estate as for a specialty debt. *Dickson, In re, Blackburn* v. *Dickson*, 40 L. J., Ch. 707; L. R. 12 Eq. 154; 25 L. T. 118.

By a settlement made on his marriage, the settlor covenanted with the trustees to settle estate A. upon his wife, but did not. He subsequently exchanged estate A. for estate B. and 1,050*l.* and died insolvent. In a suit by a creditor to administer his estate, the court declared that estate B. and the 1,050*l.* ought to be taken in substitution for estate A.:—Held, that the 1,050*l.* was a debt by specialty under the covenant. *Powdrell* v. *Jones*, 2 Sm. & G. 335; 23 L. J., Ch. 606; 18 Jur. 1048; 2 W. R. 361; 2 Eq. R. 624.

J. A. and R. A. being joint tenants of a freehold estate, subject to a mortgage to T. L. for 1,200*l.*, R. A., by articles made on his marriage, covenanted to settle his moiety of the estate on himself for life, remainder to his intended wife for life, remainder to the children of the marriage; and, afterwards, he bought J. A.'s moiety of the estate, and then mortgaged the entirety to J. A., without notice of the articles, for 1,000*l.* J. A. died, having by will given his residuary, real, and personal estate to R. A. absolutely, subject to a life interest therein to his wife. The executors of J. A., without notice of the articles, lent R. A. 3,200*l.*, being the residue of J. A.'s personal estate, to pay off the mortgage of T. L., and also for his other occasions, on mortgage of the entirety of the estate; and afterwards R. A. died, leaving his wife and children surviving, and the executors of J. A. took possession of the estate, and applied the rents in payment of the interest of the mortgages; and some years afterwards the widow of J. A. died:—Held, that the widow of R. A. had no right to be paid out of the assets of R. A., in priority to his other creditors, the amount of the rents of the settled moiety of the estate, received by the executors of J. A., and by them applied, after they had entered into possession, in paying the interest of the mortgages during the life of J. A.'s widow; and that she had no lien against any portion of J. A.'s assets coming to the estate of R. A. for the discharge of such arrears, but that she could only claim as a specialty creditor against R. A.'s estate. *Allen* v. *Aldridge*, 6 Jur. 183.

—— **Debitum in præsenti solvendum in futuro.**]—E. covenanted that he in his lifetime or his heirs, executors, or administrators, within three months after his death, would pay 3,000*l.*, and died without having paid in 1823:—Held, that the money was a debt within the meaning of the Statute against Fraudulent Devises (3 & 4 W. & M. c. 14). *Coope* v. *Cresswell*, 36 L. J., Ch. 114; L. R. 2 Ch. 112; 15 L. T. 427; 15 W. R. 242.

—— **Principal and Surety.**] — A. and B. executed a joint and several bond to secure a sum of money with interest to W. Subsequently to the deaths of A. and W., the executors of W. obtained from B., as principal, and C. as surety, another bond to secure a part of the money then due on the original bond with interest. No payments were ever made in respect of the first bond, but after C.'s death, the second bond was paid

off out of C.'s estate, and his representatives thereupon procured the original bond to be assigned to them:—Held, on a suit to administer the estate of A., that C.'s representatives were entitled by virtue of the assignment, to rank as specialty creditors of A.'s estate in respect of the payments made by C., or his estate on the second bond to the extent of the penalty in the assigned bond. *Hodgson* v. *Shaw*, 3 Myl. & K. 183; 3 L. J., Ch. 190.

The plaintiff joined the testator as surety in a bond, which he paid after the death of the testator, taking an assignment of the bond; he is only a simple contract creditor of the testator. *Jones* v. *Davids*, 4 Russ. 277.

Where two persons execute a bond, the one as principal, the other as surety, and no other assurance is executed at the time, the surety paying the bond debt is a simple contract creditor only of the principal. *Copis* v. *Middleton*, Turn. & R. 224; 2 L. J. (o.s.) Ch. 82. S. P., *Simpkins* v. *Poulet*, 2 L. J. (o.s.) Ch. 81. But see *Robinson* v. *Wilson*, 2 Madd. 434.

—— **Covenant in Mortgage Deeds.**]—A lessee mortgaged the demised premises, and covenanted for himself and his heirs with the mortgagee, his executors, administrators, and assigns, to repay the mortgage money. Afterwards the mortgagee joined with the mortgagor in surrendering the lease for the purpose of having a new lease granted to the latter, which they agreed should be assigned to the mortgagee by way of security for his principal and interest, and that that arrangement should not prejudice any other security that the mortgagee might have for his debt. A new lease was granted to the mortgagor, but he did not make any assignment of it in pursuance of the agreement. After his death the mortgagee assigned to A. the principal and interest due to him, and his security for them under the deed of surrender:—Held, that the covenant in the mortgage of the original lease was not extinguished by the surrender, and that the assignee was a specialty creditor of the mortgagor in respect of it. *Greenwood* v. *Taylor*, 14 Sim. 505; 9 Jur. 480.

Although a debt is acknowledged under seal and a security given, yet, if there is no covenant for repayment, the acknowledgment does not necessarily create a general specialty debt. *Jackson* v. *North Eastern Ry.*, 47 L. J., Ch. 303; 7 Ch. D., 573; 37 L. T. 664; 26 W. R. 513.

A. borrowed money on mortgage of a ship, and covenanted to pay the insurance, but not the principal money. A. paid the insurance, and afterwards the ship was lost on a subsequent voyage:—The mortgagee shall come in on the estate of A. for the principal money as a simple contract creditor. *Thomas* v. *Terry*, Gilb. Eq. Rep. 110.

A husband made a post-nuptial settlement of 4,000*l.* in favour of his wife and children, and then, in consideration of the 4,000*l.* expressed to have been lent to him by the trustees of the settlement, made a mortgage to them of a real estate to secure that sum, and covenanted to repay it. The husband never, in fact, paid the 4,000*l.* to the trustees:—Held, nevertheless, that they were specialty creditors of the deceased husband. *Tanner* v. *Byne*, 1 Sim. 160; 5 L. J. (o.s.) Ch. 125.

—— **Covenant to pay Bills.**]—Where in an agreement under seal there was a covenant by testator "to pay by bills of exchange," a debt created by the instrument in which the covenant was, and the bills accepted by testator in pursuance of such covenant were dishonoured, it was held, in an administration suit, to be a specialty debt. *Copland* v. *Martin*, 9 Sim. 433.

—— **Simple Contract Debt—Creditors' Deed.**]—A. being indebted to B., made and executed an indenture between himself and C., to which B. was no party; and thereby, after reciting that A. stated that he was indebted to B. in a certain specified sum, A. conveyed and assigned all his real and personal property to C., upon trust to sell, and out of the proceeds to pay the debt, and to pay the surplus to A. And the deed contained a covenant for further assurance:—Held, that the debt to B. was not converted into a specialty. *Stone* v. *Vanheythuysen*, 1 Kay, 721.

Quære, whether that would have been the effect if B. had been a party to the deed, or if C. had executed it as B.'s agent. *Ib.*

By an indenture executed by a debtor of the one part, and certain scheduled creditors of the other part, the debtor covenanted that he would pay the respective debts with interest on a given day; and, in the event of non-payment by that time, he engaged to sell so much of his estates as should be found necessary for that purpose:—Held, that this was a mere personal undertaking, and that even if it were not, it would give the creditors no specific lien on his lands, so as to enable them to receive payment pari passu with the judgment creditors. *Berrington* v. *Evans*, 3 Y. & C. 384.

—— **Partnership Articles.**] — Articles of partnership under seal contained the usual covenant by the partners to be true and just to each other in all their dealings; and each bound himself his executors, &c. unto the other his executor &c. in the penal sum of 5000*l.* for the due performance of the partnership articles. On the death of one partner, he was found indebted to the partnership in 11,064*l.*:—Held, that the debt was by specialty for 5,000*l.* only, there being no covenant or obligation in the deed for payment of the general balance on the settlement of the partnership accounts, but only for 5,000*l.* the express contract for a definite sum excluding any implication for a larger sum as a specialty debt. *Powdrell* v. *Jones*, 2 Sm. & G. 305; 23 L. J., Ch. 606; 18 Jur. 1048; 2 W. R. 513; 2 Eq. R. 624.

—— **Award under Seal.**]—A lessor agreed in writing to demise minerals to a lessee at a certain rent. Disputes having arisen, and no rent having been paid, an action was brought for the rent, and a bill was filed to cancel the agreement. The matter was then referred to arbitration by submission under seal, and by an award under seal the arbitrator decided that the lease should be cancelled, and awarded a lump sum to the lessor as damages. The lessee then died, and a bill having been filed to administer his estate, the lessor claimed to rank as a specialty creditor in respect of the sum awarded:—Held, that the sum awarded was not a specialty debt. *Talbot* v. *Shrewsbury (Earl)*, 42 L. J., Ch. 877; L. R. 16 Eq. 26; 21 W. R. 473.

—— **Declaration of Trust.**]—The words "covenant or agree" are not necessary in a trust deed to constitute a specialty contract. A declaration by the trustee that he will stand possessed

on certain trusts, &c. is sufficient. *Richardson* v. *Jenkins*, 1 Drew. 477; 22 L. J., Ch. 874; 17 Jur. 446.

Testator bequeathed his personal estate to A., B. and C., his executors, in trust to invest two sums of 600*l.* in their names for his daughters for life, and after their deaths for their children. A. and B. alone acted; A. paid the interest of the two sums to his daughter, but did not invest the principal. B. executed a mortgage to A. and C. for securing 1,300*l.*, part of the testator's estate possessed by him, and died; his executors paid off the 1,300*l.*, and A. and C. joined in assigning the mortgage to them, and in signing a receipt for the money. A. died, having executed a deed poll reciting that the testator gave all his personal estate to A., B. and C., upon certain trusts mentioned in his will, and acknowledging that A. had received the whole 1,300*l.*, and that C. joined in the assignment and receipt for conformity only:—Held, that, under the deed poll, the cestuis que trustent for the two sums of 600*l.* were specialty creditors of A. *Turner* v. *Wardle*, 7 Sim. 80.

A deed of release is executed to the executors of a will, reciting that a certain sum has been paid to S. P. for the purposes and upon the trusts declared in the will, and witnessing that in consideration of this payment, which is thereby acknowledged by S. P., he S. P. holds this sum upon the trusts of the will:—Held, that this acknowledgment by S. P. under seal did not constitute a debt by specialty against his assets in favour of the cestui que trust under the will. *Brewe* v. *Cox*, 3 W. R. 276.

A mortgagor, by his will, created a trust for the payment of, amongst others, the mortgage debt. In a suit to foreclose:—Held, that the mortgagee was entitled to have his mortgage paid, in the first instance, out of the general personal estate of the mortgagor, and, in default of payment thereout, to have the mortgaged lands sold, and in case the fund so produced should prove deficient, that then the mortgagee was entitled to come in as a specialty creditor, and avail himself of the trust in the will of the mortgagor, and the decree was so made. *Marshall* v. *M'Aravey*, 3 Dr. & War. 232.

A creditor coming in under a decree cannot rely upon a will as creating a trust in his favour, unless it has been put sufficiently in issue for that purpose, either by the pleadings in the cause, or by the charge or discharge in the office. *O'Kelly* v. *Bodkin*, 2 Ir. Eq. R. 361.

—— **Under Deed not Executed by Trustee.**]—A trustee under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. *Richardson* v. *Jenkins*, 1 Drew. 477; 22 L. J., Ch. 874; 17 Jur. 446.

—— **Foreign Specialty—Equitable Assets in England.**]—When a debt is contracted by an Englishman in a foreign country the provisions of the lex loci contractus do not avail to entitle the creditor to payment of his debt out of equitable assets administered in this country in priority to other creditors. *Pardo* v. *Bingham*, L. R. 6 Eq. 485.

When, therefore, an Englishman residing in Venezuela executed an instrument to secure repayment to G. of 1,600*l.*, and G. afterwards registered the instrument in the form prescribed by the law of Venezuela, and by virtue of such registration became entitled, according to that law, to be paid his debt out of the general assets of the debtor in priority to other creditors:—Held, nevertheless, that a fund in this country constituting equitable assets of the debtor must be divided among the creditors without regard to any such priority. *Ib.*

—— **Adoption of Debt—Heir.**]—T., the heir-at-law and executor of a bond debtor, entered into possession of his real estates and admitted assets, and died before 1833, having devised his real estates to A., whom he appointed executrix. A. paid interest on the bond up to her death in 1834, and interest was afterwards paid by her executors. Upon a bill filed twenty years after the death of A., seeking payment of the bond out of the real estates of T. and A.:—Held, first, that the debt was the personal debt, but not the specialty debt of T., and the creditors were not entitled to have it paid out of his real estates. *Thorne* v. *Kerr*, 2 Kay & J. 54; 25 L. J., Ch. 57; 2 Jur. (N.S.) 322; 4 W. R. 131.

Held, secondly, that the debt was not the debt of A., unless by reason of her devastavit, the remedy for which was barred by the Statute of Limitations. *Ib.*

Priorities of.]—Where in a suit by an equitable mortgagee against the executor and devisee, the general assets proved insufficient to pay the debts and costs, and the parties beneficially interested under the will disclaimed:—Held, that the plaintiff was entitled to the proceeds of the sale of the mortgaged premises, and the executors to retain their own debts in full out of the general assets, and the residue to be applied, first, in satisfaction of the costs of the executor; secondly, of the plaintiff and the purchaser; thirdly, of the devisee, the defendant beneficially entitled under the devise; and lastly, of the debts remaining due of the plaintiff and the other creditors. *Tipping* v. *Power*, 1 Hare, 405; 11 L. J., Ch. 257; 6 Jur. 434.

Where A. with others, committee of a joint stock company, mortgaged premises of the company, and covenanted personally for payment of the money, and afterwards executed a bond for another debt; on the death of A., who held shares in trust for the company, which were decreed to be sold and applied in payment of the debts for which A. was liable:—Held, that his representatives were entitled to have the proceeds applied in payment of the bond debt in priority of the mortgage. *Lawrence* v. *Kempson*, 7 Beav. 574.

A. owes money by real judgments and bonds, and dies intestate; his administrator pays the judgments and some of the bonds, and pays more than the personal estate amounts to. What the administrator paid on the judgments must be allowed him, but as to what he paid on the bonds he must come in pro ratâ with the other bond creditors. *Robinson* v. *Tonge*, 3 P. W. 400.

Where a bill prays for the payment of debts in a due course of administration, a bond creditor cannot claim payment pari passu with a judgment creditor on the ground that the bill is filed on behalf of all the specialty creditors, even though the assets may have been partially distributed pari passu in the belief that there would be no deficiency. *Berrington* v. *Evans*, 3 Y. & C. 384.

A creditor by bond, in which the heirs are

named, takes priority over a specialty creditor under a security in which the heirs are not expressly named. *Jenkins* v. *Robertson*, 1 Drew. 477; 22 L. J., Ch. 874; 17 Jur. 446; 1 Eq. Rep. 123; 1 W. R. 298.

An agreement, not under seal, was entered into to refer a dispute as to an agreement for a lease to arbitration, and the submission to arbitration was made a rule of court: the award, which was under seal, declared the agreement for a lease to be valid, but ordered it to be cancelled, and awarded a sum of money:—Held, that such sum of money was in the nature of damages, and not of arrears of rent, and had no priority over simple contract debts. *Talbot* v. *Shrewsbury (Earl)*, 42 L. J., Ch. 877; L. R. 16 Eq. 26; 21 W. R. 473.

—— **Doweress, Claims by.**]—By the 3 & 4 Will. 4, c. 104, freeholds and copyholds of a deceased are assets for the payment of his debts; and by the 3 & 4 Will. 4, c. 105, s. 5, all debts to which the land of a deceased are subject, are "valid and effectual as against the right of his widow to dower":—Held, nevertheless, that the widow's right to dower or freebench has still priority over mere creditors of a deceased. *Spyer* v. *Hyatt*, 20 Beav. 621; 1 Jur. (N.S.) 315; 3 W. R. 294.

A widow, dowable out of her husband's lands, having elected to take an annuity given by the will in lieu of her dower, the testator's estate being insufficient to pay the legacies in full:—Held, entitled to priority over the other legatees. *Stahlschmidt* v. *Lett*, 1 Sm. & G. 421.

Lien.]—A. borrowed 300*l.*, and by his note of hand promised to pay the same on demand, and to give a security by mortgage of lands for the same when required. A. died in the month following. At the time of giving this note, and at the time of his death, he had a small real estate; the debt is not a charge on the land. *Williams* v. *Lucas*, 2 Cox, 160.

What circumstances will give the creditor of a testator a specific lien on assets, standing as part of the testator's estate at his death. *Tyler* v. *Manson*, 5 L. J. (O.S.) Ch. 34.

—— **Waiver.**]—A., and B. a solicitor, were executors. B. deposited some of his deeds in the trust box, to secure some money due to the testator's estate. The box remained in B.'s possession, and on his death the deeds were found to have been abstracted from it, and they could not be identified. The legal personal representative of B. then deposited certain specific deeds, selected by A., as a security for the debt:—Held, assuming that A. had, in consequence of B.'s wrongful act, obtained a general lien on all B.'s deeds for the money, still that he had waived it by taking the particular security from the legal personal representative. *Mason* v. *Morley*, 34 Beav. 471.

Held, also, that the creditors of B. were bound by the arrangement between his legal personal representative and A. *Ib.*

5. Debts and Liabilities in respect of Leaseholds.

Rent.]—A declaration for use and occupation against executors, charging them in respect of premises held by them as executors under a demise to their testator, but not alleging any occupation by them, is good, under 11 Geo. 2, c. 19, as sufficiently charging them de bonis testatoris. *Atkins* v. *Humphrey*, 2 C. B. 654; 3 D. & L. 612; 15 L. J., C. P. 120.

An executor, in whom a term of years has vested, the value of which is less than the rent reserved by the lease, is liable, notwithstanding, as assignee, for rent to the extent for which he might have let the premises. *Hopwood* v. *Whaley*, 6 C. B. 744; 6 D. & L. 342; 18 L. J., C. P. 43; 12 Jur. 1088.

Where the residue of a term of years becomes vested in executors, and the yearly value is less than the reserved rent, the executors are still liable, as assignees, for so much of the rent as the premises are worth. *Rubery* v. *Stevens*, 4 B. & Ad. 241; 1 N. & M. 183; 2 L. J., K. B. 46.

The plaintiff having declared in an action on a covenant for rent at 26*l.* a year, the defendants pleaded that they were only chargeable as executors; that the term came to them as such; that the premises were of less yearly value than the rent of 26*l.*, viz., of no value, and that they had fully administered. Replication, that the premises were of the yearly value of 26*l.* At the trial, the yearly value was found by the jury to be 20*l.*:—Held, that the replication was, in substance, that the premises were of some value; that the issue was merely informal, and cured by verdict, and that the plaintiff might recover the arrears of rent at the rate fixed by the jury. *Ib.*

A party having died possessed of a residue of a term of eight years, her executors let the premises to an under-tenant, to hold from year to year, subject to the determination of their own interest; who, at the expiration of the term, refused to give up possession. His goods were afterwards distrained on by the executors, who, having got the under-tenant out of possession, tendered the same to the lessor, who refused it, claiming one quarter's rent:—Held, that the lessor was entitled to recover against the executors for the use and occupation of the premises from the expiration of the term until the day when possession was offered to him. *Ibbs* v. *Richardson*, 1 P. & D. 618; 9 A. & E. 849; 8 L. J., Q. B. 126; 3 Jur. 102.

An executor who takes possession of a leasehold of his testator is liable personally as assign of the lease for subsequent rent, up to the letting value of the holding. *Bowes, In re, Strathmore (Earl)* v. *Vane*, 57 L. J., Ch. 455; 37 Ch. D. 128; 58 L. T. 309; 36 W. R. 393.

When executors received a premium upon the assignment of a lease, and paid the amount into their testator's estate:—Held, that they were not personally liable for rent accrued due after the assignment, in respect of the premium so paid in. *Goodland* v. *Ewing*, 1 Cab. & E. 43.

—— **Executor de son tort.**]—An executor de son tort in possession of lands, held by the deceased owner for an unexpired term of years, is suable by the landlord for rent. *Fielding* v. *Cronin*, 16 L. R., Ir. 379—C. A.

—— **No Entry into Possession by Executors.**]—The executor of a lessee cannot be made liable as assignee of a term without an entry and an actual taking possession by him of the demised premises; but if he enter and take possession he may be made liable as assignee, though, by proper pleading, he may limit such liability for

rent to the yearly value which the premises might have yielded. But, semble, he cannot, after entering, limit his liability under the testator's covenant to repair. *Rendall* v. *Andreae*, 61 L. J., Q. B. 630.

—— **Defence—That Premises produced "no Profits."**]—To an action for rent against an assignee of a term, he pleaded that he was administrator; that the premises were of less value, and had yielded less profit than the arrears of rent; that he had paid over to the plaintiff all the profits received from them, and had offered to surrender before any rent became due, and had fully administered:—Held, that the averment in the plea, as to the value of the premises, was not supported by showing that the intestate had underlet them, and that the defendant had been unable to get the rent from the under-tenant, or by proof that they were out of repair, as the lease to the intestate contained a covenant to repair, and it was therefore the defendant's duty to repair them. *Hornidge* v. *Wilson*, 3 P. & D. 641; 11 A. & E. 645; 9 L. J., Q. B. 72.

Although, in respect of rent, the personal liability of an executor of a lessee for years does not exceed the value of the demised premises, this qualification does not extend to a covenant for repairs. *Sleap* v. *Newman*, 12 C. B. (N.S.) 116; 6 L. T. 386.

A plea by an executor, that the premises yielded no profit beyond what he had paid over to the lessor; that the premises came to him only as executor; and that he offered to surrender them before the breaches occurred, is a bad plea. *Ib.*

When an executor is sued for use and occupation in his own right, he must show that his occupation is as executor, and that he entered in that character; that he has no assets; and that the value of the land is not equal to the rent. Where the land yields some profit, but less than the rent, he may tender the amount of profit, and plead a tender, or he may pay it into court. *Patten* v. *Reid*, 6 L. T. 281.

—— **Other Pleas.**]—To a declaration against the defendant, as assignee of a lease of premises, alleging the nonpayment of rent, he pleaded: first, that administration de bonis non of the lessee of the premises was granted to A., whom he afterwards married, and that neither he nor his wife ever entered into or took possession of the premises, nor did they vest in the defendant otherwise than as in, and by, the plea appears. Secondly (after repeating the grant of administration, and that the defendant married the administratrix), that the plaintiff sued the defendant and his wife as administratrix for the recovery of the same rent, and they pleaded plene administravit præter; that the plaintiff recovered judgment against them for the amount claimed, part to be levied de bonis testatoris, and the residue to be levied of assets quando acciderint. Thirdly (after repeating the matters alleged in the preceding plea), plene administraverunt præter goods not sufficient to satisfy the judgment debt:—Held, that the plea afforded a good answer as an argumentative traverse that the defendant was assignee. *Kearsley* v. *Oxley*, 2 H. & C. 896.

The second plea was also good as a plea in the nature of a judgment recovered—Per Pollock, C.B., Channell, B., and Pigott, B. Martin, B., dubitante.

The third plea would have been bad if it had not amounted to an argumentative traverse that the defendant was assignee—Per Martin, B., and Channell, B. *Ib.*

An account of rent decreed, under the circumstances, against the personal representatives of a lessee who had assigned his interest. *Trat* v. *Burn*, Ll. & G. t. Sugd. 78.

Equity will oblige an executor to pay arrears of rent, though the person of the testator was not liable. *Eton College* v. *Beauchamp*, 1 Ch. Ca. 121.

A testator to whom the interest in a lease was assigned entered into an express covenant with his assignors, the commissioners of public works, to pay the rent reserved by the lease to the commissioners, and further to indemnify them from the payment thereof:—Held, that the commissioners had a right, under the covenant, to require the testator's executor to pay the rent, although they might never be sued; and that the commissioners were not bound, if sued, to set up technical objections, which might or might not be sustainable, to defeat a fair claim, in order to exonerate the testator's executors from the covenant. *Trevor* v. *Thomas*, 13 Ir. Eq. R. 222.

Breaches of Covenant.]—Held, that under a devise for payment of debts, lands were liable, in default of the personal estate, to make good damages recovered against the executor for breaches of covenants in a lease, committed both before and after the death of the testator; but that, not having been a party to the action, the devisee was entitled to an inquiry as to the amount of costs, damages and expenses incurred by the executor in the action. *Wilson* v. *Leonard*, 3 Beav. 373.

Assets of a testator, consisting of personalty which could be identified, were settled bonâ fide upon the marriage of his daughter and residuary legatee:—Held, that they thereupon ceased to be liable to subsequent accruing claims in respect of breaches of covenants which had been entered into by the testator, but of which the parties to the settlement had no notice when they executed it. *Dilkes* v. *Broadmead*, 2 De G. F. & J. 566; 30 L. J., Ch. 268; 7 Jur. (N.S.) 56; 3 L. T. 605; 9 W. R. 238.

An under-lessee of a dwelling-house bequeathed all his residuary personal estate in trust for his daughter on her marriage absolutely. By a settlement prior to marriage the whole fund was settled, part of it for the husband for life, remainder to the wife for life, and the rest for the separate use of the wife for life, with remainder in case she should survive her husband for herself absolutely. Some years after the settlement a breach of the covenants in the lease was committed, and a claim in respect of it was made by the representative of the original lessor against the under-lessor. He filed a bill for the purpose of having the damages in respect of the breach made good by the husband, or by the fund settled to the separate use of the wife:—Held, that the consideration of marriage protected the whole fund from the claim. *Ib.*

Dilapidations.]—A testator directed his executors to get in and convert all his real and personal estate, invest the same from time to time, and pay and divide the interest and dividends to two tenants for life, with benefit for life, with benefit of survivorship. At the death

of survivor to convert the whole, and to pay and divide the same amongst his nephews and nieces, naming them. Part of his personal estate consisted of leaseholds for lives, renewable on the death of the last nominee, under different terms of renewal, some arbitrary, some not. Some of the premises contained in the leases had come under the control of the charity commissioners, and alterations as to the terms of renewal had been made by other lessors. Considerable repairs had become necessary to certain of the houses, and dilapidations had taken place in the testator's lifetime:—Held, that the executors were bound to repair and make good the dilapidations, the amounts to be paid out of general estate. *Alden* v. *Kennerly*, 7 L. T. 312.

A husband made his will in 1851, and thereby gave renewable leaseholds to his wife for life and then over, and gave his personal estate to trustees upon trust to repair and insure and renew his leaseholds at the accustomed times, and then to pay the annual proceeds to his wife for life, and after her death to pay the corpus to charities. The testator died in 1873. The time for renewing the leaseholds had expired at the time of his death, and renewal had become impossible:—Held, that dilapidations on the leaseholds at the death of the testator must be provided for out of the corpus of the personal estate. *Pinfold* v. *Shillingford*, 46 L. J., Ch. 491; 25 W. R. 425.

Fines and Expenses on Renewal.]—Where testator, tenant for life, ought to have renewed lease, and it was renewed after testator's death, by remainderman, reference directed to ascertain portion to be paid by executors. *Colegrave* v. *Manby*, 2 Russ. 238. Affirming *S. C.*, 6 Madd. 72; 22 R. R. 245.

The lessee for years of tenements, part of a manor held under a lease from tenants of the manor, who were trustees of a charity, by which the lessee had covenanted to pay the fines and expenses which should be incurred from time to time during the term, in filling up the number of trustees when reduced to five, with a proviso for re-entry by the lessors in case the fines should not be paid by the lessee. The lessee devised the leasehold estate and other leasehold property, and shares, stocks, funds and securities, and all other her personal estate, to trustees for her two nieces, for their lives, with remainder to their respective children, and remainders over. The number of trustees became reduced to five shortly before the death of the lessee, and became again reduced to five some years afterwards. Litigation with the lord of the manor commenced in the life of the lessee, and was continued after her decease as to the amount of the fines; the dispute was ultimately compromised by the payment of a sum by the devisee of the leasehold estate, in respect of each renewal and of certain costs:—Held, that the fine payable in respect of the admission of the trustees, which became necessary in the life of the testatrix to fill up the number, and the costs of the litigation in respect of such fine, were payable out of the general personal estate of the testatrix, exclusive of the leaseholds; and that the fines which became payable for filling up the number of trustees when it became necessary to do so, after the death of the testatrix, were payable by the devisees of the particular leasehold estate, and not by the general personal estate. *Fitzwilliams* v. *Kelly*, 10 Hare, 266; 22 L. J., Ch. 1016; 17 Jur. 249.

When a testator, possessed of leaseholds which he was bound by a covenant in the lease to renew, gave his estate to one for life, and afterwards upon trust to sell and pay certain legacies, and pay the residue to a charity:—Held, that the costs of a renewal obtained during the life tenancy were payable out of the testator's general assets, and not out of the impure personalty alone. *Trail* v. *Jackson*, 46 L. J., Ch. 684; 25 W. R. 802.

Tenant for Life and Remainderman.]—A testator possessed of several leaseholds sold one, taking a bond of indemnity from the purchasers; he then, by his will, gave his residuary estate to a tenant for life and remainderman. The purchasers became bankrupt, and the executors of the testator, having become liable on the covenants in the lease, took a reassignment from the purchasers:—Held, that the rent and liabilities under the lease must be paid out of the corpus, and not out of the income of the testator's estate. *Allen* v. *Embleton*, 4 Drew. 226; 27 L. J., Ch. 297; 4 Jur. (N.S.) 79; 6 W. R. 272.

A. having a leasehold estate, on which he had covenanted to erect buildings within a certain time, bequeathed it and also his personal estate, subject, as to the latter, to the payment of his debts, to trustees, for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part:—Held, that his general personal estate was liable to the performance of the covenant. *Marshall* v. *Holloway*, 5 Sim. 196.

As between Executors and Legatees.]—There being a gift of leasehold property, with growing crops, &c., charged with 1,000*l.* to C. P. J., the executor pays the apportioned rent due at the testator's death out of the estate, and that sum is disallowed by the chief clerk in chambers. Upon application to vary the chief clerk's certificate:—Held, that the payment must be allowed, but the question as between the executor and legatees not decided. *Tomson* v. *Judge*, 5 W. R. 396.

By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee:—Held, that though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. *Ledger* v. *Stanton*, 2 John. & H. 687; 4 L. T. 795; 9 W. R. 848.

Therefore, the lessee having specially bequeathed the premises subject to the rent:—Held, as between the executors and the specific legatees, that specific legatees took subject to the whole rent, and that the benefit of the covenant for reduction of rent went to the executors. *Ib.*

A testator specially bequeathed certain personal estate upon trusts for H. and her children after payment thereout of a legacy and of his debts and funeral expenses, and bequeathed his residuary estate to the plaintiff, whom he appointed his executor. Part of the residuary estate consisted of a leasehold house, held for a term at a rack rent, and considerably out of repair. This leasehold being worthless, the plaintiff, five months after the testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residuary estate as a whole was valuable:—Held, that the

plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidations and for rent subsequent to the testator's death paid out of the specially-bequeathed property as being debts of the testator. *Hawkins* v. *Hawkins*, 13 Ch. D. 470; 42 L. T. 306; 28 W. R. 526.

A leasehold farm, subject to a non-alienation clause, was assigned to the testator in consideration of paying arrears of rent due; the landlord refused to accept the testator as tenant, and he never was in possession. He died leaving the arrears due, and purported to devise the farm to the plaintiff, who was in possession, it did not appear how:—Held, that the devisee was not entitled to claim the arrears against the testator's assets, the sale to the testator being a nullity, and the arrears therefore never his debt; but semble if the landlord had accepted him, the devisee would have been entitled. *Morres* v. *Morres*, 8 Ir. Eq. R. 325.

Rent—Priority of in Administration.]—Rent in arrear for land demised, whether by deed or parol, is of equal degree with specialty debts. *Thompson* v. *Thompson*, 9 Price, 464.

An administrator may retain the current half year's rent which accrued due since the death of the intestate, but which commenced before he died, for premises occupied by him as tenant at will. *Ib.*

In the administration of assets in a court of equity, a debt for arrears of rent has priority over simple contract debts; but an executor or administrator will not be personally responsible for payment of simple contract debts in priority to a debt of arrears of rent, of which he has no notice. *Clough* v. *French*, 2 Coll. C. C. 277; 15 L. J., Ch. 24; 9 Jur. 1029.

By agreement in writing, A. B. agreed to grant, and C. D. agreed to accept, a lease of lands in Jamaica for twenty-one years at a certain rent; C. D. entered into possession, and died without having paid any rent:—Held, that A. B. was not entitled to rank as a specialty creditor against the estate of C. D. in respect of the rent due. *Vincent* v. *Godson*, 4 De G. M. & G. 546; 24 L. J., Ch. 121; 2 W. R. 408. Affirming 17 Jur. 295.

Held, also, that the agreement and entry under it did not, in the absence of any admission of rent being due, create the relation of landlord and tenant between the parties, and that the creation of that relation was necessary in order to enable A. B. to sustain his claim, even if the lands had been in England. *Ib.*

Held, also, that the right to treat rent as a specialty debt is incident to privity of debt, and not to privity of contract, and would not, therefore, apply to the case of lands out of England. *Ib.*

A lessor agreed in writing to demise minerals to a lessee at a certain rent. Disputes having arisen, and no rent having been paid, an action was brought for the rent, and a bill was filed to cancel the agreement. The matter was then referred to arbitration by submission under seal, and by an award under seal the arbitrator decided that the lease should be cancelled, and awarded a lump sum to the lessor as damages. The lessee then died, and a bill having been filed to administer his estate, the lessor claimed to rank as a specialty creditor in respect of the sum awarded:—Held, that the sum awarded was not a specialty debt. *Talbot* v. *Shrewsbury (Earl)*, 42 L. J., Ch. 877; L. R. 16 Eq. 26; 21 W. R. 473.

By an agreement under seal, E. covenanted with B., his executors and administrators, that he would at any time thereafter, at the request of B., his executors, administrators or assigns, execute a demise of certain freeholds for the term of twenty-one years, at the yearly rent of 180*l.*, which lease should contain a covenant to keep the premises in good and substantial repair, and all other usual covenants; and B. for himself, his executors or administrators, covenanted with E., whenever thereto requested by E., to accept such lease, and execute a counterpart. Under this agreement B. entered and paid rent until his death (which took place before the 1st January, 1870), and after his death his widow and legal personal representative entered and paid rent. No lease was ever executed, and no such request as above mentioned was ever made by either party. Since his death rent had accrued due, and a sum was required for repairs:—Held, that the liability under the deed was from the first, and still was, a specialty in the same manner as if a lease had been executed in pursuance of the deed on the day of the date thereof; hence that a claim by E. for the sums due for arrears of rent and dilapidations under the covenants agreed to be entered into by B. were debts by specialty against the estate. *Kidd* v. *Boone*, 40 L. J., Ch. 531; L. R. 12 Eq. 89; 24 L. T. 356.

A landlord who does not distrain the goods of his deceased tenant, of whose estate a receiver has been appointed, is not entitled to have his rent paid out of the proceeds of the sale of such goods in priority to other creditors. *Sutton's Estate, In re, Sutton* v. *Rees*, 1 N. R. 464.

Rent is a specialty debt within 32 & 33 Vict. c. 46 (Hinde Palmer's Act), and therefore a landlord has no preferential claim against the estate of a deceased tenant for rent in arrear at the death of the tenant against the simple contract creditors. *Hastings, In re, Shirreff* v. *Hastings*, 47 L. J., Ch. 137; 6 Ch. D. 610; 25 W. R. 842.

6. Calls on Shares.

Where a Debt of Testator's Estate.]—Testator subscribed for twenty shares of 100*l.* each in a projected railroad, and paid 5*l.* on each share, and covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, and devised certain of his real estates to a trustee, in trust to sell and pay all debts due from him on mortgage, or for the purchase of estates which he had contracted for, and all other just debts that should be due from him at his death. When he died, the shares were at a premium, and no further instalment on them had been called for. Two years afterwards the act for making the railroad passed:—Held, that the testator's personal estate being exonerated from his debts, his widow was entitled to have the unpaid instalments paid out of the real estates. *Blount* v. *Hipkins*, 7 Sim. 51; 4 L. J., Ch. 13.

A testator gave certain real estate and some shares in a banking company to his executors in trust for an infant, for life, and afterwards for his children, but soon after the testator's death the bank became insolvent, and its affairs were wound up, and in a suit by the official manager, a large debt was established as due from the testator's estate, in respect of the shares. The executors had assented to the bequest of the shares to the infant, and received dividends:—

Held, that the infant on coming of age, having repudiated the bequest of the shares, the debt in respect of them was not to be thrown on the real estate devised to the infant, but to be borne by the residuary estate. *Moffett* v. *Bates*, 3 Sm. & Giff. 468; 26 L. J., Ch. 465; 3 Jur. (N.S.) 200; 5 W. R. 338.

Calls made upon shares in an incorporated company after the death of the owner, are payable out of his general personal estate, and not by the legatee for life under a gift of all the testator's shares in the company. *Clive* v. *Clive*, 1 Kay, 600; 23 L. J., Ch. 981. S. P., *Jacques* v. *Chambers*, 4 Railw. Cas. 499, varying *S. C.*, *Ib.* 205; 2 Coll. C. C. 435; 16 L. J., Ch. 243; 11 Jur. 295. But see *Addams* v. *Ferick*, 26 Beav. 384; 28 L. J., Ch. 594; 5 Jur. (N.S.) 588. *Day* v. *Day*, 1 Dr. & Sm. 261; 29 L. J., Ch. 466; 6 Jur. (N.S.) 365; 2 L. T. 167; 8 W. R. 288.

—— **Specific Bequest of Shares by Testator.**]—Where a testator makes a specific bequest of shares in an unfinished railway company, the specific legatee has to bear the calls which are made after the testator's death. *Day* v. *Day*, 1 Dr. & Sm. 261; 29 L. J., Ch. 466; 6 Jur. (N.S.) 365; 2 L. T. 167; 8 W. R. 288.

A testator gave to his son "any shares in railways, mines, and other undertakings that might belong to him at his decease":—Held, that all calls upon railway shares becoming due subsequently to the death of the testator were payable by the legatee; but such payments as might be necessary to constitute the testator a complete shareholder, and such calls as should be due at the time of his decease, would be payments out of his general assets. *Ib.*

Specific legatees of shares in a banking company, held liable to pay the calls made subsequent to the testator's death. *Armstrong* v. *Burnet*, 20 Beav. 424; 24 L. J., Ch. 473; 1 Jur. (N.S.) 765; 3 W. R. 433.

Distinction between the cases in which specific legatees of shares take cum onere, and those in which the general personal estate of the testator is liable to pay the future calls for the benefit of the legatees. *Ib.*

Where the interest of a testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons connected with it, the future calls fall on the legatees and not on the general personal estate. But where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose. *Ib.*

A banking company was established in 1836. By the deed of settlement 5*l.* per share was payable immediately, and the directors were empowered, at any time, to make a further call of 5*l.*, and on nonpayment, the shares might be forfeited. The shares were transferable, and, on transfer, the former proprietor was released. Legatees and executors might sell, but were not to be members until a transfer to them, and until then, were not entitled to the current dividends. The shareholders thereby covenanted to observe the clauses of the deed. A shareholder died in 1843, having specifically bequeathed his shares to infants. The executors in 1845 transferred the shares into their own names, and they assented to the legacies. Afterwards, in 1848, the further call of 5*l.* per share was made:—Held, that it was payable by the legatees, and not out of the testator's residuary estate. *Ib.*

Where shares not fully paid up are specifically bequeathed, the question whether the specific legatee or the residuary estate is liable to the future instalments, depends on whether the calls are actually made before the death of the testator. *Addams* v. *Ferick*, 26 Beav. 384; 28 L. J., Ch. 594; 5 Jur. (N.S.) 588.

A. bequeathed shares in a banking company. Before her death three calls were authorised at stated intervals, but she died before two of these periods:—Held, under the circumstances, and from the practice of the company, that the calls were not to be considered as really made until a call letter had been sent to the shareholders; and that as to those sent after the testatrix's death, the specific legatee, and not the residuary estate, must bear the calls. *Ib.*

Executors held entitled to no indemnity against liability in respect of shares in a banking company specifically bequeathed, the order of the court, in an administration suit, being of itself a perfect indemnity to them. *Ib.*

A testator bequeathed shares in companies, in which he was an original shareholder, to his son, when he completed his majority:—Held, that the legatee, on attaining twenty-one, was entitled to the dividends from the testator's death, and to have the shares fully paid up out of the residuary estate. *Wright* v. *Warren*, 4 De G. & Sm. 367.

When there is a gift of a general residue to one for life, and then over, part of the property consisting of shares not fully paid up, as a general rule, legatees of such shares specifically bequeathed will be liable to pay calls made after the testator's death. But the rule does not apply where there is an intention to be collected from the form of the will that no severance of the property should take place during the life of the tenant for life. *Box*, *In re*, 1 Hem. & M. 552; 33 L. J., Ch. 42; 9 L. T. 372; 12 W. R. 67.

—— **Liability of Testator's Estate for Future Calls.**]—Subject to s. 75 of the Companies Act, 1862, the liability of a shareholder for future call is not a debt. *Kershaw*, *In re*, *Whittaker* v. *Kershaw*, 60 L. J., Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23—C. A.

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate; afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed:—Held, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund. *Ib.*

—— **Out of what Fund Payable.**]—A testator by will, gave (after the death of his wife) any

shares in railways, mines, or other undertakings that might belong to him at his death, to his second son; and in case of his death without issue, the same to revert to his two other children. The testator was possessed of railway shares, upon which after his death, calls were made. The calls were paid by his widow, as executrix, and the company had power to make further calls. The residue was not sufficient to meet those calls. The court directed a sale of the shares by the executrix, who was to retain the sums already paid by her for calls, and to invest the residue in consols, the dividends of which were to be paid to her for life, without prejudice to the question out of what fund the calls already paid were ultimately to be borne. *Day* v. *Day*, 28 L. J., Ch. 947.

A testator bequeathed residuary personalty to trustees, with permission to continue existing investments, upon trust to convert and invest in the stock or shares of any company in Great Britain, and pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income and not out of capital. The testator at his death held waterworks and railway shares, upon which some instalments were due, but not yet payable. After his death the trustees sold some shares on which a call was actually payable, and allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser. After the testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the company:—Held, that the instalments due on shares accepted by the testator in his lifetime, when payable, and the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, and hence payable out of income. *Beran* v. *Waterhouse*, 46 L. J., Ch. 331; 3 Ch. D. 752.

Held, that the shares accepted by the trustees did not constitute part of the testator's residuary personal estate at his death, and hence that the calls on such shares were payable out of capital. *Ib.*

—— **Shares taken by Executors.**]—Executors applied for shares in a company in exchange for shares held by their testator in another company, the business of which had been taken over by the company to which the application was made. An offer of an exchange of shares had been made o the testator in his lifetime, but he had never eplied to it. The executors had originally been entered on the register individually as "executors of W. D., deceased," in respect of the shares; but at their request their names were removed from the register, and their testator's entered in their place as holders of the shares:—Held, that this was a new contract entered into by the executors, upon which the testator's estate was not liable. The testator's name was a mere dummy name, and the executors were personally liable in respect of the shares. *Cheshire Banking Co., In re, Duff's Exors.' Case*, 32 Ch. D. 301; 54 L. T. 558—C. A.

After a Winding-up.]—On the application of executors, a sum of money was appropriated to answer the liability of the testator's estate in respect of shares in a joint stock company which was being wound up; the official manager not having gone in before the master, but appearing on the motion. *Hawkins, In re*, 1 W. R. 446.

—— **Nature of Debt.**] — A call under the Winding-up Acts, 11 & 12 Vict. c. 45, and 12 & 13 Vict. c. 108, though the shareholder has executed the deed, is not a specialty debt. *Royal Bank of Australia, In re*, 3 Sm. & G. 272; 2 Jur. (N.S.) 11; 4 W. R. 186. *S. C.*, nom. *Robinson's Executors, Ex parte*, affirmed on appeal, 6 De G. M. & G. 572; 26 L. J., Ch. 95; 2 Jur. (N.S.) 1173; 5 W. R. 126. *See now* 25 & 26 Vict. c. 89, s. 75.

The call made by the master in winding-up is a liability quite independent of any stipulation contained in the deed of settlement, and depends upon the general rules of the law of partnerships. *Ib.*

The main purpose of the Winding-up Acts is not to secure the interests of creditors, but to effectually adjudicate and settle the legal and equitable rights of the partners inter se; and those rights must depend upon the contracts into which the parties have entered; and the Winding-up Acts have not altered the force and effect of those contracts, but only the mode of enforcing them (by calls). *Ib.*

R. became a shareholder in a banking company, and executed the deed of settlement for 120 shares. In winding up the affairs of the company, the master decided that the official manager's claim in respect of a call of 100*l.* per share on the 120 shares held by R. should be considered as a specialty debt, and as overriding the set-off claimed by the executors of R. in respect of simple contract creditors. On motion to reverse or vary this decision:—Held, that the call created an original liability by force of the Winding-up Acts, and that the right of the official manager to receive, and the duty of the contributory to pay, and the remedy for enforcing that duty, arose only under the statute; and therefore the call made upon R. was not a specialty debt against his assets; and the master's decision was reversed. *Ib.*

Where a testator held shares in a company, the calls on which shares formed specialty debts:—Held, that, as against simple contract creditors, no part of the estate could be reserved to provide for future calls. *Wentworth* v. *Chevell*, 26 L. J., Ch. 760; 3 Jur. (N.S.) 805; 5 W. R. 743.

Payment of simple contract debts by executors allowed, where the testator had been a shareholder in a banking company by deed under seal, and calls had been afterwards made in respect of the shares held by him, to meet which calls there were no assets. *Henderson* v. *Gilchrist*, 22 L. J., Ch. 970; 17 Jur. 570; 1 W. R. 426.

—— **Companies Act, 1862, s. 75.**]—The liability of a contributory to pay calls made since the winding-up is a debt by specialty which binds the heirs of the contributory under the Companies Act, 1862, s. 75. *Buck* v. *Robson*, 39 L. J., Ch. 821; L. R. 10 Eq. 629; 23 L. T. 391.

When an administratrix had distributed the whole of the intestate's assets without making provision for calls on shares after being placed on the list of contributories in a winding-up:—Held, that there ought to be a decree for payment, and in default for administration. *Price* v. *Mayo*, 43 L. J., Ch. 402; 22 W. R. 401.

Under Schemes of Arrangement.]—Sums payable in respect of bank shares at the times

mentioned in various schemes for the reconstruction of those banks are debts of the deceased, which his executors are entitled to deduct from the sum total of the assets in order to ascertain the balance liable to probate duty. *Master in Equity* v. *Pearson*, 66 L. J., P. C. 25; [1897] A. C. 214; 75 L. T. 526—P. C.

Executor, how far Bound as a Shareholder.]—A declaration by the public officer of a joint stock company against the executrix of a shareholder for calls, stated, that by the deed of settlement it was provided that the shareholders, while holding shares, should be partners in the company; and that, in addition to 5*l.* required to be paid by each shareholder before the execution of the deed, the directors should have power to call for the further payment by each shareholder, or his executors, of 45*l.* on every share held by him. It then averred, that after the testator's death, and whilst the defendant was a shareholder as such executrix, the directors made a call. Breach, nonpayment by the defendant as executrix. Pleas, non est factum, and a denial that the call was made whilst the defendant was a shareholder as executrix:—Held, first, that the covenant by the shareholders to pay calls bound their executors, in case a call was made on them, although the covenant did not contain the words "or their executors," and consequently there was no variance in the statement of the contract. *Wills* v. *Murray*, 4 Ex. 843; 19 L. J., Ex. 209.

Held, secondly, that the plaintiff was entitled to succeed on the other issue, inasmuch as the defendant was in one sense a shareholder as executrix, notwithstanding the deed provided that no executor should become a shareholder without the consent of the directors, and until he had done certain specified acts, which requisites were not in this case complied with. *Ib.*

The deed of settlement of a joint-stock banking company defined the term "shareholder and member" as meaning the owner of a share or interest in the capital and joint stock of the company. It provided that no benefit of survivorship should arise among the shareholders, but that the shares should be transmissible to personal representatives. But there were also provisions that no executor as such should be a member of the company, but might elect to sell his testator's shares or constitute himself a member in the manner therein mentioned, and that the directors might forfeit the shares if the executor did not constitute himself a member. The deed provided for the payment of calls by the shareholders. A transferee of shares, who by his purchase-deed covenanted to perform the stipulations of the deed of settlement, died, and his executor took no step to become a member:—Held, that the company was entitled to prove in a suit to administer his estate as a creditor in respect of a call made after the testator's death. *Heward* v. *Wheatley*, 3 De G. M. & G. 628; 22 L. J., Ch. 435; 17 Jur. 403; 1 W. R. 216.

The deed of settlement of a joint-stock banking company provided that the executor of a deceased shareholder should not be a member of the company in respect of such shares, but should be at liberty to sell the shares, or at his option to become a member on complying with certain provisions, as to giving notice of his desire to become a member, and specifying the shares in respect of which he claimed to be a member, and if he did not elect to become a member, he was not to be entitled to any dividend accruing due after the testator's death:—Held, that the executor of a deceased shareholder, who had not complied with the provisions, did not, by receiving a single dividend in respect of the testator's share, accrued due since his death, render himself liable to be sued in scire facias as a member of the company. *Ness* v. *Armstrong*, 7 D. & L. 73; 4 Ex. 21; 18 L. J., Ex. 473; 13 Jur. 847.

The executor of a deceased shareholder in a banking company held not liable to make good, out of his testator's assets, debts contracted by the company subsequently to the testator's death, though the shares were registered in the executor's name, and he received the dividends in his character of executor, the debts due at his testator's death having been subsequently discharged by the company. *Labouchere* v. *Tupper*, 11 Moore, P. C. 198; 5 W. R. 797.

The executors of a shareholder are not liable in an action for calls in the statutory form under the Companies Clauses Act, when the call is made in the lifetime of the testator. *Birkenhead, Lancashire and Cheshire Junction Ry.* v. *Colesworth*, 6 Railw. Cas. 211; 5 Ex. 226; 1 L. M. & P. 244; 19 L. J., Ex. 240; 14 Jur. 354.

—— **After Payment of Legacies.**]—Payment to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. *Newcastle Banking Co.* v. *Hymers*, 22 Beav. 367.

Where, therefore, a testator held shares in a banking company, and nine years after his death the bank was wound up, and a call made:—Held, that payments to legatees in the meantime could not be allowed to the executors as against the official manager in respect of the call. *Ib.*

A shareholder in a company who before his death had been released from all liability in respect of his shares in consideration of a certain payment, by his will gave legacies, which his executors duly paid. The company afterwards endeavoured to set aside the release, and they failed in the first instance, but on appeal succeeded in setting aside the release:—Held, that the executors were personally liable to refund the amount paid to the legatees, to meet the calls made upon the testator's estate in respect of the shares. *Bewley, In re, Jefferys* v. *Jefferys*, 24 L. T. 177; 19 W. R. 464.

The executors of a deceased shareholder in a company, which was a going concern at the time of his death, paid a legacy under his will without providing for any contingent liability in respect of the shares which they retained unsold. The company was subsequently wound up, and the executors were placed on the list of contributories:—Held, that they were liable to pay the amount of the legacy in satisfaction of calls. *Taylor* v. *Taylor*, 39 L. J., Ch. 676; L. R. 10 Eq. 477; 23 L. T. 134; 18 W. R. 1102.

By a local act it was enacted that N. and all other persons who had already subscribed, or who should thereafter subscribe, to the undertaking, should be united into a company for the purposes of the undertaking, that the number of directors should be six, and the qualification of a director the possession of fifty shares in the undertaking; and that N. and K. and four others should be the first directors in the company, and should continue in office till the first ordinary meeting, and that at such meeting the

shareholders might either continue in office the directors appointed by the act, or might elect a new body of directors. N. and K. had both signed the petition on which the act had been obtained, and had attended meetings of the company, and had each on one occasion signed the minutes. No other directors ever were elected, and there was never any register of shareholders. N. and K. were both dead; and N.'s representatives, after giving the statutory notice to creditors, had duly distributed his assets. The company having been ordered to be wound up:—Held, that the representatives of N., as well as those of K., must be settled on the list of contributories for fifty shares, the fact that N.'s executors had duly distributed his assets notwithstanding. *Dublin and Metropolitan Junction Ry., In re*, Ir. R. 11 Eq. 294.

—— **Order to Pay under 11 & 12 Vict. c. 45.**]—Under the 11 & 12 Vict. c. 45, the master made an order for placing an executrix on the list of contributories in respect of shares in the undertaking held by the testator, and directing her to pay 1,469*l.* 15*s.* 7*d.* out of the assets of the testator, if she had so much in her hands to be administered. This order having been registered as a charge against the executrix, as well as against the testator, an application to the court to alter or vacate the entry was refused. *Thomas, Ex parte*, 9 C. B. 740.

7. Crown Debts.

Order and Contribution of Assets for.]—If there is a debt owing to the king, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets. *Sagitary* v. *Hyde*, 1 Vern. 455.

—— **Marshalling.**]—Debt to the crown, levied out of lands mortgaged by debtor, subsequent to becoming indebted to the crown:—Held, that all the estates of which he was seised whilst a crown officer, must, according to their ratable value, be contributory with the mortgaged premises to pay the debt; excepting, however, lands purchased under decree of foreclosure against debtor, the purchaser not having notice of the crown debt, and having got in an old judgment against the ancestor of the debtor. The court would itself be the agent of a fraud, if it displaced a title given by itself, where the proceedings were in all respects conformable to the rules and established law of the court, the purchaser paying his money into court, and the conveyance made under its sanction, and everything transacted, not only with regularity, but optimâ fide by the purchaser. But although all the estates are thus contributory, in case of the mortgagee, yet, as between the debtor's eldest son deriving under settlement, and purchasers from the son, the contributory fund must be so marshalled, as to make the son's remaining property first applicable, and if that be insufficient, the portion of the last purchaser must be applied, before that of any prior purchaser. *Hartly* v. *O'Flaherty*, Beat. 61.

—— **Since 32 & 33 Vict. c. 46—Incidence as between Specialty and Simple Contract Creditors.**]—In the administration of the insolvent estate of a deceased person, since Hinde Palmer's Act (32 & 33 Vict. c. 46), a simple contract debt due to the crown is payable only out of the proportion of the assets which the simple contract debts bear to the specialty debts, in priority to other simple contract debts. Notwithstanding the act, it does not fall, ratably or otherwise, on the proportion attributable to the specialty debts. *Wilson* v. *Coxwell* (52 L. J., Ch. 975; 23 Ch. D. 764), and *Jones, In re, Calver* v. *Laxton* (55 L. J., Ch. 350; 31 Ch. D. 440), applied. *Williams, In re, Williams* v. *Williams* (42 L. J., Ch. 158; L. R. 15 Eq. 270) distinguished. *Bentinck, In re, Bentinck* v. *Bentinck*, 66 L. J., Ch. 359; [1897] 1 Ch. 673; 76 L. T. 284; 45 W. R. 397.

8. Judgment Debts.

Judgment Debts—What are.]—An administrator pays away all the assets in satisfying debts on specialty; decreed to pay a debt due by a decree, though he had no notice of the decree before he has paid those debts. *Searle* v. *Lane*, 2 Vern. 37, 88.

A decree in equity for a sum certain is equal to a judgment at law, and shall be paid pari passu therewith; but if the decree be for an account, it is only equal to a judgment quod computet till the account be stated. *S. C.*, 2 Freem. 103.

A final decree upon a sum ascertained, is equal to a judgment; but a mere decree for an account of plaintiff's demand, and of the personal estate come to the hands of defendant, with mere direction for payment out of the result of that account, does not prevent the executor paying a judgment. *Perry* v. *Phelips*, 10 Ves. 33; 7 R. R. 31.

An administration suit having been instituted, another suit was instituted against an executor, by the decree in which he was declared liable to make good a certain sum to the estate of his testator, and was to be charged with the balance, in the accounts directed to be taken in the first suit:—Held, that this did not constitute a judgment debt against the executor. *Garner* v. *Briggs*, 27 L. J., Ch. 483; 4 Jur. (N.S.) 230; 6 W. R. 378.

The executor died, and a suit was instituted for the administration of his estate. On further directions in the former suits it was directed that the amount due from the executor should be ascertained, and the plaintiff in these suits should go in and prove for that amount in the suit for the administration of the executor's estate:—Held, that this amount was not a judgment debt against the executor's estate. *Ib.*

An order under Ord. XIV. r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment, so as to give a judgment creditor's right of priority to a plaintiff who has failed to follow up the order by signing judgment under Ord. XLI. *Gurney, In re, Clifford* v. *Gurney*, 66 L. J., Ch. 32; [1896] 2 Ch. 863; 75 L. T. 332; 45 W. R. 92.

Of Deceased—When Undocketed.]—A debt on a judgment against a testator or an intestate, not docketed according to the directions of the 4 & 5 Will. & M. c. 20, was put by that act on a level with simple contract debts. *Hickey* v. *Hayter*, 6 Term Rep. 384; 1 Esp. 313; 3 R. R. 213. S. P., *Steel* v. *Rorke*, 1 Bos. & P. 307.

Under the plea of plene administravit, an executor might give in evidence that the plaintiff's judgment not being docketed, he had paid away all the effects in discharging debts of an inferior degree. *Ib.*

A judgment to be entitled to preference in administration, must have been docketed pursuant to 4 & 5 Will. & M. c. 20; and notice of it in any other way is of no consequence. *Hall* v. *Tapper*, 3 B. & Ad. 655.

Judgment not docketed has no preference against heirs, executors, or administrators. *Landon* v. *Ferguson*, 3 Russ. 349.

—— **Since 2 & 3 Vict. c. 11.**]—By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference against heirs, executors, or administrators in the administration of estates; 2 & 3 Vict. c. 11, closed the docket:—Held, that the old law was thereby revived, and that the administrator had committed a devastavit by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter. *Fuller* v. *Redman*, 26 Beav. 600; 29 L. J., Ch. 324; 5 Jur. (N.S.) 1045; 7 W. R. 430.

The provision of the 2 & 3 Vict. c. 11, s. 4, that all judgments shall, after the expiration of five years from the entry thereof, be null and void against lands, tenements and other hereditaments as to creditors, unless registered within five years before the right of such creditors accrued, refers only to creditors who have some right or interest in such lands, tenements, or hereditaments, as, for example, by virtue of a creditor's decree, directing a sale of such property. *Simpson* v. *Morley*, 2 Kay & J. 71; 1 Jur. (N.S.) 1158.

Creditors of a deceased debtor have not on his death a right against his leasehold property in the hands of his executor or administrator within the meaning of the act. *Ib.*

Quære, if they have, even after a creditor's decree, any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors. *Ib.*

Terrin, In re (2 Dru. & War. 147), distinguished. *Ib.*

—— **Since 23 & 24 Vict. c. 38, s. 3—Unregistered Judgment.**]—The 23 & 24 Vict. c. 38, s. 3, restores the protection which was given to representatives against undocketed judgments by 4 & 5 Will. & M. c. 20: and therefore, where judgments are not registered, so as to form a charge upon land, they have no priority over simple contract debts; and an executor, even with notice of the judgment debts, is justified in parting with the assets to simple contract creditors. *Turner, In re, Walter* v. *Turner*, 3 N. R. 413; 33 L. J., Ch. 232; 10 Jur. (N.S.) 147; 9 L. T. 758; 12 W. R. 337.

The 23 & 24 Vict. c. 38, s. 3, is not restricted in its operation to the protection of heirs, executors and administrators against claims by unregistered judgment creditors, but absolutely deprives unregistered judgment debts of all priority in the administration of assets; and the act applies equally to judgments of county courts as to other judgments. *Ib.*

The meaning of s. 3 of the act 23 & 24 Vict. c. 38, like that of s. 3 of the act 4 & 5 Will. & M. c. 20, is not merely that protection is given to an executor or administrator against an action for a devastavit by a judgment creditor of the testator or intestate whose judgment has not been registered, but that such a judgment debt is not entitled in the administration of the estate to any priority over the simple contract debts of the testator or intestate. *Turner, In re* (33 L. J., Ch. 232), followed. *Van Gheluire* v. *Nerinckx*, 51 L. J., Ch. 929; 21 Ch. D. 189; 47 L. T. 46; 30 W. R. 789.

Before 23 & 24 Vict. c. 38, s. 3, if an administrator paid simple contract debts he would not be allowed them against a judgment creditor, though the judgment was unregistered when the payment was made, and though he had neither notice nor knowledge of its existence. *Fuller* v. *Redman*, 26 Beav. 600; 29 L. J., Ch. 324; 5 Jur. (N.S.) 1046; 7 W. R. 430.

A judgment signed in 1854, but not registered until after the death of the debtor, which happened after the passing of 23 & 24 Vict. c. 38, is, by s. 3, not entitled to preference in the administration of the debtor's estate. *Kemp* v. *Waddingham*, 35 L. J., Q. B. 114; L. R. 1 Q. B. 355; 13 L. T. 709; 14 W. R. 390.

In the administration of an estate an unregistered judgment debt has no priority over simple contract debts. *Illidge, In re, Davidson* v. *Illidge*, 53 L. J., Ch. 991; 27 Ch. D. 478; 51 L. T. 523; 33 W. R. 18—C. A.

—— **23 & 24 Vict. c. 38, s. 4.**]—The 23 & 24 Vict. c. 38, s. 4, as to registering judgments, is not retrospective; so that where a debtor died before the passing of the act, a judgment, which had not been registered within five years before his death, retained its priority in the administration of his assets. *Evans* v. *Williams*, 2 Dr. & Sm. 324; 34 L. J., Ch. 661; 11 Jur. (N.S.) 256; 12 L. T. 762; 13 W. R. 423.

—— **Judicature Act, 1875, s. 10.**]—The rule by which a judgment creditor of a testator is entitled to priority over simple contract creditors in the administration of the assets of the testator under an administration decree is not affected by s. 10 of the Judicature Act, 1875, which provides that in such administration of assets the same rule shall prevail as to the respective rights of secured and unsecured creditors as may be in force under the law of bankruptcy with respect to bankrupts' estates. *Smith* v. *Morgan*, 49 L. J., C. P. 410; 5 C. P. D. 337. S. P., *Maggi, In re, Winchouse* v. *Winchouse*, 51 L. J., Ch. 560; 20 Ch. D. 545; 46 L. T. 362; 30 W. R. 729.

Of Executor.]—A judgment obtained against an executor (before 2 & 3 Vict. c. 11) is entitled to preference in the administration of the testator's estate over simple contract debts, though not docketed pursuant to 4 & 5 Will. & M. c. 20. *Gaunt* v. *Taylor*, 3 Scott (N.R.) 700; 3 Man. & G. 886; 11 L. J., C. P. 68.

The 23 & 24 Vict. c. 38, s. 3, which provides that unregistered judgments shall have no preference in the administration of assets, does not apply to judgments obtained against a personal representative; and consequently such judgments, if obtained before decree, must, though not registered until after decree, be paid in preference to simple contract debts, and in order of priority according to the dates of their being entered up. *Jennings* v. *Rigby*, 33 Beav. 198; 33 L. J., Ch. 149; 9 L. T. 308; 12 W. R. 32.

By 32 & 33 Vict. c. 46, the distinction between specialty and simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, and obtains judgment, is, though it is not registered, entitled to be paid his debt in full

in priority over all other creditors. *Williams, In re, Williams* v. *Williams*, 42 L. J., Ch. 158; L. R. 15 Eq. 270; 28 L. T. 17; 21 W. R. 160.

A creditor who has obtained judgment against the executor of his deceased debtor before a decree is made for the administration of the debtor's estate has priority over other creditors, and that priority is unaffected by 32 & 33 Vict. c. 46. *Stubbs, In re, Hanson* v. *Stubbs*, 47 L. J., Ch. 671; 8 Ch. D. 154; 26 W. R. 736.

But where a creditor had obtained in an action in the exchequer division an order nisi to sign judgment against the executrix of his debtor, and before judgment had been signed another creditor obtained in the chancery division a decree for the administration of the deceased debtor's estate, he was held to have no priority; and the action in the exchequer division was transferred to the chancery division, and proceedings therein stayed upon motion made for that purpose. *Ib.*

A creditor obtained a judgment against the executor, and, on the same day, a decree was made for the administration of the estate:—Held, that the judgment creditor had obtained no priority. *Parker* v. *Ringham*, 33 Beav. 535.

—— **By Confessing Judgment.**]—Bond creditor brings a bill against an executor for recovery of his debt, and, pending this suit, the executor confesses a judgment to another bond creditor, the executor may pay this judgment before the bond debts. *Goodfellow* v. *Burchett*, 2 Vern. 299.

Where the representative of an intestate is seeking to give preference by confessing judgment, the court will give the plaintiff leave to proceed at law, to recover judgment with a cesset executio, and in the court of equity for a discovery and account of assets. *Baker* v. *Dumaresque*, 2 Atk. 119.

Decree quod computet makes no variation as to an executor, for before a final decree he may confess a judgment, and it does not at all alter the nature of the demand. *Smith* v. *Eyles*, 2 Atk. 385.

In an action of covenant, interlocutory judgment quod recuperet was signed, but before final judgment defendant died, and his executor confessed judgment to a bond creditor. He may plead that judgment in bar to a sci. fa. in the action on the covenant. *Ib.*

Executors in equity as well as at law may prefer any creditors in equal degree, or after an action at law brought by one creditor, may confess judgment to another. *Waring* v. *Danvers*, 1 P. W. 295.

Effect of a judgment confessed by an executor pending a suit. *Parker* v. *Dee*, 3 Swan. 529, n.; *Pigott* v. *Nower*, id. 534, n.

Assignment of part of the assets, and judgment confessed to a creditor by one executor, not available against the dissent of the others on behalf of the general creditors; though perhaps the court would not interpose against the particular creditor, if the property had actually passed, or to deprive him of any legal advantage. *Lepard* v. *Vernon*, 2 Ves. & B. 51; 13 R. R. 13.

Priority of—Inter se.]—An executor ought to pay that creditor first who uses the first diligence; so at law the first judgment shall be preferred; but otherwise as to legatees, for there being no priority among them, their legacies shall be paid pari passu. *Ashley* v. *Pocock*, 3 Atk. 208.

Where, after the death of A. B., who was indebted on bond to C. and D., judgments were entered up by them against his executor, and an administration suit was instituted by C.:—Held, in administering the estate, that C., whose judgment was prior in time to D.'s, was entitled to priority of payment. *Dollond* v. *Johnson*, 2 Sm. & G. 301; 23 L. J., Ch. 637; 18 Jur. 767; 2 W. R. 505; 2 Eq. R. 621.

In a suit to administer the estate of a testator, judgments obtained against his executors are payable according to their respective dates out of legal assets. *Ib.*

The priority of creditors, by decree, over subsequent judgment creditors, established. *Morrice* v. *Bank of England*, 3 Swan. 573.

In the administration of assets judgments rank inter se, according to the time of their entry upon the roll under the statute 3 Geo. 2, c. 7 (Ir.) *Burke* v. *Killikell*, 1 Ir. Ch. R. 1.

Of Heir — Simple Contract Debts of Intestate — Priority — Descended Land.]—The 3 & 4 Will. 4, c. 104, makes real estate assets to be administered in courts of equity for payment of simple contract debts of the deceased; and the 1 & 2 Vict. c. 110, s. 13, makes a judgment a charge on any lands of which the judgment debtor is seised, or over which he shall have any disposing power, for his own benefit; and it makes such judgment an equitable mortgage thereon:—Held, that judgments entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over the simple contract creditors of the intestate, in respect of the descended estate. *Kinderley* v. *Jervis*, 22 Beav. 1; 25 L. J., Ch. 538; 2 Jur. (N.S.) 602; 4 W. R. 579.

Voluntary.]—A voluntary judgment given by a freeman of London, payable three months after his death, is to be postponed to debts by simple contract, and to the widow's part, but will bind the freeman's legatory part. *Fairebeard* v. *Bowers*, 2 Vern. 202; Pre. Ch. 17.

Assignment by Executor after judgment for Benefit of Creditors.]—An executrix, after probate and after judgment against her for a debt due from her testator, by deed assigned all his property and effects to trustees for the benefit of his creditors:—Held, that the assignment was valid, as against the judgment creditor. *Wolverhampton and Staffordshire Banking Co.* v. *Marston*, 7 H. & N. 148; 30 L. J., Ex. 402; 7 Jur. (N.S.) 1040; 4 L. T. 524; 9 W. R. 790.

Foreign.]—A foreign judgment constitutes only a simple contract debt. *Wilson* v. *Dunsany (Lady)*, 18 Beav. 293; 23 L. J., Ch. 492; 18 Jur. 762; 2 W. R. 288.

Irish.]—Where a person died domiciled in Ireland, leaving property in Ireland and England, and the same executors in both countries:—Held, that an Irish judgment had priority over English simple contract creditors, against Irish property remitted to England by the executors, and being there administered. *Cook* v. *Gregson*, 2 Drew. 286; 23 L. J., Ch. 734; 2 W. R. 401.

A person domiciled in Ireland died, leaving English and Irish assets. At the time of his death he was indebted upon a decree in a foreclosure suit obtained in Ireland, under which the mortgaged estate was sold, but proved insufficient to pay the charges upon it. He was also indebted upon covenants, and judgments recovered in England, but upon which judgment had not been entered up in Ireland. In a suit for the administration of his estate :—Held, that the assets of the testator must be administered according to the law of his domicile; and the priorities of his various creditors be such as they would be by the law of Ireland; that the decree in the foreclosure suit in Ireland gave no priority over the creditors by covenant, and that all must be paid pari passu. *Wilson* v. *Dunsany (Lady)*, 18 Beav. 293; 23 L. J., Ch. 492; 18 Jur. 762; 2 W. R. 288. But see *Kloebe, In re, Kannreuther* v. *Geiselbrecht*, 54 L. J., Ch. 297; 28 Ch. D. 175; 52 L. T. 19; 33 W. R. 391.

Attachment of Debts.]—An executor of a judgment creditor is not entitled, under the C. L. P. Act of 1854, s. 61, to attach a debt due to the judgment debtor before he has made himself a party to the judgment. *Baynard* v. *Simmons*, 5 El. & Bl. 59; 24 L. J., Q. B. 253; 1 Jur. (N.S.) 657; 3 W. R. 422.

Where judgment is recovered against an executor, a debt due from a third person to the testator's estate may be attached; and it is no answer that a decree has been made in a suit in chancery for the administration of the estate. *Burton* v. *Roberts*, 6 H. & N. 93; 29 L. J., Ex. 484.

A judgment creditor who has obtained judgment against an intestate's estate, before an administration decree, is entitled under a garnishee order to enforce his judgment against a debtor to the estate. *Barnes, In re, Harper* v. *Barnes*, 36 L. J., Ch. 63; 15 L. T. 312. S. P., *Fowler* v. *Roberts*, 2 Giff. 226; 6 Jur. (N.S.) 1189; 8 W. R. 492.

A judgment in the lord mayor's court, obtained against the garnishee, does not entitle the plaintiff to rank as a judgment creditor in the administration of the garnishee's assets. *Holt* v. *Murray*, 1 Sim. 485.

A creditor who obtains a foreign attachment in the lord mayor's court, but who, before judgment, is restrained from proceeding in consequence of a decree made in a suit to administer the estate of the debtor, is not entitled to any priority in respect of such attachment over other creditors in the administration of the assets of the debtor. *Redhead* v. *Welton*, 30 L. J., Ch. 577; 4 L. T. 230; 9 W. R. 473.

Sect. 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under execution or attachment, is not made applicable to the administration of insolvent estates in the chancery division by the Judicature Act, 1875, s. 10. *Pratt* v. *Inman*, 59 L. J., Ch. 274; 43 Ch. D. 175; 61 L. T. 760.

Lien of Judgment Creditor.]—A testator directed the trustees of his real estate to raise, by mortgage, any sum not exceeding 20,000*l.*, and to apply the same in paying such of the creditors of M. as they should think fit. The trustees raised 6,000*l.*, and in their answer to a bill by a judgment creditor of M. to enforce his lien, they stated that they had raised this sum, but had not further exercised their power, and refused to do so, except under the direction of the court. They then filed a bill to have the trusts carried into execution by the court, and to this bill they made the judgment creditor a party, and stated in it that they intended to raise the whole 20,000*l.* :—Held, that the judgment creditor had an equity to sue to have the fund raised secured, if not to have the whole 20,000*l.* raised and distributed; and that the trustees were bound, if not by the will, by their answer, and the statement in their bill, to raise the whole 20,000*l.* *Joel* v. *Mills*, 3 Kay & J. 458.

The conusor of a judgment, by his will in 1802, bequeaths certain leaseholds specifically, and appoints the conusee a trustee under his will. The executor assents to the bequest in 1808, having at the time assets for the payment of all debts of the testator. A suit is instituted in 1812 for a sale of part of the testator's property by a specific encumbrancer, and under the decree in that cause, the judgment is proved, and declared a charge on the premises. No sale takes place, and after the death of the conusee in 1822, his widow, who was entitled to the judgment under a settlement which gave the conusee a life interest in it, files her bill to raise the amount, which she amends in 1835, making parties the specific legatee, his wife and children, upon whom the chattel had been settled by a post-nuptial settlement :—Held, that she was entitled to compel the owner of the chattel to contribute to the payment of the judgment. *Mannix* v. *Drinan*, 3 Ir. Eq. R. 108.

A. confessed a judgment, and died intestate, seised of fee simple estates, and possessed of a term of years. G., his only son and next of kin, died under age, having bequeathed the term to M., the wife of D.; and the real estates descended on B., his heir-at-law. M. died, and D. took out administration to her; he was also executor to G. In 1834 D. mortgaged the term as his own property; afterwards, in the same year, B. filed a bill against D. to have the judgment paid off out of the term; a general demurrer to this bill, for want of equity, was allowed. In 1835 B. filed a second bill against D., and the mortgagee of the term for the same purpose as the former, and a demurrer by D. to this bill, for want of equity, was also allowed. In May, 1837, B. filed a third bill, for the same purpose, against D. and the mortgagee, but did not serve the mortgagee with process or prosecute the suit. In November, 1837, D. conveyed the equity of redemption to the mortgagee. In 1841 D., as personal representative of G., obtained a decree against B., as heir of G., for payment of the sum of money; and B. did not in that suit set up any claim in respect of the judgment :—Held, that, under these circumstances, B. had lost his right to be recouped out of the term the amount of the judgment, which was levied out of the real estate of C. in his hands. The judgment creditor being barred from levying his debt out of the term, though not out of the real estate, the owner of the real estate is also barred of his equity to be recouped the amount of the judgment out of the term. *Boyd* v. *Belton*, 1 Jo. & Lat. 730.

When Binding on Devisee.]—Devisee not bound by the amount of a claim substantiated against the executors in an action at law to which he was not a party. *Willson* v. *Leonard*, 3 Beav. 373.

A judgment recovered against executors, is not

evidence against a devisee. *Marten* v. *Whichelo*, Cr. & Ph. 257 ; 10 L. J., Ch. 384.

The plaintiff in a creditors' suit having taken the bill pro confesso, against one of the defendants, who was the executor, adduced no evidence of his debt as against the other defendants, who were the devisees of the testator's real estate, and who did not admit the debt except an examined copy of the judgment which the plaintiff had recovered for at law against the executor. The court, under the circumstances, refused leave to supply the defect in the evidence at the hearing, and dismissed the bill as against the devisees, with costs. *Ib.*

In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) is primâ facie evidence of a debt as against the persons interested in the real estate ; but they will be at liberty to adduce rebutting evidence. *Harrey* v. *Wilde*, 41 L. J., Ch. 698 ; L. R. 14 Eq. 438 ; 27 L. T. 471.

A., B. and C., being successive tenants in tail of property held under an inalienable parliamentary title, and B. having, after the death of A. entered into possession of the estates, and, together with them, of certain leaseholds formerly in the possession of A., his executors brought an ejectment against B. to recover possession of the leaseholds as part of his estate. B. having died before trial of the action, another action was brought against C., the successor in title. C., who was also executor of B., compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that 4,000*l.* should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise, a creditors' suit was instituted and a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s executors to prove against B.'s estate for the amount of the rents actually received by him :—Held, that the judgment in the action against C. was not evidence of wrongful possession by B., which could serve as a foundation for the claim, and that the admission by the executor as to mesne profits in the compromise was inoperative, being made after the decree. *Talbot* v. *Shrewsbury* (*Earl*), L. R. 14 Eq. 503 ; 20 W. R. 854.

Rights in respect of in Administration Proceedings.]—A judgment creditor is entitled to have satisfaction out of the real estate of the deceased debtor, whether his will were duly executed or not ; and, therefore, he has no direct interest in establishing it, and carrying the trusts into execution. *Bomford* v. *Wilme*, Beat. 253.

The ordinary course of the court, in a suit by a judgment creditor, is to decree an account only of the debt due to the plaintiff, and all other creditors of the same rank, and not to carry the administration of the assets further than to provide payment of that class of creditors. *Ib.*

Although a judgment creditor may proceed at law, if he comes into this court to have payment out of the equitable assets, he must submit to take them as the debtor has directed. He is as much bound here by those directions, as a simple contract creditor who has no other remedy. *Locke* v. *Peacock*, 2 Moll. 421.

Where an estate is sold under a decree of the court for payment of debts, a judgment creditor will be entitled to be paid out of the whole produce of the estate, and not out of a moiety only. *Tunstall* v. *Trappes*, *Lawson's Case*, 3 Sim. 300.

Assets are not marshalled against judgment creditor. *Sharpe* v. *Scarborough* (*Earl*), 4 Ves. 538.

In 1811 a creditors' suit was instituted by a simple contract creditor ; the answers were got in in 1820 ; the plaintiff's debt was admitted ; and, thereupon, the assets were brought into court in 1823 ; another simple contract creditor obtained judgment against the executors ; no decree was made in the cause until 1829 :—Held, that the judgment thus obtained had priority over all the simple contract debts. *Larkins* v. *Paxton*, 2 Beav. 219.

Where A., a bond creditor of the intestate for 600*l.*, brought an action against the administratrix, who pleaded no assets ultra 54*l.*, and then A. procured the commissary to assign him the administration bond, upon which he brought his action, and the administratrix suffered judgment by default. Decreed, that the judgment should stand as a security for so much as should fall short to satisfy A. *Greenside* v. *Benson*, 3 Atk. 248. See *Canterbury* (*Archbishop*) v. *Wills*, Salk. 315, where this question was determined.

In a creditors' suit, the plaintiff did not satisfactorily prove his debt, and the bill was retained, with liberty to establish the debt at law. Semble, that a judgment obtained by him under such circumstances, would not give him priority over the other simple contract creditors. *Gibert* v. *Hales*, 8 Beav. 236.

—— **Interest.**] — In the administration of assets, interest is not allowed on a judgment debt merely on the ground that the creditor has been prevented from rendering available his judgment by the decree and proceedings in the suit, though the debt may, by those means, have been withheld from him for several years. *Berrington* v. *Evans*, Younge, 276.

—— **Costs.**]—If lands have been sold under a decree, and judgment creditors, knowing that they have no chance of the fund reaching them, render it necessary to file a supplemental bill against them, they will not get their costs in that suit ; and semble, they will be obliged to pay the costs occasioned by such vexatious conduct. *Barrett* v. *Bermingham*, Sau. & Sc. 419 ; 1 Ir. Eq. R. 417.

A party files his bill as a judgment creditor, obtains a decree, and compels the other creditors to prove their demands under it. On taking the account he is found to have been overpaid, and to be a debtor to the estate for the balance so overpaid :—Held, that he is not entitled to the costs of his suit, and the court will order him to bring in the balance due by him, the bill remaining in operation for the other creditors. *Graves* v. *Wright*, 1 Con. & L. 267 ; 2 Dr. & War. 77.

On a bill filed by the executors of a judgment creditor to raise the amount due on the judgment, it appeared that the plaintiffs were overpaid :—Held, that they were not entitled to the costs of the suit. *Ib.*

d. Marshalling.

Generally.]—It being the object of a court of equity, that every claimant upon the assets of a deceased person shall be satisfied as far as such assets can, by any arrangement consistent with

the nature of the respective claims, be applied in satisfaction thereof, it has long been settled, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund on which the second has no lien. *Lanoy* v. *Athol*, 2 Atk. 446.

Where two estates are mortgaged to A., and one only of the estates to B., A. shall take his satisfaction out of that which is not in mortgage to B., though the estates descend to two different persons. *Ib.*

Assets cannot be marshalled where only one fund chargeable. *Ord* v. *Ord*, Dick. 440.

Instances of the rule, that a person having a double fund shall not, by his option, disappoint another who has only one. *Aldrich* v. *Cooper*, 8 Ves. 382; 7 R. R. 86.

General principle of marshalling assets, that party having two funds, his choice shall not have the effect of disappointing another who has only one, but the latter shall stand in the place of the former; upon that principle, benefit of vendor's lien on estate for purchase-money extended to third persons. *Trimmer* v. *Bayne*, 9 Ves. 209.

The principle that one creditor shall not take a part of the fund which otherwise would have been available for the payment of all the creditors, and at the same time be allowed to come in pari passu with the other creditors for satisfaction out of the remainder of that fund, does not apply where that creditor obtains by his diligence something which did not and could not form a part of that fund. *Cockerell* v. *Dickens*, 3 Moore, P. C. 98; 1 Mont. D. & D. 45.

The principle that a creditor taking solely to himself part of the insolvent estate cannot come in upon the remainder pari passu with the other creditors, does not apply where a creditor realises a fund which the assignees could not have reached, as in this case, a foreign real estate. *Ib.*

The general rule of equity is, that all fair creditors stand in a situation equally favourable; and therefore, if a subsequent creditor, by using due diligence, has contrived to receive his debts, the court will not interfere to oblige him to account for what he has so received, and refund it to a prior creditor. *Dillon* v. *Burton*, 3 Ridgw. P. C. 101.

The doctrine of marshalling amounts to this, that where one person has a clear right to resort to two funds, and another person has a right to resort to one only of the two funds, the latter may say that, as between himself and the double creditor, the double creditor shall be put to exhaust the security upon which the single creditor has no claim; but the doctrine does not apply where the single creditor is himself bound to the party entitled to the other security. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; 23 L. T. 636.

Marshalling assets, by letting simple contract creditors come in place of a specialty creditor, can only be where the specialty creditors had a remedy against the real and personal assets of the debtor deceased, whose assets are in question. *Lacon*, or *Lacam* v. *Mertins*, 1 Ves. Sen. 312. And see *S. C.*, 3 Atk. 1.

Assets are never marshalled by reason of a fact arising or happening subsequent to the death of the party. *Kearnan* v. *Fitzsimon*, 3 Ridgw. P. C. 16.

The dictum of Lord Clare, in *Kearnan* v. *Fitzsimon*, 3 Ridgw. P. C. 16, that the rule of marshalling assets holds only where it is proper to be done at the death of the party whose assets are to be marshalled, and can never arise upon any subsequent fact or accident considered. *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

Assets marshalled, if it appears at any period of the cause that specialty creditors have gone upon the personal estate, though the bill is not framed with that view. *Gibbs* v. *Ougier*, 12 Ves. 413; 8 R. R. 348.

As between Simple Contract and Specialty Creditors.]—Where specialty creditors exhaust the personal assets, simple contract creditors stand in their place, and may come upon the real. *Galton* v. *Hancock*, 2 Atk. 424; Ridgw. 301. S. P., *Soames* v. *Robinson*, 1 Myl. & K. 500; 2 L. J., Ch. 153; *Lloyd* v. *Williams*, 2 Atk. 108 (bond creditors). *Charles* v. *Andrews*, 9 Mod. 151 (specialty debts secured on real estate). *Aldrich* v. *Cooper*, 8 Ves. 382; 7 R. R. 86 (mortgagee of freeholds and copyholds, also a specialty creditor), *Robinson* v. *Tonge* (1 P. W. 680) being overruled.

—— **Voluntary Conveyance.**]—A. conveyed part of his lands in trust to pay his debts, and other part to maintain his children; this last conveyance is voluntary and void as against creditors, though good against himself. So where creditors, having a lien on land, take satisfaction out of the personal estate, which was liable to debts of an inferior nature, the inferior creditors shall stand in their place and have satisfaction out of the land. *Sneed* v. *Culpepper*, 7 Vin. Abr. 52, pl. 7.

—— **Unpaid Vendor.**]—If the vendor of an estate, the contract for which was not completed in the lifetime of the testator, who was the purchaser, is afterwards paid the purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor with respect to his lien on the estate. Quære, if a pecuniary legatee would be entitled to the same benefit against the devisee. *Selby* v. *Selby*, 4 Russ. 336; 6 L. J. (o.s.) Ch. 117; 28 R. R. 117.

—— **Judgment Creditor.**]—Assets are not marshalled against judgment creditors. *Sharpe* v. *Scarborough* (*Earl*), 4 Ves. 538.

—— **Insufficiency owing to Devastavit.**]—When specialty debts of a deceased person have been paid out of his personal estate, which was sufficient also to pay his simple contract debts, and the executor subsequently commits a devastavit which renders the personal estate insufficient to pay simple contract creditors, they are entitled to be paid out of the real estate of the debtor, to the extent to which the personal estate has been onerated by the specialty creditors. *Ellard* v. *Cooper*, 1 Ir. Ch. R. 376.

As against Devised Estates.]—Under a charge of debts, creditors by simple contract may, by marshalling, follow devised estates; if no descended estates, or they have been applied. *Kidney* v. *Coussmaker*, 12 Ves. 155; 2 R. R. 118.

As against Property mortgaged jointly with Testator's.]—An executor mortgaged his testator's estate conjointly with his own for 3,000*l.*, of which 1000*l.* was declared invalid as against

the testator's estate. A creditors' suit was afterwards instituted, and the executor subsequently made a further charge on the same estates for 2,500*l.*, and which was declared invalid as regarded the testator's estate:—Held, that the creditors had no equity to compel the mortgagee to obtain payment of his first mortgage wholly out of the executor's private estate, so as to exonerate the testator's estate for their benefit. *Shaleross* v. *Dixon*, 7 L. J., Ch. 180.

Interest, Right to.]—Simple contract creditor entitled to stand in the place of the specialty creditor, who had exhausted the personal estate, against the real estate, is not, it appears, entitled to charge the real estate with interest, although the fund taken by the specialty creditor was productive. *Leighton* v. *Hayes*, 2 Moll. 523.

Where the personal estate was exhausted by the specialty creditor, and a decree for marshalling the assets made, a considerable time having elapsed before the real estates could be made available:—Held, that the simple contract creditors were not entitled to have raised out of the real estate, in satisfaction of their debts, the interest which would have accrued on the specialty debts if they had remained unsatisfied. *Cradock* v. *Piper*, 15 Sim. 301.

Equity of Creditors generally to Benefit—Practice of Court.]—One dies indebted by mortgage and simple contract, one of the simple contract creditors gets judgment of assets, cum acciderent; the executor applies the assets to pay off the mortgage; the simple contract creditor shall stand in the place of the mortgagee as to what he has exhausted out of the personal assets, and this being only by the aid of equity, all the simple contract creditors shall come in equally with the creditor that has got judgment. *Wilson* v. *Fielding*, 2 Vern. 763; 10 Mod. 426.

The court will not marshal assets for the payment of a simple contract debt out of real estate, where the bill has not been filed on behalf of all the creditors of the deceased; and liberty to amend the bill at the hearing was refused under the circumstances. *Connolly* v. *M'Dermot*, 3 Jo. & Lat. 260.

Where a testator, supposing himself to be entitled to an estate in fee, which he had only in tail with ultimate remainder in fee, devised that estate among others for payment of debts, and afterwards by recovery obtained the fee, but did not republish his will; and afterwards a bill was filed on behalf of his creditors, both by specialty and simple contract creditors, against the legatees and heir-at-law for administration of the personal estate, and that if necessary the will might be established and the debts paid out of the realty, and the defendants did not by their answer deny that the particular estate passed by the will; and a receiver was appointed of the estate generally, and the suit then abated and was not revived till eighteen years afterwards, and the objection was then taken that where a supplemental bill was filed by a simple contract creditor the estate did not pass, and that the plaintiff was not entitled to marshal, the original bill not being expressly or apparently framed for that purpose:—Held, nevertheless, that as the plaintiff sought to affect the descended estate in place of specialty creditors, he was entitled to have the benefit of the estate in question by marshalling. *Vickers* v. *Oliver*, 1 Y. & C. C. C. 211; 11 L. J., Ch. 112; 6 Jur. 273.

A simple contract creditor who has acquired a right of marshalling real estate is not barred by the lapse of less than twenty years. *Ib.*

Specialty Creditors—Different Specialties.]—One dies, leaving a debt by judgment, and another by bond; the judgment creditor levies his debt out of the personal estate; whether the bond creditor shall, in equity, stand in the place of the judgment creditor, and charge the land with his debt. *Porey* v. *Marsh*, 2 Vern. 182.

A person mortgages freehold estates; and two months afterwards he surrendered copyhold to the use of the mortgagee, to secure the same debt. In a suit after the death of the mortgagor, for the administration of his assets, the freeholds were sold with the consent of the mortgagee, and the personal estate having been exhausted, the mortgage debt was, by order of the court, satisfied out of the proceeds of the freeholds:—Held, that the specialty creditors of the mortgagor were entitled to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate. *Gwynne* v. *Edwards*, 2 Russ. 289, n.

Husband and wife being lessees of a rectory, assign it to trustees, in trust to sell and pay certain bonds of the husband and mortgages on his freehold estates; and by deed of even date, the husband, in consideration of his wife having joined in the assignment, conveys his freehold estates in trust for himself and his wife for their lives, and after their deaths to be sold for benefit of their children. The produce of the rectory was not sufficient to pay, in full, both the bonds and mortgages:—Held, that the bond creditors had no right, as against the children, to throw the mortgages upon the produce of the freeholds. *Boazman* v. *Johnston*, 3 Sim. 377; 30 R. R. 172.

Although a specialty creditor has a right to resort to the descended real estates of his debtor as legal assets, he cannot participate in the benefit of the trust of his debtor's real estate devised by him upon trust for sale for payment of his debts, without bringing what he had obtained out of the descended estates into hotchpot. *Chapman* v. *Esgar*, 1 Sm. & G. 575; 18 Jur. 341; 2 W. R. 86.

—— **Volunteers.**]—Creditors by specialty, who are mere volunteers, are not entitled to compete with creditors on simple contract for valuable consideration, but as against the devisees of the debtor have a right to stand in the place of mortgagees who have exhausted the fund provided by the testator for the payment of debts. *Lomas* v. *Wright*, 2 Myl. & K. 769; 3 L. J., Ch. 68.

Testator devised his estates in B. to the same uses as the estates comprised in his eldest son's marriage settlement were thereby limited to; and he devised his estates in M. to trustees in trust by sale or mortgage to raise portions of 5,000*l.* each for his youngest children; and from and after the performance of that trust, and subject thereto in the first instance, and subject to the payment of such of his debts as his personal estate should be insufficient to satisfy, he devised those estates to his eldest son in fee, and appointed him his executor. The testator died

indebted by specialty as well as simple contract, and his personal estate being insufficient to pay his debts, his eldest son, with the concurrence of the trustees of the estates in M., sold those estates, and exhausted the proceeds in making good the deficiency of the personal estate to pay the testator's debts:—Held, that his youngest children were entitled in respect of their portions to a charge on the estate in B. equal in amount to the proceeds of the estates in M., which had been applied to pay the specialty debts. *Legh* v. *Legh*, 15 Sim. 135.

A. executed a voluntary settlement of real estate to uses in favour of his four children, and he covenanted that the estate should remain to those uses and for quiet enjoyment. He afterwards mortgaged the settled estate with his own unsettled estates, and died:—Held, that the children were entitled to throw the mortgages on the unsettled estate, and as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage. *Hales* v. *Cox*, 32 Beav. 118.

S., the owner of an estate, subject to an outstanding term, mortgaged it to F. H., who acted as the solicitor of both parties, handed over certain documents to F., which he represented to be, and which F. on his representations believed to be, the title deeds of the property. S. subsequently sold the estate, unknown to F., to C., without notice of the prior incumbrance, ostensibly to pay certain legacies charged upon it, together with other property belonging to S.:—Held, that F. was entitled to have the legacies paid out of the other estates upon which they were charged; and, in the event of their being sufficient, to hold the estate free from the charge. *Finch* v. *Shaw*. *Colyer* v. *Finch*, 19 Beav. 500; 18 Jur. 935. *S. C.*, 5 H. L. Cas. 905; 26 L. J., Ch. 65; 3 Jur. (N.S.) 25.

Legatees, as between.]—One, by will, gives several legacies, some charged on the real estate, and others not; if the personal estate proves not sufficient to pay all, the legacies charged on the real estate shall be paid thereout, or if they have been paid out of the personal estate, the other legacies, as to so much, shall stand in their place upon the land. *Bligh* v. *Darnley* (*Earl*), 2 P. W. 620. S. P., *Masters* v. *Masters*, 1 P. W. 422. *Hanby* v. *Roberts*, Ambl. 127. *S. C.*, nom. *Hamly* v. *Fisher*, Dick. 104. *S. C.*, nom. *Hanby* v. *Fisher*, 2 Coll. C. C. 512, n.

Trust of a term by will, to "pay the several legacies hereby given, and also the several other legacies hereinafter bequeathed"; a codicil, reciting that the legacies given by the will to the testator's daughters were not an adequate provision, gave each of them a further legacy, in addition to the said legacies given them respectively by the will. The legacies by the codicil are not charged upon the real estate; assets marshalled accordingly. *Bonner* v. *Bonner*, 13 Ves. 379.

Pecuniary and demonstrative legatees, with a deficient fund on which their legacies are charged, have a right to throw simple contract creditors on descended estates, so as to marshal the assets in their favour. *Sellon* v. *Watts*, 28 Beav. 519; 9 W. R. 847.

The rule, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, and the personalty is not sufficient to satisfy both, that the legatees, whose legacies are so charged, shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. *Scales* v. *Collins*, 9 Hare, 656.

The court does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient as intended for the exclusive benefit of that legatee, but construes the intention of the testator to be, that all his legacies shall be paid, and therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies. *Ib.*

—— **Legacy charged on Real Estate—Legatee dying before Pay Day.**]—Legacy charged on real estate, and payable at a future day, sinks, as to the real estate, by the death of the legatee before the time of payment, and the assets cannot be marshalled. *Pearce* v. *Loman*, 3 Ves. 135.

Where a legacy is given out of a mixed fund of real and personal estate, payable at a future day, and the legatee dies before the day of payment, it is doubtful whether the court will marshal assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible; whereas, as against the real estate it would sink by the death of the legatee. *Prowse* v. *Abingdon*, 1 Atk. 482.

As between Legatees and others—Creditors—Mortgagees—Devisees.]—Court will marshal assets in favour of legatees, where specialty creditors exhaust, as against the heir, in respect of estate descending, and against residuary devisee, but not as against a specific devisee. *Hanby* v. *Roberts*, Ambl. 127; Dick. 104; 2 Coll. C. C. 512, n.

A testator, after directing payment of his debts out of the proceeds of his personal estate and certain real estate, and bequeathing the surplus of this mixed fund to C., devised the residue of his real estate to C., "nevertheless charged in manner thereinafter mentioned," and then followed the bequest of an annuity charged on the estates subject to the last-mentioned devise. He then bequeathed a legacy to C., and the personal assets being insufficient for the discharge of the debts:—Held, the residuary devise being regarded as specific, that the legatee was not entitled to marshal the assets as against the devisee. *Hensman* v. *Fryer*, 39 L. J., Ch. 97; L. R. 3 Ch. 420; 17 L. T. 394; 16 W. R. 162. Reversing, 12 Jur. (N.S.) 681.

If a creditor by bond exhaust the personal estate, a legatee shall stand in his place and be paid out of real estate. *Burton* v. *Pierpoint*, 2 P. W. 81. S. P., *Tipping* v. *Tipping*, 1 P. W. 730.

Right of legatees to stand in the place of specialty creditors, paid out of the personal estates, against estates descended. *Aldrich* v. *Cooper*, 8 Ves. 396; 7 R. R. 86.

Legatees not entitled to stand in the place of bond creditors, and to have satisfaction out of the real estate devised, but are entitled to stand in the place of mortgagees. *Forrester* v. *Leigh*, Ambl. 172.

A. devises (after payment of his debts, which he wills to be first paid) his lands (in mortgage) to B., his wife, for life, and after her death to C., and directs the residue of his personal estate to

be placed out at interest, B. to have the interest during her life, and after her death to C., and gives B. 1,500*l.*, provided she accept the devises and bequests in lieu of dower; there is not sufficient personal estate to pay the debts and legacies; if the mortgagee take part of the personal estate, the legatee shall, for so much, stand in his place. *Lutkins* v. *Leigh*, Cas. t. Tal. 53. S. P., *Norris* v. *Norris*, Dick. 542.

Where the mortgage debts of a testator are primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payment in respect of the mortgage debt of the personal estate would have to be recouped by the mortgaged estate. *Porcher* v. *Wilson*, 14 W. R. 1011.

Where the testator gave his wife an annuity, and made it a primary charge, in priority of all other legacies, on a leasehold, which was, with two policies, subject to two mortgages, and directed that if the rents were insufficient to satisfy the annuity, then to be paid out of his other personal estate; the executors paid off the mortgages out of the proceeds of the policies and the general personal estate, and the rent was found insufficient to pay the annuity in full:—Held, that the legatees (other than the wife) were entitled to have the assets marshalled, and to stand in the place of the mortgagees, to the extent of so much of the mortgage as should be so apportioned upon the leasehold estate. *Johnson* v. *Child*, 4 Hare, 87.

One seised in fee owes debt by bond, and devises his lands to his heir in tail, and gives several legacies, after which he dies, leaving the heir his executor; the heir, with personal estate, pays off the bond debts, by which means there are not assets to pay the legacies; the legatees are without remedy, the land being devised in tail to the heir; otherwise had the land descended to such heir in fee. *Herne* v. *Meyrick*, 1 P. W. 201; Salk. 416.

So, though the court will marshal the assets in favour of a simple contract creditor, and (generally speaking) in favour of a legatee, yet where such legatee is a pecuniary one, he will not be relieved by being permitted to come in the place of the bond creditors upon the land in the hands of a devisee thereof. *Ib.*

One dies indebted by bond, and by will gives a legacy of 500*l.*, and devises his lands in fee to J., leaving a personal estate sufficient only to pay the bond; the legatee shall not stand in the place of the bond creditor, to charge the land, in regard the land is specifically devised; secus, if the land had descended to the heir. *Clifton* v. *Burt*, 1 P. W. 679; Pre. Ch. 540.

A legatee in the will of a tenant in tail has no equity to throw judgments which are a charge on the estate entailed, exclusively on it in exoneration of the testator's general assets. *Douglas* v. *Cooksey*, Ir. R. 2 Eq. 311.

A testator seised absolutely of the lands of A., and in tail of the lands of B., by his will left an annuity charged on all his property. A judgment creditor, whose judgment was a charge on both, sold the lands of A., which were insufficient to pay him, and afterwards sold the lands of B. for the balance due to him:—Held, that the annuitant had no equity to marshal, as against the remainderman in tail, so as to be recouped out of the produce of the sale of B. the amount paid to the judgment creditor out of the produce of the sale of A. *Ib.*

Real assets, descended, how marshalled between specialty and simple contract creditors and legatees. *Fenhoulhet* v. *Passavant*, Dick. 253.

—— **Heir Devisee.**]—Where real estates are devised to the heir, although for certain purposes he takes by descent, yet as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter. *Biederman* v. *Seymour*, 3 Beav. 368; 10 L. J., Ch. 177.

Under the 3 & 4 Will. 4, c. 106, s. 3, an heir to whom lands are devised by his ancestor, takes them as devisee for all purposes, and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him. *Strickland* v. *Strickland*, 10 Sim. 374; 9 L. J., Ch. 60.

—— **Charge of Debts on Real Estate.**]—If one owes debts by bond, and devises his lands to J. in fee, and leaves a specific legacy, and dies, and the bond creditors come upon the specific legacy for payment of his debts, the specific legatee shall not stand in the place of the bond creditor, to charge the land, and why. *Haslewood* v. *Pope*, 3 P. W. 323.

One devises all his personal estate to his daughter, and all his real estate to trustees in trust, to pay debts, &c., remainder to his daughter in tail, remainder over; the personal estate shall, in the first place, be all applied to pay the debts. *Ib.*

On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors exhaust the personal estate. *Ib.*

Where the testator, by his will, had ordered his trustees to possess themselves of his estates and substance, and to pay debts, it was held, that this was a charge on the real estate, and that the assets should be marshalled for the legatees, to let them in so far as the personal estate had paid towards the debts. *Foster* v. *Cook*, 3 Bro. C. C. 347.

Testatrix, after giving an annuity and legacies, devised her real estate, subject to the said annuity and legacies, and her debts and funeral and testamentary expenses, and the debts of her late brother; the assets were marshalled in favour of a legatee by a codicil. *Norman* v. *Morrell*, 4 Ves. 769; 4 R. R. 347.

The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, and the real estate being devised, the court would not, under a direction to the executors to pay the debts and funeral expenses as soon as conveniently may be, marshal the assets in favour of the legacies. *Keeling* v. *Brown*, 5 Ves. 359; 5 R. R. 70.

A testator after bequeathing a number of pecuniary legacies to different persons, and giving a certain field to his godson, directed that all his debts and the above legacies should be paid and discharged within six months after his decease; and all the rest and residue of his estate, both real and personal, he gave to N. The personal estate proving insufficient to pay the debts and legacies, it was:—Held, upon demurrer to a bill by some of the legatees seeking to charge their legacies on the real estate which passed under the residuary devise to N., first,

that there was no equity in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to N.; but, secondly, that both the debts and legacies were, by the words of the will, effectually charged upon that estate. *Mirehouse* v. *Scaife*, 2 Myl. & C. 695; 7 L. J., Ch. 22. Affirming 1 Jur. 134 on different grounds.

A testator, by his will, directed that his debts and funeral and testamentary expenses should be paid out of the fund thereinafter provided for the payment thereof. He then devised his real estate to trustees for sale, and directed them, out of the proceeds, to pay his debts and funeral and testamentary expenses, and to hold the residue on certain trusts. He then bequeathed his personal estate, after and subject to the payment of his debts and funeral and testamentary expenses:—Held, that the personal estate was the primary fund for the payment of debts; held, also, that the doctrine of marshalling was applicable in favour of the legatees and annuitants, and that they might stand in the place of the creditors as against the real estate devised in trust for sale and payment of debts. *Paterson* v. *Scott*, 1 De G. M. & G. 531; 21 L. J., Ch. 346; 16 Jur. 898.

A testator devised real estates upon trust for payment of his debts and funeral and testamentary expenses, and subject thereto upon various trusts; and bequeathed legacies and annuities:—Held, a case for marshalling at the instance of a legatee of an annuity where the personal estate had been exhausted in payment of debts. *Ib.*

A testator bequeathed legacies to A., B. and C., payable out of his personal estate, and he devised his real estates, subject to the payment of his debts, to D. and E. The personal estate being exhausted in payment of the debts, the legatees were held entitled on the principle of marshalling to have recourse for payment to the real estate to the prejudice of the devisees. *Surtees* v. *Parkin*, 19 Beav. 406.

The 3 & 4 Will. 4, c. 104, has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estate charged with or devised subject to the testator's debts. *Rickard* v. *Barrett*, 3 Kay & J. 289.

The question now, as before the act, is one simply of intention on the whole of the will. *Ib.*

A mere charge of debts upon the real estate or a mere devise of the real estate, subject to testator's debts, without any trust, is sufficient, in the event of the personal estate proving inadequate to pay both debts and legacies, to entitle the legatees to come upon the real estate so far as the personalty has been applied in payment of debts. *Ib.*

A testatrix, after directing her debts and funeral and testamentary expenses to be paid by her executors as soon as conveniently might be, and making a certain specific bequest, gave a legacy of 500*l.* to L. M. She then made other specific bequests, and devised and bequeathed the residue of her personal estate and all her real estate to her trustees upon trust for sale and conversion, and to hold the proceeds of sale upon trust for certain beneficiaries therein mentioned, and she appointed her trustees executors of her will. The personal estate not specifically bequeathed was insufficient to pay the legacies in full after satisfying the debts and funeral and testamentary expenses:—Held, that L. M. was entitled to have the assets marshalled so that her legacy of 500*l.* might be considered a charge on the real estate to the extent to which the personal estate had been applied in the payment of the debts and funeral and testamentary expenses. *Stokes, In re, Parsons* v. *Miller*, 67 L. T. 223. S. P., *Salt, In re, Brothwood* v. *Keeling*, 64 L. J., Ch. 494; [1895] 2 Ch. 203; 43 W. R. 500. Contra, *Bate, In re, Bate* v. *Bate*, 59 L. J., Ch. 277; 43 Ch. D. 600; 62 L. T. 559.

A testator directed estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of the residue of his personal estate; and he gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children; and the testator afterwards, by a codicil, confined the residuary gift of the produce of the estates directed to be sold to his younger children:—Held, first, that the devisees of the produce of the real estate directed to be sold were entitled to have the personal estate applied in payment of the mortgages; secondly, that pecuniary legatees were entitled to stand in the place of the mortgagees, against the estates so devised, to the extent to which the mortgages have been paid out of the personal estate; and, thirdly, that such pecuniary legatees were not entitled to stand in the place of a vendor to the testator, part of whose purchase-money remained unpaid at the testator's death, to the extent to which the purchase-money had been paid out of the personal estate. *Wythe* v. *Henniker*, 2 Myl. & K. 635; 3 L. J., Ch. 24.

—— **Unpaid Vendor.**]—M. agreed to purchase an estate of plaintiff for 1,200*l.*, but died before he had paid the whole of the purchase-money. M., by will, gave 800*l.* to his sister, and devised the estate purchased, and all his personal estate, to J., his executor, who committed a devastavit, and died, whereupon the purchased estate descended upon B., his son. The court, to give the legatee a chance of being paid out of the personal estate, directed plaintiff to take satisfaction on the purchased estate for the remainder of the purchase-money. *Pollexfen* v. *Moore*, 3 Atk. 272.

Pecuniary legatees are entitled, as against the devisees (under the doctrine of marshalling assets), to stand in the place of an unpaid vendor whose lien has exhausted the personal assets. *Lilford (Lord)* v. *Keck*, 35 Beav. 77; 35 L. J., Ch. 302; L. R. 1 Eq. 347; 14 W. R. 240.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase-money, a ratable contribution was decreed as between the devisee of the estate and the legatees and annuitants under the purchaser's will. *Headley* v. *Readhead*, G. Coop. 50.

If the vendor of an estate the contract for which was not complete in the lifetime of the testator, who was the purchaser, is afterwards paid the purchase-money out of the personal assets, the simple contract creditors of the testator shall stand in the place of the vendor in respect of his lien on the estate. Quære, if a pecuniary legatee would be entitled to the same benefit against the devisee. *Selby* v. *Selby*, 4 Russ. 336; 6 L. J. (o.s.) Ch. 117; 28 R. R. 117.

Where a party, who had contracted for the purchase of an estate, died leaving the greater part of the purchase-money unpaid, and the estate descended to his heir-at-law, the vendor's

lien for the unpaid purchase-money was marshalled for the benefit of a pecuniary legatee. *Sproule* v. *Prior*, 8 Sim. 189; 6 L. J., Ch. 1. Overruling *Coppin* v. *Coppin*, 2 P. W. 291.

Paraphernalia, Claim for.]—Where the personal estate has been exhausted to pay specialty creditors, the widow shall stand in their place for her paraphernalia upon the real assets of the heir. *Snelson* v. *Corbet*, 3 Atk. 369. See also *Tipping* v. *Tipping*, 1 P. W. 729; *Tynt* v. *Tynt*, 2 P. W. 544; *Aldrich* v. *Cooper*, 8 Ves. 399; 7 R. R. 86.

The widow shall stand in the place of creditors for the amount of her paraphernalia against real assets devised. *Tynt* v. *Tynt*, 2 P. W. 542.

Contra, *Ridout* v. *Plymouth* (*Earl*), 2 Atk. 105; *Probert* v. *Morgan*, 1 Atk. 440. See also *Incledon* v. *Northcote*, 3 Atk. 438, and *Oneal* v. *Mead*, 1 P. W. 693.

Between Legal and Equitable Assets.]—Where there are legal and also equitable assets, the creditors who will take their satisfaction out of the legal assets shall have no benefit of the equitable assets until the other creditors, who can only be paid out of those assets, have thereout received an equal portion of their respective debts. *Sheppard* v. *Kent*, 2 Vern. 436; Pre. Ch. 190.

A. devises all his real and personal estate to his executors and their heirs, in trust to sell and pay all his debts; his real estate being only equitable assets, and the testator leaving debts by bond and simple contract; if the bond creditors are paid out of the personal estate, they shall bring it back again into hotchpot, if they would be paid anything out of the real estate. *Deg* v. *Deg*, 2 P. W. 416. And see *Hazlewood* v. *Pope*, 3 P. W. 323; *Car* v. *Burlington* (*Countess*), 1 P. W. 228.

J. E., in 1829, devised all his estates and effects to trustees in trust for sale and payment of debts. Subsequently to the date of his will, J. E. purchased other real estates, which, on his death in 1852, descended to his heir. In administering J. E.'s assets under the direction of the court:—Held, that specialty creditors, resorting to the descended estates, must first bring into hotchpot the assets so received before they could participate in the benefit of the trust. *Chapman* v. *Esgar*, 18 Jur. 341.

In case of Crown Debts.]—*See* CROWN DEBTS, X. *c*, 7, col. 1551, ante.

e. CARRYING ON THE TRADE OF THE DECEASED.

Where the Deceased is a Member of a Partnership.]—Where executors justified in continuing capital of a deceased partner in the concern. *Fearnside* v. *Derham*, 13 L. J., Ch. 354.

Surviving partners, and executors who are not partners, but have continued their testator's assets in the business, are liable to account for profits made in respect of the value of a deceased partner's share only where there is no absolute contract for vesting in the survivors the share of the deceased partner or only an option to take his share on certain conditions, and the surviving partners neglect to perform such conditions or to liquidate the affairs of the partnership. *Vyse* v. *Foster*, 44 L. J., Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355.

By articles of partnership between three persons, it was stipulated that, in case of the death of any one of them, the partnership should cease on a certain subsequent day, and the property of the partnership be then divided between the surviving partners and the executors of the deceased partner. One partner, by his will, directed all his property to be converted and invested for the benefit of his children, and appointed his co-partners his executors, and died, leaving his children all infants. The two surviving co-partners, having proved the will, had the property of the partnership valued, and then proceeded to continue the business under a new firm, and debited the new firm with the value of the testator's share of the partnership property, but did not otherwise execute the directions either of the articles or of the will:—Held, that this transaction must be treated as a nullity so far as the children's interests were concerned. *Wedderburn* v. *Wedderburn*, 4 Myl. & C. 41; 8 L. J., Ch. 177; 3 Jur. 596. Affirming, 2 Keen, 722.

The executors of a testator, who were also his surviving partners, and had continued to employ his share of the partnership capital in trade, held answerable for a proportionate share of the profits of the trade, notwithstanding that the capital of the partnership at the time of the testator's decease consisted only of debts due to the partnership. *Ib.*

When a testator has authorised the employment of his estate in trade, though the firm in which it is so employed becomes bankrupt, no proof can be made against the estate of the bankrupts in respect of the money of the testator so employed. *Scott* v. *Izon*, 34 Beav. 434.

A testator was partner in a well-established and prosperous business under articles by which, on the death of any partner, his share was to be taken by the surviving partners at a price to be ascertained from the last stock-taking, and to be paid by instalments extending over two years, with interest at 5*l.* per cent. per annum from his death. He appointed three executors, one of whom was one of his partners in the business, and another, some years after his death, became a partner; the third never was concerned in the business. The value of his share was ascertained but not paid, the amount being allowed for some years to remain in the hands of the firm, who treated it in their books as a debt, and allowed interest on it at 5*l.* per cent. per annum with yearly rests. One of the residuary legatees, upon becoming entitled to payment of her share, refused to accept payment on the above footing, and filed a bill against the executors claiming to be entitled to a share in the profits of the business arising from the use of the testator's capital. The money had been left in the hands of the firm with the knowledge of the testator's family, and all his residuary legatees, with the exception of the plaintiff, approved of what had been done:—Held, that she was not entitled to any accounts of profits, the mere delay by executors in calling in a debt due to the testator from a firm of which some of the executors are members not giving his estate any right to share in the profits of the business. *Vyse* v. *Foster*, 42 L. J., Ch. 245; L. R. 8 Ch. 309; 27 L. T. 774; 21 W. R. 207. Affirmed, 44 L. J., Ch. 37; L. R. 7 H. L. 318; 31 L. T. 177; 23 W. R. 355, supra.

Five contractors jointly contracted to build a harbour, the building of which would take at least five years. Soon afterwards one of the

contractors died:—Held, that his estate was entitled to share in the profits of the contract; and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract. *M'Clean* v. *Kennard*, 43 L. J., Ch. 323; L. R. 9 Ch. 336; 30 L. T. 186; 22 W. R. 186.

The deceased contractor named in his will three executors. Before the will was proved, the four other contractors signed an agreement, in which they, and also the three executors, were named as parties, a blank being left for the names of the executors. The will was afterwards proved by two only of the executors, and those two executors then signed the agreement:—Held, first, on the construction of the agreement, that, though signed by two only of the executors, it was binding on the other contractors; secondly, that no regard could be paid to evidence that the other contractors expected the concurrence of the third executor, and would not have entered into the agreement if they had been aware that he would renounce. *Ib.*

Liability of Executor.]—By the law of England, if an executor or a trustee joins a partnership or company, he is personally liable for all the consequences, and if he acted within the scope of his authority he must seek indemnity from the trust estate. *Lumsden* v. *Buchanan*, 4 Macq. H. L. 950. S. P., *Barker* v. *Parker*, 1 Term Rep. 295; 1 R. R. 201.

Where the executors of a deceased partner continued his share of the partnership property in trade for the benefit of his infant daughter:—Held, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profits and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. *Wightman* v. *Townroe*, 1 M. & S. 412; 14 R. R. 475.

An executor of a trader carrying on the trade after his death, though avowedly in the character of executor, is nevertheless personally liable for all the debts contracted in the trade after the testator's death, whether he is entitled or not to be wholly, or to any extent, indemnified by the testator's personal estate, and whether the testator's estate is sufficient or insufficient for that purpose. *Labouchere* v. *Tupper*, 11 Moore, P. C. 198; 5 W. R. 597.

Neither does the propriety of the executor's conduct, as between himself and those beneficially interested in the testator's personal estate, give the creditors of the trade, becoming so after the death of the testator, the rights of creditors of the testator; it being immaterial, as far as they are concerned, whether the testator, if he had a partner, was bound by a covenant with him that the executor should continue the trade in partnership with the surviving partners. *Ib.*

A promissory note given to a creditor by one of the executors in the name of the testator's firm, while the executor was carrying on the business pursuant to directions in the will, but was ignorant that the estate was insolvent:—Held, personally binding on the executors. *Lucas* v. *Williams*, 3 Giff. 150; 8 Jur. (N.S.) 207.

Held on appeal, that the right of the executor to restrain proceedings on a judgment which entitled the creditor to execution de bonis propriis could not be asserted in an action to administer the estate of his testator, and decision affirmed on that ground. S. C., 4 De G. F. & J. 436; 10 W. R. 606.

Executors carried on their testator's trade in that character, and in the ordinary course of the business accepted a bill, describing themselves in it simply as executors of their testator:—Held, that neither these circumstances, nor the form of the acceptance, relieved the estate of one of the executors, who died in the lifetime of the other, from the ordinary equitable liability upon the bill. *Liverpool Borough Bank* v. *Walker*, 4 De G. & J. 24.

When Authorised.]—It is a rule, without exception, that, to authorise executors to carry on a trade with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will itself for that purpose. *Kirkman* v. *Booth*, 11 Beav. 273; 18 L. J., Ch. 25; 13 Jur. 525.

A gift and devise by one of the partners in a cotton-mill of all his property, estate, and effects, to trustees, upon trust to lay out and invest two third parts thereof upon real or good personal security, or to transfer the same, and allow it to remain in the concern of which he was one of the co-partners in the names of his trustees, and alter, vary, change, and transpose the same as they should think fit, and stand possessed of the same upon trust for the two sons of the testator, with certain powers of advancement out of their respective shares:—Held, to authorise the executors to continue the moneys of the testator in the trade, but not to trade with the moneys by becoming partners in the firm. *Travis* v. *Milne*, 9 Hare, 141; 20 L. J., Ch. 665.

The surviving partners of a testator, dealing with the property of the testator with the knowledge that it belongs to his estate, are bound to inquire into the trusts on which it is held, and are liable as if they had actual notice of those trusts. *Ib.*

A testator appointed an executor, with power to manage, conduct, carry on, and improve his estate. The property consisted of a moiety of an estate in Jamaica. The trustee took a lease of the other moiety, and managed the whole for the trust estate:—Held, that although the taking of this lease was not authorised by the will, yet that, under the circumstances of this case, the acquiescence of the cestui que trust and otherwise, the trust estate was liable for arrears of rent and dilapidations. *Neate* v. *Pink*, 3 Macn. & G. 476; 21 L. J., Ch. 574; 16 Jur. 69.

Power of Administrator cum testamento annexo.]—A testator empowered the executors or executor acting under his will to carry on his business, if they should see fit. The executors renounced probate. It was held, that the administratrix could not carry on the business under the power. *Lambert* v. *Rendle*, 3 N. R. 247.

Power of Court to Authorise.]—In a suit instituted for administration of the estate of an intestate trader by beneficiaries, where there are infants interested, the court has no jurisdiction to authorise the administrator to carry on the

trade of the intestate. *Land* v. *Land*, 43 L. J., Ch. 311.

The court has jurisdiction in an administration suit to direct a trade or business in which minors are interested to be continued, and will so direct if it is clearly for their benefit. *Perry* v. *Perry*, Ir. R. 3 Eq. 452.

Rights of Executor—Indemnity.]—Executors who carry on the business of their testator in accordance with his instructions and with the assent of the creditors are entitled to be indemnified out of the testator's estate against liabilities properly incurred in the conduct of the business in priority to the claims of the testator's creditors. *Dowse* v. *Gorton*, 60 L. J., Ch. 745; [1891] A. C. 190; 64 L. T. 809; 40 W. R. 17—H. L. (E.)

A similar rule applies where a specific portion of the assets is appropriated to the carrying on of the trade. *Johnson, In re, Shearman* v. *Robinson*, 49 L. J., Ch. 745; 15 Ch. D. 548; 43 L. T. 372; 29 W. R. 168.

The principle of *Dowse* v. *Gorton* ([1891] A. C. 190), that creditors of a testator's business carried on after the death are, through the executors, entitled to have their claims discharged in priority to creditors of the testator at his death, is applicable although the will contains no power to carry on the testator's business, and although the business has been carried on under the direction of the court in administration proceedings. *Brooke, In re, Brooke* v. *Brooke*, 64 L. J., Ch. 21; [1894] 2 Ch. 600; 8 R. 444; 71 L. T. 398.

The sole executrix of a testator, who was also his sole legatee, carried on his business for about six months after the testator's death. No authority to carry on the business was contained in the will, but the creditors of the testator assented to its being carried on by the executrix. An order was afterwards made by the court that the deceased's estate should be administered in bankruptcy. Williams, J., held that the executrix had carried on the business for the purpose of properly realising the estate, and was entitled to an indemnity for debts incurred by her in carrying on the business, and that her creditors, in respect of such debts, should be paid in priority to creditors of the deceased:—Held, that the executrix was not entitled to an indemnity, on the ground that the business was carried on by her, not for the purpose of winding up the estate, but for her own maintenance and benefit, and that there was no evidence of such a consent by the creditors of the testator as would make her their agent in carrying on the business. *Millard, In re, Yates, Ex parte*, 72 L. T. 823—C. A. Reversing, 2 Manson, 56.

Executors directed by the will of their testator to employ his estate in his business do not lose their right to an indemnity against the estate for debts incurred by them in the business by reason of their inability to account, and their creditors consequently do not lose their right of claiming through that indemnity against the estate. *Kidd, In re, Kidd* v. *Kidd*, 8 R. 261; 70 L. T. 648; 42 W. R. 571.

A testator by his will directed his executors to carry on his business. This they did, and incurred certain debts. A creditor of the testator then commenced an administration action, and obtained judgment. The assets were insufficient to pay both the costs and expenses of the executors and the debts incurred by them in carrying on the business. The minutes were referred to the judge to be spoken to, by order of the district registrar:—Held, that, the executors having continued the business lawfully with the consent of the creditors, the general rule applied, and the executors were entitled to be paid out of the assets their costs and expenses in priority to the debts incurred by them in carrying on the business. *Owen, In re, Frisby* v. *Owen*, 66 L. T. 718.

An executor who in the winding up of the testator's affairs, and acting in pursuance of the will, and according to testator's course of business, gives a promissory note for a trade debt of the testator, is not entitled to be indemnified in full in respect of the promissory note out of an insolvent estate. *Lucas* v. *Williams*, 4 De G. F. & J. 439; 10 W. R. 677.

—— **Right to Sue.**]—Where executors continued to carry on the business of the testator, and drew bills as executors for goods sold to the defendant, several of which bills the defendant accepted and paid:—Held, that they might sue as executors for the price of such goods. *Aspinall* v. *Wake*, 3 M. & Scott, 423; 10 Bing. 51; 2 L. J., C. P. 227.

—— **Price of Goods supplied.**]—A licensed victualler appointed as his executors the brewer and the spirit merchant with whom he dealt, and directed them to carry on his trade. Supplies were furnished by them for that purpose. The court refused to declare that they were entitled to the cost price only, but directed an inquiry whether the supplies were properly furnished at the ordinary market price. *Smith* v. *Langford*, 2 Beav. 362.

Where an executor, in carrying on the business of the testator, has supplied such business with goods, the onus lies upon the executor to show, as to goods not of his own manufacture, what was the cost price, and as to goods of his own manufacture what would be a fair allowance in respect of their cost, including in such allowance a fair proportion of establishment expenses and interest on capital, treating the manufactory as part of his capital. *Williams, In re, Morgan* v. *Williams*, 40 W. R. 636.

—— **Lien.**]—Upon the decease of a partner in trade, the firm was indebted to him for money advanced; the business was continued by the surviving partner, who, with the money of the firm, made additions to the stock in trade:—Held, as the executors of the deceased partner had permitted the continuance of the business, that they had no lien upon the subsequently acquired stock in trade for the money advanced to the firm by their testator. *Payn* v. *Hornby*, 27 L. J., Ch. 689; 4 Jur. (N.S.) 446.

Right of Trade Creditors.]—Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is, that, though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and, consequently, the creditors of the trade are entitled to stand in the place of the executor and the trustee and to claim the benefit of that right so as to obtain payment of their debts: but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the

trade; in such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are therefore not entitled to have their debts paid out of the specific assets unless the default is made good. *Johnson, In re, Shearman* v. *Robinson*, 49 L. J., Ch. 745; 15 Ch. D. 548; 43 L. T. 372; 29 W. R. 168.

An action having been instituted to administer the estate of a testator who had impliedly directed his executors to carry on his trade, certain persons who were creditors since his death applied for liberty to attend the proceedings with a view to enforcing their rights against the assets:—Held, that it was premature so to apply till, on further consideration, the executors were proved not to be in default, as in that case alone would the creditors be entitled to stand in the place of the executors in their right of indemnity against the estate. *Morris, In re*, 23 L. R., Ir. 333.

—— **In respect of Goods bought by Representative.**]—The administratrix of an intestate, a dealer in builder's materials, carried on the intestate's trade, and bought cement for the purposes of the trade. On the 15th of April, 1886, a receiver and manager was appointed in an administration action by the infant child of the intestate. On the 22nd of April the vendors recovered judgment against the administratrix for the price of the cement, but judgment was not signed till the 18th of May, on which day the cement remaining in specie was sold along with other effects under an order in the administration action. Execution was never issued by the vendors of the cement, but they applied in the administration action to have the proceeds of its sale applied in payment of their debt. The court refused this relief, but declared them entitled to a lien on the beneficial interest of the administratrix in the intestate's estate. The vendors appealed:—Held, that the cement, as between the vendors and administratrix, was the property of the administratrix, she being a debtor to them for the price, and that as between the administratrix and the estate the cement belonged to the estate subject to the right of the administratrix to be indemnified for the price if she was not a debtor to the estate—that the vendors could not have any higher claim than hers, and were not entitled to anything more than the order gave them. Whether the order was right in declaring them entitled to a lien, quære. *Evans, In re, Evans* v. *Evans*, 34 Ch. D. 597; 56 L. T. 768; 35 W. R. 586—C. A.

The widow of a testator carried on his business under a direction in the will that the executors should allow her to carry it on, and to have, while carrying it on, the use of the capital employed in it, and of his other personal estate. After her death, the plaintiffs, who had supplied her with goods for the purposes of the business, filed a bill against the testator's personal representative, claiming a lien on the funds employed in the trade, and by their interrogatories asked for accounts of the testator's personal estate and of the personal estate employed in the business. The executor declined to set forth the accounts, on the ground that if it should be decided at the hearing that the plaintiffs had no such lien as they claimed, the discovery would be useless:—Held, that the executor was bound to give the account. *Thompson* v. *Dunn*, L. R. 5 Ch. 573; 18 W. R. 854.

—— **Creditor, when he can administer.**]—If a testator gives his executors power to trade with a portion of his capital, a creditor for debts incurred by the executor has no right to a decree to administer the assets employed in trade. *Owen* v. *Delamere*, 42 L. J., Ch. 232; L. R. 15 Eq. 134; 27 L. T. 647; 21 W. R. 218.

Rights of Testator's Creditors.]—The executrix of a trader, who was also his residuary legatee, continued after his death to carry on his business ostensibly as her own:—Held, that the assets of the business in her hands were not impressed with any trust in favour of the testator's creditors, and consequently that, on her second marriage, such of those assets as remained in specie, as well as the property into which the rest had been converted, passed to her second husband. *Fells, In re, Andrews, Ex parte*, 46 L. J., Bk. 23; 4 Ch. D. 509; 36 L. T. 38; 25 W. R. 382.

—— **Rule in Clayton's Case.**]—A., the widow and administratrix of B., continues B.'s trade after his decease. B. at his death was indebted to C. on balance of account. A. continues to receive goods from, and to make payments to C. as B. had done, and she is charged in account by C. with the debt. The payments made by her to C. exceed the debt, but a balance is ultimately due to C.:—Held, that B.'s debt was discharged by A.'s payments, and that the ultimate balance cannot be proved as a debt against A.'s estate. *Sterndale* v. *Hankinson*, 1 Sim. 393; 27 R. R. 210.

Carrying on through Agent.—Three executors and trustees, A., B. and C., were authorised to carry on the testator's farm; A., with the concurrence of B. and C., managed the whole affairs relating thereto:—Held, that in taking the accounts against B. and C., A. was to be considered their agent. *Toplis* v. *Hurrell*, 19 Beav. 423.

—— **Right to Sue.**]—If executors, who are by their testator's will to carry on his business for the benefit of his family, suffer a person to carry on the trade in his own name, such person may bring actions in his own name for goods sold by him, although he is afterwards accountable to the executors. *Wilkes* v. *Lister*, 6 Esp. 78.

What Assets may be employed.]—Under bankruptcy of executor and trustee, directed by will to carry on trade, and a limited sum to be paid to him for that purpose:—Held, the general assets beyond that fund were not liable. *Garland, Ex parte*, 10 Ves. 110; 1 Smith, 220; 7 R. R. 352.

Testator directing, by will, his trade to be carried on with the capital then employed therein; and executors failing in the business:—Held, the capital only, and not the general assets of testator, was liable to creditors. *Richardson, Ex parte*, 3 Madd. 138; Buck, 202; 18 R. R. 204.

Proof was allowed in respect of trust property of infants continued by the administratrix in the trade in which the testator was engaged, carried on by the bankrupt's constituting a new firm of which the administratrix was a member; and the infants might prove either against the separate estate of the administratrix, or the joint estate, as might be most advantageous for them. *Watson, Ex parte*, 2 Rose, 259; 2 Ves. & B. 414; 13 R. R. 128.

A testator by his will, dated 1816, gave the mass of his property to his wife for life, remainder to his children, and appointed his son, the bankrupt, and his widow, executors. The trusts on the will were, inter alia, that the executors should carry on the testator's business, retaining therein the sum of 1,200*l.* The bankrupt and his mother carried on business till 1821, when the widow retired from business, and the bankrupt, by deed, admitted that there was a sum of 497*l.* odd in the business, and agreed to pay the widow an annuity and allow interest on the capital remaining in the business. The adjudication took place in November, 1849:—Held, that the cestuis que trustent had an equitable charge on the bankrupt's interest under the will for the sum of 497*l.* odd, and that this property under the will ought to be sold; and if insufficient to realise a sufficient sum, that the cestuis que trustent might prove for the residue. *Good, Ex parte*, 1 Fonb. N. R. 78.

Where a testator directs his trade to be carried on after his death, such part of his property only will be liable, in case of bankruptcy, which he has directed to be embarked in the trade. *Thompson* v. *Andrews*, 1 Myl. & K. 116; 2 L. J., Ch. 46.

Where a testator directed a specific portion of his property to be employed in carrying on his trade, creditors whose debts had arisen in the course of the subsequent trading were allowed to claim only against such specified portion of the assets. *Cutbush* v. *Cutbush*, 1 Beav. 184; 8 L. J., Ch. 175; 3 Jur. 142.

A person in trade, by his will, directed that his wife should carry on his trade until his youngest child should attain twenty-one, and that his wife should have the occupation of the house of business, and the management and disposal of the capital stock belonging to him at the time of his decease. The testator also authorised the trustees to augment or diminish the capital employed therein as they pleased. The trustees, who were also named as executors in the will, renounced probate, and administration with the will annexed was granted to the widow, who carried on the trade, and wasted and misapplied the capital stock and effects embarked therein:—Held, that as the trade was carried on by the widow, to whom the power to increase the capital was not given, such part only of the testator's estate as was embarked in the trade was liable to the payment of the debts incurred by the widow in carrying it on. *Ib.*

Where an order is made in an administration suit that executors may carry on the business of the testator, parties supplying on credit what is necessary for that purpose are entitled to be paid out of the funds in court forming part of the testator's estate, though the estate is insufficient to pay testator's debts. *Tinkler* v. *Hindmarsh*, 2 Beav. 348.

A trader bequeathed to his nephew T. the house and concerns in which he carried on his business, together with the stock, subject to his legacies and an annuity to his wife, the annuity to be paid to her by T. out of the profits of the business to be carried on by T. in the testator's house; and in case T. should at any time wish to discontinue carrying on the business, the testator directed that his wife should be paid 1,000*l.* in full for all claims, and that her annuity should thenceforth cease. He bequeathed several legacies, and appointed T. his executor and residuary legatee. T. continued to carry on the testator's trade, and became bankrupt:—Held, that the will contained such a direction to carry on the business as would, on T.'s bankruptcy, peril the trade assets existing at the testator's death, to the prejudice of the legatees. *Hall* v. *Fennell*, Ir. R. 9 Eq. 615.

A direction in a will that the testator's trade shall be carried on does not of itself authorise the employment in the trade of more of the testator's property than was employed in it at his decease; nor does such a direction, coupled with a direction that the testator's debts shall be paid, authorise a mortgage of his real estate, not employed at his death in the trade, for the purpose of carrying it on. *M'Neillie* v. *Acton*, 4 De G. M. & G. 744; 23 L. J., Ch. 11; 17 Jur. 1041; 2 Eq. R. 21.

—— **Implied Power to mortgage Premises.**]—A testator by his will directed that his business should be carried on by his executors thereinafter named, and appointed as such his wife and S., the latter of whom renounced probate. The testator had carried on his trade in premises of which he was seised for a freehold estate. These were not devised to the executors. The testator had deposited the title-deeds of the premises with his bankers by way of equitable mortgage. The testator's widow, who proved the will, continued carrying on his trade, and after his death she obtained from the bank a further advance for the purpose, as she stated, of carrying on the business, on the security of the deeds, which remained throughout with the bank:—Held, that the direction to carry on the business was given to the executors virtute officii, and that all powers incident thereto were capable of being exercised by the acting executrix; but held also, that the freehold premises were not assets employed by the testator in the business at the time of his death, within the doctrine of *M'Neillie* v. *Acton* (4 De G. M. & G. 744), so as to impliedly authorise the executrix to mortgage them for the purpose of carrying on the business, and that, therefore, the deeds were not a valid security for the advances made subsequently to the testator's death. *Devitt* v. *Kearney*, 11 L. R., Ir. 225.

But on appeal to the court of appeal in Ireland:—Held, (a) that the absence of a devise of the freehold premises to the executors did not prevent their making a valid mortgage thereof; (b) that the fact that some of the advances were made before probate was immaterial; (c) that the direction to carry on the business was given to the executors virtute officii, and that all powers incident thereto were capable of being exercised by the acting executrix alone; and (d) that a fresh deposit of the title-deeds was unnecessary. *Devitt* v. *Kearney*, 13 L. R., Ir. 45—C. A.

Held, also, that the freehold premises were assets employed by the testator for the purpose of his business at the time of his death, and that the executrix was impliedly authorised to mortgage them for the purpose of carrying on the business, and therefore the deposit constituted a valid security for all the advances. *Ib.*

And see SELLING OR MORTGAGING ESTATE, II. d. 4, ante, col. 1250.

—— **Right to Premises and Plant.**]—A testator, after giving legacies and annuities, proceeded to say: "My executors may realise such part of my estate as they think right and in

their judgment to pay the aforenamed legacies." He then directed his business to be carried on till his son attained the age of thirty, but did not dispose of the profits, nor did his will contain any further disposition of his real or personal estate, except a gift of a particular house. The testator carried on his business in a freehold mill which was his own property:—Held, that, so long as the testator's business was continued for the purposes and under the directions of the will, the executors were entitled to the free use and occupation of the business premises, and of the fixed plant and machinery therein, without paying any rent for the same. *Cameron, In re, Nixon* v. *Cameron*, 53 L. J., Ch. 1139; 26 Ch. D. 19; 50 L. T. 339; 32 W. R. 834—C. A.

But held, that the descended real estate could not be affected by the direction to carry on the testator's business any further or otherwise than such carrying on might be necessary for payment of the legacies and annuities given by the will, and that, so soon as they were provided for, the direction to carry on the business became inoperative, and ceased to be binding either on the heir-at-law or the next of kin, and that any surplus profits which had arisen since the testator's decease, after providing for the legacies and annuities, must be apportioned between the heir-at-law and the next of kin according to the values of the real and personal estate employed in the business. *Ib.*

Other Matters — Admission of Executor as Member of Partnership.] — A testator was a member of a partnership at will in a bank without any provision entitling the executor of a deceased partner to an interest in the good-will of the concern. The credit in which the bank was rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account, as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor for the administration of the testator's estate:—Held, that he was not accountable to the testator's estate for the profits which he had received as a partner in the bank. *Simpson* v. *Chapman*, 4 De G. M. & G. 154.

—— **Unauthorised Continuance of Trade—Liability of Executor.**] — Executors who were directed by the will to call in the testator's personal estate, with all convenient speed, continued his trade for some years after his death, and ultimately a considerable loss was sustained. But the court refused to charge them with the loss, as they had acted bonâ fide, and according to the best of their judgment. *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J., Ch. 159.

—— **Right of Execution Creditor of Executor in respect of a Private Debt.**]—If an executor, in pursuance of the directions contained in the testator's will, carries on the testator's business, and in so doing contracts debts, the fact that he has carried on the business in his own name and that the testator's assets employed in it are ostensibly the executor's own property will not entitle a judgment creditor of the executor to take in execution the testator's assets. Lapse of time and an enjoyment of the assets in a manner inconsistent with the trusts of the will, coupled with the consent of the beneficiaries, may, however, raise an inference of a gift of the assets by them to the executor, and entitle his judgment creditor to take them in execution. But, when the possession and the time which has elapsed are in accordance with the trusts of the will, no such inference can arise. *Ray* v. *Ray* (G. Coop. 264; 14 R. R. 255) distinguished. *Morgan, In re, Pillgrem* v. *Pillgrem*, 50 L. J., Ch. 834; 18 Ch. D. 93; 45 L. T. 183; 30 W. R. 223—C. A.

—— **Power to postpone Sale of Business—Profits—Tenant for Life or Remainderman.**]—A testator devised and bequeathed his real and personal estate upon the usual trusts for sale and conversion, the proceeds to be invested and to be held upon trust for his wife for life, and, after her death, for his children. The will contained the usual power to postpone the sale and conversion of the real and personal estate, and the usual direction that until sale and conversion the rents, profits, and income thereof should be paid to the same persons and applied in the same manner as the income of the trust estate. The will contained no reference whatever to the business of the testator, which comprised the bulk of his estate. The executors carried on the business for nearly two years with a view to its sale as a going concern, and the question arose whether the profits of the business during that period were to be treated as capital or income:—Held, that the executors had power to carry on the business for a reasonable period with a view to its sale as a going concern; and that, as the testator had expressly directed that the profits of his personal estate until conversion were to be treated as income, the general rule laid down in *Howe* v. *Dartmouth (Earl)* (7 Ves. 137; 6 R. R. 99) did not apply, and therefore the widow was entitled to the profits of the business. *Brown* v. *Gellatly* (L. R. 2 Ch. 751) and *Kirkman* v. *Booth* (11 Beav. 279) distinguished. *Chancellor, In re, Chancellor* v. *Brown*, 53 L. J., Ch. 443; 26 Ch. D. 42; 51 L. T. 33; 32 W. R. 465—C. A.

A direction in a will empowering trustees to postpone the sale and conversion of any part of the testator's property for such period as to them should seem expedient, justifies the trustees in postponing the sale of the testator's business, and in carrying on the business with a view to benefit the tenant for life who is entitled to the profits till sale. *Crowther, In re, Midgley* v. *Crowther*, 64 L. J., Ch. 537; [1895] 2 Ch. 56; 13 R. 496; 72 L. T. 762; 43 W. R. 571.

A power to postpone the sale of all or any part of a residue devised and bequeathed on trust to sell, and particularly to sell his business of a pawnbroker with all convenient speed:—Held, not to give power to carry on the business for an indefinite time. The court, under the circumstances, authorised the trustees to carry on one of the testator's two businesses (of a pawnbroker) for two years. *Crowther, In re* ([1895] 2 Ch. 56), considered. *Smith, In re, Arnold* v. *Smith*, 65 L. J., Ch. 269; [1896] 1 Ch. 171; 74 L. T. 14; 44 W. R. 280.

XI. DISTRIBUTION.

a. According to What Law.

According to Law of Domicil — Foreign Domicil — Interest.]—In an administration by

the court of the assets in this country of a testator who had a foreign domicil at the time of his death, although the property will be distributed according to the law of the place of domicil, the payment of interest will be governed by the practice of the Court of Chancery. *Hamilton* v. *Dallas*, 38 L. T. 215; 26 W. R. 326.

Foreign Creditors.] — In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends pari passu with English creditors. *Wilson* v. *Dunsany* (*Lady*), 18 Beav. 293; 23 L. J., Ch. 492; 18 Jur. 762, disapproved of. *Klœbe, In re, Kannreuther* v. *Geiselbrecht*, 54 L. J., Ch. 297; 28 Ch. D. 175; 52 L. T. 19; 33 W. R. 391.

See also INTERNATIONAL LAW.

b. BY STATUTES OF DISTRIBUTION.

The Intestates' Estates Act, 1890, *charges an intestate's estate with* 500*l. in favour of his widow, to be in addition to her share of residue where the estate exceeds* 500*l.*

Jurisdiction.]—The contention between the common law and the ecclesiastical court gave rise to the Statute of Distributions. *Wallis* v. *Hodson*, 2 Atk. 116.

The jurisdiction of the ecclesiastical court was made more extensive by the Statute of Distributions. *Ib.*

Bill for a distribution proper in this court. *Howard* v. *Howard*, 1 Vern. 134.

Construction of.]—The Statute of Distributions is to be construed by the rules of the civil law. The act of 1 Jac. 2, c. 17, is an act of continuance of the statute of 22 & 23 Car. 2, c. 10. *Wallis* v. *Hodson*, 2 Atk. 116.

The difference between the civil and common law in the computation of the degrees of proximity, the former to be the rule in the construction of the Statute of Distributions. *Mentney* v. *Petty*, Pre. Ch. 593.

Chancery to determine by same rules as to distribution and legacies as the ecclesiastical court. *Thomas* v. *Ketteriche*, 1 Ves. sen. 334.

The rules of computing degrees differ in the civil from the canon law: our courts compute by the former. *Ib.*

The term "legal representatives" in 22 & 23 Car. 2, c. 10, s. 6, signifies descendants, and not next of kin. *Price* v. *Strange*, 6 Madd. 161; 22 R. R. 266.

The term "next of kindred" in s. 7 of the statute does not include the issue of children of the intestate, but children and their descendants are all included under the term "children," which means children living at the death of the intestate either themselves or their descendants. *Lockyer* v. *Vade* (Barnard. Ch. 444) followed. *Natt, In re, Walker* v. *Gammage*, 57 L. J., Ch. 797; 37 Ch. D. 517; 58 L. T. 722; 36 W. R. 548.

Operation of—Period of Vesting.]—The right to the distributive share under the Statute of Distributions vests immediately on the intestate's death, but not to exclude a posthumous child. *Edwards* v. *Freeman*, 2 P. W. 442.

The shares under the statute become vested immediately after the decease, though not payable until the year thereafter. *Brown* v. *Shore*, 1 Show. P. C. 25.

—— **Conversion of Estate into Money.**]—The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money is introduced simply for the benefit of creditors, and the facility of division among the next of kin; but, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete. *Cooper* v. *Cooper*, L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.

A residuary legatee under a will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will. *Ib.*

Both may therefore be subject to the rule of election. *Ib.*

In these respects a creditor does not resemble either. *Ib.*

An administrator is not bound to sell chattels real of his intestate, in order to distribute the produce among the next of kin, where there are no debts to be paid. *Bradley* v. *Flood*, 16 Ir. Ch. R. 236.

He may, if any of the next of kin require it, convey to them their respective shares. *Ib.*

In a suit for the administration of an intestate's effects, the court may after payment of the debts, &c., declare the rights of the next of kin to chattels real, without directing a sale, if any of them require it. *Ib.*

—— **Borough English Lands.**]—A descent of lands in Borough English to the youngest son will not prevent his having a full distributive share of all personal estate. *Lutwyche* v. *Lutwyche*, Ca. t. Talbot, 279.

—— **Widow.**]—A widow who has been divorced a mensa et thoro, on the ground of adultery, is nevertheless entitled to a share in the effects of her deceased husband, under the Statute of Distributions. *Rolfe* v. *Perry*, 1 N. R. 428.

A widow, as such, cannot take under a limitation to the next of kin of her husband according to the Statute of Distributions. *Cholmondeley* v. *Ashburton* (*Lord*), 6 Beav. 86.

Nor under a limitation to the "relations" of her husband according to the statute. *Worëley* v. *Johnson*, 3 Atk. 758.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of his personal estate, but one moiety belongs to her, and the other to the crown. *Cave* v. *Roberts*, 18 Sim. 214; 6 L. J., Ch. 4.

As to distribution among wife, mother, and brother, but no children of intestate. *Keilway* v. *Keilway*, 2 Stra. 710; 2 P. W. 344; Gilb. 189. And see *Stanley* v. *Stanley*, 1 Atk. 455, post.

—— **Children.**]—A person dies intestate, leaving one child; the whole personal estate belongs to him within the Statute of Distributions. *Palmer* v. *Garrard*, Pre. Ch. 21.

—— **Illegitimate Children.**]—The Statute of Distributions being a statute not for Englishmen only but for all persons, English or not, dying intestate and domiciled in England, and applying universally to persons of all countries, races and religions whatsoever, the proper law for determining the "kindred" under that statute is the

international law adopted by the comity of states. Therefore a child born before wedlock, of parents who were at her birth domiciled in Holland, but legitimated according to the law of Holland by the subsequent marriage of her parents:—Held (by James and Cotton, L.JJ., dissentiente Lush, L.J.), entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next of kin, under the Statute of Distributions. *Boyes* v. *Bedale* (1 H. & M. 798) disapproved. *Goodman's Trusts, In re*, 50 L. J., Ch. 425; 17 Ch. D. 266; 44 L. T. 527; 29 W. R. 586—C. A. *And see* INTERNATIONAL LAW.

—— **Posthumous Children.**]—J. died intestate, and left issue, T., who died within a week after his father, and his wife enceinte, and on the 20th May following the plaintiff was born; she is entitled to her share under the Statute of Distributions, as much as if she had existed in his lifetime. *Wallis* v. *Hodson*, 2 Atk. 114; Barnard. Ch. 272.

That the shares vest on the death of the intestate holds equally in lineal and collateral succession. *Ib.*

A child en ventre sa mère is in rerum naturâ, and is as much one as if born in the father's lifetime. *Ib.*

Distributory share vests on the intestate's death, but not so as to exclude a posthumous child. *Edwards* v. *Freeman*, 2 P. W. 446.

—— **Brothers and Sisters.**]—In case of intestacy, the grandfather shall not share with the brother. *Evelyn* v. *Evelyn*, 3 Atk. 762; Amb. 191.

—— **Half Blood.**]—The sister of the half blood shall come in for an equal share, upon the Statute of Distributions, with the brother or sister of the whole blood. *Crooke* v. *Watt*, 2 Vern. 124; Show. P. C. 108.

Under the statute 1 Jac. 2, c. 17, brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate's father, in the personal property of the intestate dying without wife or children. *Jessopp* v. *Watson*, 1 Myl. & K. 665; 2 L. J., Ch. 197.

Posthumous brother of the half blood shall take under Statute of Distributions. *Burnet* v. *Mann*, 1 Ves. Sen. 156.

—— **Other Relations.**]—First cousins twice removed come under the denomination of first and second cousins, as second cousins, they being related to propositor in same—namely, sixth degree. *Silcox* v. *Bell*, 1 Sim. & S. 301; 1 L. J. (o.s.) Ch. 137; 24 R. R. 173.

Grandmother takes before aunt, being in second degree; great-grandmother equally with aunt, in third degree. *Lloyd* v. *Tench*, 2 Ves. Sen. 215.

Grand-daughter of the sister and the daughter of the aunt of the intestate are in equal degree. *Thomas* v. *Ketteriche*, 1 Ves. sen. 333.

Grandfather on the father's side, and grandmother on the mother's side, equally entitled by the Statute of Distributions. *Moore* v. *Barham*, 1 P. W. 53.

The grandmother is entitled to a distribution of the grandchild's personal estate, in exclusion of the uncles and aunts. *Woodroff* v. *Winkworth*, Pre. Ch. 527.

One dies intestate, leaving an uncle and a deceased aunt's son, the latter shall have no share under the Statute of Distributions. *Bowers* v. *Littlewood*, 1 P. W. 594.

Per Stirpes or per Capita.]—When grandchildren shall take per stirpes, and not per capita. How far in collateral successions the parties shall take per capita and not per stirpes. *Lockyer* v. *Vade*, Barnard. Ch. 444.

A share of the residuary estate of a testatrix (a widow), which she had given by her will, lapsed. She had had only two children, a son and a daughter, both of whom died before her. Three children of the son, and one child of the daughter, survived the testatrix:—Held, that, under the Statute of Distributions, the four grandchildren took the lapsed share, so far as it arose from personal estate, per stirpes not per capita. Under the Statute of Distributions the division of personal estate among descendants of an intestate is always to be per stirpes. *Natt, In re, Walker* v. *Gammage*, 57 L. J., Ch. 797; 37 Ch. D. 517; 58 L. T. 722; 36 W. R. 548.

Where no brother or sister of intestate, nephews take per capita; otherwise per stirpes. *Lloyd* v. *Tench*, 2 Ves. Sen. 215. S. P., *Walsh* v. *Walsh*, Pre. Ch. 54; 1 Eq. Ca. Abr. 24, pl. 7; *Davers* v. *Dewes*, 3 P. W. 50.

Where an intestate leaves brother's or sister's children, they take per capita. *Stanley* v. *Stanley*, 1 Atk. 455.

An intestate left a mother, wife, and brother's children, infants. Lord chancellor directed his personalty to be divided into four parts, whereof two to be given to the wife, one to the mother, and one to be vested in stock for the children in equal shares, in the name of the accountant-general. *Ib.*

Aunts and nephews being in equal degree of relationship to an intestate, they are equally entitled under the Statute of Distributions, and take per capita, not per stirpes. *Durant* v. *Prestwood*, 1 Atk. 454. S. P., *Lloyd* v. *Tench*, 2 Ves. sen. 215.

If an intestate leaves no children, but grandchildren and great-grandchildren only, they take per stirpes and not per capita. *Ross's Trusts, In re*, 41 L. J., Ch. 130; L. R. 13 Eq. 286; 25 L. T. 817; 20 W. R. 231.

—— **Extent to which Representation allowed.**]—Intestate dies, leaving a deceased brother's child, and a deceased brother's grandchild: the grandchild not admitted to any distributory share; the clause in the statute which says that there shall be no representatives among collaterals, beyond brother's and sister's children, being intended to be that none shall take by representation but the children of brothers and sisters to the intestate. *Pett's Case*, 1 P. W. 25; 1 Salk. 250; 1 Ld. Raym. 571.

The son of a dead uncle not entitled to a distribution with a living uncle. *Maw* v. *Harding*, Pre. Ch. 28; 2 Vern. 223. And see *Carter* v. *Crawley*, Sir T. Raym. 496; 1 Freem. 296; *Beeton* v. *Darkin*, 2 Vern. 168.

—— **Hotchpot — Advancement.**]—Advancement to the eldest son, if personal property, must be brought into hotchpot under the Statute of Distributions. *Kircudbright (Lord)* v. *Kircudbright (Lady)*, 8 Ves. 51; 6 R. R. 216.

The Statute of Distributions affects only the personal estate undisposed of, in order to make the provision of each child equal, but takes away nothing that has been given to any child. *Edwards* v. *Freeman*, 2 P. W. 443.

A provision by a father for a child by will not to be brought into hotchpot, nor a provision of land for an heir. *Ib.* 440.

One settles a rent out of lands upon a younger child; this is an advancement, pro tanto. *Ib.* 441.

As contingent debts are within the statute, so must contingent provision for children be. *Ib.* 442.

The provision in the Statute of Distributions for bringing advances by way of settlement into hotchpot applies only to actual intestacy, not where there is an executor; and consequently a complete will, though the executor may be declared a trustee. *Walton* v. *Walton*, 14 Ves. 324. And see *Vachell* v. *Jeffreys*, Pre. Ch. 170.

—— **What is an Advance.**]—The purchase of a commission in the army is an advancement to be brought into hotchpot. An annuity is an advancement to be brought into hotchpot—viz. the value at the date of the grant, or if it has ceased, the payments received, at the option of the child. *Kircudbright* (*Lord*) v. *Kircudbright* (*Lady*), 8 Ves. 51; 6 R. R. 216.

The widow has no claim upon what is brought into hotchpot among the children. *Ib.*

Any sum of a considerable amount paid out of the common fund of a family, to or for the benefit of a child, is an advance within the meaning of the Statute of Distributions, the intention of the statute being to make the provision for all the children equal. *Boyd* v. *Boyd*, 36 L. J., Ch. 877; L. R. 4 Eq. 305; 16 L. T. 600; 15 W. R. 1071.

So a premium paid upon the occasion of a son being articled to an attorney and solicitor is an advance to the son, though the profession is afterwards relinquished. *Ib.*

So a sum paid for the purchase of a commission in the army for a son is an advance. *Ib.*

Sums paid by a father to a son to enable him to pay debts of honour, the nonpayment of which would have compelled him to leave the army, are advances. *Ib.*

A father, who died intestate, allowed his sons, first, varying yearly sums till marriage, and fixed yearly sums after marriage; secondly, paid a son's fee to a special pleader; thirdly, his dues to an inn of court; fourthly, the outfit and passage money of a son in the army and of his wife to India; and fifthly, his debts, without payment of which he must have left the army:—Held, that these payments were not advancements by portion within the Statute of Distributions, 22 & 23 Car. 2, c. 10. *Taylor* v. *Taylor*, 44 L. J., Ch. 718; L. R. 20 Eq. 155.

He also paid, first, a son's entrance fee to one of the inns of court; secondly, the price of his commission in the army, and contemporaneously that of his outfit; thirdly, certain sums for establishing him, late in life, in business:—Held, that these payments were advancements within the statute. *Ib.*

To constitute "an advancement by portion," the gift must be something given by the parent to establish the child in life, or to make what is called a provision for him. *Ib.*

An administrator, being one of the two next of kin of the intestate, advanced since the intestate's death out of his own money sums to the other next of kin:—Held, that he might set off in an administration suit the amount of such advances against the moneys due to the other next of kin from him as administrator out of the estate of the intestate. *Ib.*

When a father buys a commission for his son upon the understanding that he will not sell out without his father's consent, the purchase-money will be treated as an advancement, unless there is evidence of a binding agreement contemporaneous with the purchase. *Andrew* v. *Andrew*, 30 L. T. 457; 22 W. R. 682.

Husband, by marriage settlement, secures a portion for daughters of the marriage, in default of issue male. There is one daughter only. The husband survives that wife and marries again; leaves issue by the second wife, and dies intestate; the daughter by the first marriage being an infant, and her portion not then due: if the daughter lives till the portion is due, it is an advancement, pro tanto, and must be brought into hotchpot as to the other issue. *Edwards* v. *Freeman*, 2 P. W. 436.

W., on his son's marriage, settled 5,000*l.* annuities on himself for life, then on his wife for life, remainder to his son for life, remainder to his intended wife for life, with remainder to the issue of the marriage:—Held, that not only so much as his life estate in the annuities should be valued at, but the whole 5,000*l.* must be brought into hotchpot before the son can be admitted to a share of W.'s personal estate, who died intestate. *Wayland* v. *Wayland*, 2 Atk. 635.

A father by deed covenanted to pay to each of his six daughters an annuity of 200*l.* for her life, subject to a proviso that the income of any property which he might thereafter settle on any of his daughters should be taken in discharge, pro tanto, of her annuity. On the marriage of one of his daughters he covenanted for payment to trustees of 5,000*l.*, the covenant not to be enforced during his life if he should pay interest at 4*l.* per cent. during that period. On the marriage of two others, being entitled to a life interest in a fund with a power of appointment amongst his children, he appointed one-sixth of such fund to each of such daughters, and surrendered to her his life interest in such sixth (exceeding 200*l.* a year), they releasing their annuities. A fourth daughter died in his lifetime, leaving issue, and the remaining two annuities were still subsisting at his death. The father died intestate. In a suit for administration:—Held, that the payments of the annuities during the life of the intestate must be considered to have been made by way of allowance for maintenance and not of advancement, and the 5,000*l.* and the subsisting annuities only were to be brought into hotchpot, the value of the latter being calculated at the death of the intestate. *Hatfield* v. *Minet*, 47 L. J., Ch. 612; 8 Ch. D. 136; 38 L. T. 629; 26 W. R. 701—C. A.

A., on marriage of B., his eldest son by first wife, made bill of sale of furniture for his use for life. On second marriage he purchased copyhold in borough English, which was surrendered to use of himself for life, remainder to wife for life; remainder to his own right heirs; and he also settled 2,000*l.* for separate use of wife during their joint lives, and then to survivor for life, with power to leave it to any children of marriage; and in case of no appointment, to children and survivors equally—viz. daughters at eighteen or marriage, and sons at twenty-one

or marriage. There were several sons and daughters all unmarried, and under the age specified. Father and mother died intestate:—Held, on question of distribution, that bill of sale was an advancement pro tanto, and to be brought into hotchpot. *Pratt* v. *Pratt*, Fitzg. 284; 1 Stra. 935.

Also, held, the 2,000*l.* should be brought into hotchpot. But whether the borough English should be also brought in was reserved for further consideration. *Ib.* But see *Lutwyche* v. *Lutwyche*, Ca. t. Talb. 279.

—— **Advance to Heir.**]—The son and heir entitled to 500*l.* under a marriage agreement, decreed to bring into hotchpot upon the Statute of Distributions, though in nature of a purchaser. *Phiney* v. *Phiney*, 2 Vern. 638.

A father, by deed, conveyed real estate to trustees for a term of years, upon trust, during his lifetime, to pay to his eldest son an annuity of 100*l.* Some years afterwards the father died intestate:—Held, that the advancement to the eldest son, being an annuity charged on land, was within the exception made by the Statute of Distributions, 22 & 23 Car. 2, c. 10, s. 5, in favour of the heir-at-law, and need not be brought into hotchpot. *Chantrell* v. *Chantrell*, 37 L. T. 220.

Money laid out by the intestate in repairs of houses which descended to his eldest son as heir is not an advancement to be brought into hotchpot under the statute; otherwise if the houses had been given to the son in the father's life. *Smith* v. *Smith*, 5 Ves. 721; 5 R. R. 22.

—— **Issue of Advanced Child Deceased.**]—A father advances one of his children in part, and the child dies, leaving issue; then the father dies intestate, the issue of the dead child claiming a distributive share shall bring into hotchpot what their father had received. *Proud* v. *Turner*, 2 P. W. 560.

A testator bequeathed all the residue of his property to his wife, whom he appointed sole executrix. She predeceased the testator. One of the testator's daughters had received, on the occasion of her marriage, a sum of 700*l.*; she also died in the lifetime of her father, leaving two children:—Held, that the Statute of Distributions applied, and the sum advanced to the daughter must be brought into hotchpot. *Harte* v. *Meredith*, 13 L. R., Ir. 341.

—— **Advance by Mother—Being Widow.**]—If the mother, being a widow, advances a child, and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot. *Holt* v. *Frederick*, 2 P. W. 356; 2 Eq. Abr. 446.

—— **Inquiry as to Advances.**]—In administering the estate of an intestate who has made advances to his children in his lifetime, the inquiry as to advances should follow the words of the Statute of Distributions. *Ennis, In re*, *Waterton* v. *Ennis*, 43 L. T. 748; 28 W. R. 885.

Where Barred by Will.—Provision by will in bar of dower and thirds does not bar widow from taking under an intestacy by the failure of a legacy. *Gartshore* v. *Chalie*, 10 Ves. 17; 7 R. R. 311.

Testator gave his wife real and personal estate in bar, &c., of all dower or thirds which she can have or claim in, out of, or to all or any part of his real and personal estate, or either of them; he gave the residue to four persons, and afterwards by codicil directed them to dispose thereof in charities; part of the residue being invested in real securities, goes according to the statute as undisposed of, and the widow is not barred. *Pickering* v. *Stamford* (*Lord*), 3 Ves. 332. Affirmed, 3 Ves. 492; 16 R. R. 185.

Testator gave real and personal estate to one daughter, in satisfaction of her child's part of whatsoever more she might have expected from him, or out of his personal estate; he also gave a provision to his wife in full of her dower, thirds or other claim at law or in equity, or by any local custom, to any other part of his real or personal estate; the residue to his other daughter; upon her death in his life, he by codicil gave it according to the appointment of his wife; the power not being duly executed, the residue goes according to the statute, as undisposed of, and the widow and daughter are not barred. *Ib.* 335.

A testator gave his wife (in the event which happened) an annuity of 30*l.*, and declared such annuity to be in lieu of all dower and claims that his wife might have upon all or any of his estate and effects. The testator's personal estate was except so far as the annual income was directed to be applied to the maintenance of his children, undisposed of:—Held, that his widow was not barred from participating in the undisposed-of personalty as one of the next of kin. *Tavernor* v. *Grindley*, 32 L. T. 424.

A testator, by his will, cut off his widow from any part of his property, and directed she should not receive any benefit therefrom, but he made no disposition of his property:—Held, that she was nevertheless entitled to the share of the undisposed-of residue. *Johnson* v. *Johnson*, 4 Beav. 318. And also *Lett* v. *Randall*, 24 L. J., Ch. 708; 1 Jur. (N.S.) 747; 3 W. R. 564.

Testator, after stating that it was his will that neither L. S. nor her children should take any benefit from his property other than what was given to her or them; and that it was not his intention that G. S., or any person claiming under him, should partake of any share in the distribution of his personal estate except what was given to him or them, said he considered that the provision which he had made for his brother and two sisters was adequate for their support, and therefore it was his intention that they should not, nor should any of them, take any benefit from his property except what was given for them; and he declared that L. S., G. S. and his brother and two sisters, should not be entitled to take any share of his personal estate of which he might happen to die intestate, but should be wholly excluded therefrom in the same manner as if they had all died in his lifetime. There was an intestacy as to residue:—Held, that the next of kin other than the five persons named who were excluded were entitled. *Bund* v. *Green*, 12 Ch. D. 819; 28 W. R. 275.

Where Barred by Settlement.]—Settlement in bar of all the wife's demands out of her husband's personal estate by the custom of the province of York, or otherwise, will bar the wife of her distributive as well as customary part. *Benson* v. *Bellasis*, 1 Vern. 15; 2 Ch. Rep. 252.

A man by marriage articles covenants to pay his wife, if she survive him, 1,500*l.* in full of dower, thirds, custom of London, or otherwise, out of his real and personal estate. A. dies

intestate. The wife is barred of her share by the Statute of Distributions. *Davila* v. *Davila*, 2 Vern. 724.

Leasehold estate settled "in lieu of dower," is not a bar of thirds. *Creswell* v. *Byron*, 3 Bro. C. C. 362.

A provision previously to the marriage of a female infant in bar of dower, thirds and all claim upon the real and personal estate of the husband, if precarious and uncertain, as that the personal estate shall go according to the custom of London, does not bar her. *Smith* v. *Smith*, 5 Ves. 189 ; 5 R. R. 22.

Provision by settlement in lieu, &c. of all dower or thirds which wife might otherwise be entitled to of real or personal estate :—Held, to bar her interest in what was not disposed of by will of husband. *Druce* v. *Denison*, 6 Ves. 385.

Provision by marriage settlement not held a purchase of all the property of wife, unless that is expressed or clearly imported. *Ib.*

A covenant by the husband in marriage articles to provide a jointure of 200*l.* sterling per annum, such jointure to be levied on the lands of D. and B., though the jointure be paid, will not bar the wife's right to her distributive share of the personal estate. *Creagh* v. *Creagh*, 8 Ir. Eq. R. 68.

On the marriage of A. a certain sum was settled in trust for her for life, "as and for her jointure, in full lieu, bar and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal or freehold," of her intended husband :—Held, that this settlement barred her claim on the personal estate of her intestate husband, under the Statute of Distributions. *Gurly* v. *Gurly*, 8 Cl. & F. 743. Affirming, 2 Dr. & Wal. 463.

Where a husband covenanted by his marriage settlement to give, devise, bequeath and secure to his widow an annuity for her life after his decease, to be levied, raised and paid to her by his heirs, executors or administrators, and the husband afterwards died intestate :—Held, on the authority of *Crouch* v. *Stratton* (4 Ves. 391), that the widow's share of the husband's personal estate, under the Statute of Distributions, was not to be taken by her as a performance of his covenant either wholly or pro tanto. *Salisbury* v. *Salisbury*, 6 Hare, 526 ; 17 L. J., Ch. 480 ; 12 Jur. 671.

A rent-charge expressed to be for a jointure, and in lieu of dower and thirds at common law, does not bar the jointress of her distributive share in her husband's undisposed-of personal estate. *Colleton* v. *Garth*, 6 Sim. 19 ; 2 L. J., Ch. 75.

Husband covenants to give his wife by deed or will 1,000*l.* at his death, if she survives him ; but dies intestate ; she is not entitled to her distributive share, in addition to her claim under the covenant. *Lee* v. *D'Aranda*, 1 Ves. sen. 1 ; 3 Atk. 419.

A marrage settlement contained a clause, that the provision thereby made and intended for the wife in the event of her viduity should be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at common law or otherwise howsoever :—Held, that she was barred of her share of her husband's personal estate under the Statute of Distributions. *Burgess, In re*, 11 Ir. Ch. R. 164.

The word "thirds" is not confined to real estate, but is a general expression, which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband. *Thompson* v. *Watts*, 2 John. & H. 291 ; 31 L. J., Ch. 445 ; 8 Jur. (N.S.) 760 ; 6 L. T. 817 ; 10 W. R. 485. S. P., *Sambourne* v. *Barry*, Ir. R. 6 Eq. 28.

In construing a stipulation in a marriage settlement, that the provision thereby made for the intended wife is "in lieu of dower or thirds," the court considers the fund out of which the provision was made. *Ib.*

Where, therefore, by an ante-nuptial settlement the provision thereby made for the intended wife was partly charged on personalty of the intended husband, who had children by a former marriage :—Held, on his dying intestate, that the claim of his widow to a distributive share in his personal estate was barred by a stipulation in the above words. *Ib.*

Where a husband covenanted on his marriage that, for the purpose of making a further provision for his intended wife, in case she should survive him, a trustee should stand possessed of all his personal property at the time of his death, in trust for the use and benefit of the intended wife and the issue of the marriage, with power to her to distribute the same as she might think proper among such issue, and the husband died before her intestate, and there was no issue :—Held, that the wife, besides taking a life interest in such personalty, was, in the absence of express words to the contrary, entitled to her share of the corpus under the Statute of Distributions. *Young* v. *Young*, Ir. R. 5 Eq. 615. And see *Garthshore* v. *Chalie*, 10 Ves. 1 ; 7 R. R. 311.

By a marriage settlement, part of the husband's real estate and of the lady's fortune was vested in trustees, upon trust to pay the rents and interest of the lands, tenements, hereditaments and premises, stocks, funds and securities to the husband for life ; and, after his death, to pay the wife, for her life, an annuity, to be in full for her jointure, and in lieu, bar and full satisfaction of and for her dower and thirds at common law, which she could or otherwise might have or claim out of, &c. "the said lands, tenements, hereditaments and premises, stocks, funds and securities whereof or whereunto" the husband, at any time during the said intended coverture, should be seised or entitled for any estate of inheritance to which dower or thirds is incident ; and subject thereto, and in the event which happened—viz. there being an only child of the marriage, to 7,000*l.* for such child, in trust for the husband absolutely :—Held, that the settlement barred the wife of dower and her distributive share of the real and personal estate comprised in the settlement, but not of dower or of her distributive share out of or in the other real and personal estate of the husband. *Sambourne* v. *Barry* Ir. R. 6 Eq. 28.

Personal estate belonging to an intended husand was settled in trust for him for life, with successive trusts for the wife durante viduitate and the children (if any) of the marriage in the usual form, with an ultimate limitation to the husband, his executors, administrators or assigns, for his and their own use and benefit. The wife survived and married again. The first husband died intestate, and on the ultimate limitation taking effect, the wife claimed her share in his assets under the Statute of Distributions :—Held, though she had by her second marriage forfeited her life estate, she had not forfeited her claim to a distributive share in the husband's assets, and that his personal representatives took

in trust for his next of kin under the statute, and not beneficially. *O'Brien* v. *Hearn*, Ir. R. 4 Eq. 103; 18 W. R. 514. Affirmed, 18 W. R. 1014.

Where Barred by Separation Deed.]—Husband and wife having agreed to live apart from each other, a sum of stock was invested in the name of trustees, &c., by a separation deed, containing the usual provisions. The husband agreed to pay to his wife, for her maintenance, an annuity of 180*l.* a year, and it was declared that the stock was intended as a security for the payment of that annuity. The deed contained a proviso, that the husband should be indemnified out of the annuity against the debts and contracts of his wife, and all dower and thirds at common law, or by custom, which she at any time thereafter might claim, challenge, or demand from, out of, or against her husband, or his present or future estate, real or personal, and an agreement that the wife should make and execute all such acts, deeds and matters as should be requisite for the purpose of releasing, barring, or extinguishing all dower or thirds at the common law, or by custom, which she could or might claim or demand, in, to, or out of, any real or personal estate of her husband. The husband afterwards died intestate:—Held, that the deed did not deprive the wife of her share of the husband's personal estate, under the Statute of Distributions, she electing to take under the intestacy. *Slatter* v. *Slatter*, 1 Y. & C. 28.

Proviso in a deed of separation that the wife surviving shall be entitled to her dower and thirds, out of all real and personal estates, whereof the husband shall die seised or possessed, construed not as a covenant to leave her such a portion of the real estate as she would be entitled to under the statute had he died intestate, but that she would be in the same situation as if not separate as to dower and thirds—i.e. the actual share by the law or custom; not interfering therefore with his testamentary disposition. *Cochran* v. *Graham*, 19 Ves. 63.

Wife of Convict—Property of—Before 33 & 34 Vict. c. 23.]—The wife of a felon convict died intestate, leaving personal property acquired by her subsequently to her husband's conviction:—Held, that such property belonged to the crown, and not to the next of kin of the intestate. *Coombs* v. *Her Majesty's Proctor*, 2 Rob. Ec. Rep. 547; 16 Jur. 820. S. P., *Reg.* v. *Whitehead*, 2 M. C. C. 181.

Intestates' Estates Act, 1890—Partial Intestacy.]—The Intestates' Estates Act, 1890, does not apply to cases of partial intestacy. *Twigg's Estate, In re, Twigg* v. *Black*, 61 L. J., Ch. 444; [1892] 1 Ch. 579; 66 L. T. 604; 40 W. R. 297.

c. By Customs of London and York.

19 & 20 Vict. c. 94.]—*By* 19 *&* 20 *Vict. c.* 94, *the 4th section of the Statute of Distributions, saving the customs of the city of London and the province of York, is repealed, save only with respect to the distribution of the personal estate of persons who may have died on or before December* 31, 1856, *and it is enacted that "the special customs respecting the distribution of the personal estates of intestates observed in the city of London, or in relation to the citizens and freemen of such city, and in the province of York, and certain other places, shall, with reference to all persons dying on or after January* 1, 1857, *wholly cease and determine."*

Note.]—*The customs of London and York not having affected the distribution of estates in any case of death since January* 1, 1857, *the cases thereon are now omitted as obsolete.*

XII. Refunding.

a. By Legatees.

1. For Creditors.

In what Cases — At whose Suit.] — Where assets fall short, legatees shall refund to unsatisfied creditors; but where an executor has made voluntary payment to a legatee, he shall not make him refund: otherwise, if the executor pays a legatee by compulsion. *Newman* v. *Barton*, 2 Vern. 205.

Where executor assents to legacy, he shall not have it refunded; secus, where compelled to pay it by suit in equity. *Noel* v. *Robinson*, 1 Vern. 94.

A creditor shall compel a legatee to refund, and so shall one legatee another, where assets are deficient. *S. C.*, 2 Vent. 358; 2 Ch. Ca. 145; 2 Ch. Rep. 248.

Legatees paid before creditors where the assets fell short, decreed to refund to an unsatisfied creditor. *Anon.*, 1 Vern. 162.

Legatee, when liable to refund. *Jewon* v. *Grant*, 3 Swan. 659.

If an executor pays a legacy on supposition that there are assets to pay all other legacies, and afterwards there is a deficiency of assets, legatee must refund. *Edwards* v. *Freeman*, 2 P. W. 447.

Executor paid legacy, assets found deficient, legatee to refund. *Davies* v. *Davies*, Dick. 32.

Where the court administers the assets the trustees are protected against all claims on the testator's estate, but legatees still remain liable in respect of their beneficial interest. *Underwood* v. *Hatton*, 5 Beav. 36.

Testator desires to be buried decently, executrix borrows 100*l.* for the purpose, and gives her bond; legatees not compelled to refund, but account directed of residue. *Langley* v. *Oates*, 2 Eq. Abr. 455.

A tenant for life was wrongfully permitted to enjoy a perishable property in specie. The executor died, and the tenant for life then proved the will, and continued to receive the income. On a bill against the representatives of the executor and the tenant for life, which contained no special charge, and after the common decree:—Held, that in such a suit a legatee could not be made to refund overpayments voluntarily made by the executor; and, secondly, that the tenant for life must account for the surplus income received by her after she had proved the will, but not for that received before. *Lichfield* v. *Baker*, 13 Beav. 447.

If a tenant for life, bound to keep down an annuity, be permitted by the executrix to receive the rents without performing the obligations, and the executrix pays the annuity, she cannot afterwards recover any portion of the past payments out of the general personal property which has been appropriated. *Riky* v. *Kemmis*, Ll. & G. t. Sugd. 131.

—— **Notice of Liability—Shares in Company liable to a Call.**]—K., a married woman, became entitled to the residue of a testator's estate for

her separate use. A part of the residue consisted of fifty shares in a limited company, which were not fully paid up. The residue of the estate was paid to K., and the certificates of the shares handed to her, but no transfer of them was executed. A call was afterwards made, which the executors paid. An order was afterwards made on an originating summons taken out by the executors, declaring that they had a lien on the shares for the amount of the call, interest and costs, and in default of payment liberty was given to the executors to sell the shares. The shares were sold, but did not realise sufficient to pay what was due to the executors, and they commenced a second action to compel K. to indemnify them:—Held, that the first action was not a bar to the second, and that the executors were entitled to recover:—that the knowledge of the executors that the shares were not fully paid up, and that a call might be made at some future time, was not notice of a debt, and therefore they were entitled to call on the residuary legatee to refund. Semble, that an executor who has paid the residue of the estate to the residuary legatee can recover from the legatee the amount of any costs, charges and expenses properly incurred by him after he has so paid over the residue to the extent of the amount so paid over. *Kershaw, In re, Whittaker* v. *Kershaw*, 60 L. J., Ch. 9; 45 Ch. D. 320; 63 L. T. 203; 39 W. R. 23—C. A.

—— **Fund in Court.**]—In a suit for the administration of a testator's assets, after the decree on further directions had sanctioned payments made by the executor in discharge of legacies, and had directed the fund in court to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the master subsequently reported a debt to be due to him; but, in the meantime, the fund had been apportioned, and part of it had been paid over, while the remainder had been carried to the account of particular legatees:—Held, that the creditor was entitled to receive out of the funds of the legatees, remaining in court, not the whole of the debt, but only part of it, bearing the same proportion to the whole as the legacies given to those legatees bore to the whole amount of the legacies given by the will. *Gillespie* v. *Alexander*, 3 Russ. 130: 27 R. R. 35.

In a suit instituted in 1814 to administer the personal estate of an intestate who died in 1807, the master reported that no debts had been proved, and, by the decree on further directions in 1817, the whole of the residue was apportioned and distributed; but, as the plaintiff was then an infant, his share, amounting to four-ninths of the fund, was retained and carried to his separate account. In 1825 a foreign prince, claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in court; and the plaintiff, coming of age soon after, applied to have that sum paid out:—Held, that the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but that every defence should be allowed those which would have been competent upon a new bill; that the debt, if established, must be restricted, as against the fund in court, to that proportion which the plaintiff's share bore to the whole amount distributed, and therefore that, after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to the plaintiff. *Greig* v. *Somerville*, 1 Russ. & M. 338.

A testator gave two legacies of 2,000*l.*, payable at a future time, and made a residuary bequest. The executors, having paid all the ascertained debts of the testator, invested the two legacies in consols in the names of themselves and the two legatees, and paid over the residue to the residuary legatee. Ten years after the death of the testator a debt was established against the testator's estate, in an administration suit, in respect of a breach of covenant under a lease. The chief clerk certified that the funds applicable to the payment of the debt were first, the residuary estate, and, secondly, the two legacies of 2,000*l.* The residuary legatee had become insolvent. The two legacies had been ordered to be brought into court:—Held, that the debt was payable out of the legacies, without prejudice to the rights of the legatees and those claiming under them, as between themselves and the other parties. *Noble* v. *Brett*, 24 Beav. 499; 27 L. J., Ch. 516; 4 Jur. (N.S.) 623; 6 W. R. 219. And see *S. C.*, 26 Beav. 233; 28 L. J., Ch. 322; 5 Jur. (N.S.) 4.

—— **Property specifically bequeathed.**]—Property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstance that there has come to the hands of the executor personal property of the testator, not specifically bequeathed, more than sufficient to pay his debts, and funeral and testamentary expenses, and that the specifically bequeathed property has been made over by the executor to the specific legatee. *Davies* v. *Nicolson*, 2 De G. & J. 693; 27 L. J., Ch. 719; 5 Jur. (N.S.) 49; 6 W. R. 790.

Leasehold property was specifically bequeathed to F. R.; the residue was bequeathed to J. R., and in the residue were included other leasehold houses. The executor handed over the residue to J. R., and when F. R. attained twenty-one, the executor assented to the specific bequest, and assigned the same to F. R. A creditor, in respect of unpaid rent and repairs to the leaseholds, included in the residue, obtained judgments against the executor, and these remaining unpaid, he filed a bill for the general administration of the testator's estate. The chief clerk certified, that the specifically bequeathed leaseholds were liable to the plaintiff's debt, but the vice-chancellor varied the certificate:—Held, that notwithstanding the assent and assignment, the specifically bequeathed leaseholds were liable to the debt; that creditors were entitled to pursue their remedies against all the assets, and that, therefore, if there were no assets in the hands of the executor, there must be a decree against the leaseholds specifically bequeathed for payment of the plaintiff's debt. *Ib.*

The rule applied in *Gillespie* v. *Alexander* (3 Russ. 130; 27 R. R. 35) is not applicable where the estate has not been administered by the court. *Ib.*

—— **Right of Purchaser or Mortgagee of Legacy.**]—Semble, a purchaser of a legacy which has been paid or delivered, cannot be called on to refund or pay any portion of a debt subsequently established against a testator's estate. *Noble* v. *Brett*, 24 Beav. 499; 27 L. J., Ch. 516; 4 Jur. (N.S.) 623; 6 W. R. 219. But see *Jennings* v. *Bond*, 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.

Where executors and trustees have paid a

pecuniary legacy, not charged on real estate, to a legatee who is also one of the residuary legatees of the proceeds of sale of the testator's real estate, the legatee covenanting to repay the legacy if required so to do; on the personal estate, after defraying prior charges upon it, proving to be insufficient to meet the pecuniary legacy, the executors and trustees are entitled, as against a mortgagee, subsequent in date, of the legatee's residuary interest in the proceeds of sale of realty, to retain thereout a sum equal in amount to the pecuniary legacy which was paid in advance. *Moore, In re, Moore* v. *Moore*, 45 L. T. 466.

A testator bequeathed leaseholds to his son, and appointed him and another person his executors. Three years after testator's death, the son settled the leaseholds on his marriage:—Held, that as against the son's wife and children, the property was not liable to the testator's creditors. *Spackman* v. *Timbrell*, 8 Sim. 260; 6 L. J., Ch. 147.

Assets of a testator, settled bonâ fide on the marriage of the residuary legatee, are no longer liable to the claims of creditors. *Dilkes* v. *Broadmead*, 2 De G. F. & J. 566; 30 L. J., Ch. 268; 7 Jur. (N.S.) 56; 3 L. T. 605; 9 W. R. 238.

Therefore a bill filed against a residuary legatee and the trustees of a settlement, to recover the amount paid by the plaintiff, by reason of the testator's breach of the covenants in a lease, was dismissed with costs. *Ib.*

—— **Right of Purchaser where Fund in Court.**]—The purchaser of a reversionary interest in a fund in court in an administration suit takes, subject to the claim of any creditor who may prove his debt at any time before the fund is paid out, the fund being available for creditors so long as it remains in court. *Hooper* v. *Smart*, 45 L. J., Ch. 99; 1 Ch. D. 90; 33 L. T. 499; 24 W. R. 152.

In 1863 an administration suit was instituted, and by an order made in it a fund in court was set aside to answer a life annuity given by the will, the rest of the assets being subsequently paid and transferred to the residuary legatees, who were also entitled to the fund in court, subject to the life interest of the annuitant. In 1873 a declaration was made in another suit, that the estate of the testator in the first suit was liable for breaches of trust which had been committed by him:—Held, that the plaintiffs in the second suit were entitled to go against the fund in court, notwithstanding that the reversion in it had been sold for value; and that the fund was liable for the whole of their debt, and not merely to that proportion of it which the fund itself bore to the total net assets of the testator. *Ib.* And see *Jennings* v. *Bond*, 2 Jo. & Lat. 720; 8 Ir. Eq. R. 755.

Delay, Laches or Acquiescence on part of Creditor.]—The testator leaves assets sufficient to pay all debts and legacies; the legatees receive payment, which the creditors might also have had if they had demanded it in time; they lie by for eleven years, and the estate is wasted: yet the legatees shall refund. *Hardwick* v. *Mynd*, 1 Anstr. 112; 3 R. R. 562.

A creditor, who, by lying by, permits the executor, having at that time assets for payments of debts, to pay a legacy, does not thereby lose his right to compel that legatee to contribute to the payment of his debt, if the executor subsequently waste the assets, but the assets of the defaulting executor must be first resorted to, and the insolvency of the executor not having been proved:—Held, that the legatee was entitled to an inquiry on the point, even after a decree to account and a report under it. *Mannix* v. *Drinan*, 3 Ir. Eq. R. 108.

Ten legatees out of seventeen having been overpaid on coming of age, ordered to refund after the lapse of eighteen years, the estate proving deficient. The executors, if compelled to pay, to have a remedy against those legatees. *Rowe* v. *Thorpe*, 1 Jur. 771.

A., one of co-trustees, A. and B., who had committed a breach of trust, died, and his personal estate was distributed among his legatees; and two of those legatees then died, having received their legacies; and the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. Ten years after the eldest of the two cestuis que trustent attained twenty-one, they filed a bill against B. and the personal representative of A., and his surviving legatees, and the personal representatives of his deceased legatees, and the residuary legatee of one of those deceased legatees, and against the father and mother of the plaintiffs, praying to have the fund replaced:—Held, that the plaintiffs were entitled to call upon the surviving legatees of A., and the personal representatives and legatees of his deceased legatees, to refund, and that, without any previous inquiry as to whether the plaintiffs had known of or acquiesced in the breach of trust, or the compromise of a suit brought against A. and B. for the same purpose by the plaintiffs by their next friend during their infancy. *March* v. *Russell*, 3 Myl. & C. 31; 6 L. J., Ch. 303; 1 Jur. 588.

The right of a creditor to make legatees refund may be lost by laches, acquiescence, or by such a course of dealing as would render the assertion of such right inequitable. *Ridgway* v. *Newstead*, 2 Giff. 492; 6 Jur. (N.S.) 1185; 3 L. T. 360; 9 W. R. 31. Affirmed, 3 De G. F. & J. 474; 30 L. J., Ch. 889; 7 Jur. (N.S.) 451; 4 L. T. 86; 9 W. R. 401.

A testator mortgaged a leasehold brewery, and covenanted to pay the mortgage debt. By his will he bequeathed legacies and an annuity, and made a residuary devise and bequest. His son, to whom he bequeathed the equity of redemption in the brewery, carried on the business, and kept down the interest on the mortgage for thirteen years, and then (in 1856) became bankrupt. In the meantime the estate of the mortgagor had been administered by the executors, and the legacies paid and the annuity kept down. In 1857 the mortgagee's representatives instituted a suit for the administration of the testator's estate, and payment of the balance of the mortgage debt (if any) which the proceeds of the mortgaged premises might be insufficient to satisfy. The mortgaged premises having become depreciated were sold for less than the debt, and the balance was certified to be due from the executors, and was ordered to be paid by them, but they were unable to pay it; whereupon, in 1860, the mortgagee's representatives filed a bill to have the mortgagor's residuary real estate applied in payment of his debts, so far as it would extend, and to compel the legatees and annuitant to refund. The residuary

devisees had mortgaged their portions, shares, and interests, as residuary legatees and executors, of and in the moneys to arise from the sale of the testator's residuary real and personal estate:—Held, first, that the lapse of time and intervening circumstances were a sufficient answer to the suit, so far as it sought to call on the legatees and mortgagees to refund. *S. C.*, 3 De G. F. & J. 474.

Held, secondly, that the mortgage made by the residuary devisees was subject to the payment of the testator's debts. *Ib.*

Where mortgagees of a leasehold brewery and machinery had permitted an executor and a residuary legatee under the mortgagor's will to remain in possession of the property for fifteen years after the mortgagor's death, and had received interest from him during that time, the property having in the meantime so deteriorated in value that the security had become of less value than the debt, they were not allowed to recover the unpaid portion of the mortgage debt by following as assets of the testator, legacies to infant legatees which had been paid into court under the Trustees Relief Act, or a sum which had been paid to annuitant by the executors in satisfaction of his annuity. *S. C.*, 4 L. T. 492; 9 W. R. 401.

Under a decree in an administration suit, a barrister tendered his claim for an amount of fees embezzled and retained by the intestate, who had been his clerk. The chief clerk disallowed the claim, on the ground that it was barred by the Statute of Limitations. The claimant took no proceeding in the administration suit to vary the certificate, and a decree was soon afterwards made, on further directions, under which the residuary estate was distributed amongst the parties beneficially interested. The barrister subsequently instituted another suit for the recovery of his demand out of the assets in the hands of the parties, amongst whom they had been distributed:—Held, that he was entitled to maintain such suit, and to a decree for payment with costs. *Teed* v. *Beere*, 28 L. J., Ch. 782; 5 Jur. (N.S.) 381; 7 W. R. 394.

T. and G. were partners in building an hotel. G. bought the share of T., who had conducted the building, and agreed to pay all the expenses. G. died, and at his death the sum of 356*l.* was due from him to T. in respect of bills which T. had paid for the building. A decree was made to administer G.'s estate. T. carried in a proof for the 356*l.* along with 82*l.* which he had paid since G.'s death. The 356*l.* was allowed and paid, the 82*l.* disallowed, and the estate was distributed. After this T. was obliged to pay further bills for the building, and filed a bill against the residuary legatees and devisees of G. to recover these sums and the 82*l.*:—Held, that the suit was maintainable as regarded the sums paid since the certificate. *Thomas* v. *Griffith*, 2 De G. F. & J. 555; 7 Jur. (N.S.) 293; 3 L. T. 761; 8 W. R. 727.

Held, also, that it not appearing on what ground the 82*l.* had been disallowed, the plaintiff had not lost his rights as to that sum. *Ib.*

Held, also, that the executor was not a necessary party to the suit. *Ib.*

The right of a creditor whose debt has not been provided for to follow distributed assets into the hands of legatees being an equitable right, will not be exercisable where the circumstances of the case would make such an exercise inequitable. When, therefore, the mortgagee of a farm, upon the death of his mortgagor, acquiesced in two of the residuary legatees taking the farm and working it, and in the distribution of the personal estate for the purpose of the share of those legatees being expended on the cultivation of the farm, he was held to have released his equitable right to fall back upon the personal estate of his debtor, the mortgage security having proved insufficient. *Blake* v. *Gale*, 55 L. J., Ch. 559; 32 Ch. D. 571; 55 L. T. 234; 34 W. R. 555—C. A.

Payment of Legacy de bonis propriis.]—If, in an action against executors for a legacy, the executors admit assets and judgment is given for payment of a legacy de bonis propriis:—Quære, whether an unpaid creditor can call upon the legatee to refund the legacy. Semble, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors de bonis propriis. *Brogden, In re, Billing* v. *Brogden*, 38 Ch. D. 546; 59 L. T. 650; 37 W. R. 84—C. A.

2. For Legatees or Next of Kin.

In what Cases—At whose Suit.]—A legatee paid by an executor voluntarily, not obliged to refund to the rest, except in case of his insolvency. *Orr* v. *Kaines*, 2 Ves. sen. 194. S. P., *Coppin* v. *Coppin*, 2 P. W. 296.

Legacy to A., payable at twenty-one, or marriage, with interest, is a vested legacy; and, executor having become bankrupt, it might have been proved under the commission; his certificate therefore a bar, and the residuary legatee not liable. *Walcott* v. *Hall*, 2 Bro. C. C. 305.

As legatees are to be paid in proportion, so if an executor pays one legatee, and there is not enough to pay all, the legatee who is paid shall refund in proportion; so if one legatee recovers his legacy in equity, and there is not enough to pay the rest, he shall refund. Secus, if the defect of assets arises by the wasting of the executor. *Anon*, 1 P. W. 495.

Legacies were given, some immediate and others to be paid to persons in succession. All trust moneys were directed to be invested in the public funds or on real securities. The executor, twelve months after the death, paid all the immediate legacies, and invested the remainder of the funds in a bank. Two months afterwards the bank stopped payment, and a loss was sustained, by which the funds became insufficient to pay the deferred legacies. The executor filed a bill to have accounts taken, and that the loss might be apportioned among the deferred legatees:—Held, that, as there was no imputation on the good faith of the executor, and as he could not obtain a settlement of his accounts with the legatees, he was justified in filing the bill, and that the loss must fall upon the deferred legatees, who must bear among themselves ratably the loss of the failure of the bank, and not throw any part of the loss on the satisfied legatees. *Fenwick* v. *Clarke*, 31 L. J., Ch. 728; 6 L. T. 593; 10 W. R. 636.

When one residuary legatee, or one of the next of kin, has not received an amount larger than his share of the assets existing at the time of payment made to him, the subsequent waste of the assets by the executor or administrator does not render him liable to refund. *Peterson* v. *Peterson*, 36 L. J., Ch. 101; L. R. 3 Eq. 111; 15 W. R. 164.

When one residuary legatee of one of the next of kin is called upon by another to refund, on the ground of overpayment made, the burden of proof that the amount received was in excess of his share of the assets existing at the time of payment lies upon the person requiring the money to be refunded. *Ib.*

A residuary legatee received his due share of the assets from the administrator. The administrator subsequently committed waste, and the assets, thus diminished, were insufficient to pay the other residuary legatees in full:—Held, that inasmuch as the unpaid legatees might have forced the payment of their legacies in full when the administrator was solvent and able to pay them, they could not call on the legatees who had been paid their due shares to refund in order to equalise the loss occasioned by their own laches. *Ib.*

When executors have made a proper distribution pro tanto of their testator's estate, and have been ready to produce proper accounts to the unpaid residuary legatees, and an administration action is then instituted by the unpaid residuary legatees, and it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it. *Hilliard* v. *Fulford*, 46 L. J., Ch. 43; 4 Ch. D. 389; 35 L. T. 750; 25 W. R. 161.

But where, after executors had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, and it then turned out that the executors had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; and, secondly, in expending part of the general personal estate in repairs of property specifically devised:—Held, that the overpaid residuary legatees could not be made to refund, that the executors must stand in the same position as if no distribution had taken place, and that the costs of the action should be paid as out of the entire residuary estate, so as to charge the executors with the share of costs attributable to each of the distributed shares; and then that the executors should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each. Form of order. *Ib.*

In a suit by a residuary legatee for the administration of the testator's estate, the court has jurisdiction to compel the residuary legatee to refund assets overpaid to him by the executor before the suit, to pay the legacies of legatees who are not parties to the suit. *Prowse* v. *Spurgin*, 37 L. J., Ch. 251; L. R. 5 Eq. 99; 17 L. T. 590; 16 W. R. 413.

A testator gave the residue of his real and personal property to trustees in trust to sell the realty and invest the produce with the personalty, and to pay 5,000*l.* to his daughter, the plaintiff, on her attaining twenty-one, or day of marriage, and he appointed H. and R. and his widow executors, and H. and his widow guardians of the plaintiff. The trustees did not act. More than 5,000*l.* was paid into the hands of H., who paid the plaintiff's maintenance during minority. The plaintiff, on coming of age, filed a bill against H. and R. to recover the principal, and got a decree for an account. R. then came to a settlement with X., the residuary devisee and legatee, and, having ascertained what would be coming to him, gave a mortgage for as much as was deficient of the personal estate, and X. went into possession of the real estate, R. and X. joining in securing under the mortgage pecuniary legacies to some other legatees:—Held, that he was bound to refund, and that the mortgage, if given in lieu of assets, should be treated as so much assets for the benefit of the plaintiff and unpaid legatees. Held, also, that the payment to her guardian H. did not bind the plaintiff. *O'Neill* v. *Hamill*, Beat. 618.

Bill against children for discovery of sums advanced to them, pendente lite, by their father, an insolvent executor. It appears on the answers, that two of them received 500*l.* each on their marriages, but two others received 500*l.* each for their maintenance; it was decreed, that the two last should refund, although they denied knowledge of their father's insolvency. The children were legatees under the will, but the decree went on fraud. *Partridge* v. *Gopp*, Ambl. 596.

P. bequeathed 1,000*l.* in trust for a daughter for life, with remainder for her issue; and in case of failure, in trust, as to one moiety, as she should appoint; and as to the other, it was to be considered as part of the residue bequeathed in favour of all his children, of whom J. was one. P. also bequeathed 600*l.* in trust for a daughter-in-law, A., for life, with remainder for his two grand-daughters. One of the trustees, C., possessed himself of the testator's estate, and did not invest, but retained in his hands these sums. In 1822 C. bequeathed to his two daughters legacies and annuities payable out of leaseholds bequeathed to O., to whom he devised and bequeathed the bulk of his property, and he charged certain premises with the payment of all trust moneys in his hands at his decease. C. died in 1823, and O., his sole executor, possessed himself of his estate, and thereout paid the legacies and annuities. In 1824 an indenture of release, to which J. and O. and others were parties, but to which A. was not, was executed, and thereby certain arrangements were made relating to P.'s estate, but excepting the sums above-mentioned, and another sum, being the residue of his estate. The power of appointment of a moiety of the 1,000*l.* was exercised in favour of O. and another; and the appointor died in 1858. The other moiety and the 600*l.*, and interest, remained due to the persons entitled to the same. On a bill by J. and A., praying that O. might be ordered to pay the legacies and interest, and that the annuitants under C.'s will might be ordered to refund what they had received in respect of their legacies and annuities:—Held, that, as against the annuitants, the bill must be dismissed, with costs, and that the two sums and interest due must be paid by O. personally, on the ground that there had been by the deed of 1824 a complete appropriation of the sums; that O. was accepted as the debtor for them; and that both J. and A. (A. having received interest from O.) were bound by the transactions which were carried out under it. *Partington* v. *Currington*, 5 Jur. (N.S.) 1093.

—— **As against a Purchaser.**]—Where trustees, under an erroneous view of the effect of a will, pay to parties money to which they are not entitled, this court, in administering the estate, will compel a restitution and repayment, and will give a lien on the other interests of such

parties under the will, even as against an assignee for valuable consideration. *Dibbs* v. *Goren*, 11 Beav. 483.

—— **Delay or Acquiescence, Effect of.**]—Where an intestate's estate has been distributed under a decree in an administration suit, among persons found by the report to be his next of kin, a person claiming to be the sole next of kin of the intestate is not precluded from filing a bill against the persons alleged to have been erroneously found to be the next of kin, for the purpose of obtaining restitution of the fund so distributed; and if the right of the plaintiff so claiming shall be established, the persons among whom the fund has been distributed will be compelled to repay it to the plaintiff, but the plaintiff will be bound by the accounts taken in the administration suit. *David* v. *Frowd*, 1 Myl. & K. 200; 2 L. J., Ch. 68.

The circumstance that an intestate's personal estate has been distributed, in a suit, among the persons appearing to be his sole next of kin, does not necessarily preclude other persons, having an equal title to that character, from afterwards instituting a new suit against the next of kin who have been thus overpaid, and compelling them to refund a proportion of their shares. *Sawyer* v. *Birchmore*, 2 Myl. & C. 611; 1 Keen, 825; 6 L. J., Ch. 277.

A married woman entitled to the income of a legacy for her separate use, continued for fifteen years, with full notice of the circumstances affecting her rights, to receive income on the footing that the legacy was liable to contribute in favour of the residuary legatees to a loss occurring on the re-investment of part of the estate. It was afterwards decided that the legacy was not liable so to contribute, but must be paid in full:—Held, that she was not entitled to recover from the residuary legatees the difference between the income of the full amount of the legacy and the reduced income she had actually received. *Stafford* v. *Stafford*, 1 De G. & J. 193; 4 Jur. (N.S.) 149.

Quære, whether the claim, apart from acquiescence, was not to a great extent barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27, s. 42. *Ib.*

An executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied, took the opinion of the counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee:—Held, that the suit could not be maintained. *Rogers* v. *Ingham*, 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338—C. A.

3. Other Cases.

Administrator against Legatee for Sum Paid by Executor before Revocation of Probate.]—P. D., by an alleged will, bequeathed 90*l.* to L., for the purpose of being applied towards building a chapel, and appointed C. executor, who obtained probate. After the grant of probate, C. paid to L. the amount of the legacy, which was applied by L., in accordance with the terms of the will. Subsequently a suit was instituted by M. D. against C., in the Probate Division, for revocation of probate. A consent was entered into between M. D. and C. in that suit, by which it was agreed that the will should be condemned, and that administration of P. D.'s estate should be granted to M. D. The consent provided for the application of certain moneys, and that C. "should have credit for all moneys properly expended, and also a sum of 100*l.* and 20*l.* paid respectively to L. for masses, without prejudice to any claim, and his costs." In an action brought by M. D., as administratrix of P. D., to recover from L. the 90*l.* which had been so paid to him:—Held, that having by the consent released the executor, she could not recover from the legatee. *Duane* v. *Lee*, 14 L. R. Ir. 56— *And see* PROCEEDINGS BY OR AGAINST AT COMMON LAW, XIII. *a.* 1, post.

4. Interest.

Interest.]—On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds, making interest in the hands of the court, is to be charged with interest; not a legatee who has no further concern in the estate. *Gittins* v. *Steele*, 1 Swan. 199; 18 R. R. 57.

—— **Interim Income.**]—An executor who compels a legatee to refund can recover only the capital which he has paid to the legatee, without any intermediate income. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

b. By Executors.

Distinction between Creditors and Legatees.]—Executors may be discharged as against legatees, though not as against creditors, the former being bound by the terms of the will, the latter not. *Doyle* v. *Blake*, 2 Sch. & Lef. 239; 9 R. R. 76.

Personal Liability.]—A mortgage comes to an executor, who receives the mortgage money, and pays it away to his testator's creditors; afterwards it appears that the mortgage had been satisfied in the testator's lifetime; the executor must refund, though he had before paid the money away in debts which he had not otherwise assets to pay. *Powley* v. *Ray*, 1 P. W. 355.

Executor pays debts with money received under a decree which is reversed; he must refund; otherwise if the appeal is delayed. *Pickering* v. *Stamford* (*Lord*), 2 Ves. J. 582.

Payment to legatees is no answer to the claims of creditors, though no debt had arisen at the time of such payment. *Newcastle Banking Co.* v. *Hymers*, 22 Beav. 367.

—— **Costs.**]—If an executor administers the estate of his testator, and pays over the residue, so that no part can be recovered to answer a subsequent debt of the testator, he will not, as against appropriated legacies, be entitled to the costs of an action brought against him by the creditor, or of a proceeding necessary to establish the debt, or of any suit by him to make the appropriated legacies available for the payment of the debt. *Noble* v. *Brett*, 26 Beav. 233; 28 L. J., Ch. 322; 5 Jur. (N.S.) 4.

Annuity—Payments by Mistake—Recouping out of future Payments.]—A testator gave his property after the death of his wife to trustees on trust to pay the interest and profits to his two daughters J. and E., to their separate use, with a

direction to pay and apply for the benefit of A., the son of E., 200*l.* annually, when he attained the age of twenty-one years, and before that period such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will, to their children or grandchildren respectively, "except that proportion of principal given to E., and from which the interest is to arise to my grandson, namely, 4,000*l.*, which sum shall be my grandson's property"; and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children or grandchildren. The executrix having in mistake made payments to A., in respect of his annuity, for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorising her to retain them, and made upon petition after the decree had been passed and entered, is regular. *Livesey* v. *Livesey*, 3 Russ. 287; 6 L. J. (O.S.) Ch. 13. But see *S. C.*, on appeal, 3 Russ. 542; 7 L. J. (O.S.) Ch. 120.

Assets Lent by Executor to Residuary Legatee—Lien on Share.]—One of several residuary legatees, with the concurrence of the others, induces the executors to sell out stock forming part of the residuary estate, and to lend him the proceeds, on his executing to them a warrant of attorney and depositing certain title deeds, as a security, but without any express lien upon or reference to his share in the residue:—Held, that the executors had upon his bankruptcy a lien on the share. *Makins, Ex parte, and In re*, 2 Mont. D. & D. 508; 6 Jur. 468.

Co-Executors—Claim by one to Indemnity.]—E. N. bequeaths leaseholds to trustees for sale, to pay the proceeds to his widow for life, and after in trust for the children: one executor proves; and his co-executor, the solicitor of the testator, finding himself involved in intricate transactions in respect of the leaseholds, proves also, and institutes a suit, and claims indemnity against liabilities in respect of the trust:—Held, that under the circumstances he was justified in filing the bill, and was entitled to indemnity and costs of the suit. Semble, that the assent of one executor to specific bequests does not take away the right of the other to indemnity. *Turner* v. *Nicholls*, 1 W. R. 157.

—— **Contribution.**] — Where a debt is due from the estate of a testator, one of whose executors is dead, and the estate of such deceased executor is the subject of administration in chancery, and the creditor of the original testator has filed a bill to recover his debt, and has compelled the surviving executor to pay the whole amount into court, such creditor cannot, for the purpose of enforcing contribution between the two executors, prove his debt against the estate of the deceased executor. *Micklethwait* v. *Winstanley*, 34 L. J., Ch. 281; 11 L. T. 582; 13 W. R. 210—L.JJ.

A creditor is not bound to wait for payment of a debt proved by him in a suit until the equities between the several parties liable to him are adjusted. *Ib.*

And see RIGHT OF INDEMNITY, col. 1298, ante.

c. BY CREDITORS.

In General.]—The general rule of equity is, that all fair creditors stand in a situation equally favoured, and therefore if a subsequent creditor, by using due diligence, has contrived to receive his debt, the court will not interfere to oblige him to account for what he has so received, and refund it to a prior creditor. *Dillon* v. *Burton*, 3 Ridgw. P. C. 101.

Not to Pay Debts of Higher Degree.] — Where executor pays simple contract debts, there shall be no refunding to pay debt of a higher nature. *Hodges* v. *Waddington*, 2 Vent. 360.

Mistake—Funds in Court—Exclusion of Mortgagee.]—Where a fund, paid into court in a creditors' suit, has been distributed by mistake among specialty and simple contract creditors, to the exclusion of a mortgagee, a court of equity holds such creditors liable to repay, not in solido, but pro ratâ; and no creditor will be fixed with liability in respect of the ratable part which the mortgagee may fail to recover from a creditor who, since sharing in the fund, has become insolvent, or cannot be found. *Todd* v. *Studholme*, 3 Kay & J. 324; 26 L. J., Ch. 271; 5 W. R. 277.

Pursuant to a decree in a creditors' suit real estate was sold, and the purchase-money paid into court. In consideration of such payment, a mortgagee, who was not a party to the suit, but whose mortgage was noticed in the conditions of sale, executed the conveyance, but the fund was distributed among the other creditors without any payment being made to the mortgagee:—Held, upon a bill filed by his personal representative, that the latter was entitled to recover as follows—first, from the creditors who had been paid simple contract debts, the several sums paid to them, the total amount of such sums being less than the plaintiff's claim; secondly, from the only specialty creditor so much as might be necessary to satisfy what might remain due to the plaintiff for principal moneys and interest, after deducting the total amount of the moneys paid to the simple contract creditors, whether parties to this suit or not; and, thirdly, from the solicitors of the plaintiff in the creditors' suit whatever might be necessary to make good any deficiency arising by reason of some of the creditors becoming insolvent, or of others not being to be found or the like, it being the duty of such solicitors to see that the purchase-money paid into court was properly applied. *Ib.*

Held, also, that the purchasers, upon payment of the purchase-money into court, had discharged the only condition incumbent upon them, and were relieved from all responsibility as to its application. But the purchaser of the largest lot having allowed the title deeds to remain with the mortgtgee, the bill, as against him, was dismissed without costs. *Ib.*

Held, further, that although the mortgagee's solicitor was chargeable, as between his client and himself, with gross negligence in not placing a stop order on the fund in the original suit, his duties were dehors that suit in which the primary duties lay with the solicitors of the plaintiff, who had the distribution of the fund, and that in this suit he could not be made responsible. *Ib.*

Principles by which the court is governed in giving directions as to costs in a suit of this nature. *Ib.*

—— **Interest on Bond Debt—Deduction for Property Tax—After Six Years.**]—Executor of obligor of bond having by mistake paid debt and interest without making deduction for property tax provided for by bond, though six years had elapsed, held entitled to have it refunded. It would have been otherwise in case of the obligor himself having paid it. *Smith* v. *Alsop*, M'Clel. 623; 13 Price 823.

—— **Debit found against Alleged Creditor.**]—Where the plaintiffs in a creditors' suit turned out to have been overpaid, it was held that the court had jurisdiction to order the plaintiffs to bring in the sum by which they had been overpaid. *Graves* v. *Wright*, 2 Dr. & War. 77; 1 Con. & L. 267.

XIII. PROCEEDINGS BY OR AGAINST.

a. At Common Law.

1. When Maintainable.

a. *Actions by.*

Executor both Plaintiff and Defendant.]—A party cannot be both plaintiff and defendant in an action; and, therefore, when the plaintiff sued as executor, and the defendant pleaded that the promises were made jointly with the plaintiff:—Held, a good plea in bar. *Moffat* v. *Van Mullinger*, 2 Chit. 539; 2 Bos. & P. 124, n; 5 R. R. 557. S. P. in equity, *Miles* v. *Durnford*, 2 Sim. (N.S.) 234; 2 De G. M. & G. 641; 21 L. J., Ch. 667.

Before Probate or Letters of Administration.]—A person suing as executor, having admitted that he had not obtained probate of the will, the court in the exercise of its general jurisdiction to prevent an abuse of its process, stayed the proceedings until probate should be taken out, and reasonable notice thereof given to the defendant. *Webb* v. *Adkins*, 14 C. B. 401; 2 C. L. R. 702; 23 L. J., C. P. 96; 2 W. R. 225.

An executor may commence an action before probate because he derives his right from the will. But an administrator ought not to commence an action before letters of administration are granted, as he derives all his authority from the ordinary. *Woolrich* v. *Bishop*, 7 B. & C. 406; 2 Man. & Ry. 431, n.; 6 L. J. (O.S.) K. B. 101.

And an administrator cum testamento annexo cannot declare before administration is granted, any more than an ordinary administrator. *Phillips* v. *Hartley*, 3 Car. & P. 121.

—— **On Bill of Exchange.**]—A bill of exchange had been indorsed by a testatrix, who was the holder thereof, and paid into her bankers for collection in the usual course of business. Before the bill became due the testatrix died, and when it became due the plaintiffs, as her executors, demanded the return of the bill, or its value. The bankers refused to deliver up the bill, on the ground that the plaintiffs had not taken out probate, but said they were ready and willing to give up the bill to the plaintiffs on their production of probate. Whereupon the plaintiffs, before taking out probate, began an action against the bankers for delivery up of the bill, or its value, and for damages for its detention:—Held, that all proceedings in the action should be stayed as frivolous and vexatious, until the plaintiffs took out probate. *Tarn* v. *Commercial Banking Co. of Sydney*, 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

—— **Continuing Proceedings after Death of Plaintiff.**]—Where, after an order directing the trial of issues of fact before a jury, one of the plaintiffs died within fourteen days of the date fixed for the trial, on the application of his executors, undertaking to apply forthwith for probate, and to produce the same at the trial of the action if obtained, the court made an order continuing the proceedings. *Hughes* v. *West*, 13 L. R. Ir. 224.

On Suggestion of Death of a Sole Plaintiff.]—The provision continued in s. 137 of 15 & 16 Vict. c. 76, gives a right to the personal representative of a deceased sole plaintiff to enter a suggestion of the death of the plaintiff, and to continue the action only in those cases where the cause of action would before that act have survived to the representative, and he could have commenced an action in his representative character. *Flinn* v. *Perkins*, 32 L. J., Q. B. 10; 8 Jur. (N.S.) 1177; 7 L. T. 364; 11 W. R. 95.

For Debts due before Death.]—A. declared as administrator of B., stating that the defendant, in B.'s lifetime, was indebted to B. in money to be paid by him to B. on request. It was proved that B. had contracted with the defendant, in writing, to do certain works for him for 400*l.*, to be paid upon completion of the works. B. died before their completion; and A., before he had taken out letters of administration, agreed with the defendant to complete, and did complete, the works:—Held, that these facts did not support the declaration, inasmuch as the contract being entire, and the works unfinished at B.'s death, no debt accrued from the defendant to B. in B.'s lifetime; although the new agreement with A. amounted, as between him and the defendant, to a rescinding of the original contract, which would entitle A., as administrator, to sue on a quantum meruit in respect of the work done by B. *Crosthwaite* v. *Gardner*, 18 Q. B. 640; 21 L. J., Q. B. 356; 17 Jur. 377.

In an action, by an executor, for work done, it appeared that his claim was for extras incurred in making a machine for the defendant by the testator beyond what was contained in the agreement and specification. The plaintiff did not produce the agreement, which was unstamped, and in the hands of a third party, but proved that the defendant had ordered, and the testator executed additions and alterations, and also that the testator had told a witness that he had received money from the defendant on account of the extras. On this evidence the defendant claimed a nonsuit, but the judge allowed the case to go to the jury, who found for the plaintiff:—Held, the defendant was not entitled to a nonsuit; but the evidence being insufficient to justify the verdict, the rule was made absolute for a new trial. *Edie* v. *Kingsford*, 2 C. L. R. 832; 14 C. B. 759; 23 L. J., C. P. 123.

The property of an intestate was assigned to assignees previously to his death; the plaintiff administered, and applied to the defendant for payment for goods sold him by the intestate in the name of the assignees, and afterwards brought an action in his character of administrator:—Held, that such action was well brought. *Brandt* v. *Heatig*, 2 Moore, 184; 19 R. R. 558.

—— **On Promissory Note.**]—In 1833, the plaintiff married, at which time his wife was the holder of a promissory note made by the defendant, and which had been given to her whilst sole. In 1843 the plaintiff's wife died, after giving birth to a child. It was then agreed between the plaintiff (who claimed the note as the representative of his wife) and the defendant that the latter should maintain the child, and that in consideration the defendant should receive the rents of cottages which had been the property of the plaintiff's wife, and that he should also retain the interest which might become payable on the note. In 1839 the defendant signed an indorsement on the note, to the effect that all the interest on the note was then paid. The defendant continued to maintain the child to the time of its death in 1848. In 1853, letters of administration were granted to the plaintiff, and, subsequently, in the same year, he sued the defendant on the note:—Held, first, that the agreement between the plaintiff and the defendant, that the future maintenance of the child should be taken in part payment of the interest on the note, and which had been acted upon within six years before action brought, was a sufficient payment of interest within the proviso of the 2nd section of the 9 Geo. 4, c. 14. Secondly, that the contract being with a person acting on behalf of the intestate's estate and for its benefit, the administration had relation back to what was done after the death of the intestate and before the grant of letters of administration, so as to entitle the plaintiff to sue as administrator on a promise made to him as such. *Bodger* v. *Arch*, 10 Ex. 333; 2 C. L. R. 1491; 24 L. J., Ex. 19.

In respect of Personal Contracts.]—An engineer was appointed to construct certain works, which it was calculated would occupy fifteen months, and was to be paid for his services during that period 500*l.* by equal quarterly instalments. Shortly after the end of the third quarter he died, two of the quarterly instalments then remaining unpaid:—Held, that although his death put an end to the contract for the future, it did not divest the right of action for those instalments which had already accrued to him, and his administrator was therefore entitled to recover them, and not merely upon a quantum meruit for the value of the amount of the work actually done. *Stubbs* v. *Holywell Ry.*, 36 L. J., Ex. 166; L. R. 2 Ex. 311; 16 L. T. 631; 15 W. R. 869.

The defendant ordered a coat of T., a tailor; the coat was cut out and tacked together, and tried on the defendant by T., but before it was finished T. died; the coat was afterwards finished, and delivered by his widow and administratrix:—Held, that the value of the coat was recoverable upon a count for goods sold and delivered by the administratrix. *Warner* v. *Humphreys*, 3 Scott (N.R.) 226; 2 Man. & G. 853.

For Money received between Death of Intestate and Grant of Administration.]—An action for money had and received will lie by an administrator against a stranger, for debts due to the intestate, received by him between the time of the death of the intestate and the grant of administration, as well as for money arising from the sale of his goods. *Welchman* v. *Sturgis*, 13 Q. B. 552; 18 L. J., Q. B. 211; 13 Jur. 388.

Where money belonging to a testator had been received by the defendant after the testator's death:—Held, that his executor might maintain an action for money had and received in his own right. *Smith* v. *Barrow*, 2 Term Rep. 476.

French Law—Without Grant.]—The widow of a French subject became donee of the universality of the real and personal estates of the succession of her late husband, and as such, all his rights, by the law of France, vested in her, and she was entitled to enforce the same in her own name, and she became liable also to her late husband's liabilities. She was compelled to pay the amount of certain bills of exchange, of which her husband was drawer and the defendant acceptor, and recovered judgment against the defendant in France. In an action on this judgment:—Held, that she was not bound to take out letters of administration in this country previously to bringing her action. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

For Work done after Testator's Death.]—A., a coachbuilder, was employed up to his death by the defendant, a jobmaster; A.'s widow took out administration, and during two or three months, until her own death, did substantial repairs to carriages of the defendant on the intestate's premises and with his tools, all the materials employed being the intestate's except one shaft. On the widow's death A.'s daughter took out administration de bonis non to A.'s estate, and sued the defendant for the price of the work done by the administratrix:—Held, that the proper inference was that the first administratrix had carried on the business for the benefit of the estate, that the money recovered would therefore be part of A.'s assets, and consequently the action was rightly brought by the administratrix de bonis non. *Moseley* v. *Rendell*, 40 L. J., Q. B. 11; L. R. 6 Q. B. 338; 23 L. T. 774; 19 W. R. 619.

She having declared as administratrix of A., and alleged the work and materials to have been done and supplied to the defendant by her as such administratrix:—Held, that the declaration might and ought to be amended by stating her to be administratrix de bonis non, and the work, &c., to have been done by the first administratrix. *Ib.*

The executors of a baker carried on the business for about ten months under directions in the will, and during that time they supplied bread and flour to the defendant, but it did not appear that any of the materials had belonged to the testator:—Held, that as the money when recovered would be assets of the testator, they could sue as executors. *Abbott* v. *Parfitt*, 40 L. J., Q. B. 115; L. R. 6 Q. B. 346; 24 L. T. 469; 19 W. R. 718.

An administrator cannot sue in his representative character upon contracts made after the death of the intestate, in the course of carrying on the intestate's business. *Bolingbroke* v. *Kerr*, 35 L. J., Ex. 137; L. R. 1 Ex. 222; 14 L. T. 365; 14 W. R. 657.

A. agreed to do certain work, and died before the work was begun. His executors did the work, using the materials:—Held, in an action by the executors in their representative character, for work and labour done, and materials found, that the executors might recover the value of the materials. *Marshall* v. *Broadhurst*, 1 C. & J. 403; 1 Tyr. 348; 9 L. J. (O.S.) Ex. 105.

For Recovery of Specific Chattel.]—Where an executor seeks the recovery of a specific chattel, he must resort to law after he has obtained a discovery in equity. *Allen* v. *Smith*, Ridgw. 288.

In Respect of Breaches of Covenant.]—An executor may maintain an action for a breach of covenant in the lifetime of the testator, relating to the realty, if it is collateral. Semble, also, he may for a substantial breach in the lifetime of the testator of a covenant running with the land. *Raymond* v. *Fitch*, 1 Gale, 337; 2 C. M. & R. 588; 5 L. J., Ex. 45.

The executor of a tenant for life may recover for the breach of a covenant to repair, committed by the lessee of the testator in his lifetime, without averring a damage to his personal estate, *Ricketts* v. *Weaver*, 12 M. & W. 718; 13 L. J., Ex. 195.

—— **Agreed to be inserted in Lease—Lease never executed.**]—The tenant of business premises, covenanted by a deed of arrangement, made between himself and the administrator of his deceased partner, in whom the premises were vested, to accept a lease of the premises for a term at a rent named in the deed, and it was stipulated that the lease should contain a covenant by him to keep the premises in repair, and other covenants usual in leases of a like nature. He retained possession of the premises till his death, but was never called upon to execute a lease:—Held, that the administrator was entitled to rank as a specialty creditor in respect of his claim for rent and dilapidations in the same manner as if a lease had been executed in pursuance of the deed on the day of the date thereof. *Kidd* v. *Boone*, 40 L. J., Ch. 531; L. R. 12 Eq. 89; 24 L. T. 356.

As part of the same arrangement the tenant gave to the administrator a bond to secure part of a sum due from him to the partnership, and thereby bound himself, in case he should not punctually pay the instalments therein mentioned, to pay the remainder of the sum due. The instalments were not paid regularly:—Held, that the administrator was entitled to claim as a specialty creditor for the whole sum. *Ib.*

Against Legatees.]—Distribution of the estate by an executor with notice of a contingent liability does not preclude him from recovering the estate from the legatees in case the contingent liability afterwards ripens into actual loss. *Jervis* v. *Wolferstan*, 43 L. J., Ch. 809; L. R. 18 Eq. 18; 30 L. T. 452.

An executor, who allows a legatee of leaseholds to take possession, and is compelled at the suit of the landlord to pay rent which subsequently accrues due, is entitled to recover the amount from the legatee as money paid to his use. *Armstrong* v. *Swann*, Ir. R. 5 C. L. 297. *See also* REFUNDING, XII. *a*, ante, col. 1594.

Asportation of Property.]—A near relative of a deceased person being in the house at the death, removed some of his jewellery from one room to another. The executor having brought trespass for this asportation, the jury found that the defendant removed the goods bonâ fide for their preservation:—Held, that this was no answer to the action. *Kirk* v. *Gregory*, 45 L. J. Ex. 186; 1 Ex. D. 55; 34 L. T. 488; 24 W. R. 614.

Semble, per Bramwell and Amphlett, BB., that if the defendant had proved not merely that the interference was made bonâ fide for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner, this would have constituted a good defence. *Ib.*

Trespass de bonis asportatis is maintainable by an administrator for a trespass committed upon the goods of the intestate after his death, and before letters of administration granted. *Tharpe* v. *Stallwood*, 1 D. & L. 24; 5 Man. & G. 760; 6 Scott (N.R.) 715; 12 L. J., C. P. 241; 7 Jur. 492.

For Injury to Personal Chattels.]—A plaint by an administratrix, complaining of an injury to the personal chattels of the intestate is not sustained by proof of injuries to a building held by him as tenant from year to year, or to machinery firmly attached to the walls and floor by bolts and screws, in the nature of trade fixtures removable as between landlord and tenant. *Barnett* v. *Lucas*, Ir. R. 5 C. L. 140.

For Loss of Interest—Deposit by Deceased in part payment of Purchase-money—Breach of Contract.]—Where the vendor of an estate (the vendee having made a deposit in part payment of the purchase-money) fails to make out a good title by the time stipulated, and the vendee dies, the personal representative of the vendee, and not his heir, is entitled to maintain an action to recover damages for loss of interest on the deposit, and for expenses incurred by the vendee in endeavouring to procure a title, the injury accruing to the personal estate. *Orme* v. *Broughton*, 4 M. & Scott, 417; 10 Bing. 533; 3 L. J., C. P. 208.

Of Mortgagee—Covenant for Specific Bequest.]—An executor of a mortgagee cannot maintain an action of covenant for a specific bequest, although his co-executor has assented to the bequest, as the covenant with the mortgagee is collateral, and does not run with the land. *Canham* v. *Rust*, 2 Moore, 164; 8 Taunt. 227.

For Trover.]—In trover for goods of the testator, the executor must declare as such if the goods were in the possession of the executor. *Cockerill* v. *Kynaston*, 4 Term Rep. 280.

Wherever the produce of the goods would be assets, the executor may sue in trover in that character, whether the conversion happened before or after the testator's death. *Ib.*

Detinue.]—A. having died intestate, the defendant and B. took possession of his goods and divided them between themselves. Letters of administration having been subsequently obtained by the plaintiff, detinue was brought against the defendant:—Held, that the action was not maintainable as to the goods which B. had kept possession of, as they had not been in the defendant's possession after the grant of letters of administration. *Crossfield* v. *Such*, 8 Ex. 825; 22 L. J., Ex. 325; 1 W. R. 471.

For Trespass.]—An executor can maintain trespass for injury to a chattel real of his testator done in the testator's lifetime. *Hone* v. *Hamilton*, Ir. R. 9 C. L. 15.

—— **Against Sheriff.**]—An intestate died in August: her next of kin took out letters of administration in the same month, and went and lived in her house till the month of November, when the goods of the intestate in the house were seized under a fi. fa. against the adminis-

trator for a debt of his own :—Held, that an action lay against the sheriff by the administrator, in his representative capacity for this seizure. *Gaskell* v. *Marshall*, 5 Car. & P. 31.

For Damage to Estate arising out of Injury to Person.]—The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing, was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value :—Held, that the plaintiff could not sue in respect of damage to the intestate's estate arising as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. *Pulling* v. *G. E. Ry.*, 51 L. J., Q. B. 453 ; 9 Q. B. D. 110 ; 30 W. R. 798 ; 46 J. P. 617.

——**Breach of Contract causing Death.**]—Where a passenger on a railway was injured by an accident, and after an interval died in consequence : —Held, that his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Daly* v. *Dublin, Wicklow and Wexford Ry.*, 30 L. R., Ir. 514.—C. A.

A wife, in the lifetime of her husband, received during a journey as a passenger on a railway, a bodily injury, in consequence of the negligence of the company, by reason whereof her husband incurred expenses and suffered pecuniary loss, and on her husband's death, without having received any compensation for the damage thereby incurred, she, as his executrix, sued the company upon their contract safely and securely to carry, to recover compensation for such expenses and loss to her testator's personal estate :—Held, that the action was an action of contract, and that a loss or damage from the breach of the contract having accrued to the personal estate of the testator, an action to recover damages by reason of that loss survived to her as executrix, and that therefore the action was maintainable. *Potter* v. *Metropolitan Ry.*, 32 L. T. 36—Ex. Ch.

When a passenger on a railway was injured by an accident, and after an interval died in consequence :—Held, that his executrix might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. *Bradshaw* v. *Lancashire and Yorkshire Ry.*, 44 L. J., C. P. 148 ; L. R. 10 C. P. 189 ; 31 L. T. 847 ; 23 W. R. 310.

—— **Where prior Action.**]—Claim, stating that the plaintiff was administratrix of her husband, who, being a season-ticket holder, was received by a railway company at their station to be conveyed as a passenger, and by their negligence was injured, and in consequence unable to attend to his business from that day to the day of his death, and incurred expense. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased and the damage arising from it ; and stating that after his death the plaintiff, as his administratrix, for the benefit of herself, as his wife, and of his children, sued the railway company in respect of the injury caused to them by his death, and recovered damages. Reply, that the company was estopped from denying the facts relating to the accident, as in the previous action they had pleaded not guilty, and that her husband was not received by them as a passenger, and those issues were found by the jury in her favour :—Held, first, that the second action was not barred by the judgment and satisfaction under the first. *Leggott* v. *G. N. Ry.*, 45 L. J., Q. B. 557 ; 1 Q. B. D. 599 ; 35 L. T. 334 ; 24 W. R. 784.

Held, secondly, that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action. *Ib.*

Continuation of Action by.]—When an action is commenced in the name of a dead man, his representatives cannot be substituted as plaintiffs. *Clay* v. *Oxford*, 4 H. & C. 690 ; 36 L. J., Ex. 15 ; L. R. 2 Ex. 54 ; 12 Jur. (N.S.) 944 ; 15 L. T. 286 ; 15 W. R. 109.

For present practice, see PARTIES, XIII. *c.* post.

On Bill of Exchange for Accommodation of one of co-Executors.]—Bills of exchange were accepted by A. for the accommodation of B., who, being one of the executors of C., and having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in B.'s possession, discounted such bills with the moneys belonging to C.'s estate, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box :—Held, that B. could not sever his character of an accommodation holder of the said bills, from his character of executor, so as to enable him and his co-executors to sue as indorsees of the bills of exchange for a valuable consideration. —— v. *Adams*, Younge, 117.

Ejectment—Leasehold—Testator the Lessor.] —The executor of a lessor can maintain an action to recover possession of the lands comprised in the lease, though not suing in his representative capacity. *Mahony* v. *Mahony*, 30 L. R., Ir. 475.

Lease by Administratrix—Ejectment by—Administrator de bonis non.]—An administratrix made a lease, in 1854, of premises forming a portion of the intestate's assets, for a term of twenty-one years. The lease did not purport to be made by her in her representative capacity. The lessee admittedly went into possession under the lease, but never paid any rent. He continued in possession until 1883, when the administrator de bonis non of the intestate brought an ejectment for nonpayment of rent. The jury having found that the defendant had continued in possession on the terms of the lease :—Held, that the plaintiff (the administrator de bonis non) was entitled to a verdict for possession and arrears of rent. *Doyle* v. *Maguire*, 14 L. R., Ir. 24.

b. *Actions against.*

Not before Probate.]—No action can be maintained against a party as executor, until he has taken upon himself to act as such, or has proved the will. *Douglas* v. *Forrest*, 1 M. & P. 663 ; 4 Bing. 686 ; 6 L. J. (O.S.) C. P. 157 ; 29 R. R. 695.

In respect of Contracts.]—A contract to supply A. from 50 to 100 tons of slate, of certain

dimensions, monthly; also from 100 to 130 tons of blocks, of other dimensions, monthly, and any further quantity that he might require, not exceeding 200 tons per month; the contract to be in force to a certain time, unless previously cancelled by mutual consent, is a contract binding on his administrator, and not merely personal. *Wentworth* v. *Cock*, 2 P. & D. 251; 10 A. & E. 42; 8 L. J., Q. B. 230; 3 Jur. 340.

A contract with the plaintiff that he should endeavour to sell a picture belonging to A., and if he succeeded, A. should pay him 100*l.*; A. died. The plaintiff endeavoured to sell the picture, and after A.'s death succeeded in selling it, and brought an action against A.'s administratrix. The declaration set forth these facts, and alleged that the defendant confirmed the sale as administratrix, and the plaintiff claimed the 100*l.* from the defendant as administratrix:—Held, that the declaration was bad, and the defendant was not liable as administratrix or personally for the 100*l.*, the original authority having been revoked by A.'s death. *Campanari* v. *Woodburn*, 15 C. B. 400; 3 C. L. R. 140; 24 L. J., C. P. 13; 1 Jur. (N.S.) 17; 3 W. R. 59.

An action is maintainable against the executors of an innkeeper on his implied promise to keep safely and without diminution the goods of his guests. *Morgan* v. *Ravey*, 6 H. & N. 265; 30 L. J., Ex. 131; 3 L. T. 784; 9 W. R. 376.

A declaration stated that L., being possessed of land, agreed with M., an architect, that he should lay out the land for building purposes, and make surveys, &c.; that he should make no charge for the above services, but in the event of the land being disposed of for building purposes M. should be appointed architect on L.'s behalf, and the parties building should pay him a percentage on the outlay, provided they did not employ him as their own architect; but in the event of L. or his successors wishing to dispense with M.'s services, that he or they should remunerate him for his services in making the preparations. L. made the surveys, &c., and the land was not disposed of for building purposes, and L.'s executors dispensed with M.'s services, and put it out of their power to dispose of the land for building purposes, and thereupon M. claimed remuneration for the preparations:—Held, that he was not entitled to recover, the disposal of the land for building purposes being the event in which he was to have any remuneration; that even if the declaration could be taken as charging the executors with wrongfully putting it out of their power to dispose of the land for building purposes, no contract could be implied from the agreement that L. or they should not dispose of the land otherwise than for building, in which case M. was not entitled to anything. *Moffatt* v. *Laurie*, 15 C. B. 583; 24 L. J., C. P. 56; 1 Jur. (N.S.) 283; 3 W. R. 252.

Debt accruing after Death of Testator.]—An action of debt was maintainable against an executrix upon a cause of action accruing after the death of the testator. *Riddell* v. *Sutton*, 5 Bing. 200; 2 M. & P. 345; 7 L. J. (O.S.) C. P. 60; 30 R. R. 569.

On a Covenant.]—A., by voluntary conveyance, assigned to B. his furniture, in trust to the use of A., the settlor, for his life; and, at his death, in moieties to the use of his two nieces. Covenant by A., for himself and his executors, to do all reasonable acts for further and better assigning and transferring the furniture to B., on the same trusts as by B. or his counsel should be reasonably advised. A. was in possession of the furniture till his death. On that event his executor became possessed of and sold the whole. B. sued him as executor of A. on the covenant for further assurance, averring that it was at no time necessary to sell any of A.'s chattels to pay any debt of his, and that there were no creditors of his who could impeach the validity of the conveyance; and assigning by way of breaches that the executor refused to deliver the possession of the furniture to B.; and that the executor converted and sold the same, not alleging that he sold it in market overt:—Held, that B. was entitled to recover, at least on the last breach, the value of the furniture possessed by A., from the time of his executing the deed to his death, and afterwards sold by his executor, though trover might have been sustained for the same cause of action. *Ward* v. *Audland*, 16 M. & W. 862.

In an action on a covenant for non-payment of rent and for non-repair against an executor, it appeared that the testator had been appointed assignee under 1 Geo. 4, c. 119, s. 7, of an insolvent's estate, which consisted of the premises held under lease, and other property. The testator consented in writing to act as assignee, and an assignment to him from the provisional assignee was prepared and executed by the latter, but the testator did not execute the deed, although he let the premises and received the rent:—Held, that the executor of the deceased assignee was liable, as it did not appear that the insolvent court had appointed any other assignee of the insolvent estate. *Abercrombie* v. *Hickman*, 3 N. & P. 676; 1 W. W. & H. 534; 8 A. & E. 683; 7 L. J., Q. B. 269.

For Money had and received.]—In an action for money had and received, brought by the plaintiff as administrator of Jane V., against the defendant, as executor of Ann V., it appeared that Jane and Ann were sisters, Jane being the elder. The plaintiff's case was, that Jane had lent money to E., who gave his promissory note for the amount payable to Miss V. After the death of Ann, who survived Jane, the defendant, as the executor of the survivor, sued E. upon the note, alleging it to be payable to both sisters jointly, an alteration to that effect having, as it was said, been made in the note. E. settled the action and paid the amount of the note to the defendant:—Held, that the plaintiff could only support this action by affirming the act of the defendant in obtaining payment of a note payable to both sisters, but as he would have no right to receive payment of such a note, an action for money had and received would not lie. *Vaughan* v. *Matthews*, 13 Q. B. 187; 18 L. J., Q. B. 191; 13 Jur. 470.

For Contribution.]—Where several persons jointly contract for a chattel to be made or procured for the common benefit of all, and the executors of any party dying are by agreement to stand in the place of such party dying, although the legal remedy of the party employed would be solely against the survivors, yet the law will imply a contract on the part of the deceased contractor that his executors shall pay his proportion of the price of the article to be furnished. *Prior* v. *Hembrow*, 8 M. & W. 873; 10 L. J., Ex. 371.

Semble, that an action for contribution lies

against the representatives of a deceased contractor. *Batard* v. *Hawes*, 2 El. & Bl. 287; 22 L. J., Q. B. 443; 17 Jur. 1154; 1 W. R. 387.

By Creditor appointed Executor but who does not prove.]—If a debtor makes his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. *Rawlinson* v. *Shaw*, 3 Term Rep. 557; 1 R. R. 768.

Trover.]—Trover did not lie against an executor for a conversion by his testator. *Hambly* v. *Trott*, Cowp. 371.

In respect to Legacies.]—No action lies for a pecuniary legacy. *Deeks* v. *Strutt*, 5 Term Rep. 690. S. P., *Farish* v. *Wilson*, Peake, 103. And see *Southampton Corporation* v. *Graves*, 8 Term Rep. 593; 5 R. R. 480.

But an action lies against an executor to recover a specific chattel bequeathed after his assent to the bequest. *Doe* d. *Saye and Sele* (*Lord*) v. *Guy*, 3 East, 120; 4 Esp. 154; 6 R. R. 563.

An action lies against an executrix for a legacy upon a promise in consideration of assets; but if the action is brought against her personally in her own right, the judgment can only be de bonis propriis. *Hawkes* v. *Saunders*, Cowp. 289. S. P., *Atkins* v. *Hill*, Cowp. 284.

Where an executor agrees with a legatee to allow him interest on his legacy, if he will permit it to remain in his hands, it becomes a loan to the executor, for which he is personally responsible at law, and cannot plead plene administravit in bar to an action by the legatee. *Wasney* v. *Earnshaw*, 4 Tyr. 806.

In an action against executors (upon an account stated) for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. *Rose* v. *Savory*, 2 Scott, 199; 1 Hodges, 269; 2 Bing. (N.C.) 145; 4 L. J., C. P. 275.

E. bequeathed, subject to debts and legacies, the residue of his personal estate to his executors, to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins, T., W., and H., and the remaining as therein mentioned, and appointed M. his executor, who duly proved the will. M., having taken upon himself the execution of the will, called a meeting of the residuary legatees, at which H. was present, and exhibited an account charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay H., but was prevented from so doing. Another meeting was afterwards called, at which H. was not present, when the executor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and, amongst others, with having paid "cash for legacy duties." To this was appended a supplemental account, containing the following item:—"By cash retained for H., 179*l.* 10*s.*" In an action for money had and received, and on an account stated, brought by H. against the executor, to recover the amount of the legacy:—Held, that the action was maintainable. *Hart* v. *Minors*, 2 C. & M. 700; 4 L. J., Ex. 275.

An action does not lie for the amount of the plaintiff's distributive share of the personal estate of an intestate, admitted by the administrator to be in his hands. A fortiori it will not lie against the executor of such administrator, upon an admission made by the former, although the latter has expressly promised payment. *Jones* v. *Tanner*, 1 Man. & Ry. 420; 7 B. & C. 542; 6 L. J. (O.S.) K. B. 71.

Money retained outside Character of Executor.]—The plaintiff and three others, being residuary legatees under the will of P., the defendants, as the executors named in the will, accounted with them; and having paid to the latter the respective sums due to them thereon, took from them and from the plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands:—Held, that the money not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action. *Gregory* v. *Harman*, 1 M. & P. 209; 3 Car. & P. 205; 6 L. J. (O.S.) C. P. 56. See also *Moert* v. *Moesard*, 1 M. & P. 8. *Topham* v. *Morecraft*, 8 El. & Bl. 972; 4 Jur. (N.S.) 60; 6 W. R. 294.

Where an executor receives money to the use of another he is personally liable, and may be personally sued. *Waite* v. *Gale*, 2 D. & L. 925; 14 L. J., Q. B. 212; 9 Jur. 782.

For Wrongful Acts of Testator.]—A tenant for life of an estate, in 1868, leased a farm adjoining plantations in which yew trees were growing, and which the lessor reserved to himself. In March and September, 1869, sheep belonging to the lessee died from having eaten of the yew that protruded through the fence surrounding the plantations, and clipping of yew that had been thrown over the fence by the lessor's gardener. The lessor died in February, 1870; the tenant continued to hold the farm as the tenant of the trustees of the will by which the estate was settled. In September and October, 1870, four steers belonging to him got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, and died from eating yew there. A bill for the administration of the lessor's estate was filed in February, 1871, and the lessee brought in under the decree a claim against the executors for damages on account of the loss of his sheep and cattle so poisoned:—Held, that the claim for the losses which occurred in the lessor's life, if ever sustainable, was one in respect of an injury to property coming within 3 & 4 Will. 4, c. 42, s. 2, and was made too late. *Erskine* v. *Adeane*, *Bennett's Claim*, 42 L. J., Ch. 835; L. R. 8 Ch. 756; 29 L. T. 234; 21 W. R. 802.

An administrator is liable to an action for money had and received by the intestate for coal tortiously raised and taken by him from the plaintiff's land, if the intestate has sold it and received the money. *Powell* v. *Rees*, 7 A. & E. 426; 2 N. & P. 571; W. W. & D. 680; 8 L. J., Q. B. 47.

Where part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass for so much as was raised within six months, and also for money had and received for so much as was raised before; the acts being distinct, and therefore the two actions not being incompatible. *Ib.*

The executors are also liable in tort, the loss of the goods being a wrong committed within 3 & 4 Will. 4, c. 42, s. 2. *Ib.*

In trover against an executor, it appeared that the watch, which was the subject-matter of the action, had been given by the testatrix to S., in September, 1837; that S. re-delivered it to the testatrix in March, 1838, for the purpose of its being pawned by her; that, on its being demanded by the plaintiff, in December, 1838, the testatrix said that she would consult her solicitor; and that the testatrix died in March, 1839:—Held, that this was sufficient evidence to warrant the jury in finding a conversion within six months before the death. *Richmond* v. *Nicholson*, 8 Scott, 134; 9 L. J., C. P. 1.

—— Executor of Tenant for Life—Action against for Non-repair, by Remainderman in Fee.]—A devise of premises for life provided that the tenant for life should keep the premises in repair. The tenant for life entered upon and enjoyed the premises during her lifetime, but left them at her death out of repair. The remainderman in fee brought an action against the executor of the tenant for life in respect of the non-repair of the premises within the period of limitation prescribed by 3 & 4 Will. 4, c. 42, s. 2, which gives a right of action against the executor of a person deceased in respect of wrongs committed by the testator to another in respect of his property:—Held, that an action of tort in respect of the permissive waste by non-repair of the premises would have lain at common law against the tenant for life in her lifetime, and consequently lay under the above-mentioned statute against her executor after her death. *Woodhouse* v. *Walker*, 49 L. J., Q. B. 609; 5 Q. B. D. 404; 42 L. T. 770; 28 W. R. 765; 44 J. P. 666.

Expenses of Removal of Sunken Vessel—Liability under Local Act.]—Under a local act, commissioners were empowered, when a vessel had been sunk or stranded, if the owner should neglect or refuse, within a certain time, to raise it, to cause it to be raised, or if that could not be effected to blow it up, and to recover the expense in a summary manner from the owner. A vessel having sunk, her two partners did not raise her, so, by order of the commissioners, endeavours were made to raise her, and these proving ineffectual, she was blown up. After the attempts to raise, but before the blowing up, one of the owners died, and proceedings were taken against the survivor and the co-executor to enforce payment of the expenses, both of the attempts to raise the ship and to blow it up:—Held, that the order for payment of the expenses could not be made against the executor, but that it might be made against the co-owner. *Wilson* v. *Carter*, 7 L. T. 676; 11 W. R. 337.

Plene Administravit—Devastavit—Estoppel.]—A creditor of a testator having recovered judgment for his debt in an action against the executor after issue found in favour of the creditor on a plea of plene administravit, sued the executor in an action on such judgment, suggesting a devastavit:—Held, that the executor could not shew that the acts of waste complained of were committed by him before such judgment with the concurrence of the creditor, as that would amount to no assets as between him and the executor, and would therefore negative the judgment, which the executor was estopped from doing. *Jewesbury* v. *Mummery*, 42 L. J., C. P. 22; L. R. 8 C. P. 56; 27 L. T. 618; 21 W. R. 270—Ex. Ch.

b. OTHER PROCEEDINGS.

1. When Maintainable.

Executor both Plaintiff and Defendant.]—A., the surviving executor of B., filed a bill to set aside a mortgage of the assets made by C., the deceased executor of B. A. was also the representative of C.:—Held, that A. could not sever his character of representative of the original testator, in which he had title to sue, from that of representative of C., in which he could not sue, to set aside his testator's deed, and on this ground the bill was dismissed. *Miles* v. *Durnford*, 2 Sim. (N.S.) 234; 2 De G. M. & G. 641; 21 L. J., Ch. 667. S. P., *Moffat* v. *Van Mullingen*, 2 Chit. 539; 2 Bos. & P. 124, n.; 5 R. R. 557.

Before Probate or Letters of Administration—When Plaintiff.]—The rule that, in order to entitle a party to sue in any court in this country, whether of law or of equity, in respect of the personal rights of a testator or an intestate, he must appear to have obtained probate or letters of administration from the proper court in this country, is subject to this qualification, that he is suing in right of the deceased. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

Plaintiff entitles himself as administrator; defendant pleads plaintiff is not administrator; a good plea in abatement in equity, as well as in law. *Winn* v. *Fletcher*, 1 Vern. 473.

Though administration is not taken out till after the filing of the bill, yet if granted before a cause comes to a hearing in equity it is sufficient; otherwise at law, because there the defendant may crave oyer of the letters of administration. *Fell* v. *Lutwidge*, 2 Atk. 120.

Where an executor before probate files a bill, and afterwards proves the will, such subsequent probate makes the bill a good one. *Humphreys* v. *Humphreys*, 3 P. W. 351.

An executor filed a bill before probate; plea that he had not proved the will, allowed. *Simons* v. *Millman*, 2 Sim. 241; 6 L. J. (O.S.) Ch. 148. S. P., *Bourke* v. *Kelly*, 1 Hog. 172.

A decree cannot be obtained as to a sum due to a testator until the probate has been properly stamped. *Howard* v. *Prince*, 10 Beav. 313.

If an executrix sues in that character, she must produce probate, though she could make out her title as legatee of a lease for years. *Gleeson* v. *Cooke*, 1 Hog. 294.

Bill of revivor must shew that plaintiff has proved testator's will. *Humphreys* v. *Ingledon*, 1 Dick. 29. And see *S. C.*, 1 P. W. 752.

The plaintiffs sued as trustees of A., but omitted to prove his will, and the bill was dismissed. They afterwards presented a petition of rehearing, and moved for leave to exhibit interrogatories to prove the will, which was granted, the omission having arisen from the inadvertence of counsel, and the will not being the subject of dispute in the court. *Hood* v. *Pimm*, 4 Sim. 101; 9 L. J. (O.S.) Ch. 63.

A surviving husband, having mortgaged the reversionary share of his deceased wife in personal estate, died. Upon the death of the tenant for life the mortgagee petitioned the court; and in the proceedings on the petition a person was appointed by order of the court to represent the estates of the husband and the wife, there being

no legal personal representative of either. Upon evidence being produced that the commissioners of inland revenue would be willing to accept a sum equal to administration duty, as from an administrator of the wife, without the production of an actual grant of letters of administration, if succession duty was also paid; and the petitioner being ready to satisfy these demands the court dispensed with production of letters of administration. *Ranking, In re*, L. R. 6 Eq. 601.

Where a testator had contracted for the sale of leaseholds to a company, but died before payment of the purchase-money:—Held, that the executors could obtain an injunction to restrain the company before obtaining probate. *Newton* v. *Metropolitan Ry.*, 1 Dr. & Sm. 583; 8 Jur. (N.S.) 738; 5 L. T. 542; 10 W. R. 102.

Demurrer lies to a bill inter alia for a receiver till letters of administration granted, where no reason is shewn why they cannot be immediately taken out. *Jones* v. *Frost*, 3 Madd. 1.

An objection was taken to a bill by a husband for a legacy due to his late wife, that administration had not been taken out till after bill filed; the objection was overruled, partly because the administration had relation back to the time of the death; partly because, before taking out administration, the husband had an equitable interest. *Moses* v. *Leci*, 3 Y. & C. C. C. 359.

A bill having been filed by a party as administratrix who had not taken out letters of administration, the defendant pleaded that fact, and the plaintiff replied, and afterwards took out letters of administration:—Held, that the fact that administration was not granted to the plaintiff until after she had replied to the plea, did not preclude her from having a decree at the hearing. *Davies* v. *Coleman*, 3 Jur. 948.

In an administration suit by six infants against A. the executor, A. dies; and two of the plaintiffs, being then of age, procure administration to the testator, and they and the four infants file two supplemental bills alleging the fact of the administration, the letters not being in fact granted till some days after the filing of those bills. The administrators (defendants to the infants' supplemental bill) put in a plea that they were not administrators as alleged at the filing of the supplemental bills:—Held, that if administration be granted before hearing, it is sufficient. *Horner* v. *Horner*, 23 L. J., Ch. 10; 2 W. R. 47.

—— **Petition to Wind up by Executor.**]—The executor of a creditor of a company is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition. *Masonic and General Life Assurance Co., In re*, 55 L. J., Ch. 666; 32 Ch. D. 373; 34 W. R. 739.

When Plaintiff — For Indemnity against Judgment—Administration taken out to raise Case of Damage.]—The plaintiff being beneficially interested with others in an annuity or rent-charge issuing out of land, and secured by the covenant of the grantor, joined in a suit against the purchaser of the lands to whom they were conveyed expressly subject to the annuity, for the recovery of the arrears thereof; and in that suit recovered six years' arrears only, there being more due. The plaintiff then obtained administration to the grantor of the annuity, in order that she might become defendant in an action at law on the covenant. Such action was brought, and judgment by default was obtained against her for the arrears due beyond the six years: the damages and costs to be levied de bonis testatoris; et si non, the costs de bonis propriis. She then filed a bill against the purchaser, to be indemnified against the judgment:—Held, that her right to institute the suit depended upon the existence of damage which she had sustained or might sustain by the judgment, and therefore that she was bound to shew that there were assets out of which the judgment might be levied; and quære, whether she was entitled to relieve upon proof of the existence of assets, she having obtained administration to the covenantor in order to raise the case of damage of which she complained by her bill. *Byrne* v. *Duignan*, 3 Jo. & Lat. 116; 9 Ir. Eq. R. 295.

—— **Agreement to Compromise Action — Adoption by Administrator of Plaintiff—Right of Administrator to Enforce.**]—The plaintiff in an action having, at the instance of the defendant, consented to a compromise of the action, the plaintiff's solicitors suggested that the defendant should make an offer of a money payment in satisfaction of the plaintiff's interest in certain property which was the subject of the action. The defendant's solicitors asked the plaintiff to name a sum which he would accept. A few days later the plaintiff died intestate. His daughter thereupon instructed the plaintiff's solicitors to agree to a compromise of the action on payment by the defendant of 500*l.* The defendant's solicitors replied that the defendant would pay 450*l.* in discharge of all claims. This offer was accepted by the plaintiff's daughter. It was then arranged that a summons should be taken out by consent, staying all further proceedings in the action on the terms agreed upon. Shortly afterwards the defendant's solicitors stated that, the defendant having discovered the property to be less valuable than he originally believed, it was impossible for him to pay 450*l.* The plaintiff's solicitors declined, however, to vary the terms of the compromise. Letters of administration to the plaintiff's estate were subsequently granted to his daughter, and an order was made that the proceedings in the action should be carried on by her as plaintiff. A summons was then taken out, on behalf of the plaintiff, to stay all further proceedings in the action on the terms agreed upon. The defendant refused to consent to such summons:—Held, that the administration related back to the date of the death of the plaintiff intestate, and the plaintiff's daughter was entitled to enforce the agreement to compromise the action, although the same had been entered into before the grant of administration; that the evidence did not shew that there had been any repudiation of such agreement; and that therefore the order asked for by the summons must be made. *Baker* v. *Baker*, 55 L. T. 723.

until after his death. The banking company having filed a bill against his legal personal representative for an account, the defendants demurred, on the ground that the acts of A. were felonious, and therefore could not be made the ground of a suit in equity. The rule of public policy not applying, the demurrer was overruled, with costs. *Wickham* v. *Gatrell*, 23 L. J., Ch. 783 ; 18 Jur. 768 ; 2 W. R. 673.

—— **Suit against Co-executor for Debt to Estate.**]—When a person named executor, though he has not proved the will nor acted, has not renounced probate, he cannot be sued by his coadjutor at law for a debt due from him to the estate, and therefore he can properly be sued in equity. *Morley* v. *White*, 42 L. J., Ch. 880 ; L. R. 8 Ch. 731 ; 29 L. T. 822 ; 21 W. R. 828.

A person named executor, alleged to be a debtor to the estate, was made a defendant to a bill for administration, and answered it, stating that he had not acted, and purporting to disclaim. Afterwards he renounced probate, and on the bill being amended to state how he was indebted to the estate, he pleaded the renunciation :—Held, that he was originally properly made a defendant, and that the jurisdiction having once attached, still remained after the renunciation. *Ib.*

—— **For Tort of Deceased—Actio personalis.**]—By a decree in 1870 it was declared that H. and F., and the estate of their deceased partner, were liable to the plaintiffs for minerals taken by them under the plaintiffs' farm, and that H. and F. were liable to compensate the plaintiffs for user of all roads and passages under the farm, and inquiries were directed—1. As to the quantity of minerals taken and their value. 2. What quantities of minerals had been carried by the defendants through the roads or passages under the farm. 3. What, upon the result of the second inquiry, ought to be paid by the defendants as wayleave for the user of the roads and passages. 4. Whether the farm, and the mineral property of the plaintiffs under it, had sustained any and what damage by reason of the way in which the defendants had worked under the farm. Pending these inquiries F. died, and his executrix moved to stay proceedings under the second, third, and fourth inquiries :—Held, that the fourth inquiry must be stayed : but that, as the estate of F. had derived profit from the trespasses to which the second and third inquiries related, it was liable after his death, and that those inquiries must be prosecuted. But held, on appeal, that proceedings under the second and third inquiries must also be stayed, for that, apart from cases of breach of contract, a remedy for a wrongful act done by a deceased person cannot be pursued against his estate, unless property, or the proceeds or value of property, belonging to another person have been appropriated by the deceased person, and added to his estate. *Phillips* v. *Homfray*, or *Fothergill* v. *Phillips*, 52 L. J., Ch. 833 ; 24 Ch. D. 439 ; 49 L. T. 5 ; 32 W. R. 6. Extending 52 L. J., Ch. 401.

A client, in 1869, entrusted money to a solicitor to invest on mortgage of land, trusting to representations by the solicitor (who acted for both parties) that the property was of fee-simple tenure, and free from incumbrances. The mortgagor died in 1879, and the solicitor died in 1881, when the client discovered that part of the property was only leasehold for lives, and also that the solicitor held a prior mortgage on part of the lands. In an action to make the solicitor's estate liable for the deficiency of the security :—Held, that though on the evidence the solicitor would have had no defence to the action if brought in his lifetime, yet it was not maintainable against his executors. *Young* v. *Wallingford*, 52 L. J., Ch. 590 ; 48 L. T. 756 ; 31 W. R. 838.

There is no equity to maintain a bill against the representatives of a person who was accessory to a fraud, from which he derived no pecuniary benefit, merely on the ground that, if alive, he might have been answerable for costs. *Walsham* v. *Stainton*, 1 Hem. & M. 322.

—— **Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2.**]—A tenant for life of an estate, in 1868 leased a farm adjoining plantations in which yew trees were growing, and which the lessor reserved to himself. In March and September, 1869, sheep belonging to the lessee died from having eaten of the yew that protruded through the fence surrounding the plantations, and clipping of yew that had been thrown over the fence by the lessor's gardener. The lessor died in February, 1870 ; the tenant continued to hold the farm as the tenant of the trustees of the will by which the estate was settled. In September and October, 1870, four steers belonging to him got over a ditch, which happened to be nearly dried up, on to land in the hands of the trustees, and died from eating yew there. A bill for the administration of the lessor's estate was filed in February, 1871, and the lessee brought in under the decree a claim against his executors for damages on account of the loss of his sheep and cattle so poisoned :—Held, that the claim for the losses which occurred in the lessor's life, if ever sustainable, was one in respect of an injury to property coming within 3 & 4 Will. 4, c. 42, s. 2, and was made too late. *Erskine* v. *Adeane*, *Bennett's Claim*, 42 L. J., Ch. 835 ; L. R. 8 Ch. 756 ; 29 L. T. 234 ; 21 W. R. 802.

The plaintiff brought his action for damages and an injunction against the firm of T. & Co. for torts committed by the firm. The firm consisted of T. alone, who died more than six months after the commencement of action, and the action was continued against his executors : —Held, that T. having died more than six months after the commission of the acts complained of, no action, either for damages or injunction, could be maintained against his executors ; although the action had been commenced in the lifetime of the testator, and although the executors continued the business in the name of the firm. *Kirk* v. *Todd*, 52 L. J., Ch. 224 ; 21 Ch. D. 484 ; 47 L. T. 676 ; 31 W. R. 69—C. A.

—— **Light—Obstruction by Deceased Person completed more than Six Months before Death —Continuing Injury.**]—Where an actionable obstruction to ancient lights is continued by the obstructor down to his death, an action for damages lies against his executors or administrators under s. 2 of the Civil Procedure Act, 1833, though the obstruction was completed more than six months before his death. *Woodhouse* v. *Walker* (49 L. J., Q. B. 609 ; 5 Q. B. D. 404) followed. *Jenks* v. *Clifden* (*Viscount*), 66

L. J., Ch. 338 ; [1897] 1 Ch. 694 ; 76 L. T. 382 ; 45 W. R. 424.

2. Account.

The cases under 13 *&* 14 *Vict. c.* 35, *and* 23 *&* 24 *Vict. c.* 38, *s.* 14, *for taking accounts of the debts and liabilities of deceased persons without suit are omitted as obsolete. The enactments have been repealed, see* 46 *&* 47 *Vict. c.* 49, *s.* 3, *sched.*

Pending Litigation for Probate.] — Jurisdiction of a court of equity for an account of personal estate, and a receiver, pending a litigation for probate, though an administration pendente lite might be obtained in the Ecclesiastical Court. *Atkinson* v. *Henshaw*, 2 Ves. & B. 85. S. P., *Ball* v. *Oliver*, 2 Ves. & B. 96. *Watkins* v. *Brent*, 1 Myl. & Cr. 97 ; 7 Sim. 512 ; 5 L. J., Ch. 49. *Wood* v. *Hitchings*, 3 Beav. 504 ; 2 *Id.* 289 ; 10 L. J., Ch. 257 ; 4 Jur. 858.

A., the executor of the surviving executrix of the testator, obtains probate to her estate ; this is challenged by her next of kin and recalled, and pending that recall a suit is instituted for the administration of the estate of the original testator ; and upon the question whether a decree for account could be taken, treating A. as the legal personal representative of the original testator and his testatrix :—Held, that it could not, although, if the litigation in the Ecclesiastical Court was prolonged, means might be found to prosecute the suit. *Way* v. *Way*, 2 W. R. 395.

On demurrer to a bill filed by the assignee of a deceased insolvent, who had been discharged under the 53 Geo. 3, c. 138, against the personal representative of the insolvent :—Held, that the jurisdiction of equity to direct an account of the after-acquired property of the deceased in favour of the unsatisfied creditors, was not ousted by the provisions made by the above act for enforcing payment at law out of the after-acquired property. *Byrne* v. *Byrne*, Fl. & K. 435. Affirmed, 2 Dr. & War. 71 ; 1 Con. & L. 189 ; 4 Ir. Eq. R. 621.

The jurisdiction of the court of chancery cannot be taken away unless by express words. *Ib.*

Second Action — Fresh Evidence.] — After account taken and final decree in a cause instituted in the Court of Exchequer, in which the executors were plaintiffs for an account of assets, on an original bill in this court by one of the next of kin for an account against the executors, charging that the account under the decree in the exchequer was collusively taken, stating particular items of surcharge, and that some assets were subsequently received, as appeared by evidence newly-discovered :—Held, that the executors not having brought all the assets in their hands into account, is not such a fraud as will entitle the plaintiff to file an original bill after an account taken and final decree. It should have been a bill of review upon the newly-discovered evidence filed in the exchequer, and the receipt of assets subsequent to decree is matter of supplement. *Dolan* v. *Nevill*, 2 Moll. 494.

Generally.]—Distinction between the right to an account, and the right to the administration of a fund admitted to be in hand. *Kohler* v. *Reynolds*, 26 L. J., Ch. 415 ; 5 W. R. 422.

In the absence of any averment in the bill, the court will not, upon demurrer, assume that assets have come to the hands of an administrator without assuming also that they have been duly administered. *Ib.*

Infant Personal Representative.]—If letters of administration are granted to an infant, under which he receives and disposes of the assets of the intestate, an account cannot be directed in respect of his receipts during infancy. *Hindmarsh* v. *Southgate*, 3 Russ. 324 ; 27 R. R. 81. *And see* 1 L. J. (o.s.) Ch. 24.

Against one or more Personal Representatives.] —Bill for account cannot be filed against one co-executor only, either by a creditor or as residuary legatee. *Scurry* v. *Morse*, 9 Mod. 89.

Several executors, and some admit assets ; yet an account decreed against the rest. *Norton* v. *Turvill*, 2 P. W. 145.

An infant legatee sued for an account against the two executors ; one of them had not proved, and denied having received any assets ; the account was directed against both. *Price* v. *Vaughan*, 2 Anstr. 524.

A co-executor beyond seas need not be made party to a bill for account against the other. *Cowslad* v. *Cely*, 1 Eq. Abr. 73. Cp. *S. C.*, Pre. Ch. 83.

Against Representative of Accounting Party.] —Pending an account directed by the decree the accounting party died. An order was made, on motion to revive, against his executor, and that he might either admit assets or account for his testator's estate. *Cartwright* v. *Shepheard*, 20 Beav. 122.

Defendants, executors to their father, who was guardian in socage to plaintiff, ordered to answer for profits taken by him. *Burgh* v. *Wentworth*, Cary, 54.

A deed apportioning rent between A. and B., executed without any consideration or intention of bounty by A.'s agent, without authority, and in ignorance that the rent had been conclusively apportioned by a former deed, not enforced against A. But A., when afterwards apprised of his rights, obtaining from B. a settlement according to the former apportionment, and for several years after, during the life of B., paying the whole rent, without demanding contribution, not entitled, after the death of B., to an account against his assets ; as from A. being in active litigation with B. during his whole life, it was not to be presumed that the forbearance arose from kindness, but that A. knew, if he stirred his demand during B.'s life, he might have started some countervailing demand which B.'s representative had no means of setting up. A. entitled to contribution according to the former apportionment against C., the remainderman, from the death of B., when he went into possession ; also from a purchaser of part of the lands from the time of the purchase. *Stratford* v. *Aldborough*, Beat. 228.

Against Executor, where Business of Testator is carried on by some other Person.]—The widow of a testator carried on his business under a direction in the will that the executors should allow her to carry it on, and to have, while carrying it on, the use of the capital employed in it, and of his other personal estate. After her death, the plaintiffs, who had supplied her

with goods for the purposes of the business, filed a bill against the testator's personal representative, claiming a lien on the funds employed in the trade, and by their interrogatories asked for accounts of the testator's personal estate and of the personal estate employed in the business. The executor declined to set forth the accounts, on the ground that if it should be decided at the hearing that the plaintiffs had no such lien as they claimed the discovery would be useless: —Held, that the executor was bound to give the account. *Thompson* v. *Dunn*, L. R. 5 Ch. 573; 18 W. R. 854.

Where directed—Where Personal Representative is a Beneficiary.]—The plaintiff, being entitled to one-third of a residue, filed a bill against the defendants, the executrixes, who were entitled to the other two-thirds, for the usual accounts. The defendants' answer stated that the plaintiff had informed the defendants that she (the plaintiff) had possessed herself of part of the assets:—Held, that this suggestion (which was not proved) did not entitle the defendants to a cross account against the plaintiff. *Davies* v. *Peers*, 5 L. J., Ch. 123.

On a claim, filed by one of two administrators, who were respectively beneficially interested in the property, for an account of the rents of certain leaseholds received by the other administrator, and the appointment of a receiver, the court refused the appointment of a receiver, but ordered the account. *Scurrah* v. *Scurrah*, 14 Jur. 874.

—— **Where there has been a Submission to Account.**]—A., made defendant in an original suit, being out of the jurisdiction of the court, never appears to the bill, nor is he served with subpœna to answer; he dies abroad, and letters of administration are taken out to his estate, and the suit revived against his administratrix, who denies assets, but submits to account. On objection taken, that he was no party to the original suit, and that a bill of revivor was not the proper course:—Held, that, as his representative submitted to account, the decree could be made against his estate. *Collins* v. *Collins*, 11 L. J., Ch. 384.

—— **Where Assets Admitted.**]—Admission of assets prevents the necessity of setting forth accounts. *Pullen* v. *Smith*, 5 Ves. 21.

—— **Insufficient Admission of Assets.**]—A bill of revivor against the executor of a deceased party, prayed that he should either admit assets or for an account. The executor admitted assets sufficient to answer the plaintiff's demand, if any, he being advised that the plaintiff had not any demand against the assets:—Held, not a sufficient admission of assets, and that an account should be directed. *M'Tiernan* v. *Bell*, 3 Ir. Eq. R. 193.

To a legatee's bill the executor admitted assets sufficient to pay the legacies, but relied on his right to retain them as an indemnity for the contingent liability on the testator's covenants, and did not set out the amount of the assets:—Held, the answer was insufficient, and that the executor was bound to set out the amount of the assets. *M'Auley* v. *M'Auley*, 9 Ir. Eq. R. 142.

Executor unable to state whether houses, the rent of which he has been receiving as executor, are leasehold or freehold, not allowed to set up the title of the heir-at-law as between himself and the personal representative. *Freeman* v. *Fairlie*, 3 Mer. 35; 17 R. R. 7.

That the executor is uncertain whether part of the property is real or personal, and (if real) who are the persons entitled to it, does not afford him any ground for declining to set forth in answer to a bill by the personal representatives what he has done with the property. *Id.* 36.

—— **After Release.**]—Release expressing that administrator had received "all" testator's property, court will not assume that he has received anything since, so as to direct an account. *Taunton* v. *Pepler*, 6 Madd. 166.

—— **After Agreement not to take Proceedings.**]—An agreement by a creditor not to take proceedings against the debtor during his life, nor against the debtor's estate during the life of his wife, if she should survive him, construed (as to the latter clause) to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband; and, therefore, the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

—— **Where the Right to an Account is Disputed.**]—If an executor, knowing a plaintiff's title, by answer denies it, he is not bound to set out an account of assets; but if the title does not lie in his knowledge, he is, sed quære. *Sweet* v. *Young*, Ambl. 353.

Administrator disputing by his answer the fundation of the bill, viz., a balance of accounts against the intestate's estate, need not set forth an account of the personal estate, &c., by way of schedule. *Phelips* v. *Caney*, 4 Ves. 107. But see *Elmer* v. *Creasy*, 42 L. J., Ch. 807; L. R. 9 Ch. 69, 71.

Bill by cestuis que trustent against the representatives of a deceased trustee, to make his estate liable in respect of alleged breaches of trust, and asking that the defendants might admit assets, or set out accounts of the deceased's estate. The defendants did not admit assets; and denying the plaintiff's title to relief, refused to set out any account:—Held, that the plaintiffs were entitled to know whether there would be assets to satisfy their claim in case of success, and that the defendants were bound to set forth some account not in detail, but in an abridged and general form. *Cull* v. *Ingles*, 37 L. J., Ch. 385; 19 L. T. 183; 16 W. R. 477.

—— **As between Legatee Indebted and Testator's Estate.**]—Testator bequeathed an annuity to B., who was acting as collector of the rents of his leasehold estate. By a codicil, dated 1837, reciting that B. was in arrear in respect of such rents, testator declared that the annuity should not be payable until B. had settled with his executors from the date of that codicil, and paid the balance due, and that the first payment in respect of the annuity should be three months after payment of such balance. Testator died in 1845. B. did not send in his accounts till 1850, when he claimed a balance due to himself there-

upon. The executors rejected the accounts as unsatisfactory, and in particular as including an allowance of 450*l.* as commission for collecting, whereas they swore in their answer that they believed B. was to act gratis. B. being examined, swore that he had been promised the usual commission; but the accounts were somewhat suspicious, and only commenced in 1839. In May, 1850, B. filed his bill for the annuity, alleging that he could not make out better accounts without documents in defendant's possession:—Held, that, irrespective of the question whether an agreement had been made to allow B. a commission, and irrespective also of the question whether the production of accounts to the satisfaction of the executors was a condition precedent or subsequent to B.'s right to enjoy the annuity, the accounts between B. and the testator's estate ought to be taken by this court in this suit, inasmuch as the estate could not be properly cleared while the contingent claim to the legacy was suspended over it. *Brogden* v. *Merton*, 22 L. J., Ch. 1040; 17 Jur. 824.

—— **Other Cases.**]—Bill by a married woman for an account against an executor and trustee, charging him with wilful default, her husband and a solicitor acting for all the legatees having been present at, and consented to, what was practically, though not formally, a settlement of the account, and certain items which were objected to appearing to the court to be fair and reasonable, dismissed with costs, to be paid by her next friend. *Ibberson* v. *Warth*, 1 Jur. (N.S.) 440; 3 W. R. 230.

An executrix, the widow of the testator, who died in 1783, was, under his will, entitled during her widowhood to 400*l.* a year for the maintenance of herself and children, but only to 60*l.* a year for herself if she married again. She was appointed receiver of her children's fortune, and in 1791 she married B., but, concealing her marriage, passed her accounts as a widow on her death in 1794. B. administered to her and the testator, and passed his accounts in continuation of the widow's without acknowledging their marriage. All the children having attained their majority, disputed B.'s accounts, which were then referred to arbitration. Catherine, the eldest child, married before the award was made, and one of the arbitrators was a trustee of her settlement: her marriage was concealed from the court, and B. paid her husband sums which ought to have been paid to her trustees. In 1836 C. and her children filed a bill against B. and the trustee:—Held, that all the accounts should be taken again without regard to the award or to the accounts passed subsequently to the marriage of Catherine; that B.'s estate should be charged with the difference between the 60*l.* and 400*l.*, which his wife had received; and that the consideration of the liabilities of C.'s husband and of the trustee under her settlement should be reserved until the report. *M'Can* v. *O'Ferrall*, 8 Cl. & F. 30; West, 593.

Effect of a decree against administrator, entitling him to an injunction against the suit of a creditor, qualified by requiring an account of the assets, either by the answer or affidavit. *Gilpin* v. *Southampton* (*Lady*), 18 Ves. 469.

Account of mesne profits since title accrued decreed against executor, upon special ground that plaintiff was prevented from recovering in ejectment by rule of court of law, and by injunction at instance of occupier, who ultimately failed both at law and equity. *Pulteney* v. *Warren*, 6 Ves. 72; 5 R. R. 226.

What Items included—Profit on Investment.]—If an executor lay out the assets on private securities, all the benefit made thereby shall accrue to the estate; yet the executor shall answer all the deficiency, and the particular circumstances, of good conduct in the executor, cannot prevail against the general rule. *Adye* v. *Feuilleteau*, 1 Cox, 24.

—— **Assets received Abroad.**]—A creditor of a person who died intestate in India took out letters of administration to the deceased in that country. He then came to England, and obtained letters of administration from the Prerogative Court. Afterwards, one of the intestate's next of kin procured that administration to be revoked, and administration to be granted to himself:—Held, that the Indian administrator is compellable to account to him for assets possessed in India as well as in this country, in a suit instituted by him as personal representative only of the intestate, and to which the other next of kin, who were resident in India, were not parties. *Sandilands* v. *Innes*, 3 Sim. 263.

A suit cannot be instituted for an account of assets of a testator, possessed by an executor in Honduras, unless the will is proved here, or a sufficient reason assigned why it is not proved here. *Lewis* v. *Gentle*, 7 L. J. (O.S.) Ch. 43.

—— **Money paid over by Executor to other Persons.**]—Under a decree for an account, and applying personal estate in payment of debts and funeral expenses, and directing the clear surplus to be paid over, making to the parties all just allowances, the Master ought to allow payment in discharge of legacies. *Nightingale* v. *Lawson*, 1 Cox, 23.

Creditors cannot, on a bill filed by them, charge an administrator with sums received, when the sums so received have been paid over to persons appointed at a meeting of the creditors of the deceased. *Hindmarsh* v. *Southgate*, 3 Russ. 324; 27 R. R. 81; 1 L. J. (O.S.) Ch. 24.

Under a general reference to Master of just allowances the executor cannot be charged with over-payment from estate, though the court might make the charge. *Browne* v. *Spooner*, 1 Ves. J. 291.

—— **Amount of Rents of Real Estate wrongly paid to Deceased Person.**]—The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed she died. On a bill filed by the heir, against her personal representative, praying the delivery of title deeds, and an account, it was held, that the suit was maintainable for the rents received during her continuance in possession; that as the defence of the Statute of Limitations was not raised upon the pleadings, the account should be taken from the time when the plaintiff's title first accrued; and that the plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's

life interest, the plaintiff was devisee. *Moneypenny* v. *Bristow*, 2 Russ. & M. 117; 1 L. J., Ch. 88.

—— **Against Executor Partner with Deceased.**]—Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executor, though collusion between them is neither charged nor proved. *Cropper* v. *Knapman*, 2 Y. & Coll. 338; 6 L. J., Ex. Eq. 9.

—— **Against Executor de son tort, Partner with Deceased.**]—If a defendant answers, he must answer fully; he cannot refuse to answer as to part, on the ground that the plaintiff is not entitled to that portion of the relief sought. *Leigh* v. *Birch*, 32 Beav. 399; 9 Jur. (N.S.) 1265; 11 W. R. 554.

A plaintiff filed a bill for an account against a defendant in his character of executor de son tort, and also in his character of a surviving partner of the deceased:—Held, that he having answered, must answer fully, both in his character of executor and surviving partner. *Ib.*

In a suit for an account by the next of kin of a deceased partner against the surviving partner, who also filled the character of executor de son tort of the estate of the deceased partner:—Held, that the defendant, by submitting to answer the bill, rendered himself liable to set out not only the accounts of the estate so received by him, but also of the partnership dealings and transactions. *Ib.*

If he intended to object to answer the interrogatories as to the accounts of the partnership, he ought to have demurred to that part of the relief sought. *Ib.*

—— **Against Real Estate—Prayer for General Relief.**]—A bond creditor not having prayed an account of the testator's real estates in a suit for payment of his debt, he was held not entitled to such relief under the prayer for general relief. *Chapman* v. *Chapman*, 13 Beav. 308; 20 L. J., Ch. 465; 15 Jur. 265.

—— **Absence of Heir—Produce of Real Estate—Actual Receipt by Executor.**]—A testator directed his real estate to be sold by his Jamaica executors, and the produce remitted to A. and B., his English executors. B. and C. were the consignees and agents of the testator and of his executors. The assets, including 2,253*l.*, part of the produce of the real estate, were remitted from Jamaica to B. and C. on account of the executors in England, and the amount was entered to the credit of the estate of the testator. After the death of B., A. instituted a suit for an account of the receipts of B. and C., on account of the personal estate of the testator since his death, but the heir-at-law was not made a party. The bill specified the items of 2,253*l.*, which the answer stated to be the produce of the real estate. The decree directed an account of the dealings and transactions in the bill mentioned, and of the receipts of B. and C. on account of the testator's personal estate since his death; and the Master, in taking the accounts, charged C. with the 2,253*l.* The defendant C. obtained a rehearing of the cause, and excepted to the report, and contended either that the decree was wrong in authorising an account of the real estate in the absence of the heir, or that the Master had been wrong in including this item; but the court overruled the objection. *Pringle* v. *Crookes*, 7 Beav. 257.

—— **Limited Account.**]—There is no instance of an executor answerable only pro tanto, as having administered only partially. *Kilbee* v. *Sneyd*, 2 Moll. 201.

—— **Other Cases.**]—In a suit against defendants, who were the personal representatives both of a testatrix who died during coverture, and of her husband, praying an account of her separate estate; and a declaration that certain sums of stock which stood, and always had stood, in her name, constituted part of that estate; although the husband and his executors during a long period of years had uniformly acknowledged those sums to be, and dealt with them as being, part of her separate property; and although strong evidence was adduced by the plaintiff, which was not met by any evidence on the other side, yet the court refused to make the declaration at the original hearing, and only referred it to the Master to take the account generally, with special inquiries founded upon the evidence. *Hornby* v. *Hunter*, 1 Russ. 89. Affirmed, 5 Russ. 149.

In a suit by residuary legatees of A. against the personal representatives of B., who was the executor of A., for payment of a debt due from B. to A., the amount of which was not admitted, and also for an account of the personal estate of A.; praying also, unless assets were admitted an account of the personal estate of B., and, that being insufficient, seeking to charge his real estate:—Held, that the plaintiffs were not entitled to a declaration that a particular debt or sum constituted an item in the account to be taken; but that evidence tending to shew that the defendants should be charged with such particular debt or sum was admissible. *Tomlin* v. *Tomlin*, 1 Hare, 236.

Where an executor died insolvent after a sum had been reported due from him in an administration suit, and a supplemental suit was instituted against his personal representatives:—Held, that the decree in the latter suit ought to embrace the general administration of the executor's estate. *Cochrane* v. *Robinson*, 9 Sim. 377; 7 L. J., Ch. 266.

Executor bound to accumulate, cannot account as if the money had been laid out in the funds, if it was not so laid out, or being so, he had sold out an advance. *Raphael* v. *Boehm*, 11 Ves. 108. Affirmed 13 Ves. 407; 8 R. R. 95.

Trustees and executors under the will of a testator, who had directed them to invest a share of his residuary estate, either in the public funds or on mortgage, at 5 per cent., having admitted by their answer that they had from time to time balances in their hands, and it being proved that, many years after the death of the testator, they had not invested the share, either in the funds or on mortgage, inquiries will be directed at the original hearing concerning the balances retained by them, and the prices of 3 per cent. stock, at the several times when such balances were in their hands. *Hockley* v. *Bantock*, 1 Russ. 141.

After a perishable fund, part of a general residue had been for some time wrongfully enjoyed by the tenant for life, who was also

executor, the remainderman filed his bill for an account simply, though he had notice of the existence of such a fund as part of the residue, and the fact also appeared by the answer, and at the hearing the common decree for account was made. On further directions the court directed the perishable fund to be converted as from the date of the order only, but refused to make the tenant for life account for prior receipts, but the Lord Chancellor, on appeal, gave the accounts as upon a conversion made when the tenant for life proved the will. *Lichfield* v. *Baker*, 2 Beav. 481; 9 L. J., Ch. 291.

A father, administrator during minority of his daughter, who was executrix, and the residuary legatee of her grandmother's estate, agreed, that when she married plaintiff, she should have 800*l.*, which, in the settlement, was called a portion. Lord Hardwick refused to decree an account of the grandmother's estate, as she had been dead twenty years, but directed that the father's representative should account for his personal estate as to the 800*l.* only, and interest at 4 per cent. from the marriage. *Wood* v. *Briant*, 2 Atk. 521.

Under a decree for the administration of the estate of G., the plaintiff brought in his claim as a creditor, and a portion of his claim was disallowed; subsequently, after the distribution of the assets, the plaintiff paid other moneys on account of G.'s estate, and filed a bill against the residuary legatees for an account of what was due to him in respect as well of the disallowed portion of his original claim as of the moneys subsequently paid:—Held, that the plaintiff was entitled to have an account taken of what, if anything, was due to him. *Thomas* v. *Griffith*, 2 Giff. 504. Affirmed, 30 L. J., Ch. 465; 7 Jur. (N.S.) 465; 3 L. T. 761; 9 W. R. 293.

Interrogatories as to Accounts.]—A bill was filed against an executor to establish a lien on the testator's estate for administration and an account, and the usual interrogatories as to accounts were administered. The executor submitted that he ought not to answer as to the accounts till the lien was established:—Held, that he must answer at once, but that he need not go into minute details, and that a fair general account would be sufficient. *Thompson* v. *Dunn*, L. R. 5 Ch. 573; 18 W. R. 854.

In an administration action the persons beneficially entitled have a right to call upon an executor defendant before the hearing or the close of the pleadings to answer interrogatories, by which he is required to make discovery on oath of the accounts of the estate. This rule has not been abrogated or altered by the judicature acts and rules. Semble, that in such a case, if an account has been already rendered, it would be a sufficient answer to verify such an account. *Sutcliffe, In re, Alison* v. *Alison*, 50 L. J., Ch. 574; 44 L. T. 547; 29 W. R. 732.

Objection by one of several Persons entitled to an Account.]—One of several residuary legatees, or others entitled to an account, refusing to join as co-plaintiff, being satisfied with the account rendered without suit by the executor, or other accounting party, cannot object in a suit instituted by the rest, on the ground that the costs will have to come out of the residue, or common fund, because, if the account taken in that suit be surcharged, all would participate equally. *Lansdowne* (*Marquis*) v. *Beauman*, 1 Moll. 89.

One of several Plaintiffs bound by Settled Account.]—Where in a suit for an account of a testator's estate, one of the plaintiffs was bound by a settlement of accounts, made some time after the testator's death:—Held, that the other plaintiffs could not in a suit so framed carry the account further back than the date of such settlement. *Lambert* v. *Hutchinson*, 1 Beav. 277; 8 L. J., Ch. 196.

Order excluding Creditors.]—After order upon motion directing the preliminary inquiries as to the testator's estate, debts, &c., ordered that creditors who should not come in should be excluded the benefits of the order. *Trotter* v. *Walmesley*, 7 Beav. 264.

For Accrued Interest—At suit of Co-defendant after Decree.]—In a suit against the executrix and trustee of a fund, which the latter had invested in an improper security, and been ordered to restore, the court refused to make an order for the trustee to render an account of the interest received to the widow, who was tenant for life, as a decree between co-defendants, and no such case made by the pleadings. *Goodwin* v. *Clewley*, 2 Beav. 30; 3 Jur. 552.

Vouching.]—A sum of 27*l.* for wages due to the servants of a testator at his death, and another sum of 16*l.* for keeping a house, for the repairs of which the testator's estate was liable, were allowed to an executor in passing his accounts (under the circumstances of the case) on his own affidavit, and without vouchers. *Caton* v. *Rideout*, 19 L. J., Ch. 408; 15 Jur. 308.

Executor discharges himself by his affidavit, without voucher, when the amount of the item is under 40*s.*, and by his affidavit, with production of the voucher when above 40*s.*, saving all just cause of exception. That is sufficient proof, if no objection, and he will be restrained, on the application of the parties interested in the first instance, from proceeding by commission. *Bingham* v. *Clanmorris* (*Lady*), 1 Moll. 20.

Accounts recorded in the Court of Chancery in Jamaica, in a suit instituted against executors, who had proved the testator's will in that island, ordered, in a suit against them in England, to be taken under the 15 & 16 Vict. c. 86, s. 54, as primâ facie evidence of the truth of the matters therein contained, with liberty to the plaintiff to surcharge and falsify. *Sleight* v. *Lawson*, 3 Kay & J. 292; 26 L. J., Ch. 553; 5 W. R. 589.

Debt to Executor—Right of Suit after Account taken.]—If there be a decree for an account to which an executor is party, and the executor has a debt which he does not claim, but lies by, and the account is taken and perfected, he shall not bring a new bill for his debt, and put the estate to the charge; this being contrary to the trust reposed in him. *Cowper* v. *Cowper* (*Earl*), 2 P. W. 733.

After what Time—Against Personal Representative.]—Administration taken out in 1771. Distribution to certain extent made, but a large sum retained on fraudulent pretences. No

effectual measures were taken against the administrator till 1792; and that protracted in great measure by administrator's fault in court below till 1810:—Held, that notwithstanding lapse, administrator should be charged with full interest on sum remaining undistributed during the whole period of retention, with annual rests and costs incurred subsequent to original decree. *Stackpoole* v. *Stackpoole*, 4 Dow, 209.

An account was decreed against an executor after nine years, notwithstanding an account totted by a mutual friend of the plaintiffs and the defendant, and admitted by the plaintiffs in 1833, but not then examined by them or vouched by the defendant. *Purcell* v. *Cole*, 1 Longf. & T. 449.

Lapse of time will bar the right of the next of kin of an intestate to an account against an administrator. *Kohler* v. *Reynolds*, 26 L. J., Ch. 415; 5 W. R. 422.

—— **At Suit of Executors.**]—A testator, shortly before his death, said to the person who had for several years acted as his land agent, that he would make him a present of 300*l.*; and having been suddenly taken ill, he desired the agent to retain that sum out of a larger balance then in his hands. No third person was present at this declaration, and on the day after the testator died. The agent was also a solicitor, and acted as such, together with his partner, for the testator; and there was a suit pending against the latter in the Exchequer at the time of his death. After the testator's death, in 1831, the agent acted as the solicitor of the executors and made out for them an account of the testator's assets, in which the 300*l.* was treated as a gift by the testator in his lifetime to the agent, and the inventory returned by the executors contained a similar account of that sum. In 1832 the agent furnished an account to the executors, stating all the circumstances under which he claimed credit for the 300*l.*, and taking credit for it against the balance in his hands, and stating that he retained the residue of the balance to meet the costs due to him and his partner, the amount of which he was then unable to ascertain. That account was retained by the executors without objection. In 1839 they filed a bill against the agent, for an account of the sum due by him to the testator's estate:—Held, that the agent was not entitled to retain the 300*l.*, at the death of the testator, and that the executors had not, by acquiescence, precluded themselves from disputing his right to it. *Walsh* v. *Studdart*, 6 Ir. Eq. R. 161; 2 Con. & L. 423; 4 Dr. & War. 159.

See also LIMITATIONS, STATUTE OF.

Order for Accounts without Administration under Ord. XV. r. 1, Effect of.]—An order for accounts under Ord. XV. r. 1, without a decree of administration, made in an administration action, does not prevent a creditor of the estate from suing the executor or the executor from paying a debt due from the estate. *Barratt, In re, Whitaker* v. *Barratt*, 59 L. J., Ch. 218; 43 Ch. D. 70; 38 W. R. 59.

—— **Account on the Footing of Wilful Default.**]—A claim against an executor for an account, on the footing of wilful default, is not a "case of ordinary account" within the meaning of Ord III. r. 8, and consequently a summary order for such an account cannot be made under r. 1 of Ord. XV. *Bowen, In re, Bennett* v. *Bowen*, 51 L. J., Ch. 825; 20 Ch. D. 538; 47 L. T. 114.

3. Administration under Direction of Court.

(a) *Jurisdiction.*

Discovery of Assets before Probate.]—A bill may be brought against an executor for discovery of the personal estate before the will is proved, or during the litigation thereof in the Spiritual Court. *Dulwich College* v. *Johnson*, 2 Vern. 49.

Bill by an administrator for discovery of the personal estate; it is no bar to the discovery that the administration is litigated. *Wright* v. *Bluck*, 1 Vern. 106.

Where Interim Protection Claimed.]—A bill to protect a testator's estate until a legal personal representative has been appointed, and also to administer the estate, is irregular. It should be limited to the first object. *Overington* v. *Ward*, 34 Beav. 175. S. P., *De Feuchères* v. *Dawes*, 5 Beav. 110; 11 L. J., Ch. 394; 6 Jur. 594. *Rawlings* v. *Lambert*, 1 Johns. & H. 458.

Where suit Collusive.]—In an administration suit, a party, interested in the residue, by his answer averred that, according to his information and belief the suit was collusive, as between the plaintiff and the executors and other parties; there being no replication, the allegation was taken as proof of the fact: and it was held, that the fact was no objection to the making of the decree. *Humble* v. *Shore*, 3 Hare, 119.

Within a Year after Death.]—The court may order administration of an estate before the expiration of a year from the death of the testator. *Tennant, In re, Prosser* v. *Mossop*, 29 W. R. 439.

A next of kin may bring an action for administration of the intestate's personal estate within a year from the intestate's death. *Wallis* v. *Wallis*, 9 L. R., Ir. 511.

Where the Deceased was a Lunatic so found.]—Bill to administer the estate of a deceased person found lunatic by commission, and for an account of the dealings of the defendants with his estate from the date of the lunacy till his death, alleging fraud. Demurrer by the defendants, who were the executors and trustees of a will made before the lunacy, and also committee and surety under the commission that the proper jurisdiction was in lunacy. Overruled with costs. *Scammell* v. *Light*, 4 Giff. 127; 1 N. R. 83; 5 Jur. (N.S.) 1122; 7 L. T. 414; 11 W. R. 83.

Scotch Assets—Testator domiciled in Scotland.]—A testator domiciled in Scotland, and possessed of a large personal and some heritable property in Scotland, and of a comparatively small personal property in England, by will made in Scotch form appointed several persons to be executors and trustees, some of whom resided in England and some in Scotland. The trustees obtained a confirmation of the will in Scotland, and the confirmation was sealed by the English Court of Probate under 21 & 22 Vict. c. 56. An infant legatee, resident in England, brought by his next friend an action here to administer the estate, and the writ was served upon some of the trustees in England, and, under an order, upon the Scotch trustees in Scotland. The trustees appeared without protest, and took no steps to discharge the order, but obtained an

order of reference to inquire whether the further prosecution of the action would be for the benefit of the infant plaintiff; upon which an order (not appealed from) was made for the further prosecution of the action. The trustees removed all the English personalty into Scotland before the action came on for trial:—Held, that the English court had jurisdiction to administer the trusts of the will as to the whole estate, both Scotch and English; and that as no proceedings were pending in a Scotch court (if such were possible) by which the interests of the infant plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was a matter of course. The dicta of Lord Westbury in *Enohin* v. *Wylie* (10 H. L. Cas. 1) disapproved. *Ewing* v. *Orr-Ewing*, 53 L. J., Ch. 435; 9 App. Cas. 34; 50 L. T. 401; 32 W. R. 573—H. L. (E.)

Where the probate division of the High Court of Justice has granted a general probate of the will of a testator domiciled in Scotland, the chancery division will make the ordinary decree for the administration of the personal estate of the testator, without limiting it to the English assets, and notwithstanding the opposition of a majority of the executors. *Stirling-Maxwell* v. *Cartwright*, 48 L. J., Ch. 562; 11 Ch. D. 522; 40 L. T. 669; 27 W. R. 850.

Administration of Estate of Intestate in Newfoundland—Decree of Colonial Court—Res Judicata.]—Demurrer for want of equity to bill for administration of the estate of an intestate which was the subject of a suit in Newfoundland; from the decree in which suit an appeal was about to be brought to the privy council. *Henderson* v. *Henderson*, 3 Hare, 100.

See also INTERNATIONAL LAW.

Rules of 1883 — Pending Proceedings.]—An administration action was commenced in December, 1882, by an executrix and beneficiary. Pleadings were delivered, from which it appeared that there were several questions between the parties; but it was ultimately arranged that a general administration decree should be taken, upon admissions in the defence, according to agreed minutes, and notice of trial was given on 2nd October, 1883. Upon the case coming on as a short cause upon motion for judgment, North, J., refused to make the proposed decree in face of the provisions of Ord. LV. r. 10, of the rules of 1883, merely because the action had been commenced before they came into operation, and he directed a reference to chambers to inquire whether, under the circumstances of the case, a general administration of the testator's real and personal estate should be ordered. *Llewellyn, In re, Lane* v. *Lane*, 53 L. J., Ch. 602; 25 Ch. D. 66; 49 L. T. 399; 32 W. R. 287.

—— **Discretion—Limited Accounts and Inquiries.**]—A direction by a testator that his executors shall take proceedings to have his estate administered by the court, does not deprive the court of its discretion to refuse to make an order for administration; but weight ought to be given to such a direction in considering whether the order shall be made. Where such a direction had been given, an order was made in chambers, on the application of one of the executors, more than a year after the death of the testator, declaring that the estate ought to be administered by the court, and directing an inquiry of what the estate then consisted. The defendants (the other executor and a party beneficially interested) moved to discharge this order, on the ground that an order for administration was unnecessary and would cause great and useless expense. North, J., refused to discharge the order, and his decision was affirmed by the Court of Appeal, who expressed their approval of the limited form in which the order was made. *Stocken, In re, Jones* v. *Hawkins*, 57 L. J., Ch. 746; 38 Ch. D. 319; 59 L. T. 425—C. A.

A party interested in the estate of a deceased person, even though that party be an infant, is not entitled, as a matter of course, to an administration judgment at the expense of the estate. Having regard to Rules of Supreme Court, 1883, Ord. LV. r. 10, a party interested is only entitled to an administration judgment where there are questions which cannot be properly determined except by an administration action; but the court has power under that rule to order a limited administration only, that is, to direct particular accounts and inquiries, if it sees that the question can thus be properly determined, the object of the rule being to prevent general administration except in cases of necessity. *Wilson, In re* (infra), considered. *Blake, In re, Jones* v. *Blake*, 54 L. J., Ch. 880; 29 Ch. D. 913; 53 L. T. 302; 33 W. R. 886—C. A.

Infants were entitled under a will to legacies amounting together to 35,000*l.*, and they were also together entitled, in remainder, subject to the life interests therein of four persons, to seven elevenths of the residuary estate. An originating summons was taken out under Ord. LV. r. 4, by one of the tenants for life and the infants, asking for the administration of the testator's estate. The summons was supported by one of the trustees, but was opposed by the other trustees and all the beneficiaries other than the plaintiffs:—Held, that, notwithstanding the discretion given to the court by Ord. LV. r. 10, the infants were entitled to an order for administration, but that the court had power to direct only such accounts and inquiries to be taken and made as were absolutely necessary for their protection. *Wilson, In re, Alexander* v. *Calder*, 54 L. J., Ch. 487; 28 Ch. D. 457; 33 W. R. 579.

Letters of Administration—Stamp.]—Where an administrator brings an action to administer the estate of a deceased person claiming a considerable amount as due to his estate, and the letters of administration are stamped for a nominal amount only:—Held, that this is not a bar to the action. *Rowe, In re, Jacobs* v. *Hind*, 60 L. T. 596. See *S. C.* in C. A.

In Bankruptcy — Insolvent Estate — Debtor resident Abroad for more than Six Months prior to Decease.]—By s. 125, sub-s. 1, of the Bankruptcy Act, 1883, "any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy," and by sub-s. 10, "unless the context otherwise requires, 'court' in this section means the court within the jurisdiction of which the debtor resided or carried on business for the greater part of the six months immediately prior to his decease":—Held, that the context referred

to in sub-s. 10 was not limited to the context in s. 125, but embraced the whole act. Where, therefore, a debtor, who was a domiciled Englishman, had resided for more than six months immediately prior to his death at Mayumba in Africa, where he carried on his business, and where he died:—Held, that the London court of bankruptcy had jurisdiction to make an order for the administration of his estate under s. 125 of the act, by reason of the provision in s. 95 that if the debtor against whom a bankruptcy petition is presented is not resident in England, the petition is to be presented to the High Court. *Evans, Ex parte, Evans, In re*, 60 L. J., Q. B. 143; [1891] 1 Q. B. 143; 64 L. T. 242; 39 W. R. 98; 7 Morrell, 297—C. A. *See also* (c) ii., post, col. 1662.

—— **Transfer from Chancery Division to Court of Bankruptcy.**]—The power given by the Bankruptcy Act, 1883, s. 125, sub-s. 4, to transfer the administration of an insolvent estate from the Chancery Division to the Court of Bankruptcy, is a discretionary power, and not a power which the judge is bound to exercise whenever the estate is shewn to be insolvent. The circumstance that the executor has a right of retainer and a liberty not to plead the Statute of Limitations to a debt, which rights would be recognised in the Chancery Division, but might be taken away by a transfer to the Court of Bankruptcy, is not a ground for the transfer. *Baker, In re, Nichols* v. *Baker*, 59 L. J., Ch. 661; 44 Ch. D. 262; 62 L. T. 817; 38 W. R. 417—C. A.

In County Court—Jurisdiction.]—The county courts have power, under the County Courts Equitable Jurisdiction Act, 1865 (28 & 29 Vict. c. 99), to entertain administration suits instituted by the assignees and representatives of next of kin, and of the other classes of persons specified in s. 1, sub-s. 1, of that act. *Turner* v. *Rennoldson*, 42 L. J., Ch. 510; L. R. 16 Eq. 37; 28 L. T. 330; 21 W. R. 558.

—— **Discretion as to Exercise of.**]—A person interested in the estate of a deceased person is not entitled as of right to an administration order in a county court, the combined effect of Ord. VI. r. 6, and Ord. XXII. r. 11, of the County Court Rules, 1886, being to place the granting of such order within the discretion of the county court judge. *Pearson* v. *Pearson*, 56 L. T. 445.

—— **To Restrain Proceedings.**] — Notwithstanding that, by Ord. I. r. 8, of the County Court Orders in Equity, 1865, a decree cannot be made till a month after the plaint has been filed, a county court judge has not jurisdiction under Ord. XII. r. 1, of the County Court Orders in Equity, 1865, in a creditor's administration suit, before decree, or on an ex parte application, to restrain a creditor's action commenced previously to the institution of the suit. *Nokes* v. *Gandy*, 43 L. J., Ch. 276; L. R. 17 Eq. 297; 29 L. T. 828; 22 W. R. 293.

—— **Further Proceedings in Aid of—Discretion as to Carriage.**]—Where in the course of an administration suit, outside proceedings have to be brought, the county court judge has power to direct by whom such proceedings are to be taken. The personal representatives of the testator whose estate is to be administered, if his conduct is unimpeached, is primâ facie the person to have carriage. *McKinlay* v. *Mackey*, [1895] 1 Ir. R. 302.

Ord. XXXVI. r. 9, of the County Courts (Ireland) Orders, 1890 [the language of which is practically identical with Ord. LI. r. 11, of the English County Court Rules, 1889], is not limited to a suit in existence at the time of making the order for carriage of proceedings, but extends to any proceedings which may have to be instituted in the course of an administration suit, and for its furtherance. *Ib.*

—— **Transfer from.**]—A plaint in a county court for the administration of an estate, stated that the value of the property did not exceed 500*l.* At the hearing, an application, of which notice had been given, was made by the defendant that the plaint might be struck out, on the ground that the estate exceeded 500*l.*; and the court had consequently no jurisdiction. The judge, after hearing evidence in proof of the excess of value, ordered the suit to be transferred to the Court of Chancery:—Held, that the suit was in progress within the County Court Act, 1865, s. 9, and the value of the property appearing to be under 700*l.*, directions were given that the suit should be proceeded with in chambers, as upon an administration summons. *Birks* v. *Silverwood*, L. R. 14 Eq. 101.

(b) *Practice.*

Intituling Writ.]—The writ of summons in an action for administration ought to be entitled in the matter of the estate. *Eyre* v. *Cox*, 24 W. R. 317.

Action or Summons—Under 15 & 16 Vict. c. 86.]—Practice of the court in granting or refusing the common administration decree, upon summons, in cases involving complicated questions. *Rump* v. *Greenhill*, 20 Beav. 512; 24 L. J., Ch. 90; 1 Jur. (N.S.) 123; 3 W. R. 51.

Where a married pecuniary legatee took out a summons in chambers for administration of the testator's real and personal estate (the summons being afterwards confined to the personalty), and the husband was not served or made a party to the summons, and the evidence that he was either dead or out of the jurisdiction was insufficient, the summons was dismissed as being, under the circumstances of the case, an inconvenient mode of administration. *Lesiter* v. *Camm*, 14 L. T. 97; 14 W. R. 472.

Where a bill was filed for the administration of a testator's estate, and sought to charge the representative of the testator's executrix, on the balance of an account, and such representative had offered to pay a sum in full, but had refused to account; and there was a question on the construction of the will to be decided:—Held, that the suit was properly instituted by bill, and that the case was not one for an administration summons, under s. 45 of the 15 & 16 Vict. c. 86, and therefore that the plaintiff was entitled to his costs. *Smith* v. *Spilsbury*, 1 Dr. & Sm. 151; 8 W. R. 596.

The court has jurisdiction under the 45th section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, to entertain an application, by a beneficiary under the will of a married woman, made under a power contained in a deed, for a summons, requiring the executors named therein to shew cause why an order for

the administration of the personal estate of the testatrix should not be made. *Sewell* v. *Ashley*, 3 De G. M. & G. 933. *S. C.*, 10 Hare (App.) lxvii.; 22 L. J., Ch. 659; 17 Jur. 269.

A married woman, having under a will an absolute power over a fund, made a will whereby she appointed it specifically to trustees upon trust for A. for life, with remainders over; and made a residuary gift to the same trustees upon certain trusts. One only of the trustees proved the will:—Held, that the court had jurisdiction under 15 & 16 Vict. c. 86, s. 45, to make an order upon summons by A. for administration of the estate of the married woman. *Berkeley, In re, Berkeley* v. *Mason*, 44 L. J., Ch. 554; L. R. 19 Eq. 467; 23 W. R. 687. But see *Newbery, In re, Allcroft* v. *Farnan*, 10 W. R. 378.

A creditor's summons was taken out in chambers in a cause. Upon the return of the summons, the chief clerk, finding that he had no jurisdiction, adjourned the summons into court at the suggestion of all parties, to come on with the cause upon further consideration:—Held, that the application by summons was regular, but that it ought to have been referred to the judge in chambers, and not adjourned into court. *Halliley* v. *Henderson*, 4 Jur. (N.S.) 202.

An order was made against an executor, in chambers, for taking the accounts, under the 15 & 16 Vict. c. 86, s. 45. The executor insisted on a release:—Held, that there being no jurisdiction to set aside the release on summons, the order was irregular. *Acaster* v. *Anderson*, 19 Beav. 161; 24 L. J., Ch. 437; 3 W. R. 156.

Where an inquiry as to personal estate was directed in a suit, commenced by administration summons, and a question arose, in the course of such inquiry, whether there was a binding agreement for a settlement, which it became necessary to determine, in order to ascertain what the personal estate consisted of, and the chief clerk determined that question, and this finding was objected to as being ultra vires:—Held, that the chief clerk had power to decide the question, it being necessary to do so to carry out the inquiry. *Wadham* v. *Rigg*, 2 Dr. & Sm. 78; 8 Jur. (N.S.) 206; 6 L. T. 180; 10 W. R. 365.

In a suit commenced by summons, the court may decide questions between parties entitled to the residuary estate, if those questions are founded upon the decree, but it cannot go out of the decree; and if that did not extend beyond estate not specifically bequeathed, the court cannot determine nor direct inquiries as to the question of conversion of leaseholds, involving the assumption of their being specifically bequeathed. In such a case, under a decree made on a summons, as well as on bill, if the decree is insufficient it must be reheard. *West* v. *Laing*, 3 Drew. 331; 4 W. R. 1.

In an administration suit, commenced by summons, the chief clerk certified that the testatrix had contracted to sell a house and furniture, that the executors had completed the contract by an assignment of the property, and that they had in such assignment included another house, without having received any additional consideration. On the cause coming on upon further consideration, an attempt was made to charge the executors with a breach of trust in respect of the house:—Held, that this could not be done in a suit commenced by administration summons, but offered to direct an inquiry as to the value of the house. *Delevante, In re, Delevante* v. *Child*, 6 Jur. (N.S.) 118; 1 L. T. 397.

Two executors and trustees under a will which directed a general conversion, sold and realised a large amount, which was received by one by the direction of both. The one who undertook the sole management of the estate became bankrupt, and a great loss occurred. A suit was instituted by summons in chambers, and under the common decree it was sought on summons to charge the non-acting executor and trustee with two surcharges, on the ground of constructive receipt. Summons dismissed, with costs, on the ground that such a surcharge could not be made in such a form of suit. *Peterson* v. *Peterson*, 16 L. T. 377.

An executor may be deprived of his costs of suit upon a decree made on an administration summons and without a bill charging him with misconduct. *King, In re, Gilbert* v. *Lee*, 34 Beav. 574; 11 Jur. (N.S.) 899; 12 L. T. 818; 13 W. R. 1012.

—— **As against the Crown.**]—When three suits were instituted for the administration of the estate of an intestate, and the Crown, who claimed the property, was defendant in all, two of them being by bill and one by summons:—Held, that such a suit could be properly instituted against the Crown by summons, and a decree was made in all three suits. *Polini* v. *Gray*, 22 W. R. 255.

—— **Service of Summons.**]—Under 15 & 16 Vict. c. 86, s. 45, the only person to be served with the summons is the executor or administrator of the deceased; but the court has power to direct service of the order upon other persons with the like effect, as when service of a decree is directed under s. 42. *Berkeley, In re, Berkeley* v. *Mason*, 44 L. J., Ch. 554; L. R. 19 Eq. 467; 23 W. R. 687.

—— **Under Order LV.**]—In 1867 T. P. mortgaged an estate to L. and A. for 1,000*l.*, and at the same time E. P. and C. P. gave to L. and A. a joint and several bond in the penal sum of 400*l.* reciting that the 1,000*l.* had been advanced at the request of E. P. and C. P., and that they had agreed to give as a better security for part thereof, a bond conditioned for payment of 200*l.* and interest. The bond was conditioned to be void if the mortgagor paid the mortgage-money and interest according to his covenant. T. P. paid the interest till December, 1877, after which it fell into arrears, and in 1880 the mortgagees entered into possession. E. P. died in 1883 without having made any payment or given any acknowledgment. L. and A. as creditors under the bond, took out a summons for administration of his estate. E. P.'s representatives disputed the claim on the ground that this was a proceeding to recover money secured on land, and was barred by the lapse of twelve years under the Real Property Limitation Act, 1874. Bacon, V.-C., without giving any opinion on this question, dismissed the summons under the discretion given by Ord. LV. r. 10, on the ground that a disputed debt ought not to be tried on summons:—Held, that as there were no facts in dispute the vice-chancellor ought to have decided the question of law on the summons. *Powers, In re, Lindsell* v. *Phillips*, 30 Ch. D. 291; 53 L. T. 647—C. A.

Semble, a joint creditor who desires to proceed

against the separate estate of a deceased partner should do so by action and not by originating summons. *Barnard, In re, Edwards* v. *Barnard*, 55 L. J., Ch. 935; 32 Ch. D. 447; 55 L. T. 40; 34 W. R. 782—C. A.

An action was brought against the surviving trustee of a will, claiming a declaration that he was not entitled to charge in account with the plaintiff, who was a cestui que trust under the will, the costs of an action brought by the superior landlord in consequence of the failure by the trustee to repair some houses which formed part of the trust property, or to charge commission paid to a collector who had collected the rents of the same property, and also claiming (if necessary) administration of the testator's estate. There was no practical dispute as to the facts:—Held, that the points in dispute between the parties might have been decided upon an originating summons, under Ord. LV. r. 3, and that, although the plaintiff succeeded in his claim, no costs of the action would be given. *Johnson, In re, Wagg* v. *Shand*, 53 L. T. 136.

Two legatees having alleged that they had been induced to execute a release indemnifying the executors of a testator's estate without having had independent advice:—Held, that they were entitled to take out an originating summons under Ord. LV. r. 3, of the Rules of Court, 1883, to have the release set aside, the question of the validity of the release being one "arising in the administration of the estate," and "affecting" the rights of the legatees within the meaning of that order. *Garnett, In re, Gandy* v. *Macaulay*, 50 L. T. 172; 32 W. R. 474.

An executor having retained a sum of 1,100*l*., which he claimed to have received from the testator as a donatio mortis causâ, and the estate being thereby reduced so as to be insufficient to pay the legacies bequeathed by the will in full, a legatee whose legacy abated, applied on summons for the administration of the personal estate of the testator:—Held, that the question whether the sum so retained by the executor formed part of the testator's assets should not be tried by administration summons. *Neilan* v. *Farrell*, 29 L. R., Ir. 12.

—— **Profit Costs—Recovery.**]—After taxation and payment of costs in an administration, part of the costs were handed to one of the executors under an agreement between him and the solicitors that he should receive half the profit costs:—Held, that though there might be ground for an independent action against the executor for having made a profit out of his office, these costs could not be recovered from him by a summons in the action taken out by the party having conduct of the proceedings. *Thorpe, In re, Vipont* v. *Radcliffe*, 60 L. J., Ch. 529; [1891] 2 Ch. 360; 64 L. T. 554.

Originating Summons — Service.] — In an administration action commenced by originating summons under Ord. LV. rr. 3 and 4, of the Rules of Court, 1883, the defendant being a person of unsound mind not so found by inquisition, the summons was served, as required for writs by Ord. IX. r. 5, of the same rules, on the person under whose care the person of unsound mind was. No appearance was made by the defendant on return of the summons, and none was entered. Notice of motion was served for the appointment of a guardian ad litem, as required by Ord. XIII. r. 1, of the same rules in case of default of appearance to writs. The court, holding that the rules as to the service of writs applied to an originating summons, made an order appointing a guardian ad litem. *Pepper, In re, Pepper* v. *Pepper*, 53 L. J., Ch. 1054; 50 L. T. 580; 32 W. R. 765.

—— **Right of Residuary Legatee to set up Statute of Limitations.**]—Upon the hearing of an originating summons, taken out by the executor, under Ord. LV. r. 3, to determine whether a defendant is a creditor or not, it is competent for the residuary legatee, also a defendant, to set up the objection of the Statute of Limitations, notwithstanding the refusal of the executor to interfere. *Wenham, In re, Hunt* v. *Wenham*, 61 L. J., Ch. 565; [1892] 3 Ch. 59; 67 L. T. 648; 40 W. R. 636.

Joinder of Causes of Action—Before the Judicature Acts.]—Where in an administration suit the bill was filed against the executors, and B. was added as a defendant, but no assets were stated to be in his possession, and nothing was alleged against him, except that a fictitious sale had been made to him of part of the testator's estate, demurrer by B. allowed for want of equity. Demurrer by the same defendant allowed for multifariousness, on the ground that the question as to the validity of the sale could not be decided in an administration suit. *Marshall* v. *Gilliard*, 12 Jur. (N.S.) 483; 14 L. T. 618; 14 W. R. 830.

A plaintiff by his bill sought to have the personal estate of an intestate administered, and asked to have a deed under which he had dealt with his share of the same estate declared void:—Held, on demurrer, that such a bill was multifarious. *Bouck* v. *Bouck*, 35 Beav. 643; L. R. 2 Eq. 19; 14 W. R. 682.

A bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee to himself and to another person:—Held, multifarious. *Salvidge* v. *Hyde*, Jac. 151. Reversing 5 Madd. 138.

In order to determine whether bill is multifarious, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. *Ib.*

Demurrer for multifariousness to bill by creditor against the personal representative of his deceased debtor, and against the trustee of a fund which his debtor was entitled to receive, the bill charging that plaintiff had acquired a specific lien on the debt due to testator, overruled. *Grady* v. *Furlong*, 2 Moll. 418.

A testator invested moneys in the name of his sister, and made a will giving her an annuity and appointing the plaintiffs his residuary legatees. The plaintiffs then obtained the ordinary administration decree against the executors, served it on the testator's sister, and moved for an injunction to restrain her from dealing with the fund invested in her name by the testator which she claimed as her own:—Held, that the question between the testator's estate and his sister could not be tried in this way, but required the institution of a distinct suit. *Walker* v. *Seligmann*, 40 L. J., Ch. 601; 25 L. T. 294.

When plaintiffs have a common interest in all the matters comprised in a suit, the objection of a defendant that he is not concerned in the

whole subject-matter is one the allowance of which is in the discretion of the court, which will be guided by considerations of convenience under the particular circumstances of the case. *Coates* v. *Legard*, L. R. 19 Eq. 56 ; 31 L. T. 625 ; 23 W. R. 40.

An administratrix of an intestate assigned a share in a business forming part of the intestate's estate to trustees to pay the intestate's debts, and then for her, and subsequently assigned her own beneficial interest in the share to the same trustees on certain trusts. The next of kin, who were also co-heiresses of the intestate and interested under his marriage settlement, filed a bill against the administratrix, the assignees in trust of the share in the business, and the trustees of the settlement, for administration of his real and personal estate, and of the trusts of the settlement. The assignees in trust of the share in the business demurred for multifariousness :—Held, that the various interests of the infants could be most conveniently ascertained in one suit ; and consequently, that the demurrer must be overruled. *Ib.*

—— **Since the Judicature Acts—Action for Recovery of Land.**]—In an action by the heir-at-law, who was also one of the next of kin of an intestate, against the administratrix, who was in possession of the intestate's real estate, leave was given to join a claim for the recovery of the land, and a claim for the administration of the estate. *Kitching* v. *Kitching*, 24 W. R. 901.

An action for the administration of personal estate may be joined with an action to establish title to real estate, when the plaintiff claims both estates under a common gift in the same will. *Whetstone* v. *Dewis*, 45 L. J., Ch. 49 ; 1 Ch. D. 99 ; 33 L. T. 501 ; 24 W. R. 93.

Ord. XVIII. relates to Joinder of Causes of Action.

Creditor's Action.]—Bill against executor and heirs of obligor, to be paid out of personal assets, and if not sufficient, out of real; assets descended, decreed. *Walter* v. *Goring*, Dick. 299.

Bill by single bond creditor, for payment of what was due out of real assets descended. *Robinson* v. *King*, Dick. 297.

Where a bond creditor brings a bill against an executor for an account of assets and satisfaction, it is no objection for want of parties that he has not brought other bond creditors or creditors of a superior nature before the court, for the court only decrees an account, with a direction for the executor to pay in a course of administration. *Anon.*, 3 Atk. 572.

Held, that where a single creditor brings a bill, there is no general account of debts directed, but the course is to direct an account of the personal estate, and of that particular debt which is ordered to be paid in course of administration ; and all debts of a higher or equal nature must be paid by the executor, and must be allowed to him in his discharge. *Att.-Gen.* v. *Cornthwaite*, 2 Cox, 45.

A bond creditor, claiming also an equitable mortgage on real estate, filed his bill for foreclosure, and in aid for the administration of the personal estate, against the executors and the parties entitled to the mortgaged estate. He failed in proof of the equitable mortgage :—Held, that he was not on such a record entitled to a decree, as a specialty creditor, for the administration of the real estate. *Chapman* v. *Chapman*, 13 Beav. 308 ; 20 L. J., Ch. 465 ; 15 Jur. 265.

—— **Right to Sue Administrator appointed Pendente lite by Probate Division.**]—An administrator pendente lite, appointed by the probate division under s. 70 of the Court of Probate Act, 1857, may, without the leave of the probate division, be sued in the chancery division by a creditor of the deceased. *Toleman, In re, Westwood* v. *Booker*, 66 L. J., Ch. 452 ; [1897] 1 Ch. 866 ; 76 L. T. 381 ; 45 W. R. 548.

In a probate suit one B. was appointed administrator and receiver pendente lite. Two months later an originating summons was taken out in the chancery division by one W., who claimed to be a mortgagee and creditor of the testator's estate, asking, as against B., who was made defendant, that an account might be ordered in respect of a tramway in or near London ; that a certain mortgage might be declared valid and subsisting ; that accounts might be taken of what was due thereunder, and for a sale of the mortgaged property. Upon motion by the administrator and receiver, pursuant to directions, to restrain the chancery proceedings against him, and for a stay of those proceedings :—Held, that a judge of this division has no power to restrain or stay proceedings in the chancery division, but that leave should be given to the administrator and receiver to defend those proceedings, and that he would have to apply for his costs in this court and also in the chancery proceedings, the executors to have their costs of this application out of the estate. Leave was granted to the administrator and receiver to appeal against this decision on the one point of want of jurisdiction to restrain. *Martin* v. *Toleman*, 77 L. T. 138.

—— **Separate Estate of Deceased Partner—Joint Creditors—Separate Creditors.**]—Under decree obtained by separate creditor, for satisfaction out of assets, the surviving partner a bankrupt, and the joint estate insolvent, the joint creditors not entitled pari passu with the separate creditors to the separate estate, but can only claim the surplus after satisfaction of the separate debts. *Gray* v. *Chiswell*, 9 Ves. 118 ; 7 R. R. 151.

In a creditors' suit for the recovery of a partnership debt against the assets of a deceased partner, the surviving partner is a necessary party, and the case is not within the Thirty-second Order of August, 1841, which enables a plaintiff to proceed against one or more persons severally liable. *Hills* v. *M'Rae*, 9 Hare, 297 ; 20 L. J., Ch. 533 ; 15 Jur. 766.

A creditor of a partnership firm brought an administration action against the executor of a deceased partner. Afterwards a separate creditor of the same partner brought an administration action against the executor, and obtained judgment :—Held, on an application by the plaintiff in the first action for the conduct of the proceedings in the second action, that a joint creditor of a firm could not maintain a simple action for the administration of the estate of a deceased partner, and therefore that the first action was not properly constituted. Application of the plaintiff was consequently refused. *McRae, In re, Forster* v. *Davies*, 53 L. J., Ch. 1132 ; 25 Ch. D. 16 ; 49 L. T. 544 ; 32 W. R. 304—C. A.

Where the estate of a deceased partner is

being administered at the suit of a separate creditor, and no partnership creditor is party thereto, the certificate ought to distinguish between the separate debts of the deceased and the debts of the firm in which he was partner, and at some stage of the proceedings the surviving partner ought to be brought before the court, so as to have an opportunity of disputing the finding as to the partnership debts. *Hodgson, In re, Beckett* v. *Ramsdale*, 55 L. J., Ch. 241; 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127—C. A.

Creditors, who are—Voluntary Covenant.]—A voluntary covenant is sufficient to support a creditors' suit against the representatives of the covenantor. *Watson* v. *Parker*, 6 Beav. 283; 12 L. J., Ch. 221; 7 Jur. 143.

—— **Unliquidated Damages.**] — A creditors' suit to administer the estate of a deceased person may be instituted by one whose claim is for unliquidated damages recoverable for breach of covenant. *Burch* v. *Coney*, 14 Jur. 1009.

—— **Voluntary Assignee of a Debt.**] — A voluntary assignee of a debt due from a person deceased cannot maintain a suit for the administration of the deceased's estate. *Sewell* v. *Moxsy*, 2 Sim. (N.S.) 189; 21 L. J., Ch. 824; 16 Jur. 608.

—— **Surety.**]—A., as surety to a firm, signed a joint and several bill of exchange, on the faith that B. would join as co-surety. B. never signed it, but A. was afterwards compelled to pay it by proceedings at law, at the suit of an indorsee. One of the firm died, and the others became bankrupt: — Held, that the claim of A. was sufficient to support a creditors' suit for the administration of the estate of the deceased partner. *Rice* v. *Gordon*, 11 Beav. 265.

—— **Holder of Promissory Note.**] — Where, in a creditors' suit, the plaintiff's claim was on a promissory note, and the defendant was an infant, and the debt was not proved, the court made the usual decree, upon an affidavit of the signature of the maker of the promissory note. *Gascoyne* v. *Lamb*, 11 Jur. 902.

—— **Costs of Lunacy Proceedings.**]—A commission de lunatico inquirendo was issued against a man on the petition of his wife, and he was found lunatic, and died:—Held, that if the proceeding was for his benefit, the solicitor employed in it by the wife was entitled to institute a creditors' suit in respect of his costs. *Chester* v. *Rolfe*, 4 De G. M. & G. 798; 23 L. J., Ch. 233; 18 Jur. 114; 2 Eq. R. 19.

The cost of issuing a commission of lunacy, if for the lunatic's benefit and after the lunatic's death, may be proved against the lunatic's estate, notwithstanding the pendency of a traverse of the inquisition. *Cumming, In re*, 5 De G. M. & G. 30; 23 L. J., Ch. 261; 18 Jur. 181; 2 W. R. 248.

—— **Costs of Probate Action.**]—A will was proved by A., who acted as executor for some months. Then the Probate Court, and the House of Lords on appeal from the Probate Court, decreed probate to B. instead, and directed all the costs to be paid out of the estate. There was very little personal estate, but considerable real estate. B. filed a bill for the administration of the real and personal estate of the testator in order to obtain payment of his costs:—Held, that the Probate Court, not having jurisdiction over real estate, could not, neither could the House of Lords on appeal from the Probate Court, make an order for payment of the costs out of the real estate. B. therefore was not entitled to a decree for the administration of the real estate, but, as he had acted for some time as executor, he was entitled to a decree for the administration of the personal estate. *Charter* v. *Charter*, 45 L. J., Ch. 705; 3 Ch. D. 218; 34 L. T. 412; 24 W. R. 874.

—— **Where there is a Direction to carry on Testator's Trade.**]—If a testator gives his executors power to trade with a portion of his capital, a creditor for debts incurred by the executors has no right to a decree to administer the assets employed in trade. *Owen* v. *Delamere*, 42 L. J., Ch. 232; L. R. 15 Eq. 134; 27 L. T. 647; 21 W. R. 218.

—— **Liability arising from Foreign Law.**]—Estates in a foreign country were the subject of certain settlements called fidei commiss., somewhat analogous to entails in England, and by the law of the foreign country the possessor of these estate was liable for deterioration whether voluntary or permissive, and entitled to compensation for improvements; and after his death the liability could be enforced in accordance with a special procedure code as between his representatives and his successor. The successor to the estates brought an action in England against the executrix of the late possessor, who was a domiciled Englishman and left property in England, for administration of his estates:—Held, that the plaintiff's claim did not depend simply on tort, but was dependent on an implied contract or implied obligation which by the law of the foreign country every possessor under a fidei commiss. takes upon himself when he enters into possession of the property under it, and that therefore the action could be maintained here against his legal personal representative; and that the mere fact that the claim could not be finally established without proceedings being taken in the foreign courts was not a ground for the action being at once dismissed. *Batthyany* v. *Walford*, 56 L. J., Ch. 881; 36 Ch. D. 269; 57 L. T. 206; 35 W. R. 814—C. A.

—— **Debitum in presenti solvendum in futuro.**]—A creditor, having debitum in presenti solvendum in futuro, may maintain a creditors' bill. Whether he can obtain a decree for immediate security must depend on circumstances. *Whitmore* v. *Oxborrow*, 2 Y. & C. C. C. 13; 12 L. J., Ch. 21; 6 Jur. 985.

—— **What Evidence required.**] — Where an apothecary files a bill to obtain payment of sums due to him from the testator's estate for professional charges, he must prove that he has been duly licensed in manner required by the 55 Geo. 3, c. 194. *Hood* v. *Hall*, 6 Jur. 1121.

The admission of the debt by the answer of one of two executors, is a sufficient foundation for a decree in a creditors' suit. *Burdett* v. *Booth*, 10 L. J., Ch. 356.

Simple contract creditor filing a bill to execute trusts of will for payment of debts, must prove his debt, although his demand be not contested. *Caledon (Lord)* v. *Every*, 2 Moll. 360.

Bill by a creditor against an administrator, who, by his answer, stated he believed the debt

was due. It being thought doubtful whether this was a sufficient foundation for a decree, plaintiff consented to exhibit an interrogatory. *Hill* v. *Binney*, 6 Ves. 738.

To obtain the usual decree in a creditors' suit, it is not sufficient for the plaintiff to put in an acceptance of the testator proved as an exhibit. Quære, whether any evidence should be given of the consideration. *Keaton* v. *Lynch*, 1 Y. & C. C. C. 437.

In a bill against the executors, the plaintiff having stated two promissory notes of the same date, one for 15,000*l.* sterling, the other for 15,000 French louis, given by the testator for securing a sum of 15,000*l.*; on an affidavit by one of his executors that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity; that he was informed, and believed, that the second note had been produced by the plaintiff for payment in a foreign country; and he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note; it was ordered that the defendant should not be compelled to answer till a fortnight after production of the second note. *Wales* (*Princess*) v. *Liverpool*, 1 Swanst. 114; 1 Wils. Ch. 113; 19 R. R. 282.

In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) is primâ facie evidence of a debt as against the persons interested in the real estate; but they will be at liberty to adduce rebutting evidence. *Harrey* v. *Wilde*, 41 L. J., Ch. 698; L. R. 14 Eq. 438; 27 L. T. 471.

Where, in a suit instituted by three creditors, it was objected that one of the plaintiffs had not proved his debt, the court will not favour such an objection. *Pearcy* v. *Dicker*, 13 Jur. 997.

A decree may be obtained in a creditors' suit, for a reference to the master to take the usual accounts of the personal estate and of the debts of an intestate, without entering into evidence to prove the plaintiff's debts; notwithstanding the bill may pray a sale of the intestate's real estate, and the heir-at-law of the intestate may be an infant, the form of the decree being, that the plaintiff shall be at liberty to exhibit an interrogatory to prove his debt. *Ayles* v. *Cox*, 11 L. J., Ch. 408.

—— **Stamp.**]—A. filed a bill on behalf of himself and other creditors against the executors who had renounced. Subsequently he took out administration, and amended his bill by inserting an allegation to that effect, and a prayer for administration generally:—Held, that he must still be regarded as plaintiff in a creditors' suit, and therefore could not get a decree until the instrument, under which he claimed as a creditor, had been stamped. *Nichols* v. *Nichols*, 10 W. R. 598.

—— **Where the Creditor is Estopped.**]—The plaintiff, as solicitor of a banking firm, in order to prevent the taking out of circulation notes issued in the lifetime of the testator, who was at the head of the banking concern, induced the mother and guardian of the testator's heir to forego proceedings to compel the application of the primary funds to the payment of the testator's debts in exoneration of certain descended estate, by representing that such proceedings were wholly unnecessary, and that the property primarily liable was abundantly sufficient for the payment of the testator's debts. The plaintiff afterwards filed a creditors' bill against J. W., the executor and devisee of the testator, and against the heir, and upon the bankruptcy of J. W. his assignees were brought before the court by a supplemental bill:—Held, that the plaintiff was entitled to the common decree against the personal and devised real estate of the testator, but the bill as against the heir was dismissed with costs. *Jones* v. *Waters*, 2 Myl. & K. 610.

An agreement by a creditor not to take proceedings against the debtor during his life, nor against the debtor's estate during the life of his wife, if she should survive him, construed (as to the latter clause) to mean that any beneficial interest which the wife might take in the property of the husband should not be disturbed during her life, and not to be an agreement that the creditor should be debarred from suing the personal representative of the husband, and therefore the creditor obtained a decree for an account against the wife as the personal representative of the husband, with a declaration that the interest of the wife was not to be disturbed during her life. *Harman* v. *Richards*, 10 Hare, 81; 22 L. J., Ch. 1066.

Action by one Creditor on Behalf of others — As to Real and Personal Estate.] — In a creditors' action for the administration of an intestate's real and personal estate, the writ must be indorsed with a claim by the plaintiff "on behalf of himself and all other creditors." *Royle, In re, Fryer* v. *Royle*, 5 Ch. D. 540; 36 L. T. 441; 25 W. R. 528. Explaining *Wooldridge* v. *Norris*, post. Contra, *Cooper* v. *Blissett*, 45 L. J., Ch. 272; 1 Ch. D. 691; 24 W. R. 235. *O'Kelly* v. *Bodkin*, 2 Ir. Eq. R. 361. *M'Keown, In re*, 22 W. R. 292.

A plaintiff, at the request of A., became surety for repayment of 50*l.* advanced to B., and A. gave him a bond of indemnity. A. died, having appointed the defendants his executors, and having devised to them certain property in trust to pay the 50*l.*, "if then due from him as a surety." The creditor called upon the plaintiff to repay the 50*l.*, and he had requested the defendants to do so:—Held, that the plaintiff could maintain a bill to administer the estate of A. and execute the trusts of his will, and that he need not sue on behalf of himself, and all other creditors. *Wooldridge* v. *Norris*, 37 L. J., Ch. 640; L. R. 6 Eq. 410; 19 L. T. 144.

—— **As to Personal Estate.**]—In a creditors' action for the administration of the personal estate of a deceased person, the plaintiff need not, since 15 & 16 Vict. c. 86, s. 45, sue on behalf of all the creditors in order to obtain a general account of debts. *Blount, In re, Naylor* v. *Blount*, 27 W. R. 865.

—— **As to Real Estate.**]—Bill by a mortgagee, with the additional security of a bond, to be satisfied out of personal and real assets; the bill, after consideration, dismissed, so far as it prayed satisfaction out of the real estate. *Bedford* v. *Leigh*, Dick. 707.

The court will not decree a specialty debt to be paid out of the deceased's real estate, unless the creditor sues on behalf of himself and all the other specialty creditors; but leave will be given to amend the bill at the hearing. *Johnson* v. *Compton*, 4 Sim. 47.

A creditor cannot have a decree for the administration of real estate, unless he sues on behalf of all creditors. *Ponsford* v. *Hartley*, 2 John. & H. 736. S. P., *May* v. *Selby*, 1 Y. & C. C. C. 235; 6 Jur. 52. *Vincent, In re, Parham* v. *Vincent*, 26 W. R. 94. *Worraker* v. *Pryer*, 45 L. J., Ch. 273; 2 Ch. D. 109; 24 W. R. 269.

Though an account of real estate can only be had at the suit of a creditor in a bill on behalf of all creditors, still, if in a suit not so entitled, it becomes expedient to take such an account, the court will, at the hearing, direct the bill to be taken as a bill on behalf of creditors. There is no objection to a bill for an account of the estates of two testators who are joint debtors. *Woods* v. *Sowerby*, 14 W. R. 9.

In a creditor's action for administration of real estate it is sufficient that the statement of claim should express that he sues on behalf of all creditors. *Eyre* v. *Cox*, 24 W. R. 317.

If the writ in a creditors' action for the administration of real and personal estate does not shew that the plaintiff is suing on behalf of all the other creditors of the deceased, this fact ought to appear in the title of the statement of claim. *Eyre* v. *Cox*, supra, explained. *Tottenham, In re, Tottenham* v. *Tottenham*, 65 L. J., Ch. 549; [1896] 1 Ch. 628; 74 L. T. 376; 44 W. R. 539.

—— **Creditors' Suit by Mortgagee.**]—A bill may be maintained by a mortgagee on behalf of himself and all other the creditors of a deceased mortgagor. *Shey* v. *Bennett*, 2 Y. & C. C. C. 405; 7 Jur. 571.

A legal mortgagee may maintain a creditors' suit. *Groves* v. *Lane*, 16 Jur. 854.

A creditor by mortgage and collateral bond cannot sue both as mortgagee and also on behalf of himself and all other creditors of the debtor, such rights of suing being inconsistent with each other; nor, for the purpose of obtaining payment out of the real assets of his debtor, can he sell as sole specialty creditor, unless he makes all persons interested in contesting that fact parties to the suit. *White* v. *Hillacre*, 3 Y. & C. 597; 4 Jur. 102.

The proper form of a bill by an equitable mortgagee, being also a specialty creditor, who seeks to charge the real assets of a testator generally, as well as to enforce his security, is on behalf of the plaintiff, and all other the creditors of the testator, and the court permitted a plaintiff at the hearing to amend his bill accordingly, and with reference to the Statute of Limitations:—Held, that such bill must date from the day of the filing of the original bill, and not from the day of the amendment. *Blair* v. *Ormond*, 1 De G. & Sm. 428; 11 Jur. 665.

A mortgagee, filing a bill for the benefit of himself and the other creditors of the deceased, is entitled to payment of his mortgage money out of the mortgaged estate, before payment of the costs of suit. *Aldridge* v. *Westbrook*, 5 Beav. 188.

A creditor's bill was filed by a mortgagee, who was also a simple contract creditor of the testator in the cause, and in the course of the suit the mortgaged estate was sold, with the concurrence of the mortgagee, and the purchase-money paid into court:—Held, that notwithstanding the nature of the suit, and that the mortgagee had proved his debt before the master, he was entitled to have the whole of the proceeds of the mortgaged estate applied, in the first instance, in payment of his principal debt and interest before the payment of the costs of the suit. *Allen* v. *Alldridge*, 6 Jur. 159.

A mortgagor died, and a bill was filed by the mortgagee for the administration of the estate and payment of the mortgage. The mortgaged property was sold, and the produce paid into court to a general account, and accumulated for a series of years:—Held, that the mortgagee had no right to treat the fund as appropriated to the mortgage, and take the accumulations. *Irby* v. *Irby*, 22 Beav. 217.

Mortgagee's Suit to Realise Security.]—Mortgagee may pray a sale of the mortgaged premises in the first instance, where the heir and personal representative are the same person, and the personal estate is clearly deficient. *Daniel* v. *Skipworth*, 2 Bro. C. C. 155.

A mortgagee held entitled to sustain a suit for realising his security by a sale of the mortgaged premises, against the devisee of the real estate, an infant, although a decree had been made in suits framed only for the administering the personal estate; and in such cases, where the sale is clearly for the infant's benefit, a sale will be directed in the first instance, without a reference to inquire whether it will be so or not. *Davis* v. *Dowding*, 2 Keen, 245; 7 L. J., Ch. 169.

Semble, the mortgagee may maintain a suit against the executors of the mortgagor for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator. *King* v. *Smith*, 2 Hare, 239; 7 Jur. 694.

An equitable mortgagee, if the mortgagor is dead, is entitled to have the estate sold, and the proceeds applied in payment of his debt, and to stand as a creditor for the balance (if any) on the general assets of the mortgagor. *Brocklehurst* v. *Jessup*, 7 Sim. 438.

Form of decree in a suit by a mortgagee against as well the specific as the general estate of his deceased debtor. *Hanman* v. *Riley*, 9 Hare (App.) xli.

A mortgagor, by his will, created a trust for the payment of, amongst others, the mortgage debt. In a suit to foreclose:—Held, that the mortgagee was entitled to have his mortgage paid, in the first instance, out of the general personal estate of the mortgagor, and, in default of payment thereout, to have the mortgaged lands sold, and, in case the fund so produced should prove deficient, that then the mortgagee was entitled to come in as a specialty creditor, and avail himself of the trust in the will of the mortgagor, and the decree was so made. *Marshall* v. *M'Aravey*, 3 Dr. & War. 232.

Where mortgagee is a creditor of trustee under will of estate to pay debts, and advances further moneys to trustee for payment of them, and takes mortgage of estate knowing of trust, he cannot have a sale of estate in prejudice of other creditors of testator. *Turner, Ex parte*, 9 Mod. 418.

Chattels real were mortgaged, and judgments were recovered by the mortgagee against the mortgagor as collateral security for the sums advanced on mortgage. The mortgagor having died, a bill was filed against his personal representative, praying an account of the sums due in respect of the mortgages, and a foreclosure and sale, and an account of the personal estate

of the mortgagor. The personal representative, in her answer, stated her belief that the chattels real were adequate to discharge the sums due. A decree was then taken for an account of those sums, and of the incumbrances prior to or contemporaneous therewith, but not directing any account of the personal estate of the mortgagor. A report pursuant to that decree having been made, a decree for sale of the chattels real was pronounced. The proceeds of the sale were insufficient to pay the sums due on the mortgages:—Held, that a supplemental bill afterwards filed by the mortgagee against the personal representative of the mortgagor, praying an account of the personal estate of the mortgagor, could not be maintained, and such a bill was accordingly dismissed with costs. *Joly* v. *Leyden*, 13 Ir. Eq. R. 444.

Other Persons entitled to sue for—Beneficiary—Residuary Legatee.]—A residuary legatee has a right to institute a suit where the estate is considerable, and it is uncertain whether there will be a residue or not. *Simmond, In re, Morgan* v. *Middlemiss*, 14 W. R. 414.

—— **Annuitant.**]—An annuity was by will charged upon the general residue of the testator's estate. The annuity was not in arrear, but accounts, though asked for, had not been supplied until after the issue of the writ of summons, and were still insufficient:—Held, that the annuitant was entitled to administration. *Wolaston* v. *Wolaston*, 47 L. J., Ch. 117; 7 Ch. D. 58; 37 L. T. 631; 26 W. R. 77.

A testator by deed covenanted with trustees to pay an annuity to a woman during her life, to be considered as accruing from day to day, by equal quarterly payments. The testator's estate was not sufficient to pay the estimated value of the annuity as well as his other debts and liabilities, and the trustees took out an originating summons under Ord. LV. r. 3, as creditors for administration of the estate. At the time when the summons was taken out no quarterly payment of the annuity was due:—Held, that the trustees of the annuitant were not creditors of the testator, and could not take out a summons for the administration of the estate, although if an administration order was obtained by some other person they would be entitled to prove for the estimated value of the annuity. *Hargreaves, In re, Dicks* v. *Hare*, 59 L. J., Ch. 375; 44 Ch. D. 236; 62 L. T. 819—C. A.

—— **Assignee of Beneficiary.**]—A party entitled to, or taking by assignment, a legacy or a share of a residuary estate may institute a suit for the administration of such estate at any time before the complete administration of the assets, or before such legacy or residuary share is withdrawn from its position as assets unadministered, and constituted a trust fund applicable to the specific trusts of the will; but semble, where the right is unnecessarily exercised, the court may make the decree without costs. *Cafe* v. *Bent*, 5 Hare, 24.

Assignee of legatee filed a bill against the administrator, pending a suit to establish an alleged will, for the preservation of the assets, and a receiver, and an account of the personal estate, and to compel the administrator to bring in the assets received by him, and to restrain him from further receiving them, and praying that the rights of the plaintiff under the will might be ascertained:—Held, on demurrer, that the relief must be limited to the preservation of the assets, to which an account was also incidental; and that the plaintiff was not entitled to a declaration of the rights under the will, or to have the assets administered. *Tom* v. *Deane*, 8 Ir. Eq. R. 39.

—— **Next of Kin.**]—A next of kin may bring an action for administration of the intestate's personal estate within a year from the intestate's death. *Wallis* v. *Wallis*, 9 L. R., Ir. 511.

In a suit by a plaintiff claiming to be one of the next of kin of an intestate against the administrator (the solicitor to the Treasury), the cause was heard short, and a decree was made, notwithstanding that the defendant objected on the ground that a search was being prosecuted for documents which, if found, would prove the plaintiff to be illegitimate. *Felstead* v. *Gray*, L. R. 18 Eq. 92.

A father gave his residuary personal estate upon trust for three daughters for their lives, with remainder on trust for their children or issue, with cross-remainders between them; and if his daughters should all die without having any children or issue entitled under the trusts aforesaid, on trust for such person or persons as would have been entitled under the Statute of Distributions if he had then died intestate. The three daughters entitled under the will were unmarried; these and another daughter were the sole statutory next of kin of the testator at the present time:—Held, that an action for administration by collateral relations, who would have been some of the next of kin at the present time if the four daughters were dead, was demurrable for want of interest. *Clowes* v. *Hilliard*, 46 L. J., Ch. 271; 4 Ch. D. 413; 25 W. R. 224.

Bill by next of kin, intended legatee, in an unexecuted testamentary paper before probate or administration obtained against the executor in a former will for an account of personal estate of testator (alleging fraud, collusion, &c.). Defendant demurs. Demurrer overruled. *Morgan* v. *Harris*, 2 Bro. C. C. 121.

—— **Right of Widow of Intestate in respect of her Charge under Intestates' Estates Act, 1890, to administer Realty.**]—The widow of an intestate entitled under the Intestates' Estates Act, 1890, to a charge for 500*l.* upon his real and personal estate, has a sufficient interest in the real estate to entitle her to maintain an action for administration. *M'Ferran* v. *M'Ferran*, [1897] 1 Ir. R. 66.

—— **Other Cases.**]—A testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors; and he constituted his wife and T. W. his executors, and he appointed to sell and dispose of all his estates and chattels, in such manner as they should jointly agree upon, or not to sell if it seemed most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, all overplus to his wife, towards her support and her family:—Held, upon demurrer, that the testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the

rents and profits. *Woods* v. *Woods*, 1 Myl. & C. 401.

Debtor on death of creditor is bound to pay the latter's representative, and cannot file bill for direction. *Darthez* v. *Winter*, 2 Sim. & S. 536; 4 L. J. (o.s.) Ch. 175.

Conduct and Prosecution—In general.]—It being important that administration suits should be conducted in a friendly spirit, the court will not facilitate strangers to the estate—creditors, for instance—having the conduct of the same. *Penney* v. *Francis*, 30 L. J., Ch. 185; 7 Jur. (N.S.) 248; 9 W. R. 8.

—— **Executor.**]—The conduct of proceedings for the benefit of an estate will not be taken away from an executor without sufficient grounds being shewn. *Harrison* v. *Richards*, 14 W. R. 823.

—— **Creditors' Suit.**]—Bill filed by one creditor on behalf of self and rest; he has absolute dominion over suit and decree, and may dismiss bill at pleasure; but secus, after decree, the rest may prosecute it if they think fit. *Handford* v. *Storie*, 2 Sim. & S. 196; 3 L. J. (o.s.) Ch. 110.

Creditor having come in under decree, cannot institute a fresh suit; but on account of delay, he was permitted to prosecute that decree, though only interested in the first part thereof. *Edmunds* v. *Acland*, 5 Madd. 31.

The court will not on the ground of irregularity in a decree in a creditor's suit, take the conduct of the suit from the plaintiff and give it to another creditor, though collusion be suggested. Where decrees had been obtained in two creditors' suits for the administration of the same estate, the court ordered that the plaintiff in the suit in which the second decree had been made should be at liberty to attend the proceedings under the first decree; but, on the ground that he was a stranger to that suit, refused to give him the conduct of it. *Smith* v. *Guy*, 2 Ph. 159.

An order that a creditor who is no party to an administration suit, or who has not gone in under the decree and proved his debt, should have the conduct of the suit, would be irregular. *S. C.*, 2 Coop. t. Cott. 289.

A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor, and the costs of the administratrix, but he still persisted in prosecuting the suit:—Held, that the fund must be applied, first, in paying the costs of the administratrix, then in paying the plaintiff's costs down to the notice, and the residue in payment of the specialty creditor. *Sullivan* v. *Bevan*, 20 Beav. 399.

A plaintiff who sues as creditor, will not be deprived of the conduct of the suit because the master has reported that he is not a creditor, if exceptions to that finding of the report are pending, and there is no reason to suppose that the exceptions will not be prosecuted actively. *Jeudwine* v. *Agate*, 5 Russ. 283.

Where the prosecution of an administration suit has been neglected for several years, the conduct of it was given to parties who had been proved to be creditors, until further order. *Beale* v. *Symonds*, 2 H. & Tw. 374.

In a creditors' suit, the plaintiff obtained a decree to account. Afterwards, and before the decree was made up, the plaintiff was paid his demand. The plaintiff having neglected to prosecute the cause, the court gave the carriage of the suit to a third person, alleging himself to be a creditor of the deceased. *Hines* v. *O'Keeffe*, 2 Jones, 625.

—— **Delay.**]—Creditor having been restrained from proceeding at law on account of decree obtained, allowed to prosecute suit, where proceeding on decree delayed for some years. *Powell* v. *Wallworth*, 2 Madd. 183.

On account of great delay in prosecution of suit, creditor was, on petition, allowed to prosecute. *Fleming* v. *Prior*, 5 Madd. 423. S. P., *Bowen* v. *Webb*, 2 Fowl. Ex. Pr. 212.

Where great delay has occurred in the prosecution of a decree for the administration of assets, a creditor may apply to have the conduct of the cause, though it has become abated by the death of a defendant. *Cook* v. *Bolton*, 5 Russ. 282.

Motion by a plaintiff in a creditors' suit, for leave to go before the master and prosecute a cause instituted by the next of kin of the deceased, on the ground of wilful delay in that suit, granted. *Sims* v. *Ridge*, 3 Mer. 458.

Though the assets, excepting a small part, not realised, were situated in Ireland, where another creditors' suit for the administration of the same estate was being actively prosecuted, the plaintiff in a creditors' suit in this country is bound to proceed with proper diligence; and not having done so, the conduct of the cause was given to another creditor applying for the same who had proved his debt under the decree. *Driswell* v. *King*, 8 L. J., Ch. 158.

—— **Delay, Mismanagement and Improper Conduct.**]—The conduct of a creditors' suit was taken out of the hands of the plaintiff on the ground of delay and mismanagement in regard to the sales of real estates, delay in the payment of money into court, and the appropriation by the plaintiff's solicitor of rents and profits of the estates, in discharge of his costs. *Price* v. *North*, 2 Y. & C. 628; 7 L. J., Ex. Eq. 9.

—— **Employment of Executor's Solicitor.**]—It is not a sufficient ground for depriving a plaintiff of the conduct of a creditors' suit, that the proceedings up to the decree have been conducted by the executor's solicitor, with the view of obtaining an injunction against a creditor proceeding at law. *Bookless* v. *Crummack*, C. P. Cooper, 125.

—— **Bankruptcy.**]—Order, in the nature of a supplemental decree, for a creditor who had proved his debt to carry on a creditors' suit, where the original plaintiff had been bankrupt. *English* v. *Hayman*, 9 Hare (App.), lxvii.

If, after a decree in a creditors' suit, the suit abates by the death or bankruptcy of the plaintiff, another creditor cannot upon petition, without filing a supplemental bill, upon leave for that purpose, obtain an order giving to him the conduct of the cause. *Nash* v. *Ward*, 9 L. J., Ch. 265.

—— **Limited Order.**]—A creditors' suit was instituted in 1803, and in 1806 the usual decree was made, and a sum was paid into court. The suit became defective in 1807 by the death of

the personal representative of the debtor, and the decree was not prosecuted. In 1853 the representatives of the plaintiff (having revised the suit against the administrator de bonis non of the debtor) petitioned for payment of his debt out of the money in court. The court gave leave to prosecute the decree as to the debts. *Forster* v. *M'Kenzie*, 17 Beav. 414.

—— **Inspection of Papers.**]—The prosecution of a decree in a creditor's suit having been taken from the plaintiff and committed to another creditor under the fifty-sixth Order of 1828, the plaintiff's solicitor was ordered to allow that other creditor's solicitor to inspect and take copies of all the papers in the cause in his possession. *Bennet* v. *Baxter*, 10 Sim. 417; 9 L. J., Ch. 137; 4 Jur. 50. And see *Heslop* v. *Metcalfe*, 8 Sim. 622; 7 L. J., Ch. 49; 1 Jur. 816.

—— **Other Matters.**]—The conduct of an administration suit was taken from the plaintiff and given to a defendant. The master afterwards was of opinion that the suit had been defective from the beginning for want of parties, and suspended the prosecution of the inquiries directed by the decree, to enable the defect to be supplied:—Held, that a bill for that purpose filed by the defendant having the conduct of the suit without previous notice to the plaintiff was not irregular, so as to entitle the plaintiff to move to take it off the file, and a motion to that effect was refused with costs. *Lys* v. *Lee*, 4 De G. M. & G. 219.

In a suit instituted by a legatee against an executor, in which the common decree for an account had been made, an order was obtained, by consent, to dismiss the bill, the executor agreeing to pay the legatee's costs as between solicitor and client. Such order was, two years afterwards, discharged, on the petition of a creditor of the testator, and the suit ordered to be continued under the control of the creditor, he paying back to the executor the costs as between party and party. *O'Donnell* v. *Young*, 5 L. J., Ch. 30.

—— **In concurrent Actions.**]—*See* col. 1716, post.

One Action for the Administration of Two Estates.]—Cases in which the residuary estate of one testator having devolved upon another, it is proper to join the executors of the first testator in a suit to administer the estate of the second, and to take the accounts of both estates in one suit. *Young* v. *Hodges*, 10 Hare, 158.

A., B., C. and D. were co-partners. A. and B. died, and soon afterwards C. and D. became bankrupt; M., who was a creditor of the firm at the death of A. and B., and at the bankruptcy, filed a bill on behalf of himself and all the other creditors of A. and B. against the executors (who, however, had not proved), and devisees of both A. and B. and the assignees of the bankrupts, for the purpose of having the real and personal assets of both A. and B. applied in payment of their joint and separate debts:—Held, that the administration of the two estates might be comprised in one suit, and, therefore, a demurrer for multifariousness was overruled. An objection, however, made ore tenus, that no properly constituted personal representatives of A. and B. were parties, was allowed, but the court did not give the plaintiff the costs of the demurrer on the record, but merely allowed the demurrer ore tenus, without costs. *Brown* v. *Douglas*, 11 Sim. 283; 10 L. J., Ch. 14; 4 Jur. 1200.

There is no objection to a bill for an account of the estates of two testators who are joint debtors. *Woods* v. *Sowerby*, 14 W. R. 9.

(c) *As to Debts.*

i. Generally.

Duty of Court—Since 25 & 26 Vict. c. 42.]—Since the passing of the 25 & 26 Vict. c. 42, the Court of Chancery is bound to decide on the claims of creditors coming in under an administration decree, and cannot leave them to their remedies in an action at law. *Hooper's Estate, In re, Baylis* v. *Watkins*, 3 De G. J. & S. 348; 1 N. R. 115; 32 L. J., Ch. 55; 8 Jur. (N.S.) 1165; 7 L. T. 843; 11 W. R. 130.

Letting Creditors in to prove—Within what Time.]—The reason why creditors are excluded unless they come in within a limited time is because they could not be known to the court nor ascertained unless they should appear; but that does not apply to legatees, who are therefore not to be excluded from the benefit of a decree by not coming in to claim. *Anon.*, 9 Price, 210.

Creditors let in at any time, while the fund is in court, though the time has elapsed. *Lashley* v. *Hogg*, 11 Ves. 602. S. P., *Graves* v. *Davies*, 17 Ir. Ch. R. 90.

Creditor allowed on motion to prove his debt under decree on creditors' suit, though money apportioned amongst creditors, and transferred to accountant-general, on paying costs of motion, and of reapportioning funds. *Angell* v. *Haddon*, 1 Madd. 529.

After report settled in a creditors' suit, a creditor cannot be let in to prove his debt without leave of the court, even though the report be not signed. *Parker* v. *Moorley*, 3 Y. & C. 720; 9 L. J., Ex. Eq. 16.

A foreigner, who claimed to be a creditor of the testator in the cause, petitioned to have his claim referred to the master, after he had made his report; the court made the order, upon condition of his giving security for the costs. *Drever* v. *Maudesley*, 5 Russ. 11.

The preliminary accounts of the testator's estates, debts, &c., being directed upon motion, it was ordered that the creditors who should not come in should be excluded the benefit of the order. *Trotter* v. *Walmesley*, 7 Beav. 264.

In a creditors' suit for the administration of the assets of an intestate, who had joined in a bond as a surety, the bond creditor, being aware of the suit, omitted to prove till the time limited by the advertisements for creditors to come in had expired; a decree on further directions had been made; the administratrix had admitted assets, and the principal debtor in the bond had become bankrupt:—Held, that he might still be let in upon terms, the fund remaining undistributed. *Brown* v. *Lake*, 1 De G. & Sm. 144.

No suit was commenced against the executors of a deceased banker for more than three years after his death for the debts of the bank:—Held, that creditors of the bank were excluded from coming in under a decree in a suit to administer his estate, their proper course being by petition and not by exceptions. *Barker* v. *Buttress*, 7 Beav. 134; 13 L. J., Ch. 58; 8 Jur. 89.

As to the right of a creditor to come in under

a decree, at any time before the fund has been distributed, after a long delay, the court requires more than the ordinary proof of a debt in the master's office. In 1817 a trust deed was executed by A. B. for the benefit of his creditors. The deed was established by the decree in 1842, and an account of debts was directed. The petitioner in 1846 came in under the decree, and claimed in respect of promissory notes, dated in 1816, given by A. B. to his father, who died in 1828. He produced the notes and proved the signatures, but gave no proof of the consideration, or of anything being then due:—Held, that his claim had been properly rejected by the master, for after the great lapse of time the notes could not be admitted upon the ordinary proof. *Hartwell* v. *Colvin*, 16 Beav. 140.

M. was the executor of J., who had been the executor of A. A decree having been made for the administration of the estates of A. and J., a sum of 496*l.* was found due from the estate of J. to that of A., and on further consideration directions were given for raising it out of J.'s real estate. The account had been taken on the footing that at A.'s death nothing was due to him from J. for interest. Before anything further had been done, M. found a small book in the handwriting of J., by which he admitted himself to owe to A. at A.'s death 70*l.* for interest on the principal moneys due from him to A. This book contained a reference to a page in a larger account-book which had been used in making out the accounts; and this page contained an entry to the same effect. The book had no index, and the page in question was at the end of the book, and separated by a number of blank pages from what went before, so that it had never been observed. M. petitioned to have the amount to be raised out of J.'s estate increased by allowing this interest. Fry, J., refused the application on the ground that at the time when the account was taken M. had in his hands the account-book which contained materials enabling him to make the claim:—Held, on appeal, that the case fell within the ordinary rule, that a creditor may come in as long as there are assets undistributed, and that the additional amount ought to be raised. *Metcalfe, In re, Hicks* v. *May*, 49 L. J., Ch. 192; 13 Ch. D. 236; 41 L. T. 572; 42 L. T. 383; 28 W. R. 499.

—— **Claim to be Mortgagee.**]—A bond creditor proved his debt under a decree in a creditors' suit; he also claimed to have an equitable mortgage for the amount. The matter stood over to amend his charge, &c. He neglected to do so, and was reported a bond creditor only. The estate was sold, the money paid into court, and an apportionment directed. Nine years afterwards, his personal representative presented a petition for liberty to go in and establish his mortgage, alleging that he had recently discovered that the charge had not been amended: it was dismissed with costs. *Cattell* v. *Simons*, 8 Beav. 243; 14 L. J., Ch. 138; 9 Jur. 418.

—— **Finding of no Debts—Charge of Fraud.**]—Where a creditor, after the master had reported there were no debts, presented a petition charging fraud, and asking leave to go in and prove against the real estate, there being no receiver and no fund in court, the petition was dismissed, but without prejudice to his filing a bill. *Seale* v. *Butler*, 2 Giff. 312; 6 Jur. (N.S.) 989; 2 L. T. 659.

—— **Where Creditor is out of Time.**]—A creditor who, after final decree in a creditors' suit, applies for leave to file a charge under the decree to account, should state by affidavit either that he had no notice of the pendency of the suit, or, if he had, should account for his not having filed his charge at the proper time. *O'Kelly* v. *Bodkin*, 3 Ir. Eq. R. 506.

A court of equity may, by additional orders, without a bill of review or a rehearing deal with a fund which is still in court. But where a party so requiring the court to deal with the fund might have appeared at an earlier stage of the cause, he will be required to pay all the additional costs which have been occasioned by the imperfect manner in which his claim was brought forward. *Montefiore* v. *Browne*, 7 H. L. Cas. 241; 4 Jur. (N.S.) 1201. And see *Knierim* v. *Schmauss*, 10 W. R. 860.

Creditor let in, but an admission of assets by the administratrix, embodied in an order made on a petition in the cause, qualified by a declaration in a subsequent order. *Brown* v. *Lake*, 1 De G. & Sm. 144.

—— **Priorities.**]—Arrangement of priorities between simple contract creditors coming in within the time limited by the advertisements and bond creditors coming in subsequently. *Brown* v. *Lake*, 1 De G. & Sm. 144.

—— **In respect of what Fund.**]—Testator by his will declared that one-fifth of the residue of his personal estate, should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors and the debts due to them respectively:—Held, that the parties so named in the schedule were not to be considered as legatees but strictly as creditors, and consequently that the representatives of such as died in the testator's lifetime, were entitled to the benefit of the will; that the fund being insufficient to pay the debts in full, and many of the creditors having failed to answer the master's advertisement, their shares were to be applied in further satisfaction of the demands of the creditors who had come in, and were not to be distributed amongst the testator's next of kin. *Williamson* v. *Naylor*, 3 Y. & C. 208.

Whilst conditional orders for attachments are depending against plaintiff and defendant for not executing the deeds of conveyance to the purchaser, the creditors who came in under the decree cannot be paid out of the purchase-money, though the purchaser has gone into possession, but the court will give them leave to proceed on their securities. *Ormsby* v. *Nicholson*, Vern. & Scriv. 115.

T. died intestate, leaving E., L. and A., a minor, his next of kin. A. was his heiress-at-law. E. and L. administered to T., and also entered upon his freehold property. A. having filed a bill for an account against E. and L., obtained a decree against them as debtors to the assets of T., and also as debtors to her in respect of the rent of the freehold received by them, and for the costs of the suit. Pending this suit, E., for valuable consideration, assigned her interest in the assets of T. In another cause, in which E. and L., as administratrices of T., were parties, they were, together with A., declared entitled to a fund in court as part of his assets:—Held, that the several demands of A., under the decree in the first cause, ought to be paid out of the shares of

E. and L. in the fund in the second cause. *Hodgens* v. *Wheeler*, Sau. & Sc. 443.

—— **Amount Provable.**]—The master's report speaks from its date; and if a creditor of a deficient estate proves a debt in respect of bills of exchange indorsed to him by the testator, and before the master has made his report, receives certain sums from the estates of other persons liable on the bills, such sums will be properly deducted in the report from the amount of the debt proved. *Jennings* v. *Elster*, 1 Myl. & K. 440; 2 L. J., Ch. 72.

A judgment was obtained against the indorsee of a bill of exchange. In a suit for the administration of the assets of the acceptor, the report found the full amount of the debt. After the report the indorsee paid several sums on account of the debt. The assets being deficient, the debts were decreed to be paid ratably:—Held, that the sums paid by the indorsee should be deducted from the amount reported, in calculating the ratable proportion of the assets to which the creditor was entitled. *Cummins* v. *Cummins*, 16 Ir. Ch. R. 156.

Executors, before suit commenced, paid some of the testator's creditors a certain portion of their debts:—Held, that they were not entitled to any further payment until the other creditors had been paid proportionably. *Wilson* v. *Paul*, 8 Sim. 63. S. P., *Mitchelson* v. *Piper*, *Id.* 64; 5 L. J., Ch. 294.

A creditor having five bonds, one of which had been paid before the bill filed, and afterwards a decree that the specialty creditors should abate in proportion, he shall not be called upon to bring back what he has received, but shall only abate on the outstanding debt. *Lowthian* v. *Hassel*, 4 Bro. C. C. 167.

Testatrix bequeaths all her personal estate to trustees, in trust to sell, and out of the produce to pay all debts; "and in the next place to pay to A. 300*l.* due on bond." The testatrix owed only 120*l.* to A. upon bond; but the court decreed payment of the whole 300*l.* *Whitfield* v. *Clemment*, 1 Mer. 402; 15 R. R. 143.

Where one of two obligors in a joint and several bond had become bankrupt, and the obligee having by several dividends in the bankruptcy been paid 20*s.* in the pound upon the amount of principal and interest due at the date of the commission, also carried in a claim in respect of the same bond under a decree in a suit for the administration of the estate of the obligor who had died:—Held, that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend, in the first place, to the payment of the interest due at the date of such dividend, and the surplus, if any, in reduction of the principal, and, semble, the same principle of computation is applicable in bankruptcy as between the bankrupt and the creditors, where there is a surplus of the estate after payment of 20*s.* in the pound upon all the debts proved. *Bower* v. *Marris*, Cr. & Ph. 351; 10 L. J., Ch. 356.

—— **After Order for Payment.**]—Where, in a creditor's administration suit, an order had been made directing payment of a dividend to the creditors who had proved, a creditor who had not proved was not allowed to stay the payment of the dividend in order to have an opportunity of establishing her claim. *Hull* v. *Falconer*, 11 Jur. (N.S.) 151; 11 L. T. 761.

In a suit for the administration of the estate of a domiciled Englishman, whose property was all in this country, his debts were certified by the chief clerk in the usual course, and were paid by his executors. Afterwards, but before the executors could carry out an order of the court for the distribution of the remaining part of his estate, proceedings were commenced in France by persons claiming to be creditors of the testator, who had had notice of the proceedings here, but had not come in under them. On a petition of the executors, the order for the distribution of the testator's estate was stopped until a certain day, before which the French claimants might come in and claim in the suit here. *Brett* v. *Carmichael*, 35 Beav. 340; 35 L. J., Ch. 369; 14 L. T. 247; 14 W. R. 507.

—— **Proof by Plaintiff.**]—Decree for an account of the estate of plaintiff's testator come to his hands, and of his debts, and that the creditors should come in before the master. Plaintiff being a creditor was allowed to go in and prove his debt, and the master to examine him relating thereto. *Newman* v. *Norris*, Dick. 259.

—— **Joint Creditor.**]—In a creditors' suit for administering the assets of B., a joint creditor of A. and B. was permitted to prove. A. having become bankrupt, and it appearing that there were no joint assets of A. and B. *Cowell* v. *Sikes*, 2 Russ. 191; 26 R. R. 46.

—— **After Payment of Debt into Court.**]—Liberty given in one suit to prove in another for an amount appearing due in the former does not confer an absolute right of proof in the latter suit. It is the right and duty of the branch of the court to which the latter suit is attached to see that the claim made is a valid subsisting claim. *Micklethwait* v. *Winstanley*, 34 L. J., Ch. 281; 11 L. T. 582; 13 W. R. 210—L. JJ.

The effect of the payment into court by the survivor of two executors of a debt due by them jointly to their testator's estate is to discharge also the estate of the deceased executor; and an order giving liberty to the person entitled to the testator's estate to prove for that debt in a suit for the administration of the deceased executor's estate cannot after such payment be acted upon. *Ib.*

Lien—Tender of Amount found due—Claim after Rejection of Tender.]—A. having a lien on the testator's estate established his debt under the decree, but his claim for interest was disallowed by the master, whose report stood confirmed. The estate was sold subject to A.'s lien, and A. having refused to accept from the purchaser his principal without interest was not allowed to participate as a creditor in the purchase-money. *Hempstead* v. *Hempstead*, 4 Beav. 423.

ii. Insolvent Estate.

Secured Creditor—Before Judicature Act.]—A mortgagee petitioned for the sale of his security and to be permitted to prove the full amount of his debt, in a suit for the administration of the assets of the deceased mortgagor:—Held, that he could prove only for so much of his debt as

might remain unpaid by the produce of the mortgaged estate, according to the rule in bankruptcy. *Greenwood* v. *Taylor*, 1 Russ. & M. 185.

Discussion of the principles upon which a specialty creditor, whose debt is also secured by a mortgage or lien, should prove his debt under a decree in a creditor's suit. Sir J. Leach's decision in *Greenwood* v. *Taylor* (1 Russ. & M. 185) questioned. *Mason* v. *Bogg*, 2 Myl. & C. 443; 1 Jur. 330.

In an administration suit, a mortgagee, unless he seeks the aid of a court of equity for the sale of his security, has a right to prove for his whole debt, and not for the balance only, after deducting the value of the mortgage. *Rome* v. *Young*, 4 Y. & C. 204.

Vendor of an estate obtained a decree for specific performance, with a declaration that if the purchase-money was not paid by a given day the estate should be sold, the proceeds paid to the vendor, and the purchaser be made personally liable in the event of any deficiency. The master fixed the day of payment, but the purchaser died before that day insolvent, and a creditors' suit was instituted for the administration of his assets. Upon a bill of revivor and supplement filed by the vendor, praying to have the benefit of the creditors' suit, as well as his own:—Held, that he was not entitled to prove against the general assets of the testator and at the same time to reserve his lien on the estate contracted to be sold, in case of a deficiency in the general assets. *S. C.*, 3 Y. & C. 199; 9 L. J., Ex. Eq. 41; 2 Jur. 963.

Quære, whether in this case he had any claim on the general assets until after the estate had been sold; and if he had, whether he was entitled to prove for the whole amount, or only the deficiency after sale of the security. *Ib.*

A mortgagee, after foreclosure and attempted sale, admitted to prove in an administration suit on giving up the property, but not allowed costs of foreclosure. *Haynes* v. *Haynes*, 3 Jur. (N.S.) 504.

Six persons entered into a joint commercial adventure, and opened an account at a bank. To secure the bank against overdrafts they gave the bank a joint and several cash credit bond in Scotch form, a letter of guarantee, and three joint and several promissory notes. One of the joint adventurers died insolvent before the judicature acts came into operation, and a suit was instituted for the administration of his estate, in which the bank sent in a notice of claim, and filed an affidavit claiming 30,195*l.*, as being the amount due on the joint account at the date of claim. By subsequent payments by the co-obligors the amount due on the joint account was reduced to 4,139*l.*:—Held, that the collateral security afforded by the liability of the deceased obligor's co-obligors on the joint and several securities constituted the bank a secured creditor of the deceased person, that the claim had been sufficiently made, and that, according to the practice before the judicature acts, the bank's assignee was entitled to prove for the whole 30,195*l.* and interest, so long as not more than 20*s.* in the pound in all was received. *Lovel* v. *Lovel*, 45 L. T. 252.

—— **Under the Judicature Act, 1873, s. 25, sub-s. 1.**]—The 1st sub-section of the 25th section of the Judicature Act, 1873, was not directed to take effect at the passing of the act, and therefore was suspended by the Supreme Court Commencement Act, 1874, until the 1st of November, 1875. Consequently, the estate of a person who died in April, 1874, and for the administration of which a suit was commenced in December, 1874, was to be administered according to the old rule of the Court of Chancery respecting secured creditors, and not according to the rule of the Court of Bankruptcy. *Hilton* v. *Jones* (47 L. J., Ch. 740; 9 Ch. D. 620; 38 L. T. 808; 26 W. R. 737) overruled. *Sherwin* v. *Selkirk*, 12 Ch. D. 68; 40 L. T. 701; 27 W. R. 842.

—— **Under the Judicature Act, 1875, s. 10—Realisation or Valuation of Security—Proof.**]—In cases of administration by the court, where, by the operation of the 10th section of the Judicature Act, 1875, the rules in bankruptcy are made applicable, a secured creditor of the person whose estate is being administered has a right of election either to realise his security (with the assistance of the court, if he pleases) and to prove for the amount by which the proceeds of the realisation fall short of his claim, or, in the alternative, to set a value upon his security, and to prove for the amount, by which his claim exceeds such valuation. If he elects to pursue the latter course, the valuation is binding, whether the proceeds of realisation of the security exceed or fall short of the valuation, and the secured creditor cannot claim the excess of the proceeds of realisation of the security if it fetches more than the valuation, nor if it fetches less can he prove against the estate for the amount by which it is deficient. A secured creditor for 1,828*l.* valued his security at 1,800*l.* It realised only 1,457*l.*:—Held, that by s. 10 of the Judicature Act, 1875, r. 101 of the Bankruptcy Rules of 1870 was made applicable to the case, and that the plaintiff could only prove against the estate for 28*l.* *Hopkins, In re, Williams* v. *Hopkins* (No. 1), 18 Ch. D. 370; 45 L. T. 117; 29 W. R. 767—C. A.

In cases of administration by the court, where, by the operation of the 10th section of the Judicature Act, 1875, the rules in bankruptcy are made applicable, a secured creditor of the person whose estate is being administered, has a right of election, either to realise his security (with the assistance of the court, if he pleases), and to prove for the amount by which the proceeds of the realisation fall short of his claim, or, in the alternative, to set a value upon his security, and to prove for the amount by which his claim exceeds such valuation. If the secured creditor is desirous of electing to realise his security, he must so elect before the period in the administration when the amount of his debt has, in ordinary course, to be ascertained by the chief clerk for purposes of proof; and if he has not at that time so elected, the chief clerk is bound to call upon him to value his security, and the valuation so arrived at will be binding, and if the security should realise less than the amount of the valuation the loss will have to be borne by the creditor. *Hopkins, In re, Williams* v. *Hopkins* (No. 2), 44 L. T. 773; 29 W. R. 752.

Secured creditors of an insolvent estate claimed for 400*l.* and interest; they valued their security at 500*l.*; their names were struck out from the schedule of creditors in the chief clerk's certificate. The security realised more than 500*l.*:—Held, that their right to the benefit of security was not limited to 500*l.* *Hopkins, In re, Williams* v. *Hopkins*, 52 L. J., Ch. 736; 48 L. T. 513; 31 W. R. 495.

In the administration of the insolvent estate of a deceased person, who died after the Judicature Act came into operation, a creditor holding a security sent in a claim in the suit, and in answer to a notice calling on him to value his security valued it at the full amount of his debt and interest:—Held, that the creditor could not subsequently reduce the valuation of the security in order to prove on the estate for the balance of his claim. *Findlater* v. *Butler*, 5 L. R., Ir. 95.

In a suit for the administration of the real and personal estate of T., a bank, to whom T. was indebted, sent in a claim in response to a posting for creditors. The claim stated the full amount of the debt, and stated also that the bank held, as security therefor, a mortgage of T.'s freehold estate. At the foot of the claim there was added the following paragraph:—"Inasmuch as there does not appear any reason to expect that the estate of the said T. will be insufficient for payment in full of his debts and liabilities, the bank have not valued the foregoing stated securities, or taken a summons asking for an order that the lands and premises affected by the said securities shall be sold or realised immediately, under the direction of the court; but if the defendant E. T. (executrix) apprehends that the estate will be deficient, and if she so informs the bank, they will thereupon take the steps required by the Judicature Act in the case of insolvent estates." In reply to an inquiry by the bank's solicitor, the solicitor for executrix wrote, on the 2nd February, 1888, stating that he believed that the estate would prove insolvent, but that he could not say what dividend it was likely to pay; and no further intimation was at any time given to the bank that the estate would prove insolvent. The chief clerk's certificate, which was filed on the 14th December, 1888, set out the bank's debt in the first schedule, and set out the mortgage in the fourth schedule, and stated that the full amount of the said debt was due thereon. On the 22nd January, 1889, the bank applied for liberty to proceed to realise their securities, with a view to ascertaining their value in the event of the estate proving insolvent:—Held, that it was still competent for the bank to value their securities, and prove for the balance of the debt against the general assets. *Cooper* v. *Teahan*, 23 L. R., Ir. 203—C. A.

—— **Right to Interest on Debt—Proof.**]—In the administration of an insolvent estate, a mortgaged property of the testator having been sold in the administration action, and the proceeds of sale paid into court:—Held, that the mortgagee was entitled to have the proceeds of sale applied first in payment of interest on the mortgage debt down to the date of payment, and then in payment of principal, and to prove against the estate for the unpaid balance of principal, but that the amount of the proof could not exceed the amount of principal due at the date of the judgment in the action. *Summers, In re* (13 Ch. D. 136) distinguished. *Talbott, In re, King* v. *Chick*, 58 L. J., Ch. 70; 39 Ch. D. 567; 60 L. T. 45; 37 W. R. 233.

In the administration of an insolvent estate a secured creditor is only entitled to interest on the amount at which he values his security from the date of valuing it, and not from the judgment for administration, which is the equivalent for adjudication in bankruptcy. Money received by secured creditors on account of such interest before the estate was found to be insolvent was deducted from the amount payable to them for principal. *Ross* v. *Ross*, 25 L. R., Ir. 362.

—— **Sale of Realty—Costs of Sale—Priority.**]—In a creditor's suit for the administration of an insolvent estate, mortgagees of realty, being required so to do, valued their security. An order was subsequently made for the sale of the realty, the mortgagees not objecting, and the same was carried out, the plaintiff having the carriage thereof. The amount realised was less than the sum at which the mortgagees had valued their security:—Held, that the plaintiff was not entitled to be paid his costs of the sale out of the amount realised. *Ross* v. *Ross*, 29 L. R., Ir. 318.

J., in his lifetime, had dealings with the Royal Bank, with whom he had deposited the title deeds of certain property, including some real estate at Portarlington. At the date of his death, J. owed the bank 361*l.* 15*s.* 1*d.* In an action to administer his assets the estate proved insolvent, and the Portarlington property was sold by the plaintiffs, by consent of all the parties, and realised 195*l.* The bank had valued their security on the Portarlington property at 160*l.*:—Held, that the bank was entitled to have the sum of 35*l.* (being the excess of the proceedings of the sale over the valuation) applied to pay their general costs of the proceedings before the plaintiffs were entitled to be paid any of their costs, even the costs of the sale. *Millar* v. *Johnston*, 23 L. R., Ir. 50.

—— **Suit by Mortgagee—Costs—Priority.**]—Mortgagees of realty and personalty brought an action for administration of the estate of the deceased mortgagor, and the mortgaged property was sold under an order of the court. A balance was found due to the executor on his accounts of personal estate. The personal estate not comprised in the mortgage was insufficient to pay the executor's costs of action, and the proceeds of the sale were insufficient to pay the principal and interest due on the mortgage:—Held, that the executor should be paid his costs out of the personal estate not comprised in the plaintiffs' mortgage, so far as the same would reach; and that, after providing for the costs of sale of the mortgaged property out of the money realised thereby, the executor's costs, not covered by the general personal estate, should be paid out of the proceeds of the personal estate comprised in the plaintiffs' security, in priority to the plaintiffs' demand and costs. Rules as to costs in suits by mortgagees discussed. *Leonard* v. *Kellett*, 27 L. R., Ir. 418. *See also* COSTS—OF CREDITOR, i., 3, (c), post.

Priority—Judgment Debts.]—The rule by which a judgment creditor of a testator is entitled to priority over simple contract creditors in the administration of the assets of the testator under an administration decree is not affected by s. 10 of the Judicature Act, 1875, which provides that in such administration of assets the same rules shall prevail as to the respective rights of secured and unsecured creditors as may be in force under the law of bankruptcy with respect to bankrupts' estates. *Smith* v. *Morgan*, 49 L. J., C. P. 410; 5 C. P. D. 337.

Sect. 10 of the Judicature Act, 1875, does not introduce into the administration of insolvent

estates of deceased persons the provision of s. 32 of the Bankruptcy Act, 1869, that all debts (with certain exceptions) are to be paid pari passu. Sect. 10 affects only the rights of the class of secured creditors as conflicting with those of the class of unsecured creditors; it does not affect the rights inter se of the members of those classes. Therefore, if a creditor of an insolvent testator recovers judgment for his debt against the executor before the date of a judgment in an administration action, he is, notwithstanding s. 10, entitled to be paid out of the assets in priority to the other creditors of equal degree. *Smith* v. *Morgan* (5 C. P. D. 337), approved and followed. *Maggi, In re, Winehouse* v. *Winehouse*, 51 L. J., Ch. 560; 20 Ch. D. 545; 46 L. T. 362; 30 W. R. 729.

The provision in the Judicature Act (Ireland), s. 28, sub-s. 1, that in the administration of insolvent estates the rules in bankruptcy shall be observed as to the respective rights of secured and unsecured creditors, does not affect unsecured creditors inter se. Therefore, where a creditor obtained judgment against an administratrix before decree for administration, the judge in chambers ordered his demand to be paid in full out of a fund in court, in priority to the other unsecured creditors. *Winehouse* v. *Winehouse* (20 Ch. D. 545), and *Smith* v. *Morgan* (5 C. P. D. 337), followed. *Scott* v. *Murphy*, 13 L. R., Ir. 10.

—— **Local Rates.**]—By the combined operation of s. 1, sub-s. 6 of the Preferential Payments in Bankruptcy Act, 1888, and s. 10 of the Judicature Act, 1875, parochial and other local rates (including poor rate and highway and general district rates) have, in the administration by the court of the assets of any person whose death is subsequent to December 31, 1888, and whose estate proves to be insufficient for the payment in full of his debts and liabilities, the same priority which they have, by virtue of the Preferential Payments in Bankruptcy Act, 1888, in the case of a bankruptcy where the receiving order is made after December 31, 1888, and, pari passu with wages and salaries, are payable before other debts. *Heywood, In re, Parkington* v. *Heywood*, 67 L. J., Ch. 25; [1897] 2 Ch. 593; 77 L. T. 423; 46 W. R. 72.

Bill of Sale.]—The 10th section of the Judicature Act, 1875, is not intended to enlarge the assets of an insolvent estate, but only to vary the rights of the persons entitled to the assets. And therefore that section does not apply the rules of bankruptcy so as to make an unregistered bill of sale void as against the unsecured creditors of an insolvent estate. *D'Epineuil, In re, Tadman* v. *D'Epineuil*, 51 L. J., Ch. 491; 20 Ch. D. 217; 46 L. T. 409; 30 W. R. 423.

Mutual Credit.]—The mutual credit clause (s. 39) of the Bankruptcy Act, 1869, will not be applied in the administration of the estate of a deceased person until it is shewn that the estate is insolvent, but the court may direct that a debt claimed on behalf of the estate from a creditor shall be paid into court to a separate account, with liberty to the creditor to apply, in case the estate shall prove to be insolvent. *Smith, In re, Green* v. *Smith*, 52 L. J., Ch. 411; 22 Ch. D. 586; 48 L. T. 254; 31 W. R. 413.

Married Woman—Advances to Husband—Claim against his Estate.]—The provisions of s. 3 of the Married Women's Property Act, 1882, postponing the claim of a wife, who has advanced money to her husband for purposes of his trade, as a creditor in case of his bankruptcy to the claims of his other creditors, must be treated as a rule of bankruptcy which is imported by virtue of s. 10 of the Judicature Act, 1875, into the case of the administration by the court of his assets in the event of his estate proving insolvent after his death. *Leng, In re, Tarn* v. *Emmerson*, 64 L. J., Ch. 468; [1895] 1 Ch. 652; 12 R. 202; 72 L. T. 407; 43 W. R. 406—C. A. Contra, *Moore* v. *Smith*, [1895] 1 Ir. R. 512—C. A.

Contingent Liability.]—A testator covenanted by deed for payment to his daughter of a sum of 5,000*l.*, with interest at 4 per cent. per annum, within one month after the death of his wife; also for payment to his daughter of an annuity of 100*l.* during the joint lives of himself and his wife and the life of the survivor, if his daughter should so long live. The testator died in 1879 insolvent, leaving his widow and daughter surviving, and a judgment was made, in a creditor's action, for administration of his estate. The daughter having sent in claims in respect of the principal sum and the annuity, they were both allowed on a valuation as at the date of the judgment, but subsequently the widow died. No certificate had yet been made in the action:—Held, applying the rules in bankruptcy as to contingent liabilities (Judicature Act, 1875, s. 10), that the daughter was entitled to prove for the full amount of the 5,000*l.*, less a rebate of interest at 4 per cent. per annum for the period between the date of the judgment and the death of the widow, and that her proof in respect of the annuity must be treated on the same principle. *Bridges, In re, Hill* v. *Bridges*, 50 L. J., Ch. 470; 17 Ch. D. 342; 44 L. T. 730.

iii. *Interest.*

Ord. LV. rr. 62 *and* 63, *relate to payment of interest on debts.*

Before the Orders of 1841.]—As to the rate of interest under a decree, which fluctuated in Lord Hardwicke's time, according to the nature of the fund, but which is now generally 4 per cent. *Denton* v. *Shellard*, 2 Ves. Sen. 239.

The court had decreed an account against defendant as administratrix of the assets of her husband. After his death, she took all his goods and stock-in-trade, and carried on the same business. The Master having reported 1,400*l.* due to plaintiffs, they demanded interest upon it; but the debt being on simple contract, and the administratrix not having yet sold the goods, which was her only fund for raising the money, Lord Chancellor would not allow her to be charged with interest. *Ryves* v. *Coleman*, 2 Atk. 440.

An executor settled an account with the landlord of his testator, for rent of certain freehold premises which had accrued since the testator's decease; gave him an order for the payment of the sum found due, with interest out of a certain fund when it should be made available:—Held, that such interest was not allowable to the

prejudice of other creditors, although the fund itself bore interest. *Short* v. *Judge*, Hayes, 443.

Interest not given from the confirmation of the report upon demands liquidated by it, but not bearing interest in their nature, as legacies and arrears of annuities, though both legacies and annuities were charged upon land, and the annuities were not paid out of the rents and profits as possession was taken by mortgagees, and though one of the annuities was the provision for a widow. *Creuze* v. *Hunter*, 2 Ves. J. 157; 4 Bro. C. C. 316; 2 Cox, 242; 2 R. R. 38.

Interest is computed by the Master's report, upon such debts only as carry interest according to the rate they carry; and upon further directions, subsequent interest is directed only on those upon which the report has already computed interest, but no interest is computed on simple contract debts by the report or order afterwards. *Id.* 165.

A creditor who has proved his debt under a decree, before the orders of 1841 came into operation, is not entitled to interest upon it. *Spencer* v. *Butler*, 5 Jur. 1130.

Since the Orders of 1841.]—The 46th order, entitling creditors who prove under a decree to interest from the date of it, is not retrospective. *Gullard* v. *Watson*, 4 De G. & Sm. 139.

A. claimed a debt before the Master in an administration suit. The executors resisted the claim, and the Master disallowed it; but a suit was afterwards instituted, in which the claim was established, and liberty was given to A. to apply for payment of his debt in the administration suit:—Held, that as he had not established his debt in that suit, he was not entitled to interest upon it under the 41st general order of August, 1841. *Davis* v. *Combermere*, 15 Sim. 394; 10 Jur. 959.

A creditor (under the old practice) who comes in and proves his debt in an administration suit, if such debt does not, in its nature, carry interest, will not be entitled to such interest merely on the ground of delay in the dealing with the assets, or in consequence of accumulation being directed. *Gruggen* v. *Cochrane*, 12 L. T. 72; 13 W. R. 520.

A creditor must not only prove, but come in for the purpose of proving his debt after the orders of August, 1841, came into operation, to bring his case within the scope of those orders; and where a decree is made before those orders came into operation, the orders do not apply to that case. *Ib.*

To entitle a creditor in an administration suit to interest on his debt, the decree must have been obtained, as well as the debt proved, since the Gen. Ord. 46 of the 26th August, 1841 (Cons. Ord. xlii. r. 10). *Wheeler* v. *Gill*, 44 L. J., Ch. 181; L. R. 19 Eq. 316; 31 L. T. 641; 23 W. R. 227.

A creditor's suit was instituted, and the usual decree made in 1830, but no inquiries or other further proceedings were prosecuted until 1873, when an order was made on petition in the suit directing inquiries as to debts, under which the chief clerk ultimately certified the plaintiff's debt:—Held, that he had not "come in and established" his debt within the meaning of the Gen. Ord. 46 of the 26th August, 1841 (Cons. Ord. xlii. r. 10), so as to entitle him to interest thereon. *Ib.*

Interest at 4*l.* per cent. will be allowed on the amount of a demand for work and labour in an administration suit, from the time when the demand for interest was made. *Mildmay* v. *Methuen*, 3 Drew. 91.

Interest is not payable upon the arrears of an annuity; and it forms no exception to that rule that the annuity is for maintenance, and is secured by a bond; but in an administration suit, upon further directions, the assets of a testator may, after payment of the other debts, be rendered liable, under the 46th order of August, 1841, for interest upon the arrears of an annuity from the date of the decree, and from the subsequent times of the annuity falling due. *Lainson* v. *Lainson*, 18 Beav. 7; 23 L. J., Ch. 170; 17 Jur. 1044; 2 W. R. 82.

—— **Reference as to, made on further Directions.**]—The reference to compute interest under the 46th order of August, 1841, on debts not by law carrying interest, may be made on further directions, although not made at the hearing. *Flintoff* v. *Haynes*, 4 Hare, 309.

—— **Deduction of Income Tax.**]—On a reference to the Master to compute interest on the simple contract debts of a testator, the income tax, in respect of interest on a bill of exchange due from the estate, was deducted from the same interest; and, it appearing to have been the uniform practice of the Masters to deduct the income tax from interest on bills of exchange and promissory notes, the court declined to disturb the practice, and held the deduction to be properly made. *Dinning* v. *Henderson*, 19 L. J., Ch. 273; 14 Jur. 1038.

Insolvent Estate—Judicature Act, 1875, s. 10.]—Under s. 28, sub-s. 1, of the Judicature Act (Ireland) (equivalent to the Judicature Act, 1875, s. 10), in administering the estate of a person who has died insolvent, a creditor on the estate whose debt bears interest, is entitled to interest only up to the date of the judgment for administration, which by virtue of that section is equivalent to an adjudication in bankruptcy, in cases where the death of the person whose estate is being administered occurred after the commencement of the act. *O'Brien* v. *Gillman*, 13 L. R., Ir. 6.

In an action for the administration of the estate of a person who has died insolvent since the commencement of the Judicature Act, 1875, a creditor on the estate whose debt bears interest is not entitled to interest up to the day of payment, but only to the date of the judgment for administration, which, by virtue of the 10th section of the act, is equivalent to an adjudication in bankruptcy. *Summers, In re, Boswell* v. *Gurney*, 13 Ch. D. 136; 27 W. R. 865.

—— **Eventual Surplus.**]—H. died in 1882. In 1883 an order was made for the administration of his estate in a creditor's action. The estate was then insolvent, consisting of shares in a company which were worthless. These shares afterwards became valuable. In 1896 the chief clerk made a certificate stating the amount of the debts, in which he calculated interest on the debts carrying interest only down to the date of the judgment. The estate turned out more than sufficient to pay the certified debts:—Held, that the questions as to which rules of bankruptcy are incorporated by s. 10 of the Judicature Act, 1875, were all settled by the certificate, and those rules had nothing to do with the distribution of the surplus. The surplus

must be distributed according to the rules of the Chancery Division, viz., in paying first interest on the debts which at law carried interest down to the date of payment, at the rates fixed by their contract, and subject thereto in paying interest at 4 per cent. to the other creditors on their debts. *Henley, In re, Alcock* v. *Henley*, 75 L. T. 307.

—— **Joint and Separate Creditors—Surplus Interest—Priority.**]—Prior to 1856 A. carried on a banking business in partnership with B. On the 13th March, 1856, A. died. Soon afterwards the bank stopped payment, and B. was adjudicated bankrupt. Several actions were commenced for the administration of the estate of A. By an order made in the year 1881 and in one of these actions, it was declared that A.'s separate creditors were entitled to be paid out of the estate in priority to his joint creditors, and also that A.'s separate creditors whose debts by law or special contract carried interest, were not entitled to interest in priority to the joint creditors in respect of the principal due to the joint creditors. The joint estate of the banking firm down to A.'s death, and the bank assets from that time until B.'s bankruptcy, and also B.'s separate estate, were administered in bankruptcy. The result of the actions to administer A.'s estate was that dividends amounting to 20*s.* in the pound were paid to both the separate and the joint creditors of A. on the principal sums due to them respectively, and that a surplus remained which was sufficient to satisfy all the interest on the joint as well as the separate debts:—Held, that the separate creditors, whether their debts did or did not by law carry interest, were entitled to take their interest in priority to the joint creditors. Held, also, that the dividends received ought to be accounted for in ascertaining the amount of interest due, in manner following, viz., by treating the dividends as ordinary payments on account and applying each dividend and the surplus (if any) to the reduction of the principal. *Whittingstall* v. *Grover*, 55 L. T. 213; 35 W. R. 4.

On Bond Debt—Not in Excess of Penalty.]—Where, in a creditors' suit, bond creditors had been allowed by the Master their principal and interest to the extent of the penalties of the bonds, and had received an apportionment upon the amount of the penalties upon further funds becoming available for the creditors, they were held entitled to subsequent interest on the sums mentioned in the conditions of the bonds remaining due, provided that such interest, together with the sums remaining due, did not exceed the penalties in the bonds. *Walters* v. *Meredith*, 3 Y. & C. 264.

A declaration in a decree, that a bond should be paid with interest from the 21st August, 1828:—Held, not sufficient to exclude the general rule, that the interest should not exceed the penalty. *Purcell* v. *Blennerhassett*, 10 Ir. Eq. R. 470.

Creditor's Default to Claim Payment.]—When any debt bearing interest, or any balance of such a debt remains unpaid, the creditor will be entitled to interest on the debt or any part of it of which he could not previously have obtained payment, but not on anything which remained unpaid through his own default to claim payment. *Ashley* v. *Ashley*, 46 L. J., Ch. 322; 4 Ch. D. 757; 36 L. T. 200; 25 W. R. 356—C. A.

When any debt bearing interest, or any balance of such a debt remains unpaid, the creditor will be entitled to interest on the debt or any part of it of which he could not previously have obtained payment, but not on anything which remained unpaid through his own default to claim payment. *Warman* v. *Zeal*, 25 L. T. 739.

Where the plaintiff in an administration suit obtained an order for a receiver, in 1822, but did not complete the appointment of the receiver under it until 1834, the court directed an inquiry to ascertain by whose default the receiver was not appointed, and directed, that if it should appear that it was by the plaintiff's default that he was not appointed, and if he might, through such appointment, have kept down the interest on his own demand, he should not now be entitled to so much of the interest on his debt as would have been paid by the receiver had he been appointed as early as he might have been. *Newby* v. *Drew*, 1 Jo. & Lat. 445; 7 Ir. Eq. R. 49.

Testator Domiciled Abroad at Death.]—In an administration by the court of the assets in this country of a testator who had a foreign domicil at the time of his death, although the property will be distributed according to the law of the place of domicil, the payment of interest will be governed by the practice of the Court of Chancery. *Hamilton* v. *Dallas*, 38 L. T. 215; 26 W. R. 326.

iv. Practice on Proof of.

Proof of Debt in Chambers.]—Answer of heir-at-law to bill by judgment creditor, admitting judgment, only binds the real estate. Executors cannot admit a debt, but plaintiff may prove it against executor in the office. *Wood* v. *Blake*, 2 Moll. 392.

A suit was instituted by A., on behalf of himself and all the other creditors of a testator, against the executor. The executor disputed the plaintiff's debt, but admitted that he had paid all the testator's debts which had come to his knowledge, and also the legacies given by the will, and that he was the residuary legatee. The plaintiff proved the debt; and, after the hearing of the cause, contended that the decree ought to be prefaced with a declaration that he was a creditor on the testator's estate for the amount of his debt. But the court held that, notwithstanding the special circumstances of the case, the declaration ought not to be made, and that the plaintiff was bound to prove his debt over again in the Master's office. *Field* v. *Titmuss*, 1 Sim. (N.S.) 218; 20 L. J., Ch. 328; 15 Jur. 121.

Simple contract creditor filing bill to execute trusts of will for payment of debts, must prove his debt, although his demand be not contested. *Caledon (Lord)* v. *Ivory*, 2 Moll. 360.

The proper form of a decree against the separate estate of a married woman, in a suit by a holder of her written engagement, on behalf of himself and all other creditors, for payment of their debts out of the real estate, charged therewith by her will, is an inquiry what debts there are to be paid, under the provisions of the will:—Held, that the plaintiff must therefore prove his debt over again before the Master. *Owens* v. *Dickenson*, Cr. & Ph. 48; 4 Jur. 1151.

The giving of the ordinary judgment, in administration suit at the instance of a creditor, does not relieve the plaintiff from the necessity of proving his debt in chambers, nor prevent the

defendant from there disputing it. *Boak* v. *Moore*, 1 L. R., Ir. 241.

If a party who has proved a charge dies, and no personal representative can be appointed to him in Ireland, the court will allocate a sufficient sum to pay his debt, and not allow the Master's report to be delayed on that account. *Piers* v. *Piers*, 2 Hog. 271.

—— **Special Circumstances.**]—The Master is not at liberty to state special circumstances unless authorised by the court; and where in a creditors' suit the decree directed the usual accounts, and the Master found the amount of the debt appearing to be due to the plaintiff, but stated without the authority of the court, special circumstances not supported by evidence, raising a doubt as to the amount of the apportionment to which the plaintiff would be entitled out of the intestate's estate, which was insolvent, upon the debt so found due, the court refused to enter into the consideration of such special circumstances. Semble, that the decision would have been the same, had the special circumstances been supported by evidence before the Master. *Gayler* v. *Fitzjohn*, 1 Keen, 469; 1 Jur. 101.

A. B. and C. D. had many business dealings and transactions together. During such dealings, A. B. gave C. D. a bond for 4,000*l*. A. B. and C. D. having both died, the administrator of C. D. filed a bill against the executor of A. B. to enforce payment of the bond. The executor of A. B. also filed a bill against the administrator of C. D. for an account of the dealings and transactions between them, and claiming that the bond should be treated, not as absolute and according to the letter, but as subject to or forming part of the account. A decree was made in the two suits referring it to the Master to take the accounts, and to inquire under what circumstances the bond was given, and in this decree an account, in the handwriting of C. D., which had been proved, was entered as read:—Held, that the account was properly receivable by the Master as evidence as well in favour of the administrator of C. D., and against the executor of A. B., as in favour of the executor of A. B., and against the administrator of C. D. *Dickin* v. *Ward*, 20 L. J., Ch. 211; 15 Jur. 834.

—— **Defence—What Permissible.**]—Under a decree in a suit by a bond creditor, made on proof of the debt, the executors may, in the Master's office, impeach the validity of the plaintiff's debt upon grounds which were not in issue in the cause at the hearing. *Whitaker* v. *Wright*, 2 Hare, 310; 12 L. J., Ch. 241; 7 Jur. 320.

After a decree in a suit by a plaintiff on behalf of himself and all other creditors, the executor may go into fresh evidence in chambers for the purpose of establishing a case of release, although the allegations in the bill contain statements upon which the defence or release might have been sufficiently raised at the hearing. *Cardell* v. *Hawke*, L. R. 6 Eq. 464; 19 L. T. 47.

—— **Right of Creditor to apply to vary Certificate.**]—A creditor first making himself a party by coming into the Master's office and proving his debt, excepted to the Master's report. By proving in the cause, he acquires a right to except to the report. *Wilson* v. *Wilson*, 2 Moll. 328.

—— **Right to attend Proceedings.**]—When a decree has been made in a creditors' suit, leave to attend the proceedings will not be given to creditors whose claims are not yet admitted. *Lacy* v. *Hill*, 23 L. T. 582; 19 W. R. 174.

Where, upon a bill filed by simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out, upon the Master's report, that the assets are insufficient to pay the specialty creditors, the specialty creditor, though not a party to the suit, may appear at the hearing on further directions without presenting a petition, if the case which he has to make depends only upon what appears in the Master's report. *Young* v. *Everest*, 1 Russ. & M. 426.

Non-proving Creditor—Sum set apart to provide for Debt.]—A sum set apart, on motion by the executor under Sir George Turner's Act (13 & 14 Vict. c. 35, s. 23), to provide for an unascertained debt mentioned in the Master's report, the creditor not having appeared or established the liability before the Master, but having been served with notice of and appearing on the motion. *Howkins, In re*, 10 Hare (App.) xxxiii., liv.

Disallowance of Claim—Appeal by One Creditor—Not available for other Creditors.]—In an administration suit where one creditor has appealed against the disallowance of a part of his claim, another creditor will not be allowed to argue, on the hearing of the appeal, against the disallowance of another claim by the same decree. *Pardo* v. *Bingham*, L. R. 4 Ch. 735; 20 L. T. 464; 17 W. R. 419.

Claims on Unsettled Accounts — Fund to answer—Title to—Inquiry.]—Where executors had invested money to answer claims on unsettled accounts between their testator and other persons, and paid the dividends to the tenant for life under the will, on a claim filed after the death of the tenant for life, by a party entitled to the fund, the court directed an inquiry before the Master as to who was the party entitled to the capital, and ordered the dividends to be paid in the meantime to the person entitled to the testator's estate. *Blachford* v. *Toller*, 15 Jur. 979.

Claim to Newly-discovered Assets.]—When a decree has been made for the administration of the estate of a deceased person, and the assets in hand have been distributed among his creditors, who have come in and proved, and at a later period further funds come in, and some only of the creditors who had proved come forward in answer to advertisements, the creditors who thus claim payment at the later period are not entitled to have the whole of the new fund applied so far as it will extend in payment of their claims, but only to receive rateable proportions of it according to the proportion which their debts bear to the total amount of the debts. *Ashley* v. *Ashley*, 46 L. J., Ch. 322; 4 Ch. D. 757; 36 L. T. 200; 25 W. R. 356—C. A.

Under an administration decree made in 1866 divers creditors carried in proofs, but the proceedings were not completed, in consequence of an insufficiency of assets. In 1888 further assets fell in, and by the chief clerk's certificate it appeared that there was a sufficient fund in court to pay all the creditors, but that some of the creditors whose claims were allowed could not be

found:—Held, that the proper course was to retain in court to the credit of each of such last-mentioned creditors a sum of consols representing the amount of his debt and the interest thereon, and to fully administer the residue of the fund. *Macdonald, In re, McAlpin* v. *Macdonald*, 59 L. J., Ch. 231; 62 L. T. 541.

v. Evidence.

Claim against Estate — Corroboration.] — The court will not act upon the unsupported testimony of a claimant upon the estate of a deceased person. *Grant* v. *Grant*, 34 Beav. 623. S. P., *Rogers* v. *Powell*, 38 L. J., Ch. 648; 18 W. R. 282. *Morley* v. *Finney*, 18 W. R. 490. *Harnett, In re, Leahy* v. *O'Grady*, 17 L. R., Ir. 543. Sed quære, *see* infra.

The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of the claimant applies to cases of alleged debt as well as to cases of alleged gift. *Finch, In re, Finch* v. *Finch*, 23 Ch. D. 267; 48 L. T. 129; 31 W. R. 526.

Semble, the rule is a rule of prudence rather than of law, and in an action tried by a jury it is the duty of the judge to recommend the jury to disregard the unsupported evidence of the claimant; but if they should decline to do so, and should find for the claimant, quære, if their verdict could be interfered with. *Ib.*

An English widow lady residing in Paris in a house which belonged to her for her separate use, married an English gentleman, and by the marriage settlement certain plate which formerly belonged to her first husband was settled to her separate use. After the marriage, her husband having family plate of his own, sent it to his wife's house in Paris, and she then sent her own plate to her son by her first marriage. Upon the death of the husband his family plate, and also a marble bust of himself, was in his wife's house at Paris. In a suit for the administration of his estate his wife claimed the plate as having been given her in exchange for her own plate, and the bust as having been presented to her by her husband:—Held, that the surrounding circumstances did not furnish corroborative evidence in support of the claim by the wife to the plate and bust, and that as the claim rested on her unsupported testimony, it could not be allowed. *Ib.*

Previously to her marriage with the testator, a widow had carried on a farm. After the marriage she continued to manage the business as before, upon an agreement, as she alleged, that the stock and capital were to be her separate estate. The farm was sold, and the proceeds invested in the husband's name, but as the widow alleged, as trustee for her. The widow claimed administration in respect of the proceeds of sale of the farm and for other sums which she stated that she had lent the testator out of her separate estate:—Held, that, in the absence of corroborative evidence, the claim of the widow to the proceeds of the farm and the other sums advanced to the testator could not be admitted as against the testator's estate; that the plaintiff was, however, entitled to the usual order for administration. *Whittaker, In re, Whittaker* v. *Whittaker*, 51 L. J., Ch. 737; 21 Ch. D. 657; 46 L. T. 802; 30 W. R. 787.

There is no rule of law that the uncorroborated evidence of a claimant against the estate of a dead man will be rejected, but it will be regarded with jealous suspicion. *Garnett, In re, Gandy* v. *Macaulay*, 31 Ch. D. 1—C. A.

There is no rule of law which precludes a claimant from recovering against the estate of a deceased person on his own testimony without corroboration; although the court will in general require such corroboration. *Hodgson, In re, Beckett* v. *Ramsdale*, 55 L. J., Ch. 241; 31 Ch. D. 177; 54 L. T. 222; 34 W. R. 127—C. A.

—— **Cross-examination.**]—A judgment creditor bringing in his claim in an administration suit, may be cross-examined as to the validity of his judgment. *Leuton* v. *Brudenel, Baker, In re*, 10 L. T. 859; 12 W. R. 1127.

An affidavit made under an administration decree in support of a claim of debt is made in a proceeding under the meaning of the 40th section of the 15 & 16 Vict. c. 86, so as to subject the deponent to cross-examination. *Cust* v. *Poyser* 3 Sm. & G. 369; 26 L. J., Ch. 93; 3 Jur. (N.S.) 38. Affirmed 26 L. J., Ch. 353.

The leave of the judge is not necessary to authorise the examiner to take the cross-examination. *Ib.*

As a general rule a party should file his affidavits before cross-examining a party on the other side. *Lancefield* v. *Iggulden*, 41 L. J., Ch. 473; 26 L. T. 687; 20 W. R. 621.

Therefore an affidavit filed in a creditors' administration suit by executors subsequently to their cross-examination of the plaintiff upon his affidavit in support of his claim is not generally admissible in proceedings in chambers for the adjudication of the claim, but it was allowed to be used upon leave given to the deponent to reply. *Ib.*

Admission of Liability by Executor—After Decree for Administration.] — A., B. and C. being successive tenants in tail of property held under an inalienable parliamentary title, and B. having, after the death of A., entered into possession of the estates, and, together with them, of certain leaseholds formerly in the possession of A., his executors brought an ejectment against B. to recover possession of the leaseholds as part of his estate. B. having died before trial of the action, another action was brought against C., the successor in title. C., who was also executor of B., compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that 4,000*l.* should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise, a creditors' suit was instituted and a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s executors to prove against B.'s estate for the amount of the rents actually received by him:—Held, that the judgment in the action against C. was not evidence of a wrongful possession by B., which could serve as a foundation for the claim, and that the admission by the executor as to mesne profits in the compromise was inoperative, being made after the decree. *Talbot* v. *Shrewsbury (Earl)*, L. R. 14 Eq. 503; 20 W. R. 854.

Issue directed as to Consideration for Bond.] —On a question, in the administration of assets, whether a bond given by the testator to his son for alleged arrears of salary was voluntary or for valuable consideration, the court, not relying on the admission of the testator, or the examination of the son and executor, in a case

where the estate was insolvent, directed an issue on the question whether the testator, at the time of executing the bond, was indebted to the obligee to the amount thereby secured. *Hepworth* v. *Heslop*, 6 Hare, 561; 18 L. J., Ch. 352; 13 Jur. 166.

Bond Debt.] — The nature of the evidence that may be required in the Master's office in proof of debts, particularly of bond debts, considered. *Whitaker* v. *Wright*, 2 Hare, 310; 12 L. J., Ch. 241; 7 Jur. 320. S. P., *Rundell* v. *Rivers* (*Lord*), 1 Ph. 88; 11 L. J., Ch. 27; 6 Jur. 89.

Mortgage by Deposit.]—A. B. took an equitable mortgage, by deposit of title deeds of certain leasehold premises, from C. D., in exchange for other premises. C. D. having died, E. F., a creditor, took out administration to his estate, and expended a large sum on the premises in question, and obtained a new lease thereof to himself from the original lessors, in ignorance of A. B.'s claim, as he alleged. E. F. denied that the debt claimed by A. B., or the greater part of it, was ever incurred, and stated that no traces of it were discoverable in his (testator's) papers:— Held, nevertheless, that the usual decree must be made as in case of an equitable mortgage, viz., an account and sale of the leasehold property. *Sims* v. *Helling*, 21 L. J., Ch. 76.

4. Sales by the Court.

In General.] — Sale of real estate, decreed provisionally, without waiting the account of the personal estate previously applicable. *Curtis* v. *Price*, 12 Ves. 105; 8 R. R. 303. S. P., *Holme* v. *Stanley*, 8 Ves. 2.

Charge upon real estate, in aid of the personal, will be made available for the satisfaction of creditor by a sale, although there be personal estate outstanding, if it be not immediately applicable; there being a deficiency of personal assets, when there is a deficiency of immediately available personal estate. A creditor being not to be delayed beyond the shortest reasonable time, the court directs the immediate application of such personal fund as is immediately available, and then resorts to the real estate. The court sometimes orders real estate to be sold before a chattel real, but only when all parties are competent to consent. A plaintiff is under no obligation to pay anything more than satisfaction of his own debt, but the court always accompanies a decree for payment of even a single debt with the order, to take the account of assets. *Clanmorris* (*Lord*) v. *Bingham*, 1 Moll. 514.

Upon a bill filed by creditors, whose debts are charged upon the real estate, no decree for the sale of the real estate can be made, unless by consent, until the Master has reported that the personal estate is insufficient, even though its insufficiency should be admitted by the executors. *Owen* v. *Pugh*, 3 L. J. (O.S.) Ch. 194.

If testator's personalty paid into court be clearly more than sufficient for payment of debts, legacies, &c., so that there is no occasion to resort to the produce of the estate devised to be sold for the purpose of creating a subsidiary fund for exigencies of will, court will proceed to decree execution of trust in exoneration of fund, without waiting for a final report, which would in strictness be necessary, or until the devised property should be sold. *Noel* v. *Henley*, 7 Price, 248; Dan. 211; 26 R. R. 660.

A testator directs his trustees to apply his personalty in paying debts and legacies, contemplating that there may be a surplus, and he directs the application of the rents of the realty on payment of such of his debts (except his mortgage debts) and legacies as his personalty should be insufficient to pay. A suit is instituted to administer his estate, and the personalty being insufficient to pay the debts and legacies, mortgage debts created by the testator remain unpaid, and no direction is given in the suit respecting them. The two first tenants for life and a remainderman concur in a petition for a sale of such part of the realty as shall be sufficient to pay off the mortgages and for an account:— Held, that there ought to be an inquiry what part of the real estate it will be fit and proper to sell to pay off the mortgages and for an account, the court having power after decree to direct a sale. *Cooke* v. *Cholmondeley*, 5 W. R. 835.

If a trustee, having discretion to sell trust property, submit to a decree for sale, the court is not therefore bound to carry the sale into execution. *Polley* v. *Seymour*, 2 Y. & C. 708; 7 L. J., Ex. Eq. 12; 1 Jur. 958.

—— **Where effected by Collusion.**] — Sale declared to be made subject to the trusts of the testator's will, where, under a decree that his real estate (which was devised in strict settlement, subject to debts) should be sold, the sale had been effected by collusion between the creditors and tenants for life. *Manaton* v. *Molesworth*, 1 Eden, 18.

Tenant for Life, as against.]—One seised in fee, and indebted by bond, in which his heirs are bound, devises his lands to A. for life, remainder to his first, &c., son in tail, remainder over. In a bill brought by bond creditors, the court will not decree the devisee for life to account for the profits, but only to keep down the interest; also the court will decree a sale to satisfy the bonds, though the lands be not devised for payment of debts. *Manaton* v. *Manaton*, 2 P. W. 234.

Tenant in Tail, as against.]—Tenant in tail coming in esse before the sale of real estate, should be made a party, because he is interested in having the account correctly taken, but such tenant in quasi tail of a chattel real need not be made a party to a bill for the administration of assets, under which there is had a sale of the chattel real, because it could be got at law by proceeding against the executor. *Clanmorris* (*Lord*) v. *Bingham*, 1 Moll. 514.

Of Lands of Lunatic Devisee.]—Estate devised away from the heir charged with payment of debts, ordered to be sold in aid of the personal estate where the devisee was insane, and the heir abroad. *Williams* v. *Whinyates*, 2 Bro. C. C. 399.

A devisee of real estate, subject to payment of debts, became of unsound mind, and was so found by inquisition. A committee was appointed, and an action for the administration of the testator's real and personal estate was commenced with the sanction of the Master in Lunacy, in the Chancery Division, by the lunatic and his committee, and, the testator's personal estate proving to be insufficient for payment of his debts, an order was made for sale of all

the testator's real estate and for payment of the purchase-money into court. Under this order the real estate was sold, and the purchaser paid the purchase-money into court. He, however, raised an objection to the title of the vendors, on the ground that they could not convey without an order in lunacy:—Held, that the administration action in which the order for sale was made, having been properly commenced with the sanction of the Master in lunacy, the lunatic plaintiff was entitled to carry on the action, and was, therefore, also bound by the order for sale made in it; that the lunatic was, therefore, a trustee within the Trustees Extension Act, 1852, s. 1, of the real estate, and that his committee should be appointed to convey. *Stamper, In re, Stamper* v. *Stamper*, 46 L. T. 372.

Where Infants interested.]—Where real estate is devised to infants charged with payment of debts, if personal insufficient, sale of real not decreed till Master report personal insufficient; though infants admit it so at the hearing. *Birch* v. *Glover*, 4 Madd. 376. See *Curtis* v. *Price*, 12 Ves. 105; 8 R. R. 303.

In a suit for administering the property of a person deceased, if an infant defendant is interested in the real estates, the court will not direct those estates to be sold till the accounts of the personal estate have been taken, and the cause heard for further directions. *Baillie* v. *Jackson*, 10 Sim. 167.

Where the heir-at-law was an infant, the court, in a suit by a simple contract creditor of the ancestor, in order to protect the infant's interests, abstained from giving the usual directions for a sale, until the cause came back for further directions; but such is not the usual or regular course of the court. *Lynch* v. *Joyce*, 3 Dr. & War. 349.

In a decree for raising legacies against an infant heir of a devisee, whose estate was charged with the legacies, a sale may be directed. *Walters* v. *Jackson*, 12 Sim. 278; 10 L. J., Ch. 383.

An estate descended to an infant heir cannot be sold at the suit of creditors, on the ground that, from circumstances of the property, a sale will be beneficial to the infant. *Brookfield* v. *Bradley*, Jac. 634.

Sale or Mortgage.] — A testator directed moneys required for the purposes of his will, to be raised by mortgage of part of his real estate. The Master found that the money could be more advantageously raised by a sale of part of the estate, but the court declined to direct a sale. *Drake* v. *Whitmore*, 5 De G. & Sm. 619.

When debts are charged on settled real estate, the court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate, than to those whose interests are more remote. *Metcalfe* v. *Hutchinson*, 45 L. J., Ch. 210; 1 Ch. D. 591.

To pay Costs.]—The court has no jurisdiction to charge the costs of an administration suit on any part of the estate administered, and direct a sale against the will of a person beneficially entitled, who submits to pay his share of the costs. *Lees* v. *Lees*, 42 L. J., Ch. 319; L. R. 15 Eq. 151; 27 L. T. 743; 21 W. R. 215.

Under 3 & 4 Will. 4, c. 104.]—The court has jurisdiction, under 3 & 4 Will. 4, c. 104, to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estate, though it be instituted, not by a creditor, but by the heir and the next of kin of the deceased. *Price* v. *Price*, 15 Sim. 484; 16 L. J., Ch. 232.

The court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts, in a suit instituted, not by a creditor of the deceased, but by a person interested in his estates under his will. *Rodney* v. *Rodney*, 16 Sim. 307; 12 Jur. 665.

In order to obtain a decree for the sale of a testator's real estate for payment of his debts, under the statute 3 & 4 Will. 4, c. 104, it is not necessary that the bill should be filed by a creditor. *Dinning* v. *Henderson*, 2 Coll. C. C. 330.

Under 15 & 16 Vict. c. 86.]—In a suit to ascertain the construction of a will of real estate, and to carry the trusts thereof into execution, the court has power, if necessary, to direct a sale or mortgage of a sufficient part of the property, for the purpose of raising the taxed costs of the suit, although some of the plaintiffs are infants. Sect. 55 of the 15 & 16 Vict. c. 86, gives power to direct a sale before the hearing in those cases only in which the court could under the old practice have given such direction at the hearing. *Mandeno* v. *Mandeno*, Kay (App.) ii.

Sect. 55 of the 15 & 16 Vict. c. 86, is applicable only to cases in which, for the protection of property or other like cause, it is necessary to apply to the court for a sale, and it was not intended to enable parties, in a contested suit, to obtain, upon an interlocutory application before the hearing, a decision upon the questions in contest. *Prince* v. *Cooper*, 16 Beav. 546; 23 L. J., Ch. 343; 1 W. R. 206.

The court has power, under 15 & 16 Vict. c. 86, s. 55, to order a sale before the hearing of a suit, where it is for the protection or benefit of the estate. *Tulloch* v. *Tulloch*, L. R. 3 Eq. 574.

In a suit to render the estate of a deceased trustee of a will liable for certain breaches of trust, a decree was made declaring the liability of the estate to make good what should be found due in respect of such breaches of trust, and directing accounts and inquiries. Before the chief clerk had made his certificate, but it having appeared in the course of taking the accounts and inquiries that the estate was liable for a considerable amount which the personal estate was insufficient to satisfy, the cestuis que trustent applied by petition, under 15 & 16 Vict. c. 86, s. 55, for the sale of certain real estate belonging to the deceased trustee, a mortgage on which had been redeemed by the existing trustee of the will:—Held, that the court had jurisdiction to order the sale, and that it was in accordance with the practice of the court in such a case when once it had been ascertained that the real estate would have to be resorted to, to make an order for the sale of the real estate without waiting for further consideration. *Bell* v. *Turner*, 45 L. J., Ch. 681; 2 Ch. D. 409; 24 W. R. 451.

The Court of Chancery has jurisdiction, under 15 & 16 Vict. c. 86, s. 47, to make an order on summons for the administration and sale of a testator's real estate, where the will only gives the executors a power to sell such estate, and to

give receipts, without vesting the estate in them by devise. *Colman* v. *Turner*, 39 L. J., Ch. 776; L. R. 10 Eq. 230.

Note.—Ord. LI. r. 1 has been substituted for 15 & 16 Vict. c. 86, s. 55, which is now repealed.

Under Ord. LI. r. 1.]—An action was brought by the infant heir-at-law (by a next friend) of an intestate against the widow, who was the administratrix, claiming accounts of the personal estate, and of the rents and profits of the real estate received by the defendant. The action came on for hearing on motion for judgment, and the court was asked under Ord. LI. r. 1, to make an order for the sale of the real estate. The defendant did not object:—Held, that this was not "a cause or matter relating to real estate" within the meaning of the rule, and that the court could not order a sale under that rule. But, upon a summons under the Settled Land Act, a sale was ordered. *Staines, In re, Staines* v. *Staines*, 55 L. J., Ch. 913; 33 Ch. D. 172; 35 W. R. 75.

Under r. 1 of Ord. LI. the court has power to order a sale of real estate only when it is necessary or expedient for the purposes of the action before it that the property should be sold. No new power to order a sale is conferred. *Robinson, In re, Pickard* v. *Wheater*, 55 L. J., Ch. 307; 31 Ch. D. 247; 53 L. T. 865.

Where Rents and Profits charged.]—Where debts are directed by will to be paid out of rents and profits, the court, if it is necessary, will decree a sale. *Berry* v. *Askham*, 2 Vern. 26.

Money devised to be raised out of profits, and the profits will not raise it in a convenient time, the court will decree a sale. *Heycock* v. *Heycock*, 1 Vern. 256.

When debt and legacies are by will directed to be raised by perception of rents and profits, or by leasing and mortgaging of the land, this restrains it merely to a payment out of rents, and the court cannot decree a sale. *Ridout* v. *Plymouth* (*Earl*), 2 Atk. 105.

A sale directed on the words "rents and profits alone," though generally contrary to testator's intent in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself; another construction, however, as to legacies, upon the addition of the words, "as the rents and profits, &c., should advance the money." *Baines* v. *Dixon*, 1 Ves. Sen. 41.

Devise of "rents, profits, and produce" of West India estate to be consigned to trustees, and applied by them in disencumbering an estate in Scotland of debts, and also in payment of other debts, funeral expenses, and legacies:—Held, on rehearing, that such charges could only be paid out of the annual perception of rents and profits, and that part of the former decree which had directed a sale was reserved. *Conyngham* v. *Conyngham*, 1 Ves. Sen. 522.

B. devised his estate to trustees to pay yearly rents and profits in discharge of his wife's jointure, his sister's annuity, and in payment of his debts and the interest thereof, then to certain uses. The creditors file a bill praying a sale, but this court cannot under such a devise decree the estate to be sold. *Lingard* v. *Derby*, 1 Bro. C. C. 311.

Devise for payment of debts by rents and profits, out of the statute of fraudulent devises; but a gross sum for that purpose will not be limited to annual rents, but is to be paid with all convenient speed. Distinction between debts and legacies and annuities, but the same provision for all is evidence, although not conclusive, that all are to be paid in the same way. The same inference as to costs, directed to be paid in the same manner, exonerating the fund generally liable in the first instance. *Bootle* v. *Blundell*, 1 Mer. 193; 19 Ves. 494, 528; G. Coop. 136; 15 R. R. 93.

Words in will "rents and profits" tended beyond their natural meaning, viz. 'annual profits," to mortgage or sale, when necessary to effect the object, such as raising a gross sum, for fines on renewal, as well as portions; and are not controlled by apparent intention to preserve estates entire. *Allan* v. *Backhouse*, 2 Ves. & B. 65. Affirmed Jac. 631; 13 R. R. 23; 23 *Ib.* 167.

A direction in a will to pay debts out of the rents and profits of real estate primâ facie charges the debts on the corpus, unless the will contains a context shewing that annual rents and profits only are meant. *Metcalf* v. *Hutchinson*, 45 L. J., Ch. 210; 1 Ch. D. 591.

When debts are charged on settled real estate, the court, in determining whether the debts are to be raised by sale or mortgage, will give greater weight to the wishes of the persons whose interests in the estate are immediate, than to those whose interests are more remote. *Ib.*

Of Incumbered Estates—In General.]—In a creditors' suit for the administration of real estate subject to a mortgage having priority to the claims of creditors, a sale of the estate free from the mortgage cannot be directed without the consent of the mortgagee, whether he is a party to the suit or not. *Wickenden* v. *Rayson*, 6 De G. M. & G. 210; 25 L. J., Ch. 162; 4 W. R. 39.

If, however, the mortgagee is a party to the suit, the direction will not be made in the common alternative form, namely, that the property shall be sold free from his security if he concurs in the sale, and subject to it if he does not concur; but the court will require the mortgagee to elect at once whether he will concur or not. *Ib.*

The court has no jurisdiction to order a sale of the mortgaged property freed from the mortgage, without the consent of the mortgagee. *Ib.*

An implied power of sale in the executor of a mortgagor, arising from a direction in the will to pay debts, will not enable the court to direct the sale of the mortgaged estate, if it cannot make a decree for foreclosure. *Bolton* v. *Stannard*, 27 L. J., Ch. 845; 4 Jur. (N.S.) 576; 6 W. R. 570.

Such a decree can only be made in a creditors' suit. *Ib.*

A. took a mortgage of part of the property devised by B. L.'s will. A suit was afterwards instituted by a party claiming under the will, for administration of the testator's estate, to which A. was made a party for the sake of impeaching his security. A receiver was appointed, and A., who had not given the notice requisite to enable him to take possession, did not oppose. Before decree the parties entitled to the equity of redemption of the mortgaged property brought an action, with the sanction of the court, against parties asserting adverse rights, and in November, 1849, the action was, with the sanction of the court, compromised. A. was served with notice of the

applications relating to these proceedings, but did not in any manner interfere. During these proceedings a decree for accounts and inquiries was made, and in November, 1849, A. was found to be first incumbrancer. In 1853, a decree on further directions was made, directing a sale and obliging A. to concur. A. did not oppose, but shortly afterwards, having discovered that a sale would be prejudicial to him, he presented a petition for the discharge of the receiver, and to be let into possession. This was refused by Sir W. P. Wood, Vice-Chancellor, on the ground that A. was not entitled to take possession till the costs relating to the action and compromise had been paid:—Held, on appeal, that the mortgage had priority over the costs incurred in relation to the action, and over the general costs of suit, and that the prayer of the petition must be granted:—Held, also, that the decree on further directions must be varied by directing the sale to be subject to the mortgage if the mortgagee should not concur, and free from it if he did concur. *Langton* v. *Langton*, 24 L. J., Ch. 625; 1 Jur. (N.S.) 1078; 3 Eq. R. 394; 3 W. R. 222—L.JJ.

The grantor of an annuity which was the third incumbrance on his real estates, executed a trust deed (to which the annuitant was not a party), whereby the estates were conveyed to trustees, on trusts for sale to discharge the incumbrances according to their priorities: and the first trust of that deed was to pay the costs of the trustees in the conduct of the sale. After the execution of the trust deed, the trustees applied to the annuitant for his consent to the sale. In answer to that application the solicitors of the annuitant offered to facilitate the sale, but asked for a copy of the trust deed: adding, "When we have seen the deed we shall be better able to inform you whether our clients will have any difficulty in joining in the conveyances." And, in answer to a subsequent application, they assented to the appropriation of a part of the rents towards rendering the property more eligible for sale. Part of the property was sold, the annuitant concurring in the sale, whereby a sufficient sum was realised to pay the prior incumbrances; but it being apprehended that the residue of the property would not realise enough to pay both the costs of the trustees and to redeem the annuity, the trustees applied to the annuitant for leave to retain, in the first place, out of the future proceeds of sale, a sum sufficient to pay their costs. This being refused, and a bill being filed to compel the annuitant to join in the conveyances:—Held, under the circumstances, that he was not bound to do so, except upon the terms of having the annuity redeemed. *Crosse* v. *General and Reversionary Investment Co.*, 3 De G. M. & G. 698; 2 Eq. R. 579.

Where a second incumbrancer's demand would exhaust the entire fund in a creditor's suit, the court refused to allow him to pay off the first incumbrance and take a conveyance without the expense of a sale; but, all parties consenting, referred it to the Master to ascertain the value of the debt and estate, and, if it would not be beneficial to have a sale, directed the conveyance to be made as asked. *Lynch* v. *Kelly*, 9 Ir. Eq. R. 342; 3 Jo. & Lat. 628.

—— **Where Incumbrancer consents—Costs—Interest—Completion.**]—The mortgagee or incumbrancer, consenting to a sale of the mortgaged premises in an administration suit, does not thereby waive his right to be paid his principal, interests, and costs, out of the moneys produced by the sale, in priority to the costs of the plaintiffs in the cause. *Hepworth* v. *Heslop*, 3 Hare, 484; 9 Jur. 796.

In a suit to administer a mortgagor's estate, the mortgagee, who was not a party, came in and consented to a sale. The produce formed the whole of the assets, and was less than the mortgage:—Held, that the mortgagee was entitled to the whole fund, after payment of the costs of sale. *Dighton* v. *Withers*, 31 Beav. 423.

Where, by consent of a mortgagee, property is sold by the court free from the mortgage security. Semble, that the costs of other parties of the sale ought not to be paid out of the proceeds of sale in priority to the mortgage debt; but whether they ought not to be so paid where the estate is so sold in an administration suit in which the mortgagee has proved for the whole mortgage debt, quære. *Mackinlay, In re, Ward* v. *Mackinlay*, 2 De G. J. & S. 358.

Where lands subject to a mortgage had been sold under a decree, in a creditor's suit, the mortgagee joining in the conveyance of the lands free from his mortgage:—Held, that he was entitled to have the expenses of the actual sale, but no more, borne out of the proceeds of the sale, the costs and expenses being left to be defrayed out of the general assets. *Berry* v. *Hebblethwaite*, 4 Kay & J. 80.

In an administration suit, an estate was ordered to be sold discharged of the mortgage, if the mortgagee consented. The mortgagee consented to the sale:—Held, that the mortgagee was only entitled to six months' interest from the date of his consent, if paid within that time, and the interest to the day of payment if paid afterwards, out of the proceeds of the sale. *Day* v. *Day*, 31 Beav. 270.

A mortgagee who was a party to the suit, consented to a sale of the mortgaged property:—Held, that he must produce, and leave in the Master's office, the title deeds which were necessary, in order to complete such sale. *Livesey* v. *Harding*, 1 Beav. 343.

—— **Sale Subject to Incumbrance.**]—A., having a lien on the testator's estate, established his debt under the decree; but his claim for interest was disallowed by the Master, whose report stood confirmed. The estate was sold subject to A.'s lien, and A. having refused to accept from the purchaser his principal without interest, was not allowed to participate as a creditor in the purchase money. *Hempstead* v. *Hempstead*, 4 Beav. 423.

—— **Under Conveyancing and Law of Property Act, 1881, s. 5.**]—Where a real estate, forming part of an estate which is being administered by the court, is charged with an annuity, upon further consideration the court will not, under the Conveyancing and Law of Property Act, 1881, s. 5, direct the property to be sold free from the annuity, but will direct an application in chambers as to the mode of sale. *Patching* v. *Bull*, 46 L. T. 227; 30 W. R. 244.

Under s. 5 of the Conveyancing and Law of Property Act, 1881, an order for the sale of land free from an incumbrance (the incumbrancer not being a party to the action) should follow the words of the act, which are to be interpreted strictly, and after directing payment into court of the purchase money, and setting apart a sufficient amount to meet the claims of the

incumbrancer, proceed to declare that thereupon any person interested should be at liberty to apply in chambers for a declaration that the land is free from the incumbrance. *Dickin* v. *Dickin*, 30 W. R. 887.

Where lands charged with legacies were ordered to be sold in an action, and it was impracticable to procure a release from the legatees, and the purchase money largely exceeded all the incumbrances on the lands, the court made an order under the 5th section of the act declaring that on payment of the purchase-money into court the lands should be freed from such charge. *Archdale* v. *Anderson*, 21 L. R., Ir. 527.

—— **Proceeds of Security Less than Debt.**]—In a suit to administer a mortgagor's estate, the mortgagee, who was not a party, came in and consented to a sale. The produce formed the whole assets, and was less than the mortgage:—Held, that the mortgagee was entitled to the whole fund, after payment of the costs of sale. *Dighton* v. *Withers*, 31 Beav. 423.

The unexpired term in a house, and the goodwill of a business established in it, were sold in a creditor's suit, with the consent of a person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt:—Held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the goodwill, or from the value of the lease, independently of the goodwill. *Chissum* v. *Dewes*, 5 Russ. 29; 29 R. R. 10.

Where the fee simple of estates mortgaged by an intestate, illegitimate, was not worth the mortgage money:—Held, that the mortgagor could not on that account, as against the Crown, entitled to the equity of redemption, be deemed a bare trustee for the mortgagee, within 4 & 5 Will. 4, c. 23, s. 2; the estate ordered to be sold in the administration of assets, the mortgagee to become a purchaser, with liberty to apply to the Crown for a grant of the fee. *Rogers* v. *Maule*, 1 Y. & C. C. C. 4.

Other Matters.]—The Court of Appeal, though it may be of opinion that a sale of real estate forming part of an estate being administered by the court would more conveniently take place in the district registry where the administration action was commenced, will not interfere with an order of the judge of the court directing the sale to take place in his own chambers, that being a matter for the discretion of the judge. *Macdonald* v. *Foster*, 6 Ch. D. 193; 37 L. T. 296; 25 W. R. 687—C. A.

A testator directed certain parts of his real estate to be sold, and the proceeds were to be held by the trustees on the same trusts as those created by the testator with respect to the unsold parts of his estates. A settlement was directed by the will to be made comprehending those trusts:—Held, that before the court in chambers could direct a sale of the portions of the real estate, it must be satisfied that all proper parties were before the court. Consequently, that all persons taking interest in the unsold parts of the estate under the testator's will, down to and including the first vested estate of inheritance, were necessary parties to the suit. *Pigott* v. *Pigott*, 8 L. T., 268.

Evidence of the propriety of a sale of an estate by private contract heard and approved of in court, and not referred to chambers. *Pimm* v. *Insall*, 10 Hare (App.), lxxiv.

5. Payment into Court.

(a) *In General.*

In what Cases.]—Equity will not take securities out of hands of executor unless on a strong case. *Clare* v. *Almuty*, 2 Eq. Abr. 420.

A clear and strong case must be made out for court to order administrator to bring personal estate unapplied into court. *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

Unless all persons interested in a fund are before the court, an order for payment of it into court will not be made on an undertaking by the plaintiff to make them parties, except perhaps in cases of administration or creditors' suits. *Marriage* v. *Royal Exchange Assurance Co.*, 18 L. J., Ch. 216.

Quære, whether such an order would be made in those suits. *Ib.*

Personal property in the hands of a testamentary guardian and executor ordered into court, there being no particular purpose to be answered by leaving it outstanding. *Blake* v. *Blake*, 2 Sch. & Lef. 26.

Executor not called on to lodge money except upon affidavit of his insolvency, or an admission by him of the balance in his hands after payment of debts. *Rutherford* v. *Dawson*, 2 Ball. & B. 17.

It is no ingredient to take the assets out of the hands of an executor that he is not of affluent fortune, as long as the testator has placed his confidence in him without regarding his circumstances. *Hathornthwaite* v. *Russell*, 2 Atk. 126.

An executor is bound to pay into court money due from himself. *Eagleton* v. *Kingston*, 8 Ves. 466.

In July 1852 H. quitted England for America, and wrote home announcing his safe arrival at New York. There was evidence that he was in declining health when he quitted England, and that, from his character, education, and previous life, he would, if living, have communicated with his friends in England. Advertisements requesting information concerning him had been inserted in the American newspapers, but he was never heard of again. The father of H. died in September 1853 intestate. One of the next of kin of the father, supposing the son to have predeceased him, filed a bill for the administration of the father's estate:—Held, that there was primâ facie evidence of the death of H. in his father's lifetime to entitle him to have the personal estate secured in court. *Danby* v. *Danby*, 5 Jur. (N.S.) 54.

—— **Validity of Will contested.**]—Where will is contested in Ecclesiastical Court on the ground of insanity of testator, executor ordered to pay in 1,000*l.* he has collected of testator's money into the bank in the name of the accountant general, and receiver appointed of the whole estate to pay in from time to time what he receives whilst the will is contesting. *Montgomery* v. *Clark*, 2 Atk. 379.

A motion on the suit of the next of kin of a deceased person, whose will is the subject of litigation in the Ecclesiastical Court, for the payment into this court of money which was in the hands of the executor of the alleged will, refused; no decision either in the Ecclesiastical

Court or at law having been come to on the validity of the will, and the executor insisting upon such validity by his answer, and denying that he was insolvent. *Edwards* v. *Edwards*, 10 Hare (App.), lxiii.

An executor, whose title is in dispute in the Ecclesiastical Court, will not be ordered to pay into court money which was received by him as executor before the appointment of a receiver pendente lite. *Reed* v. *Harris*, 7 Sim. 639; 5 L. J., Ch. 126.

—— **Pending Appeal.**]—Executor being reported to hold a balance and the party interested calling for the investment of it, pending an appeal by the executor, court will compel the executor to bring in the sum reported. *Carmichael* v. *Wilson*, 3 Moll. 92.

—— **Annuity charged on House—Insurance Money of House.**]—A testator charged his real estate with an annuity to his widow, and subject thereto devised it to S. A. in fee, and appointed her his executrix. The testator had insured a house; policy expired a few months after his death, and was then renewed by S. A. Soon afterwards the house, which was the whole of his real estate, was burnt down. The insurance money was ordered to be paid into court on a motion by the widow, in a suit instituted by her against S. A. for administration. *Parry* v. *Ashey*, 3 Sim. 97; 30 R. R. 132.

—— **Scotch Infants — Administration by Court—English will.**]—A curator bonis and factor loco tutoris of Scotch infants is not bound to pay into the Court of Chancery assets belonging to the infants receivable under an English will of which the curator is administrator, and which is in course of administration by the court. *Mackie* v. *Darling*, L. R. 12 Eq. 319; 19 W. R. 796.

—— **Order as to part of fund only.**]—Widow being, as administratrix, possessed of property of intestate, consisting of bank stock, motion to restrain her from disposing of it, and payment into court, was refused; but, being clearly entitled to her third, ordered to pay the two-thirds into court. *Rogers* v. *Rogers*, 1 Anstr. 174.

Where part of a residuary estate has been invested on an improper security, and the defendant has an interest therein, the court, on being satisfied that there is no existing claim on the estate, sometimes confines the amount to be paid into court to the share of the plaintiff. *Score* v. *Ford*, 7 Beav. 333.

—— **Income of Fund in Court.**] — On a motion to pay assets of a testator into court, the court declined to direct the payment of the income to the tenant for life, to be continued, unless the executor took upon himself the responsibility of the payment. *Abby* v. *Gilford*, 11 Beav. 28.

Contra, *Dando* v. *Dando*, 1 Sim. 510.

—— **Against Party not Executor or Administrator.**]—In a suit for the administration of a testator's estate, the court refused, upon motion, to order the payment into court of a fund which was claimed as a donatio mortis causâ, and which was admitted by the answer of the party claiming it to be in her possession. *Cutting* v. *Rand*, 5 L. J., Ch. 213.

A. died in a colony, and made colonial representatives, and bequeathed his residue to B., who afterwards died. B.'s representative received, from A.'s colonial representatives, his residue. The representative of B. was also a creditor of A:—Held, that in a creditors' suit the representative of B. could not be compelled to bring into court the money so paid to him by A.'s colonial representatives. *Silver* v. *Stein*, 1 Drew. 295; 21 L. J., Ch. 312.

An executor had deposited at his bankers money, being part of the estate, and an order had been made that the executor should pay the money into court, and sequestration had issued against him:—Held, that an adverse order to pay the money in could not be made against the bankers, not being parties to the suit, but on their submission to the jurisdiction a directory order was made. *Manton* v. *Manton*, 40 L. J., Ch. 93.

In a suit against the bank and an administrator, appointed under 38 Geo. 3, c. 87, the court, on motion before decree, ordered stock standing in the testator's name to be transferred to the accountant-general. *Warburton* v. *Hill*, 5 Sim. 532.

—— **Legacy for Life—Right of Residuary Legatee.**]—The rule that if personal property consisting of money or stock is limited to A. for life, and after his death to B. absolutely, it will be ordered into court for administration in an action by B. for the purpose, is not absolute, and will only be enforced as against A. where there is reasonable ground, such as danger to the fund, for the application. *Braithwaite, In re, Braithwaite* v. *Wallis*, 52 L. J., Ch. 15; 21 Ch. D. 121; 48 L. T. 857; 31 W. R. 180.

Form of Order.]—The order upon the executors to bring in the fund, ought to direct, not the first balance reported, but the balance to be reported on a further account, to be taken after deducting all such costs, charges, legacies, and expenses, as are presently payable, to be brought in. *Barry* v. *Barry*, 1 Moll. 210.

Evidence.]—On motion to compel the executor to pay the fund into bank, the answer only of the executor can be relied on. No affidavit can be used except that of a calculator or accountant, who examines the schedule annexed to the answer, and swears to the amount in the hands of the executor appearing therefrom. *Black* v. *Creighton*, 2 Moll. 554.

Costs.]—The court in ordering the assets to be brought in does not cramp an executor who is engaged in suits, by leaving him to carry on those suits upon his own funds. It allows him to retain sufficient not only for costs already incurred, but for probable growing costs. *Betagh* v. *Concannon*, 2 Moll. 559.

An executor, having been ordered to pay money into court, is not thereby deprived of his lien on the fund for his costs. *Blenkinsop* v. *Forster*, 3 Y. & C. 205; 8 L. J., Ex. Eq. 8. And see *Knapman, In re*, 50 L. J., Ch. 629; 18 Ch. D. 300; 45 L. T. 102—C. A.

A party who had been ordered to transfer large sums of stock into court, paid the broker at the rate of 1*s.* 3*d.* per cent. for identifying him on making the transfer:—Held, that the payment, which amounted to 28*l.* 2*s.* 6*d.*, was proper, and ought to be allowed in taxing the party's costs.

Davenport v. *Powell*, 14 Sim. 275; 14 L. J., Ch. 115.

One guinea only is allowed to the broker of the accountant-general for the transfer of stock into court, and where executors had, upon such a transfer, employed their private broker, the additional amount paid by them to him was disallowed. *Hopkinson* v. *Roe*, 1 Beav. 181.

The costs of transferring stock from the name of the testator into the names of the executors, were disallowed. *Ib.*

Effect of Order to Collect and Pay in.]—The effect of an order in an administration suit, that a personal representative shall get in the outstanding personal estate, and, within a certain date, pay the proceeds into the bank to the credit of the cause, is to ear-mark the outstanding personal estate, and to disable the personal representative from dealing with such proceeds otherwise than by paying them in as directed. *Harries* v. *Rees*, 37 L. J., Ch. 102; 17 L. T. 418; 16 W. R. 91.

The solicitors of the personal representative are in such a case bound, as officers of the court, to take notice of the order. *Ib.*

The solicitors of the personal representative in such a case having retained, in payment of their costs incurred before the date of the order, part of the proceeds of the estate which they had since the order collected, and having paid over other part to the personal representative, were held to have disobeyed the order, and to be chargeable with the amount of the proceeds collected by them, with interest from the time they had received them, and with the costs of suit up to the hearing. *Ib.*

(b) *On Admission of Assets.*

In what Cases.]—Executor not called on to lodge money, except upon affidavit of his insolvency, or an admission by him of a balance in his hands after payment of debts. *Rutherford* v. *Dawson*, 2 Ball & B. 17. And see *Richardson* v. *Bank of England*, 4 Myl. & C. 165; 2 Jur. 911.

Practice to order payment of money into court upon admission in the defendant's answer. *Strange* v. *Harris*, 3 Bro. C. C. 365.

It is only when an executor, in his answer to the bill of the next of kin, &c., admits that he has a clear residue in his hands, free from all demands, that he is ordered to bring it into court. *Standish* v. *Herbert*, 2 Moll. 522.

Where an executor admits that he has received a certain sum belonging to the testator's estate, but adds that he has made payments, the amount of which he does not specify, the court will allow him to verify the amount of his payments by affidavit, and order him, on motion, to pay the balance into court. *Anon.*, 4 Sim. 359.

An executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into court; although he stated that an action was pending against him for debts to a considerable amount, due from the testator, but with liberty in case the plaintiff in the action should recover, to apply to the court to have a sufficient sum paid out again. *Yare* v. *Harrison*, 2 Cox, 377.

An executor, for some years, received the rents of property specially bequeathed. The specific legatee having instituted a suit against him:—Held, that he could not set up the adverse title of a third party as a defence to a motion to pay the amount into court. Held, also, that the executor was not entitled to deduct the amount of debts, &c., paid by him, there having, apparently, been sufficient general assets out of which they ought to have been paid. *Lord* v. *Purchase*, 17 Beav. 171.

—— **What Sufficient.**]—Executor, admitting a balance due from him to the testator upon an unsettled account, ordered to pay the amount into court, notwithstanding there were debts of the testator still outstanding, the testator having died three years before. *Mortlock* v. *Leathes*, 2 Mer. 491.

The court will not order an executor to pay into court money which he states by his answer to have retained in satisfaction of a debt due to him from the testator. *Middleton* v. *Poole*, 2 Coll. C. C. 236.

Admission by an executor, that the whole amount of the property is near 40,000*l.*, and that the whole is invested in India in public securities, either in his name or in the name of the house in which he is a partner, and subject to his disposal, unless some part is in the hand of the said house at interest, which he believes may be the case: not a sufficient admission of money in his hands to order the payment into court of any part of it. *Freeman* v. *Fairlie*, 3 Mer. 39; 17 R. R. 7.

Administrator ordered on motion to transfer a sum of consols into court, upon admission in his examination before the Master that he had possessed it, and sold it out after the bill had been filed, and invested it in other securities which he did not specify. *Hinde* v. *Blake*, 4 Beav. 597.

An executor who had proved the will in India, and in his answer admitted that, after payment of all the known debts, a certain balance of the estate remained in his hands, subject to other charges and expenses, the amount of which he had not ascertained, and that he had invested such balance on personal security in India; ordered to pay the balance into court, allowing a reasonable sum to be retained in respect of the suggested deductions, by a day which would afford time for the remittance of the fund from India. *Roy* v. *Gibbon*, 4 Hare, 65.

A party having obtained probate to a will, which was afterwards cancelled on the ground that the alleged will was a forgery, and under that probate possessed himself of personal property of the deceased; on administration obtained by another party, and bill filed against the executor for an account and payment of the personal property of the deceased, in his answer, this defendant admitted having received certain moneys, but alleged he had paid them away under the provisions of the will. An application by the administrator, on motion, that the defendant should pay into court those sums admitted by him to be received, and alleged to be improperly paid away, was refused. *Auld* v. *Stewart*, 8 Ir. Eq. R. 399.

An executor, believing that there would be assets sufficient to pay a legacy, became trustee in and executed the marriage settlement of the legatee, in which it was recited that she was entitled to the legacy, and it was agreed that it should be assigned upon certain trusts. A suit was afterwards instituted against the executor for a breach of trust by the testator, which suit, if successful, would exhaust the assets:—Held, in a suit by the cestui que trust under the settle-

ment, that there had been an admission of assets primâ facie binding on the executor, and he was ordered to lodge in court the amount of the legacy, without prejudice to his taking such proceedings as he might be advised to be relieved against the admission of assets, in the event of there being a decree against him in the suit for the breach of trust by his testator. *Chaigneau* v. *Bryan*, 10 Ir. Ch. R. 172.

In an administration action notice of motion was served upon a defendant, an executor, for payment into court of money, part of the testator's estate, which it was shewn by affidavit that he had received. The defendant did not appear on the motion:—Held, that the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into court. *Freeman* v. *Cox*, 47 L. J., Ch. 560; 8 Ch. D. 148; 26 W. R. 689.

—— **Money in hands of Executor's Partner.**]—Money admitted by executor to be in hands of his partner, is in his own hands for the purpose of being ordered to be paid into court. *Johnson* v. *Aston*, 1 Sim. & S. 73.

A. and B. were appointed trustees, and A., B. and C. executors of a will. A. and C. alone proved. B., in his answer, said he declined to act in the trusts; but it appeared that B. and his partner were indebted to the testatrix at her death, that her executor had lent them part of the assets, and that they had paid some of her debts. The court, on motion, ordered B. to pay into court the balance due from him and his partner, who was not a party to the suit. *White* v. *Barton*, 18 Beav. 192.

—— **At what Stage.**]—In bill by legatees against executor, if he admits balance due on his examination and claims no interest, court will order him to pay it into court before report. *Curgenven* v. *Peters*, 3 Anstr. 751.

An executor admitting assets, and ordered to bring them in, cannot rely upon his own demands set forth in a charge under the decree, but not proved, as cause against the issuing of an attachment for non-compliance with the order; nor would the court extend the time for bringing in the money until after the Master should have made his report, there having already been unreasonable delay. *D'Arcy* v. *D'Arcy*, 1 Ir. Eq. R. 407. And see *Id.* 408, n.

Where, in an administration suit, the executor by his answer, admits that there are assets still outstanding, lent by the testator on personal security, the court will not, before the hearing, compel the executor to bring the money into court, or give security to abide the decree. *Costelloes* v. *Cantwell*, 6 Ir. Eq. R. 386.

The defendant in the original suit, after a decree that she should lodge in court a certain sum when ascertained by the Master, died. The suit was revived against her executors, who admitted assets by their answer, and the amount of the sum was ascertained by the report. Upon motion by the plaintiffs, the executors were compelled to bring in the money, without waiting until the cause should be heard. *Mackinnon* v. *Palmer*, 7 Ir. Eq. R. 74.

—— **Order in one of two Concurrent Actions.**]—A suit being instituted in this court by a legatee for payment of her legacy, and another suit being instituted in the Vice-Chancellor's court by the residuary legatee of the testator for the administration of his estate, the plaintiff in this suit gave notice of motion for the executrix of the testator to pay into court money admitted by her answer to be in her hands, and for the appointment of a receiver, and for certain preliminary inquiries. The day after the service of the notice of motion, the plaintiff in the other suit, who employed the same solicitor as the executrix, obtained an order for the executrix to pay the money into court in that suit, before the application was made here. Under these circumstances, the court refused to make any order interfering with the order in the other suit, until it was seen how that order was prosecuted. *Thorne* v. *Worrall*, 4 Jur. 933.

—— **Special Order by Consent.**]—Where a bill was filed against an executor and universal devisee of the estate of a party, who, as trustee, had committed a breach of trust by selling out stock to which the plaintiff was entitled for life, with remainder to his children, and the bill prayed an account of the real and personal assets of the party who had committed the breach of trust, the court, on a motion for payment of the balance of such real and personal estate, admitted by the defendant to be in his hands, into court, refused to make the order, the bill not being one framed as in a creditors' suit; but, by consent, made a special order. *Reeve* v. *Goodwin*, 10 Jur. 1050.

(c) *Misconduct of Executor.*

Misapplication of Assets.]—An executor had improperly invested money of his testator on a promissory note. On the executor's death, his executrix renewed the note to herself. She was ordered, upon motion, to pay the sum into court as money received by her, and lent out again. *Boulter* v. *Broderip*, 10 L. J., Ex. Eq. 93.

An executor and trustee who had lent trust money on unsurrendered copyholds, a deposit of a lease and a bond ordered on motion to pay the amount into court. *Wyatt* v. *Sharratt*, 3 Beav. 498.

Executors, having personal estate of the testator given to them by the will upon trust, to lay out on good and sufficient security, for an infant, to be paid on his coming of age, after a decree to account, and after notice by the next friend of the infant plaintiff, lending a part of such personal estate upon mortgage, ordered to pay the same into court; but the motion asking, in the alternative, that the executors might be ordered to replace the amount by so much stock, as the same would have purchased at the time of investment, was to that extent refused. *Widdowson* v. *Duck*, 2 Mer. 494; 16 R. R. 206.

Executor by schedule to answer acknowledging that he had received property and lent it on promissory note (which is an improper use, though at interest), ordered to pay money into court. *Vigrass* v. *Binfield*, 3 Madd. 62.

The former partners of a testator (who had retired before his death) were appointed his executors, with power to apply certain policy-moneys in their trade, provided they gave such security to the residuary legatees as W. might approve. W. refused to act; and the executors, without giving security, applied the policy-moneys in payment of a partnership debt, for which the testator had mortgaged them. They were directed to pay the amount into court as well as an admitted balance due to the testator

from the partnership. *Costeker* v. *Horrox*, 3 Y. & C. 530; 3 Jur. 996.

(d) *On stay of Action by Creditor.*

Right of Creditor.]—On an application being made to stay a creditor's suit, because of a decree obtained in an administration suit, subsequently instituted by two of the executors against the third, as there was no evidence of the amount of assets received by the executors, and as it appeared that the creditor's case in the first depended on vouchers and documents in the hands of the executors, the court ordered the motion to stand over until the executors had put in their answer in that suit. *Macrae* v. *Smith*, 2 Kay & J. 411; 4 W. R. 472.

Semble, that a creditor whose suit in equity is stayed, as well as a creditor who is restrained from prosecuting an action at law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into court. *Ib.*

Whether an executor, upon obtaining an injunction to restrain a creditor from suing at law, is bound to pay into court the amount of assets in his hands, quære. *Dawson* v. *Whalley*, 10 L. J., Ch. 383.

(e) *Under Statutory Powers.*

The Trustee Act, 1893, *repealed s.* 32 *of* 36 *Geo.* 3, *c.* 52, *the Trustee Relief Act*, 1847, *the Amendment Act of* 1849, *and the Trustee Relief Act* (*Ireland*), 1848; *and s.* 42 *of the Trustee Act*, 1893, *replaces the repealed enactments.*

Under 36 Geo. 3, c. 52.]—Order made upon petition under the statute 36 Geo. 3, c. 52, for transferring into the hands of the accountant-general a stock legacy to the account of infant legatees. *Watlington Will*, *In re*, 1 W. R. 194.

An application for a transfer of consols, purchased by means of a legacy paid into court, under the statute 36 Geo. 3, c. 52, need not be by petition, but may be made by motion. *Bennett*, *Ex parte*, 19 L. J., Ch. 375; 15 Jur. 213.

Under the Trustee Relief Acts—In what cases—Costs.] — Payment into court by an executor of a legacy bequeathed to a married woman, not specifically appropriated, the husband and wife being abroad, and the husband requiring it to be paid under a power of attorney: —Held, that the executor had a right to pay it in, his costs of paying in to be out of the general estate; his costs of appearing on a petition to be paid out of the legacy. *Jones*, *In re*, 3 Drew. 679.

When there is a doubt to whom a legacy is payable, the executor should reserve a portion of the residue to meet the costs of proceedings in court. *Birkett*, *In re*, 47 L. J., Ch. 846; 9 Ch. D. 576; 39 L. T. 418; 27 W. R. 164.

In such a case the better course is to take out an administration summons, waiving inquiries, and adjourn the case into court, or to agree upon a statement of facts in the nature of a special case. *Ib.*

If the executor does pay it in he will be left to take his costs out of the residuary estate, and will not have them out of the legacy. *Ib.*

Where a husband of a married woman mortgaged a legacy belonging to his wife, and which was charged upon land, with powers of distress and entry, and the mortgagee threatened to take proceedings at law to recover the legacy, upon a bill by the wife to have the legacy raised, the owner of the land charged held to be entitled to pay the money into court, and protect himself from being vexed by double proceedings. *Duncombe* v. *Greenacre*, 6 Jur. (N.S.) 987; 8 W. R. 657.

A married woman absolutely entitled to a legacy joined with her husband in calling on a trustee, in whose hands the fund was, to pay it to the husband; she repudiating any claim to a settlement, the trustee declined to pay, and paid the amount into court. Upon a petition by the husband and wife for payment of the fund to the husband, the wife consenting:—Held, that the trustee was justified in paying the fund into court, and should be allowed his costs of so doing, and of the petition. *Swan*, *In re*, 10 L. T. 334; 12 W. R. 738.

6. Receiver.

Pending Probate or Grant of Administration.] —A receiver will not be appointed over the personal estate of a testator, if his will has not been proved, or any steps taken in the Ecclesiastical Court for that purpose. *Gore* v. *Gore*, 1 Hog. 237.

Demurrer lies to bill, inter alia, for a receiver till letters of administration granted, where no reason is shewn why they cannot be immediately taken out. *Jones* v. *Frost*, 3 Madd. 1; Jac. 466.

Jurisdiction of a court for an account of personal estate and a receiver, pending a litigation for probate, though an administration, pendente lite, might be obtained in the Ecclesiastical Court. *Atkinson* v. *Henshaw*, 2 Ves. & B. 85. S. P., *Ball* v. *Oliver*, *Id.* 96.

The Court of Chancery will not interfere by appointing a receiver upon the mere ground that two wills are in controversy in the spiritual court; and no special case that the property is in danger and cannot be secured by administration pendente lite. *Richards* v. *Chave*, 12 Ves. 462. And see *Knight* v. *Duplessis*, 1 Ves. Sen. 324.

Whilst will is contesting in Ecclesiastical Court on the ground of insanity of testator, receiver appointed of the whole estate to pay in from time to time what he receives. *Montgomery* v. *Clarke*, 2 Atk. 379.

Where no probate or administration has been granted, it is of course to appoint a receiver, pending a bonâ fide litigation in the Ecclesiastical Court, to determine the right to probate or administration, unless a special case can be made for refusing such appointment. *Rendall* v. *Rendall*, 1 Hare, 152; 11 L. J., Ch. 93.

The fact that the litigation in the Ecclesiastical Court is on the question of which of two alleged wills shall be admitted to probate, and that the defendant in the suit in equity is named executor in both wills, is not a ground for refusing to appoint a receiver. *Ib.*

Where probate or administration has been granted by the Ecclesiastical Court, a receiver will not be appointed pending litigation to recall probate or grant of administration, unless a special case be made out for such appointment. *Ib.*

The institution of a suit in the Ecclesiastical Court for the purpose of recalling probate, is not a ground upon which alone this court will

interfere to restrain the executor from receiving assets. *Watkins* v. *Brent*, 1 Myl. & C. 97; 7 Sim. 512; 5 L. J., Ch. 49. S. P., *Rutherford* v. *Douglas*, 1 Sim. & S. 111. *Connor* v. *Connor*, 15 Sim. 598; 16 L. J., Ch. 371; 11 Jur. 662, n. *Newton* v. *Ricketts*, 10 Beav. 525; 16 L. J., Ch. 372, n.; 11 Jur. 662. *Whitworth* v. *Whyddon*, 2 Macn. & G. 52; 2 H. & Tw. 445; 14 Jur. 142.

Where, however, the executor had agreed, through his proctor, that the validity of the testamentary paper, by which he was appointed, should be tried in the suit to recall probate; an order was made for an injunction and a receiver, and that order was affirmed on appeal. *S. C.*

Probate by one executor, enures to the co-executor. Although probate or letters of administration may have been granted, yet if a sufficient case is made for disputing their validity, and a suit has been commenced in the ecclesiastical court for the purpose of having them revoked, this court will protect the property of the deceased by granting an injunction and receiver, pending the litigation in the ecclesiastical court. *S. C.*, 7 Sim. 512.

Receiver granted, at the instance of an executor, pending a suit in the ecclesiastical court, to have the probate annulled; the defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets. *Marr* v. *Littlewood*, 2 Myl. & C. 454.

Bill by one of the next of kin against the executors and one of the legatees in a will fraudulently obtained by them from a person of unsound mind, praying for an account, and for an injunction and receiver pending a suit in the ecclesiastical court to recall the probate:—Held, maintainable in this court, and demurrer for want of equity overruled. *Dimes* v. *Steinberg*, 2 Sm. & G. 75.

Although the court will appoint a receiver on account of the pendency of a suit in the ecclesiastical court respecting the validity of a will, it will not, on that account alone, order the person named as executor to pay into court money in his hands belonging to the deceased's estates. *Reed* v. *Harris*, 7 Sim. 639; 5 L. J., Ch. 126.

Pending a contest between the plaintiff and defendant in the ecclesiastical court as to the validity of two wills made by the testatrix, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the defendant. The court declined to appoint a receiver of the property comprised in the assignment, that property being claimed by the defendant independently of either will. *Jones* v. *Goodrich*, 10 Sim. 327; 9 L. J., Ch. 120; 4 Jur. 98.

Pending a litigation as to administration in the ecclesiastical court a bill was filed praying a receiver, and that upon the administrator being appointed and brought before the court, the rights of the parties might be declared, and the estate administered; a demurrer to the latter part of the relief was allowed. *De Feuchères* v. *Dawes*, 5 Beav. 110; 11 L. J., Ch. 394; 6 Jur. 594.

—— **Since 20 & 21 Vict. c. 77.**]—The Court of Chancery may appoint a receiver of personal estate pending the grant of probate, delayed on account of a caveat having been entered where a suit in the probate court has not been actually constituted. *Parkin* v. *Seddons*, 42 L. J., Ch. 470; L. R. 16 Eq. 34; 28 L. T. 353; 21 W. R. 538.

The court will also, under the same circumstances, appoint a receiver pendente lite of the rents of real estate, if neither the devisee nor the heir-at-law is in actual possession. *Ib.*

The defendant as heir-at-law of a testator entered a caveat against the grant of probate of the will, and also forcibly took possession of part of the testator's real estate. No further proceedings were taken in the probate court beyond entering the caveat. Upon a motion by the executor of the will for a receiver of all the real and personal estate:—Held, that the court had jurisdiction to appoint a receiver of the real estate (except that part in the possession of the defendant) as well as of the personal estate. *Ib.*

To a bill for the administration of real and personal estate, and for the appointment of a receiver and a new trustee, a plea in bar, by the alleged executors, that they had been prevented proving by the plaintiff's entering a caveat in the court of probate, was overruled. *Tempest* v. *Camoys* (*Lord*), 35 Beav. 201; 14 L. T. 8; 14 W. R. 326.

When the result of a suit in the Probate Court to set aside a will had been, in effect, to put the property comprised therein in such a position that no person had a legal right to deal with it, and litigation was impending in the same court, as to who ought to be the legal personal representative of the testator, a caveat having been also entered:—Held, that although there was no litigation actually pending, yet, under the circumstances, the court had jurisdiction to make an order for the appointment of a receiver. *Grimston* v. *Turner*, 22 L. T. 292; 18 W. R. 724.

When a will had been proved and afterwards impeached and declared void, the executors condemned in costs, and a suit instituted for a receiver pendente lite which had failed, a motion to make the executors pay the costs of the suit for the receiver was refused. *S. C.*, 22 L. T. 646; 18 W. R. 747.

The appointment of a receiver in such a suit is a matter entirely within the discretion of the court. *S. C.*, 18 W. R. 781.

The Court of Chancery has no jurisdiction to appoint a receiver in a simple case of contested heirship. *Hitchen* v. *Birks*, L. R. 10 Eq. 471; 23 L. T. 335; 18 W. R. 1015.

When administration has been granted the court will not exercise its jurisdiction to appoint a receiver of personal estate, unless a special case is made—a rule which will be strictly enforced, since the 20 & 21 Vict. c. 77, enables the Court of Probate to appoint an administrator pendente lite, with powers similar to those of a receiver. *Ib.*

—— **Application by Co-executor in Probate Division.**]—Where an executor had, before probate, and without the assent of his co-executor, intermeddled in the estate and made preparations to dispose of a portion of it, the court gave leave to the co-executor to issue a writ against him claiming an injunction to restrain him from dealing with the estate before probate, and praying for the appointment of a receiver. *Moore, In goods of*, 57 L. J., P. 37; 13 P. D. 36; 58 L. T. 386; 36 W. R. 576; 52 J. P. 200.

—— **Of Intestate's Business.**]—Where there is no representative of an intestate's estate, in a suit to restrain interference with the business of the intestate, the court will grant an injunction and receiver on a sufficient case made. *Steer* v. *Steer*, 11 L. T. 502; 13 W. R. 225.

A manager and receiver appointed, on a motion ex parte, to carry on the business of an intestate before grant of letters of administration has been obtained. *Blackett* v. *Blackett*, 24 L. T. 276; 19 W. R. 559.

Receiver appointed—Practice after Probate or Administration.]—A receiver having been appointed, the executor being out of the jurisdiction, on administration afterwards taken out, it was referred to the master to reconsider the appointment of receiver, regard being had to the administration granted. *Faith* v. *Dunbar*, Coop. 200.

Where a suit is instituted in equity merely for the protection of the assets, pending a litigation for probate in the Ecclesiastical Court, the practice of the court is, upon the grant of probate, to discharge the receiver, stay all proceedings in the suit, and dispose of the costs. *Barton* v. *Rock*, 22 Beav. 376.

In such a suit, for which there was not a reasonable foundation, the court ordered the plaintiff to pay all the costs, though a receiver had been appointed. *Ib.*

When, after proceedings had been commenced in the Probate Court to test the validity of a will, a bill was filed for a receiver of the testator's personal estate, and a motion made for a receiver, which motion stood over, and during its pendency the Court of Probate appointed an administrator pendente lite:—Held, that it was the intention of the legislature to extend the powers of an administrator pendente lite appointed by the Court of Probate, and such administrator having the same power of protecting the property as a receiver, the court refused to appoint a receiver. *Veret* v. *Duprez*, 37 L. J., Ch. 552; L. R. 6 Eq. 329; 18 L. T. 501; 16 W. R. 750.

On Insolvency of Executor or Administrator.]—Court will appoint receiver of intestate's personal estate, if administrator is sworn to be insolvent, before his answer is come in, although fact of his being abroad (stated in plaintiff's affidavit) be denied. *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

Creditor filing a bill against executor cannot make a debtor of the debtor a party; in case of insolvency of the executor, the court will on petition appoint a receiver, and compel the executor to allow his name to be used in bringing actions. *Utterson* v. *Mair*, 2 Ves. J. 95; 4 Bro. C. C. 270. See also *Rex* v. *Simpson*, 1 W. Bl. 458.

An executor and trustee becoming a bankrupt, a receiver was appointed, though the testator knew, after he had made his will, that a commission had been issued. *Langley* v. *Hawk*, 5 Madd. 46. But see *Gladdon* v. *Stoneman*, 1 Madd. 143, n.; *Stainton* v. *Carron Co.*, 18 Beav. 146; 23 L. J., Ch. 299; 18 Jur. 137; 2 Eq. R. 466; 2 W. R. 176.

The circumstance that the party who has the administration of the testator's real and personal effects, is an uncertificated bankrupt, and was not appointed to his office by the testator is not a sufficient reason to induce the court to appoint a receiver before answer, where several parties interested decline to join in the application. *Smith* v. *Smith*, 2 Y. & C. 353; 6 L. J., Ex. Eq. 70.

An action was commenced in the court of one of the vice-chancellors for the administration of the estate of a testator, against the administrator with the will annexed. The administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in the court of a different vice-chancellor, and then became bankrupt. The plaintiff in the first suit moved in that suit that a receiver of the estate might be appointed, and that the plaintiff might be permitted to prosecute the second action in the name of the administrator:—Held, that the plaintiff was entitled to the order asked for, and that it was properly made in the court to which the first action was attached. In such a case it is not the modern practice to permit the receiver to carry on an action in the name of a bankrupt executor or administrator. *Hopkins, In re, Dowd* v. *Hawtin*, 19 Ch. D. 61; 30 W. R. 601.

After an order had been made on summons for the administration of the real and personal estate of a testatrix, the sole executor and trustee became bankrupt:—Held, that a receiver ought to be appointed, and that the fact of the assignees not being before the court was not a sufficient reason for refusing to appoint one. *Johnson, In re, Steele* v. *Cobham*, L. R. 1 Ch. 325; 14 L. T. 242; 14 W. R. 493.

The court has jurisdiction to restrain an executor who has become bankrupt since the death of the testator from further acting as executor; and, if there is a co-executor willing to continue to act, will not require the appointment of a receiver. *Bowen* v. *Phillips*, 66 L. J., Ch. 165; [1897] 1 Ch. 174; 75 L. T. 628; 45 W. R. 286.

On Ground of Poverty of Executor.]—Receiver not appointed on mere ground of executor being poor. *Howard* v. *Papera*, 1 Madd. 142. S. P., *Hathornthwaite* v. *Russel*, 2 Atk. 126. *Anon.*, 12 Ves. 4.

—— **Of Husband of Executrix.**]—An executor is under no obligation to give security, nor is it usual for a court of equity to compel him to give any security, unless upon affidavit of insolvency or misconduct. But where an executrix, appointed guardian of three children by her first husband, marries a second husband in necessitous circumstances, the court will appoint a receiver. *Dillon* v. *Mountcashel* (*Lady*), 4 Bro. P. C. 312.

Executor out of Jurisdiction.]—Where a sole executor was abroad, and the beneficiaries under the will were unable to obtain an account from the person left in control of the property during the executor's absence, the court sanctioned the appointment of a receiver. *Dickens* v. *Harris*, 14 L. T. 98. S. P., *Westby* v. *Westby*, 2 Coop. t. Cott. 210. *Smith* v. *Smith*, 10 Hare (App.) 71. And see *Taylor* v. *Allen*, 2 Atk. 213, where husband of executrix was abroad, and order made.

Creditor's Administration Action—Executor's Right of Retainer.]—The court will not interfere with an executor's right of retainer by appointing a receiver at the instance of the plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors,

nor unless it is shewn that the assets are being wasted. *Wells, In re, Molony* v. *Brooke*, 59 L. J., Ch. 810; 45 Ch. D. 569; 63 L. T. 521; 39 W. R. 139.

Where Estate in Danger by Misconduct of Executor or Administrator.]—Where it is probable there will be a misapplication and wasting of the effects of an intestate, by a limited administrator, who is only trustee for an infant, the court will appoint a receiver. *Havers* v. *Havers*, Barnard. 23.

Receiver appointed before answer upon affidavit of misapplication and danger to the property in the hands of an executor, the co-executors consenting to the order. A strong case necessary against an executor. *Middleton* v. *Dodswell*, 13 Ves. 266. See also *Anon.*, 12 Ves. 4.

A receiver appointed where the trustees and executors had neglected to get in the testator's estate, and had thereby deprived infant legatees of their maintenance, and in consequence of non-performance of duty and general misconduct. *Richards* v. *Perkins*, 3 Y. & C. 299; 8 L. J., Ex. Eq. 57; 3 Jur. 168.

An order for injunction and receiver as against an administratrix of a deceased intestate, was granted on motion, after the common decretal order made upon summons for taking the simple administration accounts, a case of misconduct and wilful default against the administratrix having come to light in the course of the proceeding under such decretal order. *Brooker* v. *Brooker*, 3 Sm. & Giff. 475; 26 L. J., Ch. 411; 3 Jur. (N.S.) 381; 5 W. R. 382.

A testator devised all his real and personal estate to his daughter and her husband for life, "with reversion at their deaths to his granddaughter S. L. R.," and he appointed the husband of his daughter sole executor. On a bill by S. L. R. against the executor, alleging irreparable waste and injury to the testator's estate, some parts of the testator's personal estate having been taken in execution by the sheriff under a judgment, recovered against the executor for his own private debt, and a threatened immediate sale thereunder: S. L. R. was appointed receiver instanter on waiving all salary, and giving the usual security. *Rawson* v. *Rawson*, 11 L. T. 595.

In a suit for the administration of an insolvent estate instituted by a creditor bonâ fide for the protection of the property, the court appointed a receiver, although a receiver of the same estate had been previously appointed in an administration suit in the Lord Mayor's Court instituted by a creditor likely to act in concert with the personal representative, who was alleged to be misappropriating the assets. *Nothard* v. *Proctor*, 24 W. R. 34.

A receiver appointed where the executrix, being in possession of certain leasehold and other personal estate, had allowed ground rents to be in arrear, although the plaintiff had already obtained an order equivalent to a decree for sale and administration. *Bywater's Estate, In re, Sargent* v. *Johnson*, 1 Jur. (N.S.) 227.

A person holding by the warrant of her Majesty the office of judicial assessor to the native princes, and being also chief justice of her Majesty's dominions on the Gold Coast of Africa, took possession of the personal effects of a British subject who died intestate, domiciled at Cape Coast Town, in Africa, and claimed to be the official administrator of these assets by usage, in his capacity of judicial assessor, and as such to be entitled to 7½ per cent. commission upon them. He afterwards transmitted part of the assets to this country to be sold, and the proceeds carried to the account of the intestate's estate, and came to this country himself on leave of absence for a short time. The father of the intestate, being his sole next of kin, obtained letters of administration to him in England, and filed his bill against the judicial assessor for administration and for a receiver. And upon motion for a receiver in the suit:—Held, that the Court of Chancery had jurisdiction to sustain the application, as the assets and the judicial assessor were both in this country, whatever might be the nature of his authority; and that, there being the danger of his taking the assets again out of the jurisdiction, although he might be the proper representative of the intestate in Africa, a good case was made for the appointment of a receiver. *Hervey* v. *Fitzpatrick*, Kay, 421; 23 L. J., Ch. 564; 2 Eq. R. 444; 2 W. R. 338, 365.

Other Circumstances.]—A receiver, to collect personal estate, appointed by decree, to be continued until the further order of the court. *Raymond* v. *Franks*, 5 Ir. Eq. R. 24.

Receiver appointed, on application of executor, to collect assets in India; but receiver to find sureties resident in England. *Cockburn* v. *Raphael*, 2 Sim. & S. 453; 25 R. R. 244.

On a claim filed by one of two administrators, who were respectively beneficially interested in the property, for an account of the rents of certain leaseholds received by the other administrator, and the appointment of a receiver, the court refused the appointment of a receiver, but ordered the account. *Scurrah* v. *Scurrah*, 14 Jur. 874.

Secus, where the claim was by a specific legatee against executor. *Lord* v. *Purchase*, 17 Beav. 173.

Pending a question whether estates devised were subject to a bond executed by the testator for making a settlement on his wife and children, the court refused to appoint a receiver, the devisees in trust consenting to pay the rents into court. *Prebble* v. *Boghurst*, 1 Swan. 313; Wils. Ch. 161.

A. and B. were trustees and executors. A. paid more than he received, in the expectation of repayment out of a mortgage forming part of the assets. A. died, and B. refused to act. In an administration suit, a receiver of the mortgage was appointed against the representatives of A. *Palmer* v. *Wright*, 10 Beav. 234.

Where two members of a partnership obtained a renewed lease of the partnership premises, and the administratrix of a deceased partner shewed a primâ facie title to participate in the benefit of it, the court protected the property until the rights of the parties could be decided by appointing a receiver. *Clegg* v. *Fishwick*, 1 H. & Tw. 390; 1 Macn. & G. 294; 19 L. J., Ch. 49; 13 Jur. 993.

Where it was doubtful whether a power of sale of realty, given to an executrix by the will, vested under a codicil in a co-executor thereby nominated, the court appointed a receiver of the rents and profits of the real estate. *Yetts* v. *Palmer*, 9 Jur. (N.S.) 954; 8 L. T. 528; 11 W. R. 765; 2 N. R. 255.

Testator bequeathed the residue of his real and personal estate to his widow, her heirs, executors, and administrators, "having a perfect confidence she will act up to those views which I

have communicated to her, in the ultimate disposal of my property after her decease." The testator's widow died intestate. The bill alleged that the testator had bequeathed the residue of his property to his wife, on the faith of a promise that she would dispose of his property in favour of the plaintiffs, who were natural children of the testator. The court, on motion, supported by affidavits verifying the allegation, granted a receiver of the real estates against the heir and second husband of the widow. *Podmore* v. *Gunning*, 5 Sim. 485.

Receiver appointed in a suit by a specialty creditor, the assets being admitted, by the answer, to be insufficient to meet the demand. *Chalk* v. *Raine*, 7 Hare, 393 ; 18 L. J., Ch. 472 ; 13 Jur. 981.

Motion in behalf of infant, to restrain defendant executor from receiving more of personal estate, and rents and profits of real estate, and for receiver refused ; pr. ami ordered to pay costs of motion. *Buckley* v. *Buckeridge*, Dick. 395.

In a creditor's action for administration against an executrix, a decree has been made and a summons taken out for a receiver; but pending the summons, the sole defendant died. The court, on the application of the plaintiff, appointed an interim receiver, whose powers were to extend for ten days after the appointment of an administrator de bonis non, the plaintiff undertaking to use all possible speed in obtaining the appointment of such administrator and to accept short notice of motion to discharge the receiver. *Parker, In re, Cash* v. *Parker*, 48 L. J., Ch. 691 ; 12 Ch. D. 293.

Application, How made.]—In an administration suit, where an order had been made that the trustees of the estate of the testator in the cause should continue to receive the rents and profits and proceeds of the estate, and keep down the annuities bequeathed by his will, and from time to time pass their accounts in chambers, and pay in their balances, an order appointing a receiver was made in chambers by a vice-chancellor personally, upon the application of some of the beneficiaries, upon the ground that the trustees had made default in passing their accounts. The trustees and other parties opposed the application :—Held, that this was a matter connected with the management of property within the 15 & 16 Vict. c. 80, s. 26, and that the judge has jurisdiction to make the order in chambers. *Booth* v. *Coulton*, 18 L. T. 384 ; 16 W. R. 683.

Letters of administration were granted to the widow of B., who thereupon proceeded to administer the estate. Subsequently, upon a summons taken out by one of the next of kin against her, an order was obtained at chambers for the administration of B.'s estate. A notice of motion was afterwards served by the plaintiff in a suit by summons for the appointment of a receiver, and for an injunction against the administratrix. Upon the motion coming on to be heard, it was objected on behalf of another of the next of kin (the plaintiff in a suit by bill), that a receiver and an injunction could not be appointed and granted without a bill having been filed ; but held that the court had power to make an order for the appointment of a receiver, and to grant an injunction after a decretal order made upon an administration summons at chambers. *Brooker* v. *Brooker*, 3 Sm. & Giff. 475 ; 26 L. J., Ch. 411 ; 3 Jur. (N.S.) 381 ; 5 W. R. 382.

See also *Bywater's Estate, In re, Sargent* v. *Johnson*, 1 Jur. (N.S.) 227.

In a creditors' action for the administration of a testator's real and personal estate, which was commenced in a district registry, it was held, upon motion for judgment, that the court had jurisdiction to appoint a receiver. *Capper, In re, Robertson* v. *Capper*, 26 W. R. 434.

Where there were two suits for administration, and a motion for a receiver in each suit came on upon the same day, the receiver was appointed in both suits, and the court gave the carriage of the order to the plaintiffs by whom the first notice of motion for the receiver had been given. *Hart* v. *Tulk*, 6 Hare, 611 ; 18 L. J., Ch. 162.

Appointment of—At what Stage.]—In an administration action, commenced by originating summons, a receiver may (in a proper case) be appointed immediately after the service of the summons and before any order for administration has been made. *Francke, In re, Drake* v. *Francke*, 57 L. J., Ch. 437 ; 58 L. T. 305.

An administrator or executor may prefer one creditor to another, and there is no equity which entitles the court to interfere except after judgment for administration. Therefore the plaintiff in a creditor's action for administration is not entitled to interim relief against the executor or administrator unless a case is shewn of the assets being wasted. *Harris, In re, Harris* v. *Harris*, 56 L. J., Ch. 754 ; 56 L. T. 507 ; 35 W. R. 710.

Security by.]—A receiver appointed to collect in assets, and to bring actions in the name of an executrix, must give security to indemnify the executrix on account of such actions. *Taylor* v. *Allen*, 2 Atk. 213.

Account.]—The court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and pay the balance to be found due out of the assets. *Jenkins* v. *Briant*, 7 Sim. 171 ; 4 L. J., Ch. 2.

The court has no jurisdiction to order the personal representative of a receiver to account for the receiver's receipts without a bill being filed. *Ludgater* v. *Channel*, 15 Sim. 479 ; 16 L. J., Ch. 248 ; 11 Jur. 273.

The personal representative of a receiver having submitted to account for the rents received by the receiver in his lifetime, the court has jurisdiction to order him to pay in the sum appearing to be due on foot of the account. Form of the order in such case. *Magan* v. *Fallon*, 5 Ir. Eq. R. 490.

In 1812 the executors of a receiver applied to pass his accounts and pay in the balance : this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets. *Gurden* v. *Badcock*, 6 Beav. 157 ; 12 L. J., Ch. 62.

Receiver not liable by the failure of the testator's banker at Bristol, with whom the receiver, when going to London to pass his accounts, deposited the money, intending to draw for it. *Rowth* v. *Howell*, 3 Ves. 566.

—— **Interest.**]—Executors of a receiver admitting assets, bound to answer what was upon a subsequent inquiry found due for interest. *Hovey* v. *Blakeman*, 4 Ves. 606.

Admission of assets to answer rents by the executor of a receiver, makes him liable to interest if made. *Foster* v. *Foster*, 2 Bro. C. C. 616.

Where the plaintiff, a creditor in an administration suit, obtained an order for a receiver in 1822, but it was not made absolute or acted upon until 1834, the court directed an inquiry to ascertain by whose default the receiver was not appointed; and directed, that if it should appear that it was by the plaintiff's default that the receiver was not appointed, and if he might, through such appointment, have kept down the interest on his own demand, he should not now be entitled to so much of the interest on his debt as would have been paid by the receiver, had he been appointed as early as he might have been. *Newby* v. *Drew*, 1 Jo. & Lat. 445; 7 Ir. Eq. R. 49.

—— **On Application of Creditor.**]—A creditor who has proved his debt under a decree, is entitled to apply to the master for a summons on the receiver to account. *Locke* v. *Ashe*, 1 Hog. 143.

Salary.]—Where the object of a consent is to appoint a receiver over outstanding personal estate, the amount of the salary to be allowed should be fixed by the consent. *Burke* v. *Burke*, Fl. & K. 89.

A testator appointed as trustee and executor a person who for many years had been the paid receiver and manager of his estate, the tenant for life being an infant; the court continued the executor as receiver at a salary. *Newport* v. *Bury*, 23 Beav. 30.

Other Matters.]—A receiver had been appointed of the testator's estate, part of which was in India; and, it having become necessary to have it remitted:—Held, that the proper course was to refer it to the master, to inquire what would be the most advantageous course for receiving and remitting it to England. *Keys* v. *Keys*, 1 Beav. 425.

Where a receiver had been appointed to get in the outstanding estate of the testator in the cause, but one of the principal debtors to the estate was willing to pay the money due from him into court, the court, on the petition of some of the defendants, ordered that the debtor should be at liberty so to do, in order that the receiver's poundage might be saved to the estate. *Haigh* v. *Grattan*, 1 Beav. 201; 8 L. J., Ch. 249.

Where a receiver had been appointed in a creditors' suit, and petitioned to be discharged after having passed his accounts; the defendant not having been latterly personally served with the warrants, after he had been so by courtesy of the plaintiff's solicitor, allowed to go and state his objection before the master. *Oldfield* v. *Cobbett*, 2 Beav. 444.

Under a decree in an administration suit, certain parties only were allowed to attend before the master; the master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate, the funds appearing by affidavit to be abundantly ample; the court ordered the institution of the suits and the payment of costs out of the fund standing to the general credit of the cause, upon service on those only whom the master had authorised to attend him on the reference. *Lockhart* v. *Hardy*, 6 Beav. 267; 13 L. J., Ch. 50.

The plaintiff and the defendant were co-executors. The plaintiff being indebted to his testator in the sum of 300*l.* upon bond, filed his bill against the co-executor, for an account and distribution of his testator's estate, and prayed for a receiver; upon the answer coming in, the plaintiff found that there was no outstanding estate, and that the debt of 300*l.* due from him alone remained unapplied. The plaintiff allowed matters to rest as they were, but the defendant gave a notice of motion, asking for the appointment of a receiver, as prayed by the bill; but the application was refused without costs. *Robinson* v. *Hadley*, 11 Beav. 614; 18 L. J., Ch. 428.

A receiver who had been appointed in an administration action and ordered to pay to a legatee a sum quarterly out of moneys in or coming to his hands, was, on the application of creditors who had in an action in a common law division obtained a judgment against the legatee, ordered, under Rules of Court, 1875, Ord. XLV., to pay them their debt and costs. *Cowans' Estate, In re, Rapier* v. *Wright*, 49 L. J., Ch. 402; 14 Ch. D. 638; 42 L. T. 866; 28 W. R. 827.

A father, who died in 1844, devised to trustees a moiety of his real estate upon trusts for his son for life, with remainder to his grandson for life and his sons in tail, and to pay all his debts and sums of money as he should owe at the time of his death, whether by way of mortgage, bond, or otherwise, including 8,000*l.* charged upon the estates; and he directed that the rents and profits of the estates should be received by the trustees and be applied in liquidation of the debts until the whole, including the 8,000*l.*, should be paid; that no person to whom any estate for life or in tail was limited should be entitled to the rents and profits until the estates were totally disincumbered and cleared of debts; and that the trustees should invest the moneys which might come to their hands upon good security at interest until the same should be applied in payments under the trusts. A receiver had been appointed. The whole of the debts had been paid excepting the 8,000*l.*, by sales of parts of the estates under orders of the court, and there was an accumulation fund in court sufficient to pay the 8,000*l.*:—Held, that the receiver must be discharged, and the tenant for life be let into possession of the estates. *Tewart* v. *Lawson*, 43 L. J., Ch. 673; L. R. 18 Eq. 490; 22 W. R. 822.

7. Injunction, Dismissal and Stay of Proceedings.

To restrain Proceedings of Creditors at Law—Prior to Judicature Acts—On whose Application.]—Where creditors are proceeding at law after a decree, the executor should move to restrain them, or he may be responsible. *Clarke* v. *Ormonde* (*Earl*), Jac. 122; 23 R. R. 8, 143.

Creditors obtaining judgment against the executor after notice of a decree, and buying in the testator's property, would be obliged to restore it, semble. *Ib.*

After a decree for the administration of a testator's estate, creditors suing at law restrained, on the application of a legatee. *Ib.*

After a decree for the administration of the assets in a creditors' suit against an executor, the

plaintiff, as well as the defendant, may move to restrain a creditor from proceeding at law. *Robson* v. *Cameron*, 3 L. J. (o.s.), Ch. 135. S. P., *Dyer* v. *Kearsley*, 2 Mer. 482, n.; *Cox* v. *King*, *Ib.*, 483, n.

—— **Prior to Decree.**]—This court will not, before a decree, interpose in favour of an executor, against a creditor proceeding at law. *Rush* v. *Higgs*, 4 Ves. 638.

Where a creditor of a testator obtained judgment against an executor de bonis testatoris, and a decree was immediately afterwards made in a creditors' suit:—Held, that the executor was not entitled to an injunction to stay execution on the judgment. *Vincent* v. *Godson*, 3 De G. & S. 717.

Where, before a decree was made for the administration of assets, a creditor of a testator had obtained judgment against the executor de bonis testatoris, and a decree in an administration suit was afterwards obtained by another creditor, the court refused to restrain the creditor at law from issuing execution. *Roberts, In re, Fowler* v. *Roberts*, 2 Giff. 226; 6 Jur. (N.S.) 1189; 8 W. R. 492.

Where a judgment creditor had, before the date of the decree, obtained a garnishee order nisi under 17 & 18 Vict. c. 125, s. 61, a motion for an injunction to restrain him from proceeding further at law was refused, with costs. *Ib.*

Although an order for preliminary accounts and inquiries had been obtained in a suit for administering a testator's estate, yet the court will not, on that account, restrain a creditor from suing the executors at law. The order, however, does not prevent the parties from having the cause heard before the master has made his report. *Teague* v. *Richards*, 11 Sim. 46; 9 L. J., Ch. 293.

A bill-holder brought an action against the executors of the drawer, and obtained judgment under the 18 & 19 Vict. c. 67, before the will was proved by them, they not having applied for leave to defend. Execution was levied, but before any sale (the executors having in the meantime proved the will) a creditor obtained on summons an administration decree in equity:—Held, that the plaintiff in the administration suit was not entitled to an injunction to restrain further proceedings under the execution. *Marriage* v. *Skiggs, Skiggs, In re*, 4 De G. & J. 4; 28 L. J., Ch. 433; 5 Jur. (N.S.) 325; 7 W. R. 320.

Where a plaintiff commenced proceedings at law against the defendant as administratrix, for a debt due to him from the testator, and pending the action also instituted a creditors' suit in chancery for the same purpose; and where the defendant, before answering the plaintiff's bill, entered an appearance in the action, and obtained an order for its dismissal on payment of the debt and costs at law, and then offered terms as to the costs in chancery, which were not accepted; on a motion by the defendant to dismiss the plaintiff's bill:—Held, that on the payment of the costs offered by the defendant all the proceedings in the suit were to be stayed. *Deane* v. *Hamber*, 13 L. T. 522; 14 W. R. 167.

—— **After Decree.**] — Where creditor after decree (in obedience to which executor pays away assets) obtains judgment to which decree is not pleadable, equity will relieve executor. *Bank of England* v. *Morice*, 2 Bro. P. C. 465. Affirming Cas. t. Talb. 218.

After a decree in an administration suit, and after the court had taken the assets out of the hands of the executors, a creditor was restrained from further proceedings at law, although the executors had themselves given a plea of confession for judgment. But the creditor was allowed his costs. *Quin* v. *Bagnall*, 1 Ir. Eq. R. 110.

Where an estate is administered, and the residue is paid over under an order of the court, the executor will be protected, and a creditor will not afterwards be allowed to sue him at law. *Dean* v. *Allen*, 20 Beav. 1.

Creditor proceeding against executor at law, after notice of decree to account, is so far committing contempt, that upon application for injunction court will refuse him costs of further proceedings at law, and costs of application. *Curre* v. *Bowyer*, 3 Madd. 456. S. P., *Mocher* v. *Reed*, 1 Ball & B. 318. *Wilson* v. *Wetherherd*, 2 Mer. 506. Contra as to the costs, *Turner* v. *Connor*, 15 Sim. 630.

Upon motion for injunction to stay a creditor's action on ground of notice of decree in administration suit:— Motion granted, and creditor's costs taxed up to the time of notice. *McMullen* v. *Acres*, 1 W. R. 77.

Upon a motion by defendant administrator, after decree in a creditors' suit, to restrain creditors from proceeding in an action at law; the administrator having, by his answer in the cause, stated what assets had come to his hands, and having given the plaintiffs at law notice, after they had served their writ to come in and prove their demands under the decree:—Held, the defendant was entitled to the injunction, and that the plaintiffs at law were not entitled to any costs incurred by them after the notice. *Pepper* v. *Foster*, 6 Ir. Eq. R. 384.

Held, also, that the fund being deficient, the payment of the costs was not a condition precedent to granting the injunction. *Ib.*

If the answer did not contain a sufficiently full statement of the assets received, the court would allow the motion to stand over until the assets were accounted for. *Ib.*

Effect of a decree against administrator, entitling him to an injunction against the suit of a creditor, qualified by requiring an account of the assets either by the answer or affidavit. *Gilpin* v. *Southampton* (*Lord*), 18 Ves. 469.

In a suit for administration of the estate of a deceased debtor, the court will not grant an injunction to restrain a creditor from proceeding against the executors of the debtor at law, unless they admit assets or make an affidavit as to what money they have in their hands. *Lawton* v. *Lawton*, 8 W. R. 458.

When an administratrix of an intestate is sued by a creditor, as administratrix, she may obtain an order for taking the accounts, and then for an injunction to restrain such action, pending the taking of such accounts under 23 & 24 Vict. c 38, s. 14, she undertaking to be answerable in damages, and the affidavit of her solicitor is sufficient. *Cole, In re*, 17 L. T. 494.

Principles on which a creditor is restrained from proceeding after a decree for administration. *Pennell* v. *Roy*, 3 De G. M. & G. 126; 22 L. J., Ch. 409; 17 Jur. 247; 1 W. R. 237.

After the common decree in a creditors' suit, the executor, not denying that he has assets, nor disputing the debt, cannot obtain an injunction to restrain an action by a creditor of the estate against him, commenced before the suit, but not

proceeded with since notice of the decree, except upon the terms of paying the costs at law, and also of the motion for the injunction. *Cole* v. *Burgess*, Kay (App.), i.

After the usual decree has been obtained in a creditors' suit, this court will stay all further proceedings in an action by a creditor against the executor, upon payment to the creditor of his costs of the action up to the time when he had first notice of the decree, although the executor may have pleaded plene administravit, and issue may have been joined on such plea. *Vernon* v. *Thellusson*, 1 Ph. 466; 14 L. J., Ch. 83; 9 Jur. 145; 7 *Ib.*, 503.

To an action by a creditor the executors pleaded non-assumpsit and set-off, and a plene administravit præter, and the verdict was against him on all these pleas; a decree for administration of the estate having been pronounced pending the action, an injunction was granted against the creditor on payment of his costs at law. *Lord* v. *Wormleighton*, Jac. 148; 23 R. R. 14, 146.

An executor, who, in an action at law by a creditor of the testator, has pleaded according to the truth of the case, is, when the assets are taken from him, and administered in equity, entitled to the protection of the court against any personal liability in respect of such plea. *Gaunt* v. *Taylor*, 2 Hare, 413.

—— **After Appointment of Receiver.**]—Pendency of creditors' suit, in which a receiver has been appointed, is cause against allowing a puisne judgment creditor to proceed at law after death of conusor. *Anon.*, 1 Hog. 69.

A judgment creditor, not a party, will not be allowed to proceed at law, if a receiver has been appointed in a creditors' suit, and a prior incumbrancer is a party. *Thackaberry* v. *Christian*, 1 Hog. 109.

—— **After Injunction against Executors.**]—Where an action is brought against executors, who are restrained by an injunction from disposing of their testator's effects, and they resist the claim, the court will not stay proceedings, although, if a judgment had been signed, it might stay execution. *Davis* v. *Salter*, 1 D. P. C. 561; 2 C. & J. 466.

—— **In Respect of what Matters.**] — An executor pleads he has no assets ultra 100*l.* to three several actions. Judgment is had in each for 100*l.*, upon which he brings his bill and moves for an injunction which is denied. *Anon.*, 1 Vern. 119.

An action at law by a creditor against an administrator; defendant, by mistake of his attorney, pleads a false plea, and verdict for the plaintiff; though merits never tried, yet equity will not relieve. *Stephenson* v. *Wilson*, 2 Vern. 325.

After a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debt. *Ray* v. *Ray*, G. Coop. 264; 14 R. R. 255.

An attorney having delivered up deeds to an executor, which he was not obliged to do till his bill was paid, and these deeds being of great use to the executor in several suits which were then carrying on; this is a sufficient consideration to make the executor liable to the attorney's whole demand, whether there be assets or not. Order of the exchequer, refusing an injunction to stay the attorney's proceedings on a judgment at law, affirmed. *Hamilton (Duke)* v. *Incledon*, 4 Bro. P. C. 4.

Executor relieved after a verdict at law had against him upon a plene administravit, and the verdict was had on producing the executor's own letter confessing a mortgage made to the testator for 300*l.*, the executor proving in equity that his mortgage appeared afterwards to be worth nothing, and that there were two prior mortgages upon the same estate. *Robinson* v. *Bell*, 2 Vern. 146.

In debt against an executor for 700*l.*, executor pleads ne unques executor, and, on proving at the trial that a chimney back or some other slight thing came to the defendant's hand, plaintiff had a verdict; but equity relieved against the verdict. So in another case, upon the like plea of ne unques executor, plaintiff proved the defendant took money for a pot of ale sold by the testator in his lifetime and equity relieved. *Ib.*

An administratrix having an equitable demand against the personal estate of her intestate, the court will enjoin the next of kin from proceeding in the spiritual court, to compel a distribution; but they may proceed to compel the administratrix to exhibit an inventory. *Backhouse* v. *Hunter*, 1 Cox, 342.

Wherever one creditor or legatee files a bill, and there is a decree to account, all other persons whose rights can be adjusted in the master's office, are restrained from proceeding at law; but the demand of the person restrained must be definite, as upon a bill or note, or services ascertained, and the order restraining must give him a mode of relief here. *Grogan* v. *Grogan*, 2 Moll. 334.

After a decree to account, in a suit for the administration of assets, a judgment creditor of the testator, who had notice of the decree, sued out a scire facias against the executor, and obtained judgment by default, and issued a fieri facias de bonis testatoris. The court on the application of the executor, restrained the creditor from proceeding on the fieri facias, and gave the costs of the motion against him. The cases on the subject reviewed and considered. *Belmore* v. *Belmore*, 12 Ir. Eq. R. 493.

If a cause for the administration of assets has been heard for further directions, and the executors have paid their balances into court, an injunction will be granted to restrain an action against the executors for breaches of covenant in a lease granted to the testator, and the master will be directed to ascertain the damages. *Sutton* v. *Mashiter*, 2 Sim. 513.

A court of equity restrains a creditor from enforcing his legal rights against the estate of his deceased debtor, only upon the principle that the creditor is enabled to bring into equity, with some specified exceptions, all his legal rights; and that the validity of his debt must be determined in equity upon the same principle as at law; and the circumstance that the creditor is also the plaintiff in the cause is not material as to the mode of determining the validity of such debt. *Whitaker* v. *Wright*, 2 Hare, 310; 12 L. J., Ch. 241; 7 Jur. 320.

—— **Where Creditors entitled to Judgment de bonis propriis.**]—Motion on behalf of a defendant for an injunction against a party's proceeding at law upon a verdict which would entitle him to a judgment de bonis propriis against an executor, refused; for his judgment

would be of no service to him if he were delayed by a suit here until it could be ascertained whether there are assets of the testator to answer his demands, which might not be till after all chance of recovery against the executor de bonis propriis is entirely gone. *Terrewest* v. *Featherby*, 2 Mer. 480. And see *Brooke* v. *Skinner*, 2 Mer. 481 (n.), which was the case of a similar application; and the Lord Chancellor said that if the plaintiff at law recovered a judgment de bonis testatoris, he would not suffer execution to be taken out; but if he recovered de bonis propriis, he could not restrain the execution. *Dyer* v. *Kearsley*, 2 Mer. 482 (n.), where plaintiff had obtained the usual decree in a creditors' suit for an account; an action being then commenced against the executors by another creditor, to which they had obtained time to plead, and after the decree suffered judgment by default, plaintiff in equity moved to restrain plaintiff at law from suing out execution; and, it being argued that the executor had made himself personally liable by this proc edure, the Lord Chancellor said, that the executor's suffering judgment to go by default, was no more than his saying that he was ready to do whatever a court of law or equity might think proper, and granted the injunction. *Ib.*, 2 Mer. 483.

Where, before the usual decree for an account in a suit by legatees against executors, a judgment has been obtained at law against them de bonis testatoris et si non de bonis propriis, a motion made after decree to restrain execution upon such judgment was refused, with costs; it appearing by the answer of the executors that they had, in fact, misapplied the assets. *Lee* v. *Park*, 1 Keen, 714; 6 L. J., Ch. 93.

Principles upon which the court after decree interferes by injunction to restrain proceedings at law with reference to the priority of the decree or judgment at law fully considered. *Ib.*

Whether, according to those principles, the decision would not have been the same, even if no misapplication of assets had appeared, quære. *Ib.*

Injunction to restrain proceedings granted against a creditor, though his judgment would entitle him to execution de bonis propriis of the executor. *Bookless* v. *Crummach*, C. P. Cooper, 125.

After decree for administration of assets, executor pleaded false plea to action brought against him by creditors of testator, in order to have an opportunity of applying for injunction to restrain action. Court granted injunction, and held creditor not entitled to judgment against executor, de bonis propriis. *Fielden* v. *Fielden*, 1 Sim. & S. 255.

In April, 1843, a creditor obtained a judgment by default against an executrix; a decree in a creditors' suit was obtained in April, 1844; and on the 25th May following, the judgment was set aside on the terms of the executrix pleading plene administravit. On the 3rd June, on the eve of trial, the executrix moved for an injunction, which the court granted, to stay execution only, and afterwards refused to permit the creditor to proceed against the executrix for the purpose of charging her personally. *Kirby* v. *Barton*, 8 Beav. 45.

If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the court will, after a decree obtained in a suit, by another creditor, for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. *Price* v. *Evans*, 4 Sim. 514.

After a decree in a creditors' suit, the court will restrain a creditor of the testator from proceeding at law against the assets, but not from proceeding against the executors personally. *Kent* v. *Pickering*, 5 Sim. 569. S. P., *Burles* v. *Popplewell*, 10 Sim. 383. *Powell* v. *Powell*, 12 Ir. Eq. R. 501.

—— **To restrain Proceedings of Creditors in Foreign Courts.**]—The rule which prevents a creditor from proceeding with an action for the recovery of his debt after a decree in an administration suit, is applicable to the case of a creditor proceeding in a foreign court, and will render him liable to the costs of an application to restrain him after he has received due notice of the decree. *Graham* v. *Maxwell*, 1 Mac. & G. 71; 1 H. & Tw. 427; 18 L. J., Ch. 225; 13 Jur. 217. *See further* INTERNATIONAL LAW.

—— **Obtained on Interlocutory Application.**]—After a decree for an account against an executor, defendant may restrain a creditor from suing at law, on motion, and without filing an injunction bill, though until lately that remedy against a creditor was never granted, unless a bill for an injunction had been filed. The executor must pay the costs till notice of the decree; and he must make an affidavit as to funds in his hands. *Paxton* v. *Douglas*, 8 Ves. 520. And see *Pepper* v. *Foster*, 6 Ir. Eq. R. 384.

—— **Other Cases.**]—A creditor recovered judgment and sued out a writ of fi. fa. thereupon in the lifetime of his debtor, and placed the writ in the hands of the sheriff; on the day after, the debtor died; a decree was afterwards made in the suit of an equitable mortgagee of certain parts of the real and personal estate of the debtor, against his devisee and executor, for the sale of the mortgaged property, and if the proceeds of such sale should be insufficient to satisfy the plaintiff's debt then for an account and application of the general, personal, and real estate of the testator in a due course of administration; after this decree the judgment creditor levied under the fi. fa. on goods left by the debtor. The executor thereupon moved for an injunction to restrain execution, which the court refused on two grounds; first, because the decree for an account and administration of the general estate was not absolute, but was conditional on the mortgaged property proving insufficient to satisfy the plaintiff's demand; and secondly, because the judgment creditor acquired a right to the goods of the debtor by virtue of the writ of fi. fa. from the teste of the writ, and therefore paramount to the right of the executor. *Ranken* v. *Harwood*, 5 Hare, 215; 15 L. J., Ch. 446; 10 Jur. 794. Affirmed, 2 Ph. 22.

Creditor having been restrained from proceeding at law, on account of decree obtained, allowed to prosecute such where proceeding on decree delayed for some years. *Powell* v. *Wallworth*, 2 Madd. 183.

When the representative of an intestate is seeking to give preference by confessing judgments, the court will give the plaintiff leave to proceed at law to recover judgment with a cesset executio, and in the Court of Equity for a discovery and account of assets. *Barker* v. *Dumaresque*, 2 Atk. 119.

Liberty to proceed at law refused to creditor having priority to the plaintiff in the cause, if any creditor having priority to the applicant is a party to the cause, or has come in under the decree. *Ball* v. *Hill*, 2 Moll. 354.

A party employed the same solicitor to bring an action for an alleged debt, against the personal representative of an intestate, as another creditor had employed to obtain the usual decree in a creditors' suit against the same parties. The court held, that the party bringing the action must be considered as having received notice of such decree, and granted an injunction without costs to restrain him from proceeding with his action. *Clough* v. *French*, 6 Jur. 636.

Of Administration Suits.]—After a decree in a creditors' suit, the court will stop a creditor from proceeding in another suit for the recovery of a demand against the estate of a testator, if the object can be obtained in the first suit; but secus if the creditor would be unable to obtain relief in the first suit. *Costerton* v. *Costerton*, 2 Keen, 774; 7 L. J., Ch. 302.

A motion by consent in a creditors' suit, after decree, to stay the proceedings in the suit, refused. *York* v. *White*, 10 Jur. 168.

Where a debt is claimed or a demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand, and to put the plaintiff in the same situation as he would have been in if the liability had been satisfied without suit, the court, on motion, will stay all further proceedings. *Holden* v. *Kynaston*, 2 Beav. 204; 9 L. J., Ch. 198.

Proceedings in a creditors' suit stayed as against some defendants, on payment of one of the plaintiff's debts, on which alone the defendants applying were liable, and under very special circumstances, without costs. *Ib.*

In a creditors' suit instituted by the plaintiff on behalf of himself and all other creditors, the defendant is entitled, on motion at any time before decree, to have the bill dismissed on payment of the demand of the plaintiff and his costs, as between party and party; but if there be other defendants, their costs must also be paid. *Pemberton* v. *Topham*, 1 Beav. 316; 2 Jur. 1009.

—— **Satisfaction of Plaintiff's Claim—Infant Defendant.**]—Where some of the defendants in an administration action offered to satisfy the whole of the plaintiff's claim and the costs of the action, the court refused to stay the proceedings unless the rights of an infant defendant interested in the suit were also provided for. *Clegg* v. *Clegg*, 17 L. R., Ir. 118.

—— **Fund Transferred to Credit of fresh Suit.**]—If a bill filed by a creditor is dismissed, and there is money in bank to the credit of the cause, it will be retained until a defendant, also a creditor, who is about to file a bill, can apply to have it transferred to the credit of his cause. *Woods* v. *Creaghe*, 1 Hog. 313.

—— **Compromise—Fund in Court.**]—It is competent to a creditor filing a bill on behalf of himself and all other the creditors of a testator, to compromise the suit and dismiss the bill; and in such a case, a fund brought into court by the executors will, with the consent of the executors, be paid to the plaintiffs. *Wood* v. *Westall*, Younge, 305.

—— **Second Action with same Objects.**]—A bill for an account of the personal estate of W. J., an intestate, was filed by the legal personal representative of E. B. against the personal representatives of the deceased administrators of W. J., alleging that the administrators of W. J. had got in the greater part of the estate, and that E. B. was the sole next of kin. The suit was revived in 1877 by M., a subsequent personal representative of E. B., against X. and Y., as representatives of one of the administrators, and Z., as representative of the others, and was ultimately dismissed in 1880 with costs as against all three defendants, on the ground that the title of E. B. as next of kin was not proved. After this M. took out administration de bonis non to W. J., and brought his action as such administrator against Z. for an account of the personal estate of W. J. received by the administrators whom Z. represented:—Held, that, although M. formerly sued as personal representative of E. B., and now sued as personal representative of W. J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid. *Martin* v. *Beauchamp* (*Earl*), 53 L. J., Ch. 1150; 25 Ch. D. 12; 49 L. T. 334; 32 W. R. 17.

Legatees and annuitants are bound by the proceedings in a suit for administration between the executors and residuary legatees and devisees, although there may be a question as to the debts being primarily charged on the real estate, and which may incidentally affect them. Therefore, after decree in such a suit, legatees cannot sustain an administration suit against the executors. *Jennings* v. *Paterson*, 15 Beav. 28.

Where an administration summons is heard and determined by the judge personally, the plaintiff cannot file a bill for the same object in another branch of the court of co-ordinate jurisdiction; but if he is dissatisfied he must resort to the appellate tribunal. *Thompson* v. *Thompson*, 8 L. T. 490; 11 W. R. 797.

After a distribution of assets under a decree ascertaining rights of legatees, advertisements for all persons interested to prove their claims before the master being previously published, a bill by a legatee against the representative of the executor dismissed. *Farrell* v. *Smith*, 2 Ball & B. 337.

Injunction against Representative—To restrain Proceedings at Law.]—The bill stated the plaintiff was legatee under a will of which the defendant was executor; that the usual decree for an account of the personal estate had been made, and the parties had been before the master, when the plaintiff was charged with several articles of the personal estate possessed by him; that the account between them was afterwards referred to an arbitrator, who found a small sum in favour of the plaintiffs, but never made an award; but after that the defendant, as executor, brought an action against the plaintiff for the effects of the testator so in his possession; and the bill prayed an injunction to restrain the defendant from proceeding at law; and that the value of the articles possessed by the plaintiff might be deducted out of the interest taken by him under the will. The court thought upon this case that the plaintiff was entitled to an injunction till the master made his report: a demurrer, for want of equity, was, therefore, overruled. *Milner* v. *Goolden*, 1 Cox, 196.

Injunction granted upon motion to restrain, until the hearing of the cause, an action by an administrator to recover a debt which was formerly due to his intestate—upon affidavit that the intestate had requested the debtor to hold the sum due in trust for the plaintiff, and that the debtor had accepted the trust, and paid over a part of the fund to the plaintiff. *M'Fadden* v. *Jenkins*, 1 Hare, 458; 11 L. J., Ch. 281; 6 Jur. 501. Affirmed, 1 Ph. 153; 12 L. J., Ch. 146; 7 Jur. 27.

The court will not permit the executor, after the estate has been fully administered in the court, to prosecute an action without leave, against a party to the suit, for recovery of part of the testator's estate. *Oldfield* v. *Cobbett*, 6 Beav. 515.

A creditor of a testator filed a bill against the executor for administration, and obtained an injunction and receiver. The plaintiff was found a creditor, and the cause was heard on further directions, but the injunction and receiver were not continued. The executor afterwards brought an action at law against the plaintiff for moneys due to the testator. The court by injunction summarily restrained the proceeding. *S. C.*, 5 Beav. 132.

Where an administrator of an intestate has joined in giving receipts for moneys effected on policies on the intestate's life, and signed a letter to the office, requiring the company to pay the amount to the party who had effected these insurances, as securities for moneys advanced by him to the intestate, the court will restrain an action commenced by the administrator for the recovery of these moneys so received. *Andrewes* v. *Jones*, 12 L. T. 229.

—— **To restrain Suit in Equity.**]—Motion by defendants to stay proceedings in a suit, upon certain terms, on the ground that the same questions were in issue in a suit instituted by them against the plaintiffs in Scotland, and which the court had refused to stay, refused, with costs. *Stainton* v. *Carron Co.*, 21 Beav. 500.

A. proceeded against the executors of B. in Scotland, in a creditors' suit in equity by the executors. A.'s proceedings were restrained by injunction, but after three years' delay the order was reversed on appeal. In the meanwhile, the executors had instituted a suit here against A. on the same subject. It having been held, that A. had a right to proceed in Scotland, he moved to stay the executor's proceedings here until the question had been decided in Scotland. The motion was held irregular, and refused, with costs. *Ib.*

—— **To restrain Receipt of Assets.**]—The institution of a suit in the Ecclesiastical Court, for the purpose of recalling probate, is not a ground upon which alone this court will interfere to restrain the executor from receiving the assets. Where, however, the executor had agreed, through his proctor, that the validity of the testamentary paper by which he was appointed should be tried in the suit to recall probate, an order was made for an injunction and a receiver, and that order was affirmed on appeal. *Watkins* v. *Brent*, 1 Myl. & C. 97; 7 Sim. 512; 5 L. J., Ch. 49.

Where administration was granted by the sentence of the Ecclesiastical Court to A., as only next of kin of the intestate, in a suit in which B. also claimed to be the only next of kin, and that sentence was affirmed by the court of delegates on appeal, and B. filed a bill impeaching the pedigree of A., and to establish his own, the court would not, in such case, grant an injunction until answer, to prevent the administrator from possessing himself of the assets, he being, by the decree of the Ecclesiastical Court, both legally and equitably entitled thereto. *Meath* v. *Gorman*, 6 Ir. Eq. R. 304.

The pendency of a suit in the Ecclesiastical Court to have a probate or letters of administration recalled, is not of itself a sufficient ground to induce the court to grant an injunction and receiver against the personal representative. *Connor* v. *Connor*, 15 Sim. 598; 16 L. J., Ch. 371; 11 Jur. 662, n.

Where an insolvent executor is getting in the assets before probate, the court will restrain him, and direct the money to be paid into the bank. *Smith* v. *Aykwell*, 3 Atk. 566.

Injunction to restrain defendant, who was insolvent, from receiving testator's effects generally and from prosecuting actions at law for that purpose, granted under the circumstances before answer. *Mansfield* v. *Shaw*, 3 Madd. 100; 18 R. R. 201.

Wife who was an executrix, restrained from getting in the assets of a testator, her husband being in West Indies, and not amenable to the process of the Court of Chancery. *Taylor* v. *Allen*, 2 Atk. 213. And see *Yetts* v. *Palmer*, 11 W. R. 765.

Semble, that injunction restraining administrator from transferring intestate's stock into his own name, will, by equitable construction, operate to prevent his parting with any of intestate's outstanding estate, which has previously come into his hands. *Scott* v. *Becher*, 4 Price, 346; 18 R. R. 722.

—— **To restrain sending Assets abroad.**]—The court refused, at the instance of a creditor resident in England of a deceased trader in Madeira, to restrain the agent of the administratrix in England from sending over the intestate's money and effects to Madeira, the intestate's estate being the subject of a suit in Madeira. *Wallace* v. *Campbell*, 4 Y. & C. 167.

Injunction to restrain Executor from acting—Misappropriation of Assets—Bankruptcy.]—Where an executor has misappropriated the assets of his testator and become a bankrupt, the court has jurisdiction to restrain him from further acting as executor or interfering with the testator's estate. And where there is a co-executor willing to act it is not necessary to appoint a receiver. *Bowen* v. *Phillips*, 66 L. J., Ch. 165; [1897] 1 Ch. 174; 75 L. T. 628; 45 W. R. 286. *See also* RECEIVER, **6**, col. 1694, ante.

Under Common Law Jurisdiction—Stay of Proceedings till Probate.]—Since the abolition of profert and oyer the court may, on proper cause being shewn, interfere under its common law jurisdiction in an action by an executor, to order a stay of proceedings till probate is taken out, and notice thereof given to the defendant. *Webb* v. *Atkins*, 14 C. B. 401; 2 C. L. R. 702; 23 L. J., C. P. 96; 2 W. R. 225.

Since Judicature Acts—Transfer from Queen's Bench Division.]—L.'s executors mortgaged part of their testator's property in fee to C., who subsequently granted a lease of it for fourteen

years to R. and F. C. died, and his executrix served R. and F. with notice to pay rent to her, and, on their refusal, brought an action in the Common Pleas Division to gain possession of the premises under the covenants in the lease. The surviving executor of L. was let in to defend this action as landlord. He had previously commenced an action in the Chancery Division for the administration of L.'s estate. In this action the executor was plaintiff, and the beneficiaries under L.'s will defendants, and an inquiry had been directed as to C.'s mortgage debt. An order was obtained, on the part of the executor, staying proceedings in the action in the Common Pleas Division until after the hearing of the administration suit in the Chancery Division :—Held, that this order ought not to have been made. *Crowle* v. *Russell*, 39 L. T. 320.

Where an administration action is pending in the Chancery Division, the judge in whose court it is pending can order the transfer to himself of actions brought in other divisions against the executor if they are brought against him qua executor, but not otherwise. *Chapman* v. *Mason*, 40 L. T. 678.

In March a creditor of a testator recovered judgment in the Exchequer Division against the executor, and issued execution against him, under which the sheriff returned nulla bona. On 7th May the creditor issued a writ in a second action in the Exchequer Division against the executor personally. On 12th May an order was made in the Chancery Division for the administration of the testator's estate. On 20th May the creditor delivered a statement of claim alleging that the executor had committed a devastavit :—Held, on an application by the executor under Ord. LI. r. 2a, to transfer and stay this action, that, though by the words of the rule the executor was entitled to a transfer, still that he could not escape his liability (if any) by reason of an administration order having been made, and that the creditor was at liberty to pursue his remedies in the Chancery Division, just as he might have done in the Exchequer Division. *Timms, In re*, 47 L. J., Ch. 831 ; 38 L. T. 679 ; 26 W. R. 692.

A creditor who has obtained judgment against the executor of his deceased debtor before a decree is made for the administration of the debtor's estate has priority over other creditors, and that priority is unaffected by 32 & 33 Vict. c. 46. But where a creditor had obtained in an action in the Exchequer Division an order nisi to sign judgment against the executrix of his debtor, and before judgment had been signed another creditor obtained in the Chancery Division a decree for the administration of the deceased debtor's estate, he was held to have no priority ; and the action in the Exchequer Division was transferred to the Chancery Division, and proceedings therein stayed upon motion made for that purpose. *Stubbs, In re, Hanson* v. *Stubbs*, 47 L. J., Ch. 671 ; 8 Ch. D. 154 ; 26 W. R. 736.

—— **Staying Proceedings on County Court Judgment against Executor personally.**]—A creditor of a deceased person sued the executrix in the county court and obtained judgment for his debt before judgment in an administration action. After judgment for administration and a receiver the creditor obtained from the county court judge an order to commit the executrix :—Held, that the creditor could not be restrained from enforcing his judgment against the executrix ; but that the proper course was to direct the receiver to pay the creditor his debt and costs out of the estate, reserving the question whether the payment should be allowed to the executrix. *Womersley, In re, Etheridge* v. *Womersley*, 54 L. J., Ch. 965 ; 29 Ch. D. 557 ; 53 L. T. 260 ; 33 W. R. 935.

Concurrent Actions—Stay.]—Where two suits are instituted for the administration of the same estate, and, on a decree being obtained in one of them, an application is made to stay proceedings in the other ; the question always is, whether the latter suit asks anything more than can be obtained in the former. *Rigby* v. *Strangways*, 2 Ph. 175 ; 10 Jur. 998. S. P., *Gwevers* v. *Danby*, 3 Ch. Rep. 216. *Law* v. *Rigby*, 4 Bro. C. C. 59. *Anson* v. *Towgood*, 6 Madd. 374. *Pott* v. *Gallini*, 1 Sim. & S. 206. *Pickford* v. *Hunter*, 5 Sim. 122. *Jones* v. *Cooke*, 11 L. J., Ch. 15. *Belcher* v. *Belcher*, 2 Dr. & Sm. 444 ; 12 L. T. 792 ; 13 W. R. 913. *O'Keefe* v. *Holmes*, 13 Ir. Eq. R. 111. *Hoops* v. *Kingston* (*Earl*), Fl. & K. 246.

Where a second suit for administration of a deceased person's estate is instituted after decree in a previous suit for objects which could have been well attained in the first suit, the bill in the second suit will be dismissed, notwithstanding it may contain allegations, such as fraud or the possession of real estate, which are not contained in the first bill. *Menzies* v. *Connor*, 3 Mac. & G. 648.

A creditors' bill was filed after notice of a decree in a simple administration suit by one of the next of kin of the intestate, but the decree was at that time imperfect in not containing the usual preliminary inquiries. The frame of the creditors' suit was also different in making the heir-at-law a party, and in containing charges as to real estate, and as to the destruction of documents. The creditors' suit having been brought to a hearing, the vice-chancellor made an order directing the plaintiff to pay a stated sum to the heir-at-law in lieu of costs, and ordered the administratrix to pay the plaintiff's costs of suit :—Held, on appeal, that inasmuch as the creditor might have obtained all the relief to which she was entitled in the former suit, the bill ought to have been dismissed with costs ; and that, under the circumstances, the appeal to the Lord Chancellor did not fall within the rule precluding an appeal for costs. *Ib.*

Two successive creditors' suits having been instituted against the same executrix, the latter suit was permitted to go on, notwithstanding a decree had been made in the former suit ; the decree having been obtained without sufficient proof of debt, and being also irregular in form. *Reid* v. *Territt*, 1 Coll. C. C. 1 ; 13 L. J., Ch. 146 ; 8 Jur. 484.

A creditors' suit stayed on the application of the executors, after a decree in a suit by residuary legatees for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which could not have been necessary in the creditors' suit, it being competent to the master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate. *Golder* v. *Golder*, 9 Hare, 276.

A creditors' bill was filed, which prayed also other relief. Soon after a purely creditors' suit

was instituted by another party, and a decree obtained therein within seven days. The court stayed the first suit, so far only as it prayed an administration of the assets. *Dryden* v. *Forster*, 6 Beav. 146; 12 L. J., Ch. 189.

A decree for an account of the testator's estate, and for payment of his debts and legacies, having been pronounced but not drawn up in the Court of Chancery, a suit brought in the Court of Exchequer against the same defendants for a like purpose by a legatee's representative was stayed, until it was ascertained whether the plaintiff could avail himself of the decree in chancery. *Moore* v. *Prior*, 2 Y. & C. 375; 6 L. J., Ex. Eq. 74; 1 Jur. 512.

A bill was filed by a specialty creditor for the administration of an intestate's estate, praying also accounts relative to the carrying on of the intestate's business by his administratrix. Soon after, a purely creditors' suit was instituted by another party, and a decree obtained. The court refused to stay the proceedings in the first suit, holding that it embraced an object not provided for by the decree in the second suit. *Underwood* v. *Jee*, 1 Mac. & G. 276; 1 H. & Tw. 379; 19 L. J., Ch. 171. Affirming, 17 Sim. 119; 15 Jur. 99.

Before the decree in an ordinary administration suit was made, some of the defendants in it filed a second bill for the same purpose, charging the executors with breaches of trust, which, as they did not prove, they must pay so much of the costs of that suit as arose from the attempt to make a case against the executors. So much of the bill in the second suit as prayed for the usual accounts ought not to be dismissed, but the further prosecution of it stayed, and the residue of the costs of all parties to the second suit must be paid out of the testator's estate. *Taylor* v. *Southgate*, 4 Myl. & C. 203; 8 L. J., Ch. 137; 3 Jur. 214.

Where two suits for the administration of a testator's estate are proceeding at the same time, the court may stay proceedings in the second of such suits until further order, giving liberty to the parties to apply, and reserving the question of costs. *Thwaites* v. *Foreman*, 10 Jur. 483.

A residuary legatee, after mortgaging his share, and taking the benefit of the Insolvent Debtors' Act, obtained the usual order for administration on a summons, not disclosing these facts. The mortgagee afterwards brought them to the attention of the chief clerk, whereupon proceedings in the suit were stayed, and the mortgagee filed a bill for administration. An order was then obtained in the summons-suit, giving the conduct of it to another legatee, and making the provisional assignee, under the insolvency, a party. Notice of this order was given to the mortgagee, who nevertheless continued his own suit:—Held, that he ought not to have done so, and an order staying further proceedings in it was affirmed on appeal. *Whittington* v. *Edwards*, 3 De G. & J. 243; 7 W. R. 72.

When an order, under a summons to administer an estate, will effect all that can be directed by a decree in a prior suit instituted by bill or claim for the administration of the same estate, the court will, on motion, stay the proceedings in the second suit, on payment of the plaintiff's costs. *Ritchie* v. *Humberstone*, 22 L. J., Ch. 1006; 17 Jur. 756.

A common administration decree, under a summons at chambers, is no answer to a suit embracing matters which could not be included in such decree. *Rump* v. *Greenhill*, 20 Beav. 512; 24 L. J., Ch. 90; 1 Jur. (N.S.) 123; 3 W. R. 51.

On an application being made to stay a creditors' suit because of a decree obtained in an administration suit subsequently instituted by two of the executors against the third, as there was no evidence of the amount of assets received by the executors, and as it appeared that the creditor's case in the first depended on vouchers and documents in the hands of the executors, the court ordered the motion to stand over until the executors had put in their answer in that suit. *Macrae* v. *Smith*, 2 Kay & J. 411; 4 W. R. 472.

—— **Oppressive Proceedings—Dismissal.**]—A creditors' suit for the administration of the real and personal estate of a deceased testator, was in the list for hearing at the time of the institution of a suit by a legatee, who could have obtained substantial relief in the creditors' suit, in which shortly after a decree to account was pronounced. Subsequently, on the petition of a creditor, the greater part of the real estate of the testator was ordered by the Incumbered Estates Court to be sold. This court, being of opinion that the legatee's suit was oppressively and wantonly instituted, refused with costs a motion, under the stat. 12 & 13 Vict. c. 77, s. 42, on behalf of the legatee, to stay his own suit; and ordered, that if he did not file a replication within a short specified period, his bill should stand dismissed, as against one of the principal defendants, with costs, including the costs of a contemporaneous motion made on her behalf for its dismissal for want of prosecution. The construction of the 42nd section of the stat. 12 & 13 Vict. c. 77, adhered to, as laid down in *Bernard* v. *Bond* (1 Ir. Ch. R. 198), in reference to staying proceedings in this court, when lands, the subject of litigation here, have been ordered by the Incumbered Estates Court to be sold. *Moneypenny* v. *Gibbing*, 1 Ir. Ch. R. 201.

—— **Sharp Practice—Stay.**]—The rule that when two suits are instituted for administration of the same estate that shall be prosecuted in which the earlier decree has been obtained, does not apply where it has not been obtained fairly; and the court held this to have been the case where, on the same day of which notice had been given to an executor to appear to an administration summons, he appeared of his own accord, at an earlier hour, at the chambers of another judge, and consented to a decree for a summons then and not previously applied for by another plaintiff. *Harris* v. *Gundy*, 1 De G. F. & J. 13; 29 L. J., Ch. 38; 8 W. R. 32.

—— **Stay on Terms.**]—The common administration decree having been made in a suit by one of the next of kin, a second suit was instituted, six months after, by another next of kin, praying additional relief. The court stayed the second suit, on the defendant in the first undertaking not to object to any additions to the decree which the judge in chambers might think reasonable. *Gwyer* v. *Peterson*, 26 Beav. 83.

Where two suits are instituted for the administration of an estate, and a decree is made in one for ordinary administration, but in the other suit the prayer extends to other matters, the court will stay proceedings in the suit in which no

decree has been made, on the undertaking of all parties in the other suit to introduce into their decree the extra matter prayed by that bill. *Matthews* v. *Palmer*, 11 W. R. 610.

Where a decree had been made in a creditors' suit to take the usual accounts of an intestate's estate a short time after the bill filed, and, as alleged, with a view to prevent another creditor who had also filed his bill for the same purpose, the court, on an application to stay the proceedings in the second suit, will give special directions that that part of the real estate which it was alleged the administratrix was about to dispose of should be sold in the usual way, and the proceeds brought into court to abide further directions with reference to the debt due to the second creditor. *Lankester* v. *Wood*, 14 L. T. 512.

—— **Discovery.**]—On an application being made to stay a creditors' suit, because of a decree obtained in an administration suit, subsequently instituted by two of the executors against the third, as there was no evidence of the amount of assets received by the executors, and as it appeared that the creditor's case in the first depended on vouchers and documents in the hands of the executors, the court ordered the motion to stand over until the executors had put in their answer in that suit. *Macrae* v. *Smith*, 2 Kay & J. 411; 4 W. R. 472.

Semble, that a creditor whose suit in equity is stayed, as well as a creditor who is restrained from prosecuting an action at law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into court. *Ib.*

—— **Orders in both Actions.**]—One report was directed to be made in two suits (a creditors' and legatees') for the administration of an estate. *Budgen* v. *Sage*, 3 Myl. & C. 683.

A residuary legatee filed a bill against the personal representatives of a testator for an account and payment. Before decree in that cause, a creditor of the testator, upon a bond, in respect of which no interest had been paid, nor acknowledgment of debt made for upwards of twenty years, filed a creditors' bill against the same representatives; and the defendants, by their answer to the second bill, admitted the existence of the bond debt. Afterwards, the plaintiff in the first cause obtained the common decree in a residuary legatees' suit, and the defendants thereupon moved for and obtained an order that all further proceedings in the second cause might be stayed. The Lord Chancellor, on appeal, discharged that order, and in the second cause made the common decree in a creditors' suit, and directed the report to be made in both causes. *Ib.*

Where there are two administration suits, in both of which there must be decrees, endeavours should be made so to manage matters as to direct those accounts and inquiries only by the second decree which were not embraced by the first decree. *Smith* v. *Guy*, 2 Coop. t. Cott. 289.

Where, by decrees in two suits, the same accounts are to be taken, and the decree in one suit gives the master liberty to adopt the account directed by the decree in the other suit; it seems expedient in general that the plaintiff in the former suits should be served with all warrants in the latter case which respect such accounts, and should have leave to attend the master. *Ib.*

Suggested objection to some suits instituted with the view only of protecting executors, that from the frame of them, the decree must make the taking of the accounts contingent upon the master finding that all persons belonging to a class are present; and consequently, that until the master has found that all the persons constituting the class are present, and has commenced, or is about to commence the taking of the accounts, a creditor proceeding at law cannot be stopped. *Ib.*, 291.

A creditors' suit stayed on the application of the executors after a decree in a suit, by residuary legatees, for the administration of the same estate, notwithstanding there might be inquiries directed in the legatees' suit, which would not have been necessary in the creditors' suit, it being competent to the master to make a separate report, and thereby prevent the payment of the creditors from being delayed by the business of the ultimate administration of the estate. *Golder* v. *Golder*, 9 Hare, 276.

It is no objection to the hearing of a suit for a pecuniary legacy in which assets are administered, that a decree for the administration of the estate of the testator has been made at the suit of a residuary legatee, but quære, whether the court would direct the accounts of the same estate to be taken in both suits. *Suisse* v. *Lowther* (*Lord*), 2 Hare, 424; 7 Jur. 367.

A legatee, on a bill filed by him against the executor, is not entitled to the benefit of the proceedings had in a suit by creditors against the same executor. But the legatees' suit will be referred to the same master to whom the creditors' suit was referred, with liberty to him to use the proceedings had in that suit. *Broad* v. *Beran*, 1 L. J. (O.S.) Ch. 69.

Two successive creditors' suits having been instituted against the same executive, the latter suit was permitted to go on, notwithstanding a decree had been made in the former suit; the decree having been obtained without sufficient proof of debt, and being also irregular in form. *Reid* v. *Territt*, 1 Coll. C. C. 1; 13 L. J., Ch. 146; 8 Jur. 484.

Where an executor filed a bill charging his co-executor with wilful default, and praying for administration, for an account, injunction, and receiver, and that the defendant might be discharged from the office of trustee; and the defendant took out an administration summons, the vice-chancellor having decided in chambers that the case was a proper one to be disposed of on the summons, the court refused to vary the order, notwithstanding that the suit and the summons were going on simultaneously. *Piffard* v. *Vanrenen*, 11 L. T. 766; 13 W. R. 425.

—— **Immediate Decree.**]—The court by consent made an immediate decree in a cause not in the paper for the administration of the real and personal estate of an intestate at the suit of a creditor, after a summons at chambers for the administration of the personal estate had been taken out by another creditor, which was returnable before the first day on which the cause could be heard as a short cause. *Furze* v. *Hennet*, 2 De G. & J. 125.

When a cause for the administration of the real and personal estate of a testator has been instituted by one creditor, and a summons for the administration of the personal estate only has been taken out by another creditor, which is returnable before the cause can be heard as a

short cause, the court will, with the consent of all parties to the cause, make an immediate administration decree on motion, without requiring the cause to be in the paper, and heard as a short cause. *Scaffold* v. *Hampton*, 43 L. J., Ch. 137 ; 29 L. T. 575 ; 22 W. R. 182.

Semble, that the rule is the same even if the summons is for administration of the real as well as the personal estate. *Ib.*

The court by consent made an immediate decree in a cause not in the paper for the administration of the real and personal estate of a testator at the suit of a creditor, after a summons in chambers for the administration of the real and personal estate had been taken out by another creditor, which was returnable before the first day on which the cause could be heard as a short cause. *White* v. *Lyons*, 4 N. R. 221.

—— **Application to Stay—To what Judge made.**]—Where several suits for administration are attached to different courts, and a decree is made in one, an application to stay the other suits ought to be made in the court which has pronounced the decree. *Ludbrooke* v. *Bleadon*, 15 Beav. 457 ; 16 Jur. 851.

—— **Transfer from one Judge to another.**]—Two suits for the administration of the same estate having been instituted in different branches of the court, and a decree having been made in the latter of the suits, the proper course for a party wishing to stay proceedings in the other is to get it transferred to the judge who pronounced the decree, and to make an application in both suits before that judge. *Dufford* v. *Arrowsmith*, 7 De G. M. & G. 434.

Three creditors' suits had been instituted to administer the estate of the same testator ; two in the court of the Master of the Rolls, and the third in the court of Vice-Chancellor Kindersley. On an application to restrain the drawing up of an order made in the last cause, and for leave to transfer the same to the Rolls, leave was given, with the Vice-Chancellor's consent, to transfer the same. *Penny* v. *Francis*, 30 L. J., Ch. 185 ; 7 Jur. (N.S.) 248 ; 9 W. R. 8.

When two suits relating to the administration of the same estate are instituted in different branches of the court, and in one of these suits a decree has been obtained, the circumstances may be such as to render it proper that that suit should be transferred to the branch of the court where a decree has not been made. *Corser* v. *Jones*, 14 W. R. 704.

The rule, that where there are two suits for administration of an estate in different branches of the court, they shall both be prosecuted in that branch where a decree is first made, is subject to the qualification that the first decree is fairly obtained. *Harris* v. *Gandy*, 1 De G. F. & J. 13 ; 29 L. J., Ch. 38 ; 8 W. R. 32.

Two orders for administration having been obtained in different branches of the court, the court will order the administration to proceed in that branch of the court in which the order is in the most perfect state, notwithstanding such order may be posterior in date. *Littlewood* v. *Collins*, 8 L. T. 265 ; 11 W. R. 387.

The court will limit the cost of opposing such an application. *Ib.*

—— **Consolidation.**]—Where there are two suits for administration of the same estate, and a decree has been taken in one only, but the relief which can be obtained in that one is not so comprehensive as that which can be had in the other, the second suit will not be stayed, but both suits will be consolidated on such terms as the court shall think just. *Hoskins* v. *Campbell*, 2 Hem. & M. 43 ; 10 L. T. 93 ; 12 W. R. 546.

—— **Conduct.**]—When an executor and residuary legatee bring separate suits, and a decree is made in both suits, the proceedings in the executor's suit are stayed ; the principle of which is, that the residuary legatee has a greater interest in carrying on the suit so as to save expense than the executor. *Kelk* v. *Archer*, *Archer* v. *Kelk*, 16 Jur. 605.

Where several suits are instituted for the administration of a testator's estate, and a question arises as to their amalgamation and the conduct of the causes, the preference will be given to a residuary legatee, or other person who has an interest in the residue, in preference to a creditor. *Penny* v. *Francis*, 30 L. J., Ch. 185 ; 7 Jur. (N.S.) 248 ; 9 W. R. 8.

A creditor issued a writ for the administration of the personal estate of S., and subsequently obtained leave to amend his writ so as to include the real estate. Before any further steps were taken the executors of S. filed a writ and obtained a full administration decree, and then applied for the stay of proceedings in the creditors' action :—Held, that the creditors' action must be stayed, and that the plaintiff in the executors' action was entitled to the conduct of the administration. *Smith, In re, McMurray* v. *Mathew*, 33 L. T. 804.

There being two suits to take executors' accounts, the prosecution of first suit was, under circumstances, stayed, and prosecution of decree in second suit was given to plaintiff in the first suit. *Hawkes* v. *Barrett*, 5 Madd. 17.

Where there were two administration suits, and a motion for a receiver in each came on upon the same day, a receiver was appointed in both suits, and the carriage of the order was given to the plaintiffs by whom the first notice had been given. *Hart* v. *Tulk*, 6 Hare, 611.

Where a bill was filed for administration by a daughter against a widow as administratrix and only son, and the widow filed a second bill for the same object against the son, but did not make the daughter a party, the court, on the application of the daughter (the plaintiff in the first suit), gave her the conduct of proceedings in the second suit. *Belcher* v. *Belcher*, 2 Dr. & Sm. 444 ; 12 L. T. 792 ; 13 W. R. 913.

A plaintiff who files a bill for the administration of a testator's estate, charging the trustees and executors with breaches of trust, may bring his suit to a hearing notwithstanding that the ordinary administration decree has been obtained in a suit subsequently instituted, to which the plaintiff is not a party. If a second decree is made, both decrees ought to be prosecuted in the same branch of the court. Where a first suit is stayed by reason of a decree in a second suit, the plaintiff in the first suit will ordinarily have the carriage of the decree. *Gambaco* v. *Cassavetti*, L. R. 11 Eq. 439 ; 24 L. T. 770.

Where there was, first, an action by an equitable mortgagee to establish a charge ; and, secondly, a creditor's action for the administration of the estate in which the ordinary decree had been made, the court stayed further pro-

ceedings under the first action, but gave the conduct of the decree in the second action to the plaintiff in the first action. *Matthews* v. *Matthews*, 45 L. J., Ch. 711; 34 L. T. 718.

The general rule that where two actions have been commenced for the administration of the same estate the conduct of the proceedings will be given to the plaintiff in the first action, although the decree in the second has been obtained first, applies to actions commenced in the Palatine Court of Lancaster, as well as to those commenced in the High Court of Justice. In considering whether the rule ought to be applied the court will have regard to the special circumstances, and will take into account the amount of the interest of the plaintiff in the first action, and his object in bringing his action. The fact of a plaintiff being a stranger to the family who had bought up the reversionary interests of some of the residuary legatees:—Held, not a sufficient reason for not giving him the conduct of the proceedings, although his purchase of some of the shares was disputed on the ground of inadequacy of consideration and undue influence. *Swire, In re, Mellor* v. *Swire*, 21 Ch. D. 647; 46 L. T. 437; 30 W. R. 525—C. A.

Where three actions had been commenced for the administration of the same estate, the court (notwithstanding the general rule that the plaintiff in the first action is entitled to the conduct of the proceedings) ordered the three actions to be consolidated, and gave the conduct of the future proceedings in the consolidated causes to the plaintiff in the second action, on the ground that the parties thereto were the persons chiefly interested, by whom the costs would have to be borne, and consequently to whose advantage it would be to keep down the expenses. *Prime's Estate, In re*, 48 L. T. 208.

Two suits for the administration of one estate being instituted within five days of each other, and there being no evidence of unfitness on the part of either plaintiff, the court made a decree in both suits, leaving the question as to which should have the control of the proceedings to be decided with reference to the manner in which each party should conduct the inquiries in chambers. *Nowall* v. *Pascoe, Thompson* v. *Pascoe*, 31 L. J., Ch. 456; 10 W. R. 338.

—— **Conduct in Discretion of Court.**]—Two suits having been instituted for the administration of an estate, the first by the tenant for life, the second by the remainderman, the vice-chancellor, on a motion by the tenant for life that the two suits might be amalgamated, and that she might have the conduct of them, ordered that the second suit should proceed, and that the tenant for life should have the conduct of it. On appeal:—Held, that the conduct of the suit was a matter entirely within the discretion of the judge, and therefore the appeal was dismissed. *Dowbiggin* v. *Trotter*, 27 L. T. 731; 20 W. R. 1024—L.JJ.

When two creditors' suits have been instituted for the administration of the same estate, the question who is to have the conduct of the proceedings is purely a matter for the discretion of the judge, to be exercised in chambers; and in exercising his discretion the judge will have regard to whether the creditor, who has first obtained a decree, has conducted his suit with perfect fairness, and to the nature and amount of his interest in the estate. *Harvey* v. *Coxwell*, 32 L. T. 52.

A creditor took out a summons to administer the estate of a testator. The summons was dismissed by the chief clerk, as the will had not then been proved, but adjourned to be heard before the judge in chambers. After the will had been proved, another creditor filed a bill for the administration of the same estate, and obtained the usual decree. While the second suit was pending, the plaintiff in the summons (who had had no notice of the institution of the second suit) abandoned his adjourned summons, and took out a second summons for the administration of the estate. An order was then made, at chambers, staying all proceedings in the second summons, and giving the plaintiff in the summons the conduct of the second suit. The plaintiff in the suit now moved to discharge this order:—Held, that, as the plaintiff in the summons was the first in point of time, was the larger creditor, and had had no notice of the second suit, he must have the conduct of the proceedings. *Ib.*

—— **Conduct where Proceedings Improper.**]—The rule that when two suits are instituted for administration of the same estate that shall be prosecuted in which the earlier decree has been obtained, does not apply where it has not been obtained fairly; and the court held this to have been the case where, on the same day of which notice had been given to an executor to appear to an administration summons, he appeared of his own accord, at an earlier hour, at the chambers of another judge to a decree for a summons then and not previously applied for by another plaintiff. *Harris* v. *Gandy*, 1 De G. F. & J. 13; 29 L. J., Ch. 38; 8 W. R. 32.

A suit was instituted on the 16th October, on behalf of infants by their great-uncle, as their next friend, for the administration of the estates of their father and mother. On the 18th November a second suit was instituted on behalf of the same infants by a stranger, as their next friend, and a decree was obtained on the 21st, the solicitors for the plaintiffs in the second suit being the London agents of the solicitors of the defendant:—Held, that, in these circumstances, the institution of the second suit was improper, and that the conduct of it ought to be given to the next friend in the first suit. *Frost* v. *Ward*, 2 De G. J. & S. 70; 9 L. T. 268; 12 W. R. 285.

A creditor took out a summons for the administration of a testator's personal estate only, which was insufficient. On the day following the hearing of the summons, another creditor, appearing by the solicitors who appeared for the defendants to the summons, filed a bill for the administration of the personal estate, which bill he afterwards amended by making the heir-at-law a party, and praying for administration of both the real and personal estate, which together were sufficient. In the suit the same solicitors appeared for all parties. A decree having been obtained in the suit, the first creditor applied for leave to have the conduct of the cause:—Held, that the plaintiff in the suit could not retain the advantage which had been unfairly obtained by him, and that the plaintiff in the summons must have the conduct of the cause. *Singleton* v. *Barrett, Barrett, Ex parte*, 41 L. J., Ch. 103; L. R. 12 Eq. 479; 24 L. T. 454; 19 W. R. 871.

—— **Priorities.**]—A bill was filed by a creditor claiming in respect of an admitted breach of trust, against B. and the representatives of S. deceased, and it prayed that the accounts might be taken, and the real estate of S. sold and applied in paying the amount due to the plaintiff, and the other debts. A sum of money was paid into court in this suit, and a decree was made against the assets of S. only, and accounts and inquiries were directed. A creditors' suit was subsequently instituted against the representatives of S., and a common decree was made. The plaintiffs in the first suit claimed the fund in court in priority of the creditors in the second :—Held, however, that after payment of the costs of the first suit, it ought to be applied in a due course of administration towards payment of all the creditors of S. *Smith* v. *Birch*, 3 Beav. 10; 9 L. J., Ch. 349; 4 Jur. 670.

B. died equitably indebted to A. After B.'s death it was arranged between C., who was his executor and devisee, and A., that C., who admitted that he took under the devise real assets enough to pay B.'s debts, and that he was liable to pay A.'s claim out of them, should not be called upon for immediate payment of the principal, but should pay interest on it. A. afterwards filed a bill, to enforce payment either by C. or out of B.'s assets, and obtained a decree against C. personally for payment of the money due, which decree reserved further consideration, and liberty to apply, but did not give any remedy against the assets. A suit was subsequently instituted by a mortgagee, to whom C. had mortgaged one of the devised estates, and the estate was sold in this latter suit :—Held, that A. had not, by obtaining a personal decree against C., lost her right as a creditor against the assets of B., and that her claim against the surplus proceeds of the sale in the mortgagee's suit had priority over that of a judgment creditor of C., though the judgment was prior in time to the decree in A.'s suit. *De Sorbein* v. *Bland*, 2 De G. & J. 158; 4 Jur. (N.S.) 959.

Semble, if necessary, A. might in her own suit, under the reservation of further consideration and liberty to apply, have enforced her claim against B.'s assets. *Ib.*

—— **Costs.**]—Where, pending an administration suit, a suit is instituted by legatees, praying no further relief than might be had in the administration suit, the parties to the administration suit ought to apply to have the proceedings in the legatees' suit stayed; otherwise, the costs of the latter suit may be dealt with as costs in the former. *Therry* v. *Henderson*, 1 Y. & C. C. C. 481; 6 Jur. 386.

A creditors' suit against a personal representative for the administration of a testator's estate proceeded to replication, when a decree was obtained, in another creditors' suit, against the same personal representative for the same object. After the defendant had given the plaintiff in the first suit notice of the decree, the plaintiff threatened to proceed; and thereupon the defendant, upon a notice of motion, intituled only in the former cause, asked that the proceedings might be stayed. The court made an order in both suits granting the injunction, and giving the restrained plaintiff liberty to tax his costs of the first suit, and on the motion, and to go in and prove his debt and such costs in the second suit, but declined to direct that the costs should be paid out of the first assets. *Ladbroke* v. *Sloane*, 3 De G. & Sm. 291.

Legacy assigned upon certain trusts. Trustee, notwithstanding notice of former decree for administration of assets, files bill for payment of legacy. Court refused to assign legacy to him, he having acted improvidently, or to give him costs. And executors refused their costs, because they should have moved to stay proceedings, instead of answering trustee's bill. *Packwood* v. *Maddison*, 1 Sim. & S. 232; 1 L. J. (O.S.) Ch. 107.

A., B. and C., creditors of a testator, successively took out administration summonses, but an order having been made on A.'s summons, the others were not proceeded with. The defendant, the executor, who was the brother of C., paid off A. in full, and obtained an order to stay all proceedings in A.'s suit. On the same day C. took out another summons, in a different court, and obtained the usual order. B. afterwards obtained the carriage of the order made in A.'s suit, and C.'s suit was transferred to the same court :—Held, that all proceedings in C.'s suit ought to be stayed, and that he must pay the costs of the transfer, and of the application to stay proceedings. *Salter* v. *Tildesley*, 11 L. T. 759; 13 W. R. 376.

c. Parties.

Order XVI. relates to Parties.

Plaintiff—Representative Character of.]—The rule that, in order to entitle a party to sue in any court of this country, whether of law or of equity, in respect of the personal rights of a testator or of an intestate, he must appear to have obtained probate or letters of administration from the proper court in this country, is subject to this qualification, that he is suing in right of the deceased. *Vanquelin* v. *Bouard*, 15 C. B. (N.S.) 341; 33 L. J., C. P. 78; 10 Jur. (N.S.) 566; 9 L. T. 582; 12 W. R. 128.

If executors bring an action to recover back money paid by them by mistake on their testator's account, they must declare in their own right, and not as executors. *Munt* v. *Stokes*, 4 Term Rep. 561; 2 R. R. 459.

That an executor may sue in his representative character on a contract made with himself, when the money recovered would be assets is an established rule, and not to be disturbed. *Heath* v. *Chilton*, 12 M. & W. 632; 13 L. J., Ex. 225.

A person acting under a letter of attorney from administrators, may be sued by them in their own right as their bailiff or receiver, and they need not name themselves administrators. *Hudson* v. *Hudson*, 1 Atk. 462.

An administratrix, after the death of her intestate, paid a sum of money, through a misrepresentation, to her landlord, out of assets remaining in her hands, to which he was not entitled :—Held, that although it might have been a wrongful payment, yet that she was enabled to sue for its recovery in her representative character of administratrix, in an action for money had and received. *Clark* v. *Hougham*, 3 D. & R. 322; 2 B. & C. 149; 1 L. J. (O.S.) K. B. 249.

A. made a promissory note, payable to B. or order. B. indorsed it, and gave it to C. to get discounted. C. went away, and shortly after-

wards came back to B. with the money. The executors of C.'s father, of whom C. was one, brought an action on the note as executors :—Held, that as the executors produced the note on the trial as executors, they might recover on it, although there was no evidence to shew that C.'s father ever had the note in his lifetime. *Godson* v. *Richards*, 6 Car. & P. 188.

Writ Incorporated in Statement of Claim.]—When a plaintiff sues in a representative capacity, the statement of claim is to be read for the purposes of demurrer as if that fact was stated therein. *Johnson* v. *Burges*, 47 L. J., Ch. 552.

Joinder of Claims.]—Semble, that the provision of Ord. XVII. r. 5, of 1875, authorising the joinder of a claim by an executor with a claim by him personally, refers to a case where the plaintiff's personal claim is in respect of the assets of the testator as such. *Ib.* *See now* Ord. XVIII. r. 5, of 1883.

Action at Law—Joinder of Executors as Plaintiffs.]—Two or three co-executors may recover in ejectment on a demise in the names of both. *Doe* d. *Stace* v. *Wheeler*, 15 M. & W. 623; 16 L. J., Ex. 312.

That an executor may sue in his representative character on a contract made with himself, when the money recovered would be assets, is an established rule, and not to be disturbed. *Heath* v. *Chilton*, 12 M. & W. 632; 13 L. J., Ex. 225.

But where there were three executors, and two of them appointed a person to receive rents due to the testator's estate, after his death, and he was the agent of the two only :—Held, that the three executors could not adopt the employment and contract, simply because the money recoverable belonged to the estate, and were not entitled to recover in an action for money received by such person to their use as executors. *Ib.*

A., B. and C., executors of D., sold goods of their testator to E., the price to be paid to C., to be by him distributed among the creditors of D.; the three executors may, without a special count, maintain indebitatus assumpsit (or debt) against E. *Pearson* v. *Pearson*, 2 N. & M. 471; 5 B. & Ad. 859; 3 L. J., K. B. 62.

Where three executors ordered goods to be sold as the property of their testator, and afterwards sued the purchaser for the amount, without describing themselves as executors in the declaration, and without joining a fourth executor, who was named in the will :—Held, that the action was well brought, as the order for sale was given by the three alone, and as they did not act in their character of executors. *Brassington* v. *Ault*, 9 Moore, 340; 2 Bing. 177; 1 Car. & P. 302; 3 L. J. (o.s.) C. P. 243; 27 R. R. 581.

One of two executors having alone proved the will, and received a sum due to the testator, which by such will was to be appropriated to the payment of specific legacies, and having afterwards lent it to a third person, who paid it over to A., who, on being applied to by the executor, acknowledged that he had received the money, but refused to pay it over to the executor :—Held, that both the executors might join in an action for money lent against A. *Webster* v. *Spencer*, 3 B. & Ald. 360; 22 R. R. 427.

Probate to one only is evidence of the title of all. *Walters* v. *Pfeil*, M. & M. 362.

Where a payee of a bill indorsed it to A. and B. as executors :—Held, that they might declare as such in an action against the acceptor. *King* v. *Thom*, 1 Term Rep. 487.

A. obtained from the Heralds' College a grant of arms, to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir-at-law of A., and the younger his executor with another person. A. bequeathed all his household goods and effects to his wife, and she took possession of the grant of arms :—Held, that the two nephews of A. had not such an exclusive interest in the grant of arms as to enable them to maintain detinue for it against the wife of A. *Stubs* v. *Stubs*, 1 H. & C. 257; 31 L. J., Ex. 510.

Semble, that even if the executors were entitled to the grant of arms, the court could not amend, so as to give judgment for the one plaintiff who was executor, since the other executor ought to have been joined. *Ib.*

—— **Since Judicature Act—When entitled to continue Action.**]—The original plaintiff had recovered a verdict in an action against the defendants for statutory fraud. Pending an appeal to the House of Lords the plaintiff died :—Held, that his administratrix was entitled to be joined as a party to the action under Ord. L. r. 4, of 1875. *Twycross* v. *Grant*, 48 L. J., C. P. 1; 4 C. P. D. 40; 39 L. T. 618; 27 W. R. 87.

—— **Executors as Defendants.**]—An executor cannot be sued as such for dividends received since the death of his testator, because they never formed any part of his estate. *Parker* v. *Baylis*, 2 Bos. & P. 73.

Where A. and B. being in partnership, A. signed an agreement on behalf of himself and B., and B. survived A. :—Held, that an action on the agreement lay against the executors of B. without joining those of A. *Calder* v. *Rutherford*, 3 Br. & B. 302; 7 Moore, 158.

An action cannot be maintained by a surviving co-executor in his own right against the surviving partner of a deceased co-executor, without stating himself to be such surviving co-executor in the declaration : where, therefore, the plaintiff and T. were appointed co-executors, and the latter, at the time of the death of the testator, was in co-partnership with the defendant, and died, leaving the plaintiff surviving; and T. had paid large sums belonging to the testator's estate into the partnership account, which were placed to the general credit of the estate of the testator : and the defendant and T. became insolvent, and none of the funds ever came to the plaintiff :—Held, that he could not recover from the defendant in an action for money had and received, commenced by him in his own right against the defendant in his own right, and not describing him as a surviving partner of T. *Fitzgerald* v. *Boehm*, 6 Moore, 332.

Quære, whether the service of a writ of summons, in which an executor is not described in his representative character, is notice to him of the commencement of an action against him in that character, so as to render him liable to a devastavit, if he pays a debt of an equal decree with that sued for, between the service of the writ of summons and the declaration. *Rees* v. *Morgan*, 3 N. & M. 205; 5 B. & Ad. 1035; 3 L. J., K. B. 102.

—— **Since Judicature Act—Non-joinder.**]—In an action against Y. and A., his wife, the claim alleged that W. owed the plaintiff 40*l.*, and that at his death he appointed by his will M. W. his residuary legatee; that M. W. died, having by her will appointed A., the female defendant, her residuary legatee; and that the residuary estate of W. had been assigned by his surviving executor to the defendants. The plaintiff claimed payment of 40*l.* from the defendants, but the surviving executor of W. was not made a party to the action:—Held, upon demurrer, that the claim disclosed a good cause of action; for even if the practice of the Court of Chancery would have required the surviving executor of W. to be joined as a defendant, the proper course (since the passing of the Judicature Acts, 1873, 1875) for the defendants to take, if they wished to bring him before the court, was to make him a party to the action under Rules of the Supreme Court, Ord. XVI. r. 17 of 1875. *Hunter* v. *Young*, 48 L. J., Ex. 689; 4 Ex. D. 256; 41 L. T. 142; 27 W. R. 637—C. A.

—— **Executor both Plaintiff and Defendant.**]—A party cannot be both plaintiff and defendant in an action; and therefore, where the plaintiff sued as executor, and the defendant pleaded that the promises in the declaration were made jointly with the plaintiff:—Held, a good plea in bar of the action. *Moffat* v. *Van Mullingen*, 2 Chit. 539; 2 Bos. & P. 124, n.; 5 R. R. 557.

Administration Action—In General.]—Creditor, filing a bill against executor, cannot make a debtor a party. *Utterson* v. *Mair*, 2 Ves. J. 95; 4 Bro. C. C. 270.

Creditors of A. cannot maintain a bill against the representatives of B. to part of the residue of whose estate A. is entitled. *Elmslie* v. *M'Aulay*, 3 Bro. C. C. 624.

Bill by creditors against an executrix for an account. Upon the hearing, the usual accounts were directed; but before they were taken, the creditors filed another bill against the executrix, and against debtors to the estate, stating insufficiency of assets, and charging collusion between the executrix and the debtors, but which was denied by the answer. Bill dismissed with costs, as it was only sustainable in case collusion had been proved; and if allowed, a bill might be filed by every single creditor against every individual debtor. *Ib.*

The general principle that a debtor to the estate cannot be made a defendant to a bill by a creditor or residuary legatee against the executor, unless there be collusion, insolvency, or some special case, is established by many decisions. *Ib.*

A creditor cannot in any case sue a debtor to the testator's estate without making the executor a party. *Rumney* v. *Mead*, Rep. t. Finch, 303. *Griffith* v. *Bateman*, id. 334.

A mere refusal by legal personal representatives to sue for the recovery of assets alleged to be outstanding is not sufficient to entitle a residuary legatee or next of kin to maintain an action against the alleged debtor to the estate and the legal personal representative for the recovery of such assets. Special circumstances must be shown as a ground for such an action. *Yeatman* v. *Yeatman*, 47 L. J., Ch. 6; 7 Ch. D. 210; 37 L. T. 374.

The circumstances which would suffice to induce the court to answer in the affirmative an inquiry whether proceedings ought to be instituted, will in general suffice to entitle a person beneficially interested to sue in his own name. *Ib.*

The personal representatives are the proper parties to sue to recover the assets, and parties interested in the estate will not be allowed to sue for that purpose unless it be satisfactorily shown that assets exist which might be recovered, and which, but for such suit, would probably be lost to the estate. *Stainton* v. *Carron Co.*, 18 Beav. 146; 23 L. J., Ch. 299; 18 Jur. 137; 2 Eq. R. 466; 2 W. R. 176.

The rule as to joining the partner of the deceased with the personal representatives, in a suit for administration, without charging and proving collusion (if it can be supported in the absence of any additional special circumstances), does not apply to such a partnership as a joint-stock company. *Ib.*

After a decree for administration, a legatee cannot sue the debtors to recover the assets in the absence of any refusal or neglect of the personal representatives to do so. *Ib.*

After a decree for administration, a residuary legatee filed a bill against the executors and a company in which the testator was a large shareholder, and with which he had had extensive transactions, to recover the assets, relying on the fact that the executors were shareholders and officers of the company, and had interests which conflicted with their duty. A demurrer of the company was allowed, it not being shown that the executors intended to neglect the performance of the duties of their office. *Ib.*

If a testator, when he makes his will, is aware of the circumstances and position of his executors and trustees, the court will not lightly interfere with their discretion; and although the circumstance of an executor being an insolvent may be a reason for appointing a receiver, yet, if the testator was aware of his insolvency, the court will not, on that ground alone, take the property out of his hands. *Ib.*

A bill by creditors against beneficiaries for the administration of an intestate's estate, which does not allege insufficiency or collusive distribution of assets, is demurrable. *Price* v. *Mayo*, 28 L. T. 552; 21 W. R. 539.

Any person having an interest, no matter how small, in the taking of an account, may be properly made a party to a bill for an account. *Smith* v. *Farr*, 3 Y. & C. 328; 8 L. J., Ex. Eq. 46.

A suit cannot be maintained in this court by a party interested in the intestate's estate upon an administration bond, where no special reasons are shown why the proceeding is not taken in the name of the ordinary:—Held, also, that an order of the Ecclesiastical Court to attend with the bond in chancery as may be requisite and necessary for the furtherance of justice is not a sufficient reason. *Bolton* v. *Powell*, 14 Beav. 275; 16 Jur. 24.

—— **Where there is Collusion between Executor and Debtor to Estate.**]—A creditor or legatee may bring a bill against a legatee or debtor, if he make the executor a party, and charge collusion. *Att.-Gen.* v. *Wynne*, Mos. 126.

Though generally a bill by those interested in the personal estate, as creditors or next of kin, will not lie against a debtor to the estate; it will, under circumstances; as in this case, upon collusion with the representative; the defendant was not liable in the character of trustee and agent. *Doran* v. *Simpson*, 4 Ves. 651.

In the case of a creditor or next of kin, if they

can state a case that the representative is colluding with the debtors to the estate, and diminishing the fund, they have a right upon that ground to make the debtor a party to obtain a discovery, and to prevent the payment of the money for a settlement of the account by collusion between the representative and the debtor. In this case a strong case of collusion was made out, and the debtor made a party. *Ib.*

Creditor permitted to sue debtor to estate upon collusion with executors. *Benfield* v. *Solomons*, 9 Ves. 86.

Semble, in all such cases as the present, it is very convenient to state the facts upon which the allegation of collusion is made. There is great inconvenience in joining issue on a general allegation, defendant not having a hint of any one fact from which it is to be inferred. *Ib.*

Devisees and legatees filed a bill against the trustees and executors of the will, and a mortgagee in possession of part of the estate, alleging that the trustees and executors colluding with the mortgagee, refused to make him account for the rents which he had received, or to redeem the mortgage, and praying for an account of the testator's assets, and that the mortgage might be redeemed. A demurrer by the mortgagee for multifariousness was allowed. A bill by a person beneficially interested in a testator's estate against the executors and a debtor to the estate cannot be sustained, although it alleges collusion between the co-defendants, unless it is confined to the recovery of the debt. *Pearse* v. *Hewitt*, 7 Sim. 471 ; 7 L. J., Ch. 286.

See, as to collusion between executor and debtor, *Troughton* v. *Binkes*, 6 Ves. 574 ; 5 R. R. 401. And see *Alsager* v. *Rowley*, 6 Ves. 748.

—— **Against Surviving Partner.**]—Residuary legatees may sustain a bill for an account against the executor and the surviving partner of the testator, though collusion between the executor and the surviving partner is neither charged nor proved. *Bowsher* v. *Watkins*, 1 Russ. & M. 277. But see *Davies* v. *Davies*, infra.

A bill filed by a creditor of a testator against the executor and certain persons who were in partnership with the executor alleged that the partnership claimed to be entitled to retain assets, which were in their hands, in satisfaction of a debt which they pretended was due to them from the testator ; but it did not charge in express terms that the executor was colluding with his co-partners : the creditor was held to have, under such circumstances, a right to sue all the partners, and a demand by the partners other than the executor was overruled. *Gedge* v. *Traill*, 1 Russ. & M. 281 ; 2 L. J. (o.s.) Ch. I.

The general rule of the court in administration suits is, that a creditor or legatee cannot make a debtor to the estate under administration a co-defendant with those who represent the estate, unless there has been collusion between the personal representative, bound to get in the estate and administer it, and the debtor to that estate, or where the deceased was partner with others, and the estate could not be ascertained without partnership accounts. *Burrows* v. *Gore*, 4 Jur. (N.S.) 1245 ; 6 W. R. 699—H. L.

A bill was filed by residuary legatees against the executor and the surviving partner of the testator, for an account of the partnership transactions. It charged that an unfair valuation of the partnership stock had been made by a clerk of the surviving partner, and that there was no settled account with the defendant ; or that, if any, the same was fraudulent and collusive. The defendant, the surviving partner, pleaded a settled account with the executor to the whole bill, except such parts thereof as were comprised in his answer in support of the plea, and by which he denied any fraud or collusion whatever :—Held, that the defendant was not bound to set forth the settled account, or to aver that he had delivered up the vouchers to the executor, and that, though the charge of an unfair valuation of the partnership stock was not expressly denied by the answer, the plea did not therefore cover too much, as such valuation might have been admitted consistently with a just final account. *Davies* v. *Davies*, 2 Keen, 534 ; 1 Jur. 446.

The case of *Bowsher* v. *Watkins* (1 Russ. & M. 277) does not establish the general proposition that in every case a bill may be filed against any executor and the surviving partner of the testator, without charging and proving fraud and collusion between them. *Ib.*

—— **Executor Insolvent.**]—Suit by creditor against persons unaccountable to the estate allowed in special cases, as collusion between representatives, or their refusal, &c., to act. *Burroughs* v. *Elton*, 11 Ves. 29 ; 8 R. R. 79.

Where an executor has become bankrupt, or insolvent, so as not to have the means, or refuses to act, the court will permit a creditor to bring a bill for himself against persons accountable to the estate, and have administration. *Ib.*

In an administration suit by a legatee against the personal representative of an intestate, the plaintiff made defendant a third person, whose real estate had been charged under a power with a sum of money payable to the intestate, charging that the personal representative was insolvent, but not charging collusion with the debtor. The insolvency was denied by the answer of the personal representative, and not proved by the plaintiff :—Held, that the debtor was improperly made a party to the suit ; and the bill, as against him, was dismissed with costs. *Philips* v. *Philips* 6 Ir. Eq. R. 509.

A suit was instituted against A. and B., devisees of two incumbered estates. A larger portion of the incumbrances was paid out of A.'s estate than it was properly liable to. The decree directed special accounts, which were prosecuted to a draft report, finding 13,000*l.* due to A. out of B.'s estate. A. made his will, and, reciting this draft report, bequeathed an interest in the 13,000*l.* to the plaintiffs, and more to his executor. The plaintiffs filed a bill against B., and those claiming through him, and against the executor of A., praying the benefit of the former decree, and to prosecute the special accounts and be paid their legacy :—Held, that neither the specific nature of the legacy nor the character of the debt constituted any special case for taking the suit out of the common rule ; that a debtor to the estate cannot be sued by a legatee : and the suit, being to carry out a former decree, did not remove, but rather increased the objection. Neither the insolvency of the executor, if before his appointment as executor, nor his embarrassments, if removed before the commencement of the suit, nor the circumstance of the debtor evading process, and its being difficult to recover from him, if the executor had not refused to sue him, are grounds to warrant a legatee in suing a debtor to the estate. *Wright* v. *Hamilton*, 9 Ir. Eq. R. 119 ; 3 Jo. & Lat. 465.

—— **One of two Executors a Surviving Partner.**]—Where one of two executors was a partner with the testator, the residuary legatees may sustain a bill for an account of the partnership transactions against the executor, though collusion between them is neither charged nor proved. *Cropper* v. *Knapman*, 2 Y. & C. 338; 6 L. J., Ex. Eq. 9.

—— **Against Executor de son tort.**]—The widow of the testator employed A. to collect some of the debts due to the testator's estate, which A. accordingly collected and paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration:—Held, that A. was liable as executor de son tort to account to a party interested in the testator's estate, in a suit for that purpose, without any charge of collusion between such executor de son tort and the legal personal representative. *Sharland* v. *Mildon*, 5 Hare, 469; 15 L. J., Ch. 434; 10 Jur. 771.

—— **Other Special Circumstances.**]—Principle on which debtor to estate cannot be made defendant to bill by creditors, or residuary legatee against executor, unless collusion, &c., applies equally to the case of a creditor overpaid by the executor. *Alsager* v. *Rowley*, 6 Ves. 748.

The Lord Chancellor said it was very difficult to define what collusion is; it must depend on the circumstances; and where a creditor seeks to appropriate to himself the advantage arising from the too great facilities the executor may have given him to substantiate his demand, or too great readiness in admitting it, the case, as against a creditor, must be examined with very nice and critical attention before it can be said there is not collusion. *Ib.*

Although, as a rule, a debtor to the estate cannot be made a party to a bill against the executor, unless there be collusion or insolvency, there may be cases of exception; where a fund remained in court, being the surplus after satisfying a charge on the husband's estate, on which the wife had an equitable claim in respect of the husband's debts having been satisfied out of her estate, and both being dead, the executor of the wife refused to enforce her equity against the husband's estate:—Held, that a mortgagee and judgment creditor against her estate might maintain a suit against her executors and a party claiming under the husband against the fund in court for payment of the debts due from the wife. *Lancaster* v. *Evors*, 4 Beav. 158; 5 Jur. 525.

There may be circumstances under which the court will, at the suit of universal legatees under a will, direct an account against a debtor to the testator's estate, without collusion being established between the debtor and the personal representative, or any evidence of insolvency on the part of the latter, or of his refusal to sue the debtor, other than his omission to institute proceedings for a considerable period. *Barker* v. *Birch*, 1 De G. & Sm. 376; 11 Jur. 881.

—— **By Executor against Single Creditor.**]—An executor cannot maintain an action for administration against one creditor as sole defendant, even where, from the executor being the universal devisee and legatee, no next of kin or cestui que trust could become plaintiff or be named defendant. *Buccle* v. *Atleo* (2 Vern. 37) not followed. *Mandeville* v. *Mandeville*, 23 L. R., Ir. 339—C. A.

—— **Relief against person having Liberty to attend — Delivery up of Title Deeds.**]—The court has no jurisdiction in an ordinary administration action to make an order against a person who is not a party to the action but has obtained leave to attend the proceedings, for delivery up of title deeds relating to the estate. *Parkes, In re, Simpson* v. *Parkes*, 66 L. T. 151.

Administration Action—Who necessary to—Personal Representative.]—The Judicature Acts have made no change in the old rule that a decree for general administration cannot be made in the absence of a general representative of the estate. *Groves* v. *Lane* or *Levi* (16 Jur. 855, 1061; 1 W. R. 31) approved, and *Davis* v. *Chanter* (2 Ph. 545; 17 L. J., Ch. 297) explained. *Dowdeswell* v. *Dowdeswell*, 48 L. J., Ch. 23; 9 Ch. D. 294; 38 L. T. 828; 27 W. R. 241.

A claim filed for the administration of personal estate dismissed with costs, on the ground that there was no personal representative of the testator before the court, and that the claim erroneously stated that the defendant was the executor of the executrix of the testator, and sought relief against him in that capacity. *Boulding* v. *Boulding*, 16 Jur. 1154; 1 W. R. 49.

The legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate. *Rousell* v. *Morris*, 43 L. J., Ch. 97; L. R. 17 Eq. 20; 29 L. T. 446; 22 W. R. 67.

An objection to a bill for the administration of the real estate only of a testator, and without the joinder of his legal personal representative, is valid, though not raised by the answer, and may be taken by way of demurrer ore tenus at the hearing. *Ib.*

Where such an objection is plain on the face of the bill, it is not the duty of the defendant to give notice to the plaintiff that he will avail himself of it, and he will be entitled to the costs of the day. *Ib.*

Not necessary to make any other than the executors parties to bill relative to the personal estate, since he sustains the person of the testator to defend the estate for himself, creditors and legatees. *Peacock* v. *Monk*, 1 Ves. Sen. 127.

A fund was alleged to have been carried in an administration suit, "to a separate account, entitled the general account." In another suit, to give effect to the assignment of a share of the fund:—Held, that the legal personal representative of the testator was a necessary party. *Salmon* v. *Anderson*, 9 Beav. 445.

On a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix, deceased:—Held, that an allegation that all the testator's debts and the other legacies bequeathed by his will had been paid, and that there were assets ultra in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator, the allegation being one which, even if admitted by the defendant, the court would not take his word for. *Penny* v. *Watts*, 2 Ph. 149; 16 L. J., Ch. 146.

No good cause of demurrer, that an executor is not a party when plaintiff alleges in his bill he knows not who is executor, and prays defendant may discover him. *Bowyer* v. *Covert*, 1 Vern. 95.

The heir of the obligor demurs, because his administrator was not made a party, and the

demurrer was overruled, because he would not administer himself, and had opposed the plaintiff in taking out administration as a principal creditor. *D'Arnada* v. *Whittingham*, Mos. 84.

Where the bill contained a charge, "that A., the surviving executor of B., was long since dead, intestate; although plaintiff has made inquiry, he cannot now set forth the name of the person who, plaintiff is informed, administered to the said B. with his will annexed, since the death of said executors; and plaintiff has applied to the several confederates herein named for discovery of the name of such administrator, but which, although well known to them, they refuse to discover," demurrer, because B.'s personal representative (who was confessedly a necessary party) was not made a party to the bill, overruled, a sufficient excuse for not making him a party being suggested by the bill. *Ryan* v. *Cambie*, 2 Ir. Eq. R. 328.

It is not an objection at the hearing to the frame of a suit, that an administrator who is a necessary and not a formal party is brought before the court by a supplemental bill, to which the other defendants are not parties. *Kebell* v. *Philpot*, 7 L. J., Ch. 237; 2 Jur. 739.

—— **Representative out of Jurisdiction.**]—Two of the residuary legatees of a testator who died in India, filed a bill against the representative of a person who was named in the will as a trustee and executor, but never consented to act, but who was alleged in the bill to have in some manner acted in the trusts. One of the persons named in the will as executors, had proved the will in India, and was a party to the transactions by which the trust fund was wasted; and another of the persons so named proved the will in England, but both these parties were out of the jurisdiction. The bill prayed for a general account of the testator's personal estate, and for the appointment of new trustees:—Held, that the suit could not proceed in the absence of the personal representative of the testator; and that the third residuary legatee or his personal representative, and also the executor who proved in India, were also necessary parties. *Lowry* v. *Fulton*, 9 Sim. 104; 7 L. J., Ch. 158.

In a suit for administration against the administrator, with the will annexed, and the widow, to whom the assets had been assigned, such administrator was alleged and proved to be out of the jurisdiction:—Held, that the suit could not proceed in the absence of a legal personal representative. *Donald* v. *Bather*, 16 Beav. 26.

A testator dying in the Mauritius, appointed executors in that country, and left the residue of his property to his mother in England. The executors in the Mauritius transmitted the residue to England, but the mother of the testator having died, the amount was paid to her executors, who paid all her debts, exceeding the amount to which she became entitled from the testator's estate. The plaintiff was a creditor of the testator, and filed a claim to obtain payment of his debt, or to have the testator's estate administered:—Held, that the Mauritius executors were improperly made parties to this claim, and that the plaintiff could not have relief against the executors of the testator's mother without having a legal personal representative of the testator constituted, in this country, a party to the suit. *Silver* v. *Stien*, 21 L. J., Ch. 312. And see *S. C.*, 1 Drew. 295.

A clear ascertained fund was remitted from abroad by an executor to a person in England, to distribute between the legatees. The court determined the rights of the legatees, without having a legal personal representative before the court, the consignee being a party to the suit. *Arthur* v. *Hughes*, 4 Beav. 506.

J. M., resident in America, directed his executor, Q., to convert his estate into cash, and divide it into two parts, and he gave three-fourths of one moiety to persons, of whom some resided in Ireland, in equal shares, and directed Q. to remit the amount to A. and B., persons resident in Ireland, to be by them paid to the legatees, and declared the remittance should be a full discharge to Q. as against the legatees. One of the legatees, having filed a bill against the personal representatives of A., alleging that Q. had remitted several sums on account of the residue of the testator's estate, and praying an account and payment:—Held, that Q. was not a necessary party. *Lynch* v. *Musgrave*, Hay. & J. 821.

—— **Executor de son tort.**]—To a suit by a creditor of an intestate, against an administrator de son tort, for an account and payment, it is necessary that a legal personal representative duly constituted should be a party. *Creasor* v. *Robinson*, 14 Beav. 589; 21 L. J., Ch. 64; 15 Jur. 1049.

In a suit for the administration of assets, it is not sufficient to bring an executor de son tort alone before the court. The legal personal representative must be a party. *Shean* v. *Maher*, 1 Jones, 440. S. P., *McAllister* v. *McAllister*, 11 L. R., Ir. 533.

Bill for account, receiver and injunction against an executor de son tort. Administration taken out by another person after bill filed:—Held, that the administrator might be properly made a party by amendment. *Beardmore* v. *Gregory*, 2 Hem. & M. 491; 34 L. J., Ch. 392; 11 Jur. (N.S.) 363; 12 L. T. 363; 13 W. R. 674.

An allegation that the defendant, being the person entitled to take out representation to a deceased party, refuses to apply for it, and impedes the plaintiff in procuring a grant of it to any other person, is not a sufficient answer to a demurrer founded on the absence of such representative; but secus, if the bill alleges that the grant of representation is actually in litigation in the Ecclesiastical Court. *Penny* v. *Watts*, 2 Ph. 149; 16 L. J., Ch. 146.

To a bill by a legatee for general administration against the defendant who, it was stated, had proved the will, and had possessed himself of the assets and made various payments, it was pleaded in bar to the whole bill that he had not proved the will, and was not the legal personal representative of the deceased:—Held, that the plea was a good one, and must be allowed, and without liberty to amend. *Cury* v. *Hills*, 42 L. J., Ch. 100; L. R. 15 Eq. 79; 28 L. T. 6; 21 W. R. 166.

A creditor of an intestate filed a plaint in a county court against the widow and two other persons for administration of the estate, and for an account against them as executors de son tort. On the plaint coming on for hearing they demurred to it ore tenus, on the ground that the legal personal representative was not before the court. The hearing was then adjourned, and shortly afterwards the plaintiff took out administration. On the case subsequently again coming on for hearing the county court judge dismissed the plaint so far as it sought relief against the

defendants, but made a common administration decree, giving the plaintiff leave to amend the plaint by stating the grant of administration. On appeal :—Held, that a bill for an account against an executor de son tort was sustainable, notwithstanding the absence of the legal personal representative. *Coote* v. *Whittington*, 42 L. J., Ch. 846 ; L. R. 16 Eq. 534 ; 29 L. T. 206. S. P., *Rayner* v. *Koehler*, 41 L. J., Ch. 697 ; L. R. 14 Eq. 262 ; 27 L. T. 506 ; 20 W. R. 859.

The legal personal representative of a testator is a necessary party to a suit for the administration of his real and personal estate ; and if he is not a party, no decree can be made in such a suit, even although an executor de son tort and the trustees of the real estate are before the court. *Coote* v. *Whittington*, and *Rayner* v. *Koehler*, supra, dissented from. *Rowsell* v. *Morris*, 43 L. J., Ch. 97 ; L. R. 17 Eq. 20 ; 29 L. T. 446 ; 22 W. R. 67.

A creditor of a testator brought an action against the executors, who had not proved, but had got in part of the assets in Australia, alleging that they had paid some of the legacies, but refused to pay the funeral expenses and debts ; and also against other defendants, alleging that they had got in a portion of the assets in England, and that they threatened to dispose of such assets without regard to the debts. The plaintiff claimed, as against the executors, administration of the estate and payment of the debts ; and against the other defendants he claimed an injunction to restrain them from parting with the assets :—Held, that the executors were rightly sued, although they had not proved ; and that the other defendants were properly made parties as executors de son tort. *Lovett, In re, Ambler* v. *Lindsay*, 45 L. J., Ch. 768 ; 3 Ch. D. 198 ; 35 L. T. 93 ; 24 W. R. 982.

—— **Co-executors.**]—Bill for account cannot be filed against one co-executor only, either as a creditor or as residuary legatee. *Scurry* v. *Morse*, 9 Mod. 89.

All executors must sue and be sued, though one be an infant. *Offley* v. *Jenney*, 3 Ch. Rep. 92 ; Nel. 42.

It is sufficient to make those executors parties who have proved the will, and the other executors, if they have demands out of the estate, may come in as creditors before the master. *Brown* v. *Pitman*, Gilb. Eq. Rep. 75. And see *Wankford* v. *Wankford*, 1 Salk. 307. *Cramer* v. *Morton*, 2 Moll. 108.

Where one executor has alone proved, he may sue without making the other executors parties, although they have not renounced. *Davies* v. *Williams*, 1 Sim. 5 ; 4 L. J. (o.s.) Ch. 210. S. P., *Lynch* v. *Musgrave*, Hay. & J. 821. But see *Fergusson* v. *Fergusson*, Hay. & J. 300. *Houston* v. *O'Connor*, Hay. & J. 718.

A testator appointed three executors, and made his executors and two other persons his residuary legatees. All the executors proved, and one of them filed a bill for the administration of the estate, and for a partition, to which another of the executors was made sole defendant. The remaining executor and also the other two residuary legatees were served with a copy of the decree :—Held, that the bill could not be sustained without making the remaining executor a defendant. *Latch* v. *Latch*, 44 L. J., Ch. 445 ; L. R. 10 Ch. 464.

A decree for an account cannot be made against an executor who is not a party to the suit. A decree so made was discharged, but with leave to amend. *Ib.*

An executor who has not proved the will is a proper party to an administration suit, provided he has acted as executor, though he may not have received anything as such. *Vickers* v. *Bell*, 10 Jur. (N.S.) 376 ; 10 L. T. 77 ; 12 W. R. 589.

A statement by him, in answer to an inquiry by a creditor that he is an executor, and that the will has been proved, will render him liable as an executor. *Ib.*

A defendant who in his answer says that he believes the testator to be incompetent, instead of saying that he was told that the testator was incompetent, but knew nothing about it, will be held to have insisted on that allegation as a defence to the suit ; and the allegation will be confirmatory evidence that he took upon himself the executorship. *Ib.*

A testator having named four persons to be his executors, two only proved the will, leave being given to the other two to come in and prove. One, a solicitor, who had neither renounced nor disclaimed, but who had stated himself to be acting as solicitor to the executors, was made a party to a creditor's suit. He disclaimed the trusts by his answer, and maintained that he was not a proper party :—Held, that if not a necessary, he was not an improper, party to the suit. *S. C.*, 9 L. T. 600.

Where R. by his will directed his executors to invest 1,500*l.*, and to pay the interest to his wife during her life, and after her decease to divide the principal equally among his five children ; and the will was proved by one of the executors only, who possessed himself of the assets, and set apart the 1,500*l.*, and paid the interest to R.'s wife during her life ; and also made some payments to the children—in a suit by the representatives of R.'s children, for their respective shares of the 1,500*l.*, upwards of thirty years after their right accrued, praying that the executor might be declared to have been a trustee of the 1,500*l.* for R.'s children :—Held, that the executors of R.'s will, who did not prove, were not necessary parties. *Daly* v. *Kirwan*, 1 Ir. Eq. R. 156.

One devises that his executors should sell his land, and leaves two executors, one whereof dies, and the other renounces, and administration is granted to A., who brings a bill against the heir to compel a sale ; whether the renouncing executor, in whom the power of sale, collateral to the executorship, was vested, ought not to be made a party, quære. *Yates* v. *Compton*, 2 P. W. 308.

Where an executor in trust was outlawed, and a witness proved he had inquired after and could not find him :—Held, not necessary to make him a party. *Heath* v. *Percival*, 1 P. W. 684 ; 1 Stra. 403.

—— **Personal Representative of a Representative.**]—In an administration suit against a surviving executor, it is not necessary, in all cases, to bring before the court the representative of the deceased executor. *Masters* v. *Barnes*, 2 Y. & C. C. C. 616 ; 7 Jur. 1167.

A bill sought to charge the survivor of two executors with a loss occasioned by a breach of trust committed by both, and also asked a general account of the testator's estate :—Held, that the representatives of the deceased executor were necessary parties to the suit. Secus, if no general account had been prayed. *Higgs* v. *Penn*, 14 L. J., Ch. 326.

To bill by assignee of deceased executor and residuary legatee, against co-executor and

residuary legatee, for moiety of residue, representative of deceased executor need not be party, except to dispute assignment. *Blake* v. *Jones*, 3 Anstr. 651.

Demurrer for want of parties, because plaintiff had only brought before the court the surviving executor, and not the personal representative of a deceased executor, and ore tenus, because bill to establish will stated testator to have been a bankrupt, and did not state he had obtained his certificate, overruled. *Ryan* v. *Roche*, 2 Moll. 437.

In a suit for an account of the assets of a deceased person, the personal representative of his former representative is properly joined as a co-defendant with his continuing or previous personal representative. *Holland* v. *Prior*, 1 Myl. & K. 237; Coop. t. Brough. 426.

R., by his will, directed his executors to invest 1,500*l*., and pay the interest to his wife during her life, and after her decease to divide the principal equally amongst his children; and M., one of the executors, alone proved the will. M. died, and by his own will appointed two executors, both of whom proved his will: one of them died, and subsequently all R.'s children, but one, instituted a suit for the recovery of their shares of the 1,500*l*., against the surviving executor of M.:—Held, that the personal representative of the deceased executor of M. was not a necessary party. *Daly* v. *Kirwan*, 1 Ir. Eq. R. 156. See also *Popham* v. *Baldwin*, 2 Jones, 320.

After a decree to account in a suit against B. and C. (the executors of A., in a suit for the administration of A.'s assets), B. died. It appeared that B. had received part of the assets of A., and it was alleged but not proved that he died insolvent:—Held, that the cause could not proceed until the representative of B. was brought before the court. *M'Mahon* v. *O'Kelly*, 5 Ir. Ch. R. 288.

One of two executors, who were stated to have possessed their testator's assets jointly, died before a suit was instituted for the administration of the testator's estate:—Held, that the representative of the deceased executor was not a necessary party. *Clark* v. *Webb*, 16 Sim. 161; 12 Jur. 615.

In a suit for an account of administration of personal estate of a testatrix, the personal representative of a deceased executor of the testatrix may be properly made a co-defendant with the surviving executor, only where it distinctly appears that the deceased executor possessed himself of assets; and from the statement in the bill, that the executors, A. and G., both proved the will, &c., but that G., who was dead, alone acted as executor, the court will not infer that G. possessed himself of assets, so as to justify the plaintiff in making his personal representative a co-defendant with the surviving executor. *Cocking* v. *Golding*, 4 Ir. Eq. R. 169.

A person acting in the management of assets, though there be an executor who afterwards proves the will, is liable as an executor de son tort, unless it clearly appears that he was only an agent; and when the evidence left this in doubt an inquiry on the subject was directed. An executrix and A. B., who was named an executor, acted and died without proving the will, which was proved by the surviving executor named in the will. The latter and A. B. afterwards obtained a release from the parties interested in the assets. In a suit to set it aside and for an account:—Held that the personal representative of the deceased executrix was a necessary party, especially as A. B. set up as a defence that he was only her agent. The cases in which the personal representative of a deceased executor may be dispensed with in suits against a surviving executor considered. *Kelly* v. *Murphy*, 12 Ir. Eq. R. 614.

Form of order for administration dispensing with the representatives of deceased executors and trustees as parties to the suit, although incapacitated persons were interested in the estate. *Whittington* v. *Gooding*, 10 Hare (App.) xxxiii.

The testator directed his two sons, who were also his executors, to carry on his trade with his general personal estate, for the benefit of themselves and the widow and sisters, which the sons did accordingly. One of the sons died intestate. A bill was then filed for an account against the surviving son, who continued to carry on the trade; but no letters of administration being taken out to the son who had died, there was no personal representative before the court. His eldest son and heir-at-law was, however, a party:—Held, that his legal personal representative was not a necessary party to the suit. *Goddard* v. *Haslam*, 1 Jur. (N.S.) 251; 3 W.R. 357.

When all the executors under a will act, and one dies, and the bill does not allege that he has accounted to the surviving executors for what he received, in a suit to administer the estate, in the absence of allegations of rendering any account by the deceased executor, or of receipt of assets by any of the executors, a common decree ordered without the representative of the deceased executor. *Montgomery* v. *Floyd*, 18 L. T. 847.

Where a bill was filed against an executor, seeking performance of the trusts of his testator's will, and administration of his estate, and the executor by his answer admitted a surplus of the testator's estate to be in his possession, and afterwards died before the cause came to a hearing:—Held, that the suit could not be revived against the administrator of the executor, but that there must be a representative of the original testator before the court. *Barber* v. *Walker*, 15 W. R. 728.

If a creditor's bill is filed against an administrator de bonis non, the suit is imperfect, unless the former administrator, or his personal representative, be made a party. *Watson* v. *Ridge*, 1 L. J. (O.S.) Ch. 15.

A., being seised of lands, and indebted in judgment, died intestate, leaving a wife and son; the wife took out administration, and entered upon the lands as guardian, and dies, leaving B. her executor, who possesses her personal estate; the son dies, and his heir, the plaintiff, prays judgment to a bill for an account of the profits of the land: the administrator de bonis non of A. is a proper party. *Bressenden* v. *Decreets*, 2 Ch. Ca. 197.

Upon a bill against executors to have a testator's estate administered according to the trusts of the will, and impeaching certain accounts alleged to have been fraudulently settled between the defendants and a deceased co-executor, it appeared at the hearing that the personal representative of the deceased executor was not a defendant, and the decree then made therefore restricted the account to the receipts of the defendants, the surviving executors, and directed that the account settled with the deceased executor should not be disturbed. The same plaintiffs afterwards filed a bill purporting

to be a supplemental bill, bringing before the court the personal representative of the deceased executor, and also the assignees of one of the surviving executors, who had become a bankrupt, and praying that the accounts and inquiries directed by the former decree might be prosecuted, and that an account might also be taken of the receipts of the deceased executor:—Held, on the demurrer of the assignees of the bankrupt executor, that the suit for the last-mentioned purpose, not being supplemental, was irregular. *Wilson* v. *Todd*, 1 Myl. & C. 42; 5 L. J., Ch. 9.

If, in a suit in which A., a creditor, and B., an administrator, are made co-plaintiffs, B. dies, after a decree for the administration of the personal estate, B.'s personal representatives ought, in the further prosecution of the suit, to be made parties in respect of B.'s possession of assets; but as they are accounting parties in respect of such possession, they must be made defendants, and not co-plaintiffs. *Barnes* v. *Lever*, 1 L. J. (o.s.) Ch. 165.

The representatives of a deceased executor are not necessary parties to a suit by the survivor, for an account against an agent employed by the two jointly. *Slater* v. *Wheeler*, 9 Sim. 156; 2 Jur. 887.

—— **Lunatic—Guardian ad litem.**]—In a suit, commenced by summons, for the administration of the estate of an intestate, against the administratrix and her husband, the husband became lunatic, though not so found by inquisition, and the court on motion ex parte, supported by affidavit of fitness, appointed a guardian ad litem. *Osbaldiston, In re*, 1 Sm. & G. (App.) xii.

—— **Suit for Interim Protection of Assets—Claim for Administration added.**]—A bill filed for the protection of assets before administration granted, is demurrable for want of parties if it prays an account of the estate. *Rawlings* v. *Lambert*, 1 John. & H. 458. S. P., *De Feuchères* v. *Dawes*, 5 Beav. 110; 11 L. J., Ch. 394; 6 Jur. 594. *Overington* v. *Ward*, 34 Beav. 175.

—— **Heir-at-Law.**] — Though, at law, a specialty creditor may sue either the heir or executor, yet, in equity, he must make both parties. *Madox* v. *Jackson*, 3 Atk. 406. And see *Plunket* v. *Penson*, 2 Atk. 51.

To bill against executors of testator, on whose land annuities were charged, seeking arrears accrued due in life of testator, heir need not be party; but for arrears since testator's death, he must. *Weston* v. *Bowes*, 9 Mod. 309.

In a bill by creditor, under the Statute of Fraudulent Devises, against the assignee or devisee only, the heir-at-law is a necessary party; and for want of him the cause ordered to stand over. *Warren* v. *Stawell*, 2 Atk. 125.

If an action at law be brought, it must be both against the devisee and heir-at-law, and equity follows the law in this respect. *Ib.*

In a creditors' suit, since the 3 & 4 Will. 4, c. 104, making the real estate subject to the debts, it is not necessary to establish the will against the heir. *Goodchild* v. *Terrett*, 5 Beav. 398.

In a creditors' suit, instituted under 3 & 4 Will. 4, c. 104, the bill not praying the will to be established:—Held, that the heir was not a necessary party. *Weeks* v. *Evans*, 7 Sim. 546; 5 L. J., Ch. 16. S. P., *Bridges* v. *Hinxman*, 16 Sim. 71 (overruling *Brown* v. *Weatherby*, 12 Sim. 6). *Burch* v. *Comey*, 14 Jur. 1009. *Shakels* v. *Richardson*, 2 Coll. C. C. 31.

In a suit by persons interested under the will of a testator to administer his real and personal estate, it is not necessary to make the heir-at-law a party, or to prove the will. *Marriott* v. *Marriott*, 15 L. J., Ch. 422.

In a creditors' suit for the sale of the real estate; where there was no personalty, and the executors refused to prove the will, it was decided that the heir-at-law must be a party, and administration with the will annexed obtained, in order to shew a deficiency of assets. *Fordham* v. *Rolfe*, Tam. 1.

The inheritor is a proper party to a supplemental bill which is filed to have the benefit of a decree for sale against a person to whom he had, pendente lite, conveyed the legal estate in the lands by way of mortgage. *Rutledge* v. *Rutledge*, 3 Jo. & Lat. 307; 8 Ir. Eq. R. 84. And see *Barron* v. *Barron*, 3 Jo. & Lat. 320, n.

Real estate in India being made by statute personal assets for the payment of the debts of a deceased debtor, it is unnecessary to make the debtor's heir-at-law a party to a suit instituted for the administration of the assets. *Story* v. *Fry*, 1 Y. & C. C. C. 603; 11 L. J., Ch. 373; 6 Jur. 1029.

A testator directed his trustees to invest his personal estate, as soon after his death as a convenient purchase could be found, in real estate, and settle it according to certain limitations. These limitations having become exhausted before the personal estate had been invested:—Held, that the heir-at-law of the testator was not a necessary party to a suit to have the rights to the fund declared. *Hereford* v. *Ravenhill*, 1 Beav. 481.

Where a Scotch sequestration had issued against a testator's heir, and it was necessary in a suit to have the testator's real representative before the court, the trustee under the sequestration, who was named as a defendant to the suit, and stated to be out of the jurisdiction, was held to be a sufficient representative of the testator's real estate. *Wilson* v. *Moore*, 1 Myl. & K. 127.

The infant heir and only son of an intestate, was joined with his infant sisters, in a bill against the widow and administratrix of the intestate for an account of his real and personal estate, and for a guardian and maintenance:—Held, that the interests in the real and personal estate were distinct from each other, and a demurrer for multifariousness allowed. *Dunn* v. *Dunn*, 2 Sim. 329; 6 L. J. (o.s.) Ch. 175. S. P., *Maud* v *Ackom*, 2 Sim. 331.

A legacy being charged on a mixed fund, and the bill containing an averment that the testator was not, so far as the plaintiffs were aware, seised of or entitled to any real estate at the time of his death:—Held, that though the averment was informal, it was sufficient to render it impossible for the defendants to object on demurrer that the heir-at-law or devisees were necessary parties. *Beardmore* v. *Gregory*, 6 N. R. 23.

—— **Beneficiaries.**] — One of two executors may sue the other executor for an account and payment of moneys owing by such other executor to the testator at the time of his death, and to such a suit the persons beneficially interested in the estate are not necessary parties. *Peake* v. *Ledger*, 8 Hare, 313.

One of three executors and trustees filed a

claim to have the testator's real and personal estate administered, making his co-executors alone (not including any person beneficially interested) parties:—Held, that the suit was defective. *Leslie* v. *Smith*, 5 De G. & Sm. 78; 15 Jur. 1120.

Where an executor has not assented to a specific bequest, the persons beneficially entitled are not necessary parties to a suit relating to the property specifically bequeathed. *Const* v. *Harris*, Turn. & R. 514, 515; 24 R. R. 108.

Persons claiming specific portions of property in the possession of the deceased at his death, are not necessary parties to a suit for the administration of his estate. *Barker* v. *Rogers*, 7 Hare, 19.

Where the wife had a power of appointment over a sum to be raised out of the personal estate of her husband, and, if deficient, out of the realty; and upon his death an administration suit was brought against her, as the executrix, and the devisees of his real estate, pending which the wife died, having by her will appointed the fund (only in part raised and invested); a bill was afterwards filed against her representatives to revive the administration suit:—Held, that so far as the object of the suit was to make the appointed fund contributory to the husband's assets, the appointees were necessary parties; but as to the remainder of the fund they were not necessary parties; and they being very numerous, held that, as in the case of defendants to a suit, they might be represented by some on behalf of the rest. *Milbank* v. *Collier*, 1 Coll. C. C. 237.

In an action against an executor, the plaintiff, as administrator of W., deceased, who was tenant for life under the testator's will, claimed a declaration that a sum of money, which the defendant had raised for payment of debts by mortgage of part of the testator's estate, and had subsequently paid off out of income received by him during W.'s life, was payable out of the corpus of the mortgaged estate. The plaintiff also claimed repayment of the money, an account, and, if and so far as necessary, administration of the trusts of the will. The defence was that the defendant had acted on what he believed to be the true construction of the will, and that the question at issue was one of construction, which affected the estate of W. and the devisees in remainder, and ought not to be decided in the absence of the latter:—Held, that the remaindermen were not necessary parties. *Ward, In re. Bemment* v. *Balls*, 47 L. J., Ch. 781.

A defendant to a suit for the administration of an intestate's estate was entitled, in right of his wife, to a share of the intestate's estate. He had become insolvent. The administrator of the intestate received notice of an order from the Insolvent Court, requiring him to retain the money to which the husband was so entitled until further order; and he was ordered to shew cause why the money should not be paid over to the provisional assignee of the court:—Held, that the assignee was a necessary party to the suit. *Whatford* v. *Moore*, 17 L. J., Ch. 129; 12 Jur. 47.

In a case where the parties entitled in default of appointment under a settlement were not parties to the suit:—Held, that the court could make no effective decree in the suit to charge the fund under the settlement. *Innes* v. *Sayer*, 3 Mac. & G. 606; 21 L. J., Ch. 190; 16 Jur. 21. Affirming 7 Hare, 377; 18 L. J., Ch. 274; 13 Jur. 402.

It is perfectly settled, as a general rule, that a pecuniary legatee is not a necessary or proper party to a bill for an account of the personal estate. It is the duty of the executors to protect the estate against improper demands. But where a question directly occurred between the residuary legatee and a pecuniary legatee, which it was found impossible to determine in a general administration suit, and a suit was afterwards instituted by the residuary legatee against the pecuniary legatee, and the executor to determine it, a demurrer by the pecuniary legatee, on the ground that he had improperly been made a party, was, under the special circumstances, overruled. *Hertford (Marquis)* v. *De Zichi (Countess)*, 9 Beav. 11; 15 L. J., Ch. 58.

Pecuniary legatees, whose legacies are given in terms so ambiguous as to require a construction in that respect to be put on the will, are not proper parties to a suit for the administration of the estate of the testator. *Crackenthorp* v. *Jouning*, 19 L. J., Ch. 133; 14 Jur. 360.

Where, in the administration of an estate, under a will, a question arises between specific or pecuniary legatees and the parties taking the residue as to what is comprised in a gift of a specific portion of the property, the specific or pecuniary legatees are not, therefore, necessary parties to a suit for the administration of the estate. *Girdlestone* v. *Creed*, 8 Hare, 208.

When a bill was filed by three children against their father's surviving partner and executor, charging him with wilful neglect and default, and praying for the administration of their father's estate; for an account of the partnership business; and for an injunction to restrain the defendant from dealing with the partnership property:—Held, that a demurrer on the ground that a fourth child (out of the jurisdiction) was not a party to the suit, and for multifariousness, must be overruled. *Pointon* v. *Pointon*, 25 L. T. 294.

Z. T. bequeathed certain leasehold property to which she became entitled by will to R. A., his executors, administrators and assigns absolutely during the residue of her term therein, subject to the payment of the rent and the performance of the covenants reserved and contained in the lease under which she held the premises; and as to her residuary personal estate, subject to the payment of her debts, funeral, testamentary and other expenses, she gave, devised and bequeathed the same to J. B., his executors, administrators and assigns absolutely. The lease of the premises bequeathed to R. A. contained a covenant by the lessor to repair, and at the time of testatrix's decease dilapidations had taken place:—Held, in this case, that R. A. was rightly made a party to a suit for the administration of the testatrix's estate; and his representative not having been served with the petition of rehearing on which the above decision was given, time was allowed her to present a petition of appeal to have the matter reheard. *Hickling* v. *Boyer*, 3 Mac. & G. 635; 21 L. J., Ch. 388; 16 Jur. 137.

A person to whom a legacy or an annuity is given to be paid out of the residue, after the death of the legatee for life of such residue, is not a necessary party to a suit for administration of the estate brought by legatees of aliquot shares of the ultimate residue. *Fisk* v. *Norton*, 2 Hare, 381.

Every legatee whose legacy is charged on real estate ought to be before the court. *Morse* v. *Sadler*, 1 Cox, 352. And see *Bayly* v. *Cumming* 10 Ir. Eq. R. 405.

At this day, demurrer would not be allowed because a legatee, having a legacy charged on the land, was not a party to the suit. *Wallace* v. *Smith*, Beat. 386. See *Garrett* v. *Hayter*, 9 L. J. (O.S.) Ch. 197.

It is not a universal principle that all persons having equitable charges on land must be defendants to suits relating to it; there are many cases in which the court can sufficiently protect such interests without loading the estate by such defendants. Formerly, every legatee having a charge, was a necessary party to a suit for administering a real estate, but subsequently the practice was reformed. The reason of that alteration: the equitable charge of the legatee remains on the land till released; the will gives notice of it to every purchaser, who may prevent the purchase-money being paid out of court till all charges are released. *Id.* 385.

But see now R. S. C., Ord. XVI. r. 34.

If a person entitled to an annuity, payable out of the testator's personal estate and the proceeds of the sale of his real estate, files a bill for the administration of the whole of the testator's property, all the other annuitants and legatees must be made parties, notwithstanding the receipts of the trustees are made sufficient discharges. *Miller* v. *Huddlestone*, 13 Sim. 467; 7 Jur. 504.

Testator, having given the residue of his real and personal estate upon certain trusts, for the benefit of his children and their issue, in default of such issue gave several legacies:—Held, that the legacies were pecuniary, and that the legatees were not necessary parties to a suit for administering the estate. *Pidgeley* v. *Rawling*, 1 Y. & C. C. C. 552; 6 Jur. 335.

A married woman invested a sum of 525*l.* stock, out of moneys which she had as pin money, to her separate use, in the names of trustees, in confidence that the fund should be held by them in trust for such persons as she should direct or appoint. She afterwards made a will, giving the interest of the money she had in the stocks to her servant maid for life, and afterwards to the poor of certain parishes. The wife having died, administration, with the will of his deceased wife annexed, was granted to her husband. To a bill filed by the husband alone, as such administrator, against the surviving trustee of the stock, the defendant by her answer suggested that the legatees under the will were necessary parties; but the court, without requiring the legatees to be parties to the suit, ordered payment of the stock to the plaintiff, with costs. *Musters* v. *Wright*, 2 De G. & Sm. 777.

—— **Residuary Legatees.**]—In a bill against the executor either by creditors or legatees, it is not necessary to make the residuary legatee a party. *Lawson* v. *Barker*, 1 Bro. C. C. 303.

Residuary legatees not necessary parties to suit against executors. *Brown* v. *Dowthwaite*, 1 Madd. 446.

Some of the residuary legatees under a will may file a claim against the executors, without making the other residuary legatees parties; but the others ought to be summoned before the master. *Watson* v. *Young*, 1 Sim. (N.S.) 114; 15 Jur. 162.

A bill, having for its object, with other things, a general administration of the testator's estate, cannot proceed in the absence of the representative of a deceased unpaid residuary legatee. *Lowry* v. *Fulton*, 9 Sim. 104; 7 L. J., Ch. 158.

A. and B. having been executors, and A. having survived B., the representatives of A., many years after the testator's death, filed a bill against the representatives of B. to recover assets of the testator alleged to have been possessed by B. The bill did not state that any debts or legacies of the testator were unpaid, or that there was any residuary legatee, or the plaintiff or any other person was beneficially interested in the assets. There was, however, in fact, a residuary legatee, and the defendants, by their answer, objected that such legatee ought to have been made a party to the suit:—Held, that the objection was valid. *Adams* v. *Barry*, 2 Coll. C. C. 285.

Where a testator in his lifetime conveyed to trustees the mines and minerals under certain lands, upon trust for himself (the testator) for life, and after his death upon trust for sale, and out of the proceeds:—1st, to pay all his debts, so as to discharge his real and personal estate therefrom; 2ndly, to apply 3,000*l.* to the purposes of his will; and lastly, to divide the surplus amongst certain persons therein named; the persons to whom the surplus is thus given are proper parties to a creditors' suit seeking to follow the real as well as the personal estate of the testator; but the court may, in its discretion, make a decree for administration in their absence. *Savage* v. *Lane*, 6 Hare, 32; 17 L. J., Ch. 89; 11 Jur. 1053.

—— **Appeal by Residuary Legatee.**]—Where a person who claims as a creditor against a testator's estate has obtained an order for the administration of the estate against the executor, it is not open to the person entitled under the will to the residue of the estate to appeal against the order, as the residuary legatee could not be made a party to the suit, and there is no power to give to a person who could not be made a party to the action leave to appeal against the judgment. *Youngs, In re, Doggett* v. *Revett, Vollum* v. *Revett*, 30 Ch. D. 421; 53 L. T. 682; 33 W. R. 880—C. A.

—— **Assignees of Business.**]—Previously to the marriage of A. two settlements were executed whereby certain lands and moneys were conveyed and assigned on certain trusts. A. after his marriage became a partner in an iron business, under articles, giving the executor or administrator of a deceased partner the option of becoming a partner in the place of his testator or intestate. A. died intestate, and his widow and administratrix having elected to become a partner, assigned A.'s share to two persons on trust to pay his debts. A bill having been filed for the administration of his estate, and asking for the execution of the trusts of the two settlements, was demurred to by the assignees of A.'s share in the partnership who had been made defendants:—Held, that they were proper parties to the suit. *Coates* v. *Legard*, 44 L. J., Ch. 201; L. R. 19 Eq. 56; 31 L. T. 625; 23 W. R. 40.

—— **Representative of Insolvent Party.**]—An allegation in a bill that a person who would have been a necessary party was declared insolvent, and died without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party. *Seddon* v. *Connell*, 10 Sim. 79; 9 L. J., Ch. 341.

—— **Representative of Non-appearing Defendant.**]—The personal representative of a deceased defendant, who had been served with copy-bill, but had not appeared, is a necessary party. *Hardy* v. *Hull*, 14 Sim. 21; 8 Jur. 607.

—— **Agent.**]—If one of two persons named trustees and executors, disclaims and renounces, and afterwards possesses himself of assets, as the agent of the other, who has accepted the trust and proved the will, he does not thereby become accountable as a trustee and executor, and ought not to be made a party to a suit for the administration of the estate. *Dove* v. *Everard*, 1 Russ. & M. 231 ; Taml. 376.

Trustees authorised to carry on a trade, permitted it to be carried on by agents :—Held, that the agents were not necessary parties to a bill for the administration of the estate. *Ling* v. *Colman*, 10 Beav. 370.

—— **Other Persons.**]—Some of the next of kin of an intestate filed a bill against the other next of kin, the administrators and the parties claiming to be heirs-at-law, stating that the intestate had entered into contracts for the sale of certain of his real estates, which contracts, at the time of his death, and still, were incomplete, but were valid contracts ; and further stating that the administrator and another of the next of kin, who claimed to be his co-heirs-at-law, had agreed that the proceeds of the estates, whether the contracts were or were not completed by the purchasers, should be treated and be divisible as personalty, and alleging that the administrator had ever since been in possession of such estates, and had received the rents, and praying an account of those receipts, and that the amount might be invested and secured for the benefit of the persons entitled. A demurrer by the administrator, on the ground that the purchasers were not made parties to the bill, was allowed. *Lumsden* v. *Fraser*, 1 Myl. & C. 589. Affirming 6 L. J., Ch. 81 ; 7 Sim. 555.

Where a legatee filed a bill for an account against the trustees of the testator's will, making an alleged purchaser of a part of the testator's estate a party, the bill alleging alternately that the sale by the trustees was a colourable and fictitious sale, or that if any such sale was made, the defendant (one of the trustees) was himself the real purchaser, and that such purchase by him, being a trustee, could not be sustained :—Held, on a demurrer by the alleged purchaser for multifariousness and want of equity, that he was wrongly made a party. *Marshall* v. *Gilliard*, 12 Jur. (N.S.) 483 ; 14 L. T. 618 ; 14 W. R. 830.

In a suit by plaintiffs for the administration of the estate of an intestate, they claimed to be the next of kin, as being the children of A. B., a sister of the intestate, but stated that A. B. had had other children, who, by reason of illegitimacy, had no interest. The administrator, by his answer, submitted that these other children ought to be made parties, but did not state that they had made a claim. The cause being set down for hearing, on an objection for want of parties, the objection was ordered to stand for the hearing. *Pike* v. *Barber*, 19 L. J., Ch. 373 ; 15 Jur. 277.

Though the person is come of age, during whose infancy the will appointed an executor dur. min., yet, if he has not collected in the whole estate, he must be brought before the court. *Glass* v. *Oxenham*, 2 Atk. 121. S. P., *Attwood* v. *Hawkins*, Rep. t. Finch 113.

A testator gave his real and personal estate to trustees on trust to sell, and to stand possessed of the proceeds, upon trust for three infant daughters ; and in the event of the death of all of them under twenty-one, or before marriage, in trust for those who, under the Statute of Distributions, would be entitled :—Held, in an administration suit by the infants by their next friend, the mother of the testator, and by her as co-plaintiff in her own right, that though she might be an unnecessary, she was not an improper party. *Roberts* v. *Roberts*, 2 Ph. 534 ; 17 L. J., Ch. 174 ; 12 Jur. 148.

When it is ascertained that there are prior judgment creditors who will not come in and prove their demands under a decree, they ought to be made parties to the suit by supplemental bill, that their rights may be bound by the decree for a sale. It is not the practice in Ireland to make subsequent judgment creditors parties to a bill for a sale. *Johns* v. *French*, 1 Hog, 450. And see *Tyler* v. *Manson*, 5 L. J. (O.S.) Ch. 34.

When a defendant to a suit answers and then dies, it is irregular to reply to his answer without making his personal representatives parties. *Deeks* v. *Stanhope*, 2 Eq. Rep. 1268.

Where a plaintiff at his option may either file his bill against A. and B., or against A. alone, and he takes the former course, and B. afterwards dies, he cannot, at the hearing, by waiving relief against B.'s estate, proceed against A. alone, in the absence of B.'s representatives. *London Gas Light Co.* v. *Spottiswoode*, 14 Beav. 264.

—— **Intervention of Party interested.**] — Executors carried on the business of their testator after his death in partnership with other persons, but the firm ultimately became bankrupt. An action was commenced for the administration of the testator's estate, and at a later date a banking company, which had made advances to beneficiaries under the will and taken mortgages of their shares, applied by petition for leave to intervene in the action and obtain payment of their debt :—Held, that as the banking company were not creditors of the testator, they had taken the most convenient course in applying to intervene by petition. *Dimmock, In re, Dimmock* v. *Dimmock*, 52 L. T. 494.

A decree having been made for the administration of an estate, another suit was afterwards instituted against the executrix to establish an adverse claim against a portion of the assets. The executrix being abroad, and neglecting to defend the second suit, it was about to be taken pro confesso. The court gave leave to the plaintiff in the administration suit to intervene and defend the second suit on behalf of the estate, upon payment of costs and giving an indemnity. *Olding* v. *Poulter*, 23 Beav. 143.

Administration of Real Estate—Real Representative.] — A legal personal representative cannot alone institute a suit to administer the real estate of an intestate, for the purpose of having it applied towards the payment of his debts, under the 3 & 4 Will. 4, c. 104. *Catley* v. *Sampson*, 33 Beav. 561 ; 34 L. J., Ch. 96 ; 10 Jur. (N.S.) 993 ; 10 L. T. 519 ; 12 W. R. 927.

One seised of property in fee mortgaged it for a term, and afterwards died intestate and without heirs :—Held, that his administratrix could not maintain a suit to redeem the mortgage, for the purpose of making the property available for the payment of the intestate's debts. *Ib.*

—— **Executrix of Executrix—Right to Sue in respect of.**]—An executrix charged with the payment of an annuity to the testator's daughter's separate use, issuing out of real and personal estate, deposits the title deeds of a descended

estate of which she and the executrix were co-heiresses, and a mortgage deed, with bankers for moneys advanced partly for the testator's estate and partly for herself, and joins in a promissory note to secure the sum borrowed. Upon her death, and an administration suit to administer both estates by an incumbrancer on the annuity, the executrix of the executrix files a bill for delivery up of the deeds. Four questions arose :—First, whether she could sue ; secondly, if so, whether as to realty ; thirdly, whether creditors could follow the deeds of a descended estate ; and fourthly, what part of the borrowed money was recoverable from the testatrix's estate :—Held, that under the new practice no bill being dismissible for misjoinder, and this case not extending to that point under the new practice, the plaintiff could sue ; and also as to real estate, in her representative character, and to carry out a decree. That the doctrine as to alienees of real estate did not apply to a deposit only ; and an inquiry directed as to the money borrowed. Declaration for delivery up of the deeds of the descended estate without prejudice to the right to the money. *Carter* v. *Saunders*, 2 Drew. 248 ; 2 W. R. 325.

—— **Owner in Fee—Defeasible Interest.**]—Where a person is seised of an estate in fee, defeasible by a conditional limitation, shifting use, or executory devise, the inheritance is not represented in this court merely by the person who has the defeasible estate. *Goodess* v. *Williams*, 2 Y. & C. C. C. 595 ; 7 Jur. 1123.

—— **Receiver.**]—A person appointed by will a receiver of the testator's real estates, with a salary, is a proper party to a suit for the administration of those estates. *Consett* v. *Bell*, 1 Y. & C. C. C. 569 ; 11 L. J., Ch. 401 ; 6 Jur. 869.

—— **Heir and Next of Kin—Conversion.**]—A question between the heir-at-law and next of kin as to conversion of real estate cannot be disposed of in a suit in which neither of those parties is plaintiff. *Rigby* v. *Strangways*, 2 Ph. 175 ; 10 Jur. 998.

—— **Sale—Tenant in Tail.**]—Tenant in tail coming into esse before the sale of real estate should be made a party, because he is interested in having the account correctly taken, but tenant in quasi tail of a chattel real need not be made a party to a bill for the administration of assets, under which there is had a sale of the chattel real, because it could be got at law, by proceeding against the executor. *Clanmorris* (*Lord*) v. *Bingham*, 1 Moll. 514.

Suit for Recovery of Assets.]—Bill by a creditor against B. for a discovery of the estate of H., supposed to be in his hands. Demurrer, for that no executor or administrator was a party, allowed. *Conway* v. *Stroude*, 2 Freem. 188.

A demurrer allowed to a bill brought against plaintiff, who was supposed to have some of the deceased's effects in his hands, because there was no executor or administrator party ; but if none administer, plaintiff as creditor may. *Ib.*

A bill is not demurrable because the legatees of a testator join with his executor in suing for a debt due to his estate. *Rhodes* v. *Warburton*, 6 Sim. 617.

Where representative is contesting in Spiritual Court, bill for discovery of assets, without making administrator a party, may be brought. *Plunket* v. *Penson*, 2 Atk. 51.

Plea that representatives of personal estate were not before court, allowed, though suspected to be for delay merely. *Ib.*

Administrator, though insolvent, is a necessary party to bill for discovery of assets. *Ashurst* v. *Eyre*, 2 Atk. 51.

If it becomes necessary in the course of an administration suit to take proceedings to set aside dealings with the testator, the executor, and not a beneficiary, is the proper person to take the necessary proceedings, unless he has been guilty of misconduct, or refuses to conduct them. *Harrison* v. *Richards*, L. R. 1 Ch. 473 ; 12 Jur. (N.S.) 871 ; 15 L. T. 137 ; 14 W. R. 823.

The executor, and not a legatee, is the proper person to sue for outstanding assets belonging to the testator's estate. *Walker* v. *Walker*, 25 L. T. 481 ; 20 W. R. 162.

When an executor refuses to file such a bill the proper course for a legatee is to apply for leave to sue in the executor's name, instead of filing an independent bill. *Ib.* S. P., *Stainton* v. *Carron Co.*, 18 Beav. 146 ; 23 L. J., Ch. 299 ; 18 Jur. 137 ; 2 Eq. R. 466 ; 2 W. R. 176.

A., a creditor, and B., the administrator, with the will annexed of a testator, cannot join as co-plaintiffs in a bill against C., who holds part of the testator's assets. *Barnes* v. *Lever*, 1 L. J. (O.S.) Ch. 165.

A. & Son were employed as the solicitors and agents of B., in the management of certain trust affairs relating to the estate of W., deceased. A bill being filed by B. against the representatives of A. deceased, alleging that no account had been rendered to him by A. & Son of their receipts and payments in respect of the trust affairs, and seeking to charge A.'s estate in respect thereof :—Held, that the representative of W. was not a necessary party to the suit. *Bradstock* v. *Whatley*, 7 Jur. 409.

Testator appointed persons residing in India and Scotland his executors. Will was not proved in England. Executors in India remitted sum of money to agents in England, and creditor of testator filed bill against agents, praying an account and payment in meanwhile of the money to the accountant-general. Demurrable because no personal representative of testator was made party. Semble. *Lowe* v. *Fairlie*, 2 Madd. 101.

Where a bill alleged that the defendant, who was the consignee of a testator in Jamaica, received various consignments, &c., and received and paid various sums of money, on account of the testator's estate, until his death, and that after the testator's death the defendant continued to receive consignments, &c., on account of the testator's executors or his estate, in the same manner as before :—Held, that this allegation was not sufficient to render the executor of the testator in Jamaica an accounting party, and that a demurrer for misjoinder might be sustained by such executor. *Pringle* v. *Crooks*, 3 Y. & C. 666 ; 9 L. J., Ex. Eq. 3 ; 3 Jur. 1074.

A sole surviving executrix, who was beneficially interested in a moiety of the estate, filed a bill against a person who had received part of that estate, and was abroad :—Held, that the representative of the party beneficially interested in the other moiety must be before the court. But the person who has obtained letters of administration to such party from the Prerogative

Court will be considered a sufficient representative, though it appears that the deceased left a will which has been proved in a foreign country. *Price* v. *Dewhurst*, 6 L. J., Ch. 226.

By a settlement dated the 19th April, 1815, made on the marriage of Sir J. W. with Miss J. D., certain personal property, consisting of money in the funds and money out on mortgage, &c. (all belonging to the lady), were settled to the general appointment, by deed, attested by two witnesses, of the lady herself, during the joint lives of herself and her husband, with his consent, and after his decease to her general appointment; and subject to this power, the trusts were for the lady for life, to her separate use but without any restraint on anticipation, with remainders over. The marriage took place, and in the same year Sir J. W. made his will, bequeathing and devising all his property, real and personal, to his wife, Lady W., and making her his sole executrix. The trustees of the settlement never acted in any way previous to the institution of this suit, and the funds were never transferred into their names, but continued standing in Lady W.'s name. After the marriage, Lady W., who resided with her husband at a distance from London, executed several powers of attorney, to enable her bankers in London to sell out various parts of the funds in settlement, which were sold out accordingly, and paid into Sir J. W.'s name. The bank powers of attorney required to be executed with the same ceremonies as were required by the marriage settlement to be observed in executing the power of appointment there. Various sums of mortgage-money, also in the settlement, were from time to time paid off, and the amounts paid in to his name, invested also in his name in the purchase of consols, and in this manner about 8,000*l.* worth of different stock was in 1821 standing in the name of Sir J. W., and all cheques for current expenses were drawn by Sir J. W., which, in accordance with Lady W.'s written request, were honoured by her London bankers out of her separate account. On the other hand, Sir J. W. suffered a legacy of 2,000*l.* to be received and placed to the separate account of his wife. In 1826, Sir J. W. purchased, at his wife's request, the estate of B., where he habitually resided with his wife. The purchase was taken in the name of Sir J. W. alone in fee. The tenure was customary freehold. Sir J. W. died in 1844 intestate, the will of 1815 not passing after purchased estate, and without any heir-at-law. The present bill was brought after his decease by the personal representative of the last surviving trustee of the settlement of 1815, against those claiming under the lord of the fee by escheat to establish a lien on the lands for the amount of the purchase-money. Lady W., surviving her husband, had formally exercised her power of appointment in favour of E., whom she also made her executrix. E. died, leaving B. her executor:—It was held that B. was a necessary party to the suit. *Hughes* v. *Wells*, 16 Jur. 927.

Action for Legacy or Share of Estate—Personal Representative.]—If the legatee of a term sue for it, he must make the executor a party; it is not sufficient to charge that he assents to the legacy. *Moor* v. *Blagrave*, 1 Ch. Ca. 277.

A. gave his real estate to B., and his personal to B. and C., his executors, who proved will and acted. B. dies. To bill brought for legacy, charged upon real and personal estate, B.'s executors are necessary parties. *Williams* v. *Williams*, 9 Mod. 299.

Legacy to A. at twenty-one. A. went abroad when a boy, and had not been since heard of, and if living must now be seventy-seven years of age. His personal representatives apply for payment of his legacy, with accumulations to them. Inquiry directed if living, and whether he ever attained twenty-one years. The representatives of the testator, who died seventy years ago, held not necessary parties. *Hudson* v. *Twining*, Tam. 315.

A. being entitled to a legacy of 5,000*l.*, the executor and residuary legatee misrepresented the amount to be 4,000*l.*, and for this sum the residuary legatee gave his bond to A. The executor having paid all the debts and other legacies, handed over all that remained to the residuary legatee, and which was more than sufficient to satisfy A.'s demand:—Held, that a bill might be sustained by A. against the residuary legatee and the representatives of the executor, for recovering the extra 1,000*l.* and interest, without making the representatives of the testator a party. *Beasley* v. *Kenyon*, 3 Beav. 544.

A. bequeathed a reversionary interest, expectant on his wife's death, in a sum of stock to B. B. bequeathed it to C., and C. bequeathed it to D., who, on the death of A.'s wife, filed a bill against the trustees, to have the stock transferred to him, alleging that the executors of A., and B., and C. had successively assented to the bequests:—Held, that the executors were not necessary parties. *Smith* v. *Brookshank*, 7 Sim. 18; 3 L. J., Ch. 226.

A suit was instituted by legatees whose interest (upon the happening of a contingency) might vest in the next of kin, against the executors alone. The next of kin were brought before the court by supplemental bill:—Held, that the executors were not improper parties to such supplemental bill. *Parker* v. *Parker*, 9 Beav. 144.

A party who files his bill to obtain the benefit of an interest accruing by intestacy, must not only make the personal representative of the intestate a party to the suit, but must charge that, in fact, there was a surplus of the intestate's estate, after payment of all debts and incumbrances. *Stevens* v. *Frost*, 2 Y. & C. 297; 6 L. J., Ex. Eq. 41.

Bill, by one of two next of kin, to recover from the executors of a testator funds as to which it was alleged that he died intestate, and which, in that case, they had erroneously applied. The defendants, by their answer, said that there was another person, a next of kin. After the cause was at issue, the plaintiff filed a supplemental bill against the other next of kin alone:—Held, that the defendants, the executors, ought to have an opportunity of stating upon the pleadings any case they might have as against the other next of kin, and that therefore the executors ought to be parties to the supplemental bill. *Jones* v. *Howells*, 2 Hare, 342; 12 L. J., Ch. 365. Affirmed, 15 L. J., Ch. 115.

Bill against two executors; one of them is attached for want of an answer, and discharged. The cause may be heard on supplemental bill against him taken pro confesso. *Hughson* v. *Cookson*, 3 Y. & C. 578; 8 L. J., Ex. Eq. 68.

A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless he sues on behalf of himself, and all other parties interested in the debt, or makes those

other persons parties to the suit. *Alexander* v. *Mullins*, 2 Russ. & M. 568; 9 L. J. (O.S.) Ch. 3.

To an information on the behalf of a charity to discover the profits of lands, for the satisfaction of a legacy charged thereon, the executor must be a party. *Att.-Gen.* v. *Twisden*, Rep. t. Finch, 336.

—— **Assignee of Legacy.**]—The assignee of a legatee is a necessary party to a suit brought by the legatee for the recovery of the legacy, where the assignment took place before the institution of the suit. *Campbell* v. *Dickens*, 4 Y. & C. 17.

A suit was instituted to administer and ascertain the residue of an estate, and one of the residuary legatees, after the bill was filed, and before he was served with the subpœna to appear and answer, assigned his share. The assignee was held to be a necessary party to the suit. *Humble* v. *Shore*, 3 Hare, 119.

—— **Devisees.**]—Devise for seven years on condition that devisee should within the time pay devisor's debts, remainder to plaintiff at twenty-one. On a bill to compel payment of debts, or to be let into possession, other parties to whom the estate is devised until plaintiff attained twenty-one, are necessary parties. *Pigg* v. *Coldwell*, Rep. t. Finch, 278.

All residuary devisees must be parties. *Parsons* v. *Neville*, 3 Bro. C. C. 365.

But see now R. S. C., Ord. XVI. r. 35.

—— **Co-Legatees.**]—Where a legacy is given to two, one cannot sue alone for it. If the residue be given to divers, they must all be parties; but when legacies are given to divers persons, each alone may sue for his own legacy. *Haycock* v. *Haycock*, 2 Ch. Ca. 124.

In a suit for a legacy it is not necessary to make other legatees parties, although from a deficiency of assets all the legatees must abate. *Att.-Gen.* v. *Ryder*, 2 Ch. Ca. 178.

To a bill by a party entitled to a share of a legacy given in common, the co-legatees are not necessary parties. *Hughson* v. *Cookson*, 3 Y. & C. 578; 8 L. J., Ex. Eq. 68.

Where a legacy was given to a feme covert, "to her sole and separate use, and in case she died to be equally divided amongst her children"; and she died after the testator, and one of the children brought his bill against the executor to recover his share, the other children not being parties to the cause:—Held, that the plaintiff had a right to file this bill, and he was decreed his share accordingly. *Turnley* v. *Kelly*, Wallis, 311.

M., being the executor who proved R.'s will, &c., died, having by his own will appointed two executors, both of whom proved his will, and possessed themselves of his assets to an amount more than sufficient to pay all his debts. One of M.'s executors died, and the surviving executor admitted assets. In a suit by R.'s children for their shares of 1,500*l.*, bequeathed for division amongst them by R., against the surviving executor of M.:—Held, that in this suit all the children of R. entitled to the 1,500*l.* should have been before the court, and one of them having been left out, that the suit was defective. *Daly* v. *Kirwan*, 1 Ir. Eq. R. 156. See also *Popham* v. *Baldwin*, 2 Jones, 320.

Administrator of an executor, who was likewise a legatee by the will of the testator, exhibited his bill against the other executor. A demurrer, for that the defendant's brothers (also legatees, and charged by the bill as combining with the defendant), were not parties, was allowed. *Galle* v. *Greenhill*, Rep. t. Finch, 202.

Bill for an aliquot share of an ascertained fund:—Held, defective in point of parties for want of a representative of the person entitled to the other aliquot share. *Hunt* v. *Peacock*, 16 L. J., Ch. 497; 11 Jur. 555.

A testator having lent to B. 600*l.* on his promissory note, gave it with other property to trustees, his son-in-law being one, to pay the interest to his daughter for her life, for her separate use, with remainder to his son-in-law for his life, with remainder to their children equally. The son-in-law, who alone proved the will, was induced by B., in whose debt he was, to hand over the note to him. Within a day of the expiration of twenty years, the daughter and one of her children who had attained twenty-one filed a bill for the recovery of this sum. The bill was demurred to on the ground that the other children ought to have been made parties, that the Statute of Limitations was a bar, and that the bill did not allege that the legacies had been paid, or that the executor had assented. The demurrer was allowed as to want of parties and lapse of time, with liberty to amend; but the other grounds of demurrer were untenable. *Rolfe* v. *Gregory*, 31 L. J., Ch. 710; 8 Jur. (N.S.) 606; 7 L. T. 19; 10 W. R. 711.

—— **Residuary Legatees.**] — A pecuniary legacy to each of three children, and the residue to be equally divided among them; to a bill by one legatee for the pecuniary legacy, it is not necessary to make the others parties, but if the bill is for the residuary share, the others must be parties. *Dunstall* v. *Rabbet*, Rep. t. Finch, 243. And see *Atwood* v. *Hawkins*, Rep. t. Finch, 113.

In a suit for a moiety of a residue, the other persons interested must be before the court. *Sherrit* v. *Birch*, 3 Bro. C. C. 229.

Generally, a residuary legatee must bring before the court all persons interested in the residue; exception where not necessary or convenient. *Cockburn* v. *Thompson*, 16 Ves. 328. *And see now* R. S. C., Ord. XVI. r. 33.

Residuary legatee need not be a party to a bill for specific legacy. *Wainwright* v. *Waterman*, 1 Ves. J. 311.

One of a numerous class of residuary legatees permitted to sue on behalf, &c., in the absence of the greater portion of them. *Harvey* v. *Harvey*, 4 Beav. 215.

Some of the residuary legatees under a will may file a claim against the executors without making the other residuary legatees parties, but the others ought to be summoned before the master. *Watson* v. *Young*, 1 Sim. (N.S.) 114; 15 Jur. 162.

To a suit by three out of four residuary legatees to recover three-fourths of a sum of stock which the executors had omitted to get in, and which had been transferred to the Commissioners for the Reduction of the National Debt, under the statute 56 Geo. 3, c. 60, the legatee entitled to the other fourth part of the stock is a necessary party. *Hunt* v. *Peacock*, 6 Hare, 361; 17 L. J., Ch. 163; 12 Jur. 154.

In a suit by the administratrix of a deceased child claiming, under a covenant by the father, an equal share with his other children of his

real and personal estate, against his devisees and executors, and, for that purpose, praying that his residuary estate might be ascertained, the suit not being framed as a creditors' suit, the residuary legatees under the will of the father are necessary parties. *Jones* v. *How*, 7 Hare, 267; 17 L. J., Ch. 369; 12 Jur. 227.

Where a residuary legatee and next of kin had been served with a copy of the bill in a legatee's suit, and had neglected to enter an appearance within the proper time, leave to enter a common appearance was refused. *Rigby* v. *Strangways*, 10 Jur. 998.

In a case where the parties were very numerous, and the expenses of attending taking the accounts very great, an application, after decree, to exclude a number of parties interested in the residue from attending the taking such accounts, and the further proceedings, except at their own expense, was refused. *Day* v. *Croft*, 14 Beav. 29; 20 L. J., Ch. 423.

—— **Next of Kin.**]—Bill by a legatee wrongly described by the testator, for his legacy; one of the next of kin being a party, a decree was made without requiring the other next of kin, who were numerous, to be brought before the court. *Bradwin* v. *Harpur*, Ambl. 374.

Where property is bequeathed to A. for life, and after his decease to such persons as shall then be the testator's next of kin, upon a bill filed for the protection of the property, the next of kin of the testator living at the time of filing the bill must be made parties to the suit. *Wardell* v. *Claxton*, 1 Y. & C. C. C. 265. *S. C.*, nom. *Wardle* v. *Hargreaves*, 11 L. J., Ch. 126; 6 Jur. 478.

In order to enable the court to adjudicate upon the right to a residue of personal estate as between the next of kin as a class and a party claiming under a will, it is not necessary that all the next of kin should be present, provided the court be satisfied that some of them are parties to the record. *Caldecott* v. *Caldecott*, Cr. & Ph. 103.

If in an administration suit instituted by the next of kin of a testator at his death, the question is whether the testator, by the words "my next of kin," meant his next of kin at his death or at a future period, not only the executor, but also the person or persons who may by possibility be the next of kin at that period, ought to be made defendants. *Urquhart* v. *Urquhart*, 13 Sim. 613; 8 Jur. 161.

Bill by parties claiming as next of kin against executors. Report that other persons not parties were the sole next of kin. Exceptions by the plaintiffs to the report. Objection that the plaintiffs, before the exceptions were argued, must make parties the persons found next of kin by the master overruled. *Topham* v. *Lightbody*, 4 Hare, 312; 9 Jur. 1055.

A testator gave his real estate to trustees upon trust to lay out the rents, during twenty-one years from his death, in the purchase of freehold or copyhold lands, and to convey them at the end of that time to the person then answering the description of the testator's heir. The personal estate was bequeathed to the same trustees, to lay out in land for the same purpose. In a suit instituted shortly after the testator's death, by a person claiming to be the heir-at-law, for the administration of the testator's estate, it was held that the next of kin were necessary parties. *Ring* v. *Jarman*, 15 Jur. 942.

The ultimate limitation in a marriage settlement of a fund belonging to the husband was "for the next of kin or personal representatives of the husband, in a due course of administration according to the Statute of Distributions." The husband left his wife surviving, and A. B., his next of kin, was a feme covert. In another suit the fund had been treated as part of the residuary estate of the husband, and had been ordered to be paid over to two charities, who were residuary legatees. A bill being filed by the representatives of A. B., the next of kin claiming the fund:—Held, that the next of kin of the wife of the settlor and the charities were necessary parties, but that the representatives of the deceased husband of A. B., who had administered to his wife, were not necessary parties to the suit. *Kilner* v. *Leech*, 7 Beav. 202.

The ultimate limitation of a legacy was to a party's "personal representatives or next of kin":—Held, that both classes must be made parties to a suit affecting the fund. *Salmon* v. *Anderson*, 9 Beav. 445.

Bill by four of the next of kin of an intestate, for the administration of his estate, on behalf of themselves and all others the next of kin. The bill alleged that the next of kin were very numerous, but no evidence of that fact was adduced. Upon an affidavit, under the 13 & 14 Vict. c. 35, that the next of kin were upwards of twenty in number, the court made the usual administration decree. *Smith* v. *Leathart*, 20 L. J., Ch. 202.

The heir-at-law of a testator, who was also a legatee under his will, filed a bill against the executors and trustees, which prayed for the execution of the trusts under the direction of the court, for a declaration of his rights and interests and of all other parties in the real and personal estate, for the usual account and for the general administration of the estate and for inquiries. The only defendants to the bill were the four executors and trustees of the will and J. S., an infant, to whom the real estate was devised in reversion expectant on a life estate. The bill alleged that several questions had arisen as to the rights of the parties and of the heir-at-law and next of kin; that it was believed that S. and C. were the testator's next to kin, and that it was intended to serve them with notice of any decree which might be made. But S. and C. were not made defendants. J. S. demurred on the ground of want of equity, and also that it appeared, from the plaintiff's own shewing, that the next of kin of the testator in the bill named were necessary parties, but yet that they were not made parties, nor any persons or person having a common interest with the next of kin; but the demurrer was overruled, with costs. *Snepp* v. *Snepp*, 4 Jur. (N.S.) 202; 6 W. R. 355.

And see now R. S. C., Ord. XVI. r. 33.

Action for Specific Performance—Contract to Purchase Land—Devisees.]—Suit for specific performance of contract to purchase freehold; defendant had paid several large sums on account of purchase-money, leaving a considerable portion still due; he died when cause was at issue, leaving real and personal estate to infant children. Plaintiff revived against executors only:—Held, that infant devisees were necessary parties. Suit ordered to stand over to amend, in that respect, by supplemental bill. *Townsend* v. *Champernowne*, 9 Price, 130; 23 R. R. 651.

—— **Sale under Power in Mortgage.**]—An equitable mortgagee, having taken from the administratrix of the mortgagor a legal mortgage containing a power of sale, and having filed his bill to enforce specific performance of a contract for sale under the power, the court declined to entertain the suit in the absence of the administratrix and the parties beneficially interested under the mortgagor. *Sanders* v. *Richards*, 2 Coll. C. C. 568.

Action for Breach of Trust—Representative of Co-Trustee.]—The representatives of a deceased trustee are necessary parties to a bill against the surviving trustees. *Wilson* v. *Broughton*, 7 L. J., Ch. 120.

Where the personal representative of one of several trustees, who had committed a joint breach of trust, was not before the court, a decree was pronounced upon an undertaking to make him a party. *Att.-Gen.* v. *Newbury Corporation*, C. P. Cooper, 72.

A testator devised his residuary real and personal estate to A. and B., on trusts in which B. was beneficially interested. B. received part of the assets, and died:—Held, that a bill could not be maintained by the surviving trustee against the representatives of B. alone to recover the trust fund received by him, but that the bill ought to seek the general administration of the testator's estate. *Chancellor* v. *Morecraft*, 11 Beav. 262; 17 L. J., Ch. 11.

A testator bequeathed to A. a legacy in trust for B., for life, with remainder to her children. A. and the three other executors transferred the legacy into the names of A. and B., and B. having survived A. sold it, and applied it to her own use. After B.'s death her child filed a bill against the representatives of A. alone, to make them responsible for the breach of trust:—Held, that the other executors and the representatives of B. were necessary parties. *Perry* v. *Knott*, 4 Beav. 179. But see *S. C.*, 5 Beav. 293.

Action against Principal and Sureties.]—If a bill be brought against principal and one surety, and it is admitted that the other is dead insolvent, and there are no personal assets, his representatives need not be made parties. *Madox* v. *Jackson*, 3 Atk. 406. And see *Angerstein* v. *Clark*, 2 Dick. 738.

Suit by one surety against another for contribution; the representatives of another surety, who died insolvent, ought to be parties, sed quære. *Hole* v. *Harrison*, Rep. t. Finch, 15.

Where one of several sureties, defendants, who were jointly and severally bound, died before the final hearing, his representative was considered a necessary party, he having joined his co-sureties in paying a sum of money into court. But for this circumstance, quære. *Berwick Corporation* v. *Murray*, 26 L. J., Ch. 201; 3 Jur. (N.S.) 1; 5 W. R. 208—L. C.

Foreclosure Action by one Executor the other having absconded.]—One of two executors lent money belonging to his testator's estate, on the security of a charge on real estate, and subsequently became bankrupt and absconded out of the jurisdiction, and it was not known where he was. His co-executor brought a foreclosure action against the borrower, alleging that he had borrowed the money knowing that it belonged to the estate, and that with that knowledge he had given the charge to the solicitors to the estate, one of whom was the absconding executor, and both of whom had left the country together. The absconding executor was not made a party:—Held, that the action was not bad for non-joinder of the absconding executor. *Drage* v. *Hartopp*, 54 L. J., Ch. 434; 28 Ch. D. 414; 51 L. T. 902; 33 W. R. 410.

Action by Heir against Widow—Legacy in Lieu of Dower.]—A suit by the heir against the widow to compel her to abide by her election, to take a legacy in lieu of dower, an account of the personal estate was decreed, and the plaintiff had leave to amend, by making the executor a party. *Lesquire* v. *Lesquire*, Rep. t. Finch, 134.

Information for Legacy Duty.]—In an information for the payment of legacy duty, whether all the executors living, and the representatives of such as may be dead, are necessary parties, quære. *Att.-Gen.* v. *Hughes*, 11 L. J., Ch. 329.

Other Suits.]—Bill stated that an estate purchased in defendant's name was so purchased in trust for plaintiff's ancestor, who paid the purchase-money, and prayed a reconveyance: demurrer, for that the executor of the ancestor was not a party, overruled. *Astley* v. *Fountaine*, Rep. t. Finch, 4.

Feme covert, by leave of her husband, took a bond in the name of her servant, but in trust for herself; her husband died, and obligor paid the money to his administrator; to a bill of interpleader against the servant and the feme, the administrator must be a party. *Flavell* v. *Ball*, Rep. t. Finch, 330.

A term for 1,000 years was granted, but conditioned to sink and be extinguished upon payment of an annuity for forty-two years. To a bill brought by the heir of the grantor against the heir of the grantee, after the expiration of the forty-two years, for a surrender of the residue of the term, the personal representatives of the grantor need not be parties. *Bampfeild* v. *Vaughan*, Rep. t. Finch, 104.

A. covenants for himself and his heirs, that a jointure shall remain to the uses of the settlement. The jointress brings a bill against the heir for a performance. The defendant demurs, for that the executor ought to be made a party, held good. *Knight* v. *Knight*, 3 P. W. 331.

The administrator of the executor of a surviving trustee of money charged on real estate:—Held, not to represent the trustee in a suit to raise the money, and a demurrer for want of parties allowed on that ground. *Van Reitzenstein* v. *Magan*, 12 Ir. Eq. R. 415.

Share of an intestate's personal estate was assigned to trustees in trust, for the appointees of husband and wife, and in default of appointment, in trust for them and the survivor. Husband and wife sold and assigned this share. Husband died and then wife, having bequeathed all her personal estate to the plaintiff. Husband's personal representative is not a necessary party to a bill by the legatee to set aside the sale. *Dowlin* v. *Macdougall*, 1 Sim. & S. 367. *S. C.*, nom. *Dowling* v. ——, 1 L. J. (O.S.) Ch. 169.

Petition to supersede, presented in the lifetime of the bankrupt, ordered to stand over, on his death, until his personal representatives, or those entitled to take out administration, were served. *Leworthy, Ex parte, Roberts, In re*, Mont. 54.

A creditors' suit was instituted by A., a specialty creditor, and B., a simple contract

creditor, of a debtor deceased, and a decree made in it. A. died, and B. declined to go on with the suit. A supplemental suit was instituted by the representatives of A., to which B. was made a party, and the usual decree in a supplemental suit was made in it. B. afterwards died:—Held, that the representatives of B. were necessary parties to the suit. *Williams* v. *Jones*, 13 L. J., Ch. 64.

Where executor of wife has been obliged to pay creditor of wife; on bill for reimbursement against executor of husband, creditor need not be a party. *Bertie* v. *Chesterfield* (*Lord*), 9 Mod. 32.

J. K. bequeathed, amongst other property, a chattel real to his executors in trust, after payment of two legacies, for H. K. for life, remainder to J. H. B. absolutely. H. K. paid off the legacies and certain debts, and died intestate. His personal representative filed a bill against the executors to be repaid these sums out of the general assets of J. K., and for an account, but did not make J. H. B. a defendant by subpœna, but served him with the notice under the 15th General Order. A decree to account having been obtained, the plaintiff filed the present bill, charging that the general assets were deficient, and that the executors had, without consideration, given J. H. B. possession of the chattel real, and making him alone a defendant by subpœna, but serving the executors with the notice under the 15th General Order, and praying that the bill might be taken as an original bill in the nature of a supplemental bill in aid of the original decree, and for the same relief against J. H. B. in respect of the chattel real as was had against the executors in the original cause:—Held, that the bill was demurrable, the executors not having been made parties to it, semble, the relief sought by the two bills was inconsistent; one seeking relief against parties against whom the other waives all relief. Quære, is the service of notice under the 15th General Order a waiver of any right to seek relief against the party. *Harpur* v. *Boyd*, 8 Ir. Eq. R. 456.

Real estates were devised to A. for life, remainder to his sons in tail, remainder to B. for life, and powers were given to the tenants for life of jointuring and charging portions for younger children, and of limiting terms to secure them. The will also enabled H., who was the trustee and one of the executors, to enter the estates during minorities, and accumulate the rents which were to be applied in the purchase of land to be settled to the same uses. The personal estate was given to A. absolutely. During A.'s minority, H. entered and accumulated the rents. A., on his marriage, limited terms to trustees to secure a jointure and portion, and settled the residuary personalty, and died leaving a son. B. disputed the son's legitimacy, and took possession. A.'s wife and infant child filed a bill against B., H., and the trustees of the terms, alleging that the trustees of the terms refused to bring ejectment without the direction of the court, and praying for an account of the testator's personal estate, and to have it secured on the trusts of the settlement; for an account of the rents received by H. during the minority of A.; for an account of rents received by the defendants respectively since A.'s death; for a receiver; and for an injunction to restrain B. from receiving the rents; and for further relief. B. demurred for want of equity, multifariousness, and want of parties, and the demurrer was allowed by the Master of the Rolls on the first two grounds:—Held, that the demurrer was good for want of parties, for that the other executor was a necessary party to the account of the personal estate, and B., though not interested in the personal estate, had a right to require the suit to be properly constituted. *Hamp* v. *Robinson*, 3 De G. J. & S. 97.

In a suit to set aside conveyances of real and personal estate, on the ground of fraud, &c., the want of parties to represent the personal estate comprised in the impeached conveyances, was a fatal defect. *Farmer* v. *Farmer*, 1 H. L. Cas. 724.

To a bill filed by the heir to set aside a purchase from his ancestor on the ground of fraud, stating also that the purchase-money or alleged consideration was not paid, the personal representative of the ancestor having an interest in the question whether the contract is valid or not is a necessary party, and if such personal representative be brought before the court by supplemental bill the original defendant should be made a party to such a supplemental bill. *Wilkinson* v. *Foukes*, 9 Hare, 193.

A decree was made against A. B., setting aside as fraudulent a purchase by an agent from his principal; and a reconveyance, and the usual accounts of rents and purchase-money were directed, in which an allowance was to be made for substantial repairs and lasting improvements. A. B. sold and conveyed part of the property, pendente lite, and died before the accounts were completed; a supplemental bill was filed against the purchasers, and the heir and the personal representatives of A. B.; the bill charged that the purchasers, in case of eviction, claimed compensation out of the estate of A. B. The conveyances, pendente lite, being set aside:—Held, that the heir and personal representatives were proper parties to the supplemental bill. *Trevelyan* v. *White*, 1 Beav. 588.

An equitable mortgage having been made by deposit of a lease, the mortgagee discovered that the mortgagor had assigned the lease by voluntary settlement, in trust for his wife and children. On the death of the mortgagor, a bill was filed to have the settlement declared void as against the mortgagee, and the wife and children and trustee were made defendants:—Held, that the personal representatives of the settlor were not necessary parties to the suit. *Bostock* v. *Shaw*, 15 L. J., Ch. 257; 10 Jur. 107.

Executors of an insolvent lessee were necessary parties to bill against assignee of lessee's devisee for enforcing covenant to repair, &c. *Sainstry* v. *Grammer*, 2 Eq. Abr. 166.

Where a bill was filed against the devisee of of the lease, praying that the lease might be declared void, and the defendant insisted that if the lease was set aside the plaintiffs ought to repay the money expended by his devisor in the improvement of the premises; the executor of the devisor, who had assented to the devise of the lease, was not a necessary party to the suit. *Malpas* v. *Ackland*, 3 Russ. 273.

Merchants consigned goods to an agent, since dead, who pledged the bills of lading to his own brokers, to whom he was largely indebted on his private account. In an action by the merchants against the brokers for an account:—Held, that, in the absence of the representatives of the agent's estate, no account could be ordered. *Kaltenbach* v. *Lewis*, 45 L. T. 666; 30 W. R. 356.

An action was commenced to recover the sum due on a policy of life insurance, against the surviving director of the insurance company, who executed the policy. The defendant died pending the action. The insurance company filed their bill of interpleader against the plaintiff in the action, and other claimants under the policy:—Held, that the personal representative of the deceased defendant was a necessary party. *Bignold* v. *Audland*, 9 L. J., Ch. 266. And see *S. C.*, 11 Sim. 23.

A judgment debtor, who was possessed of A. for a term, and seised of the lands of B., conveyed by two contemporaneous deeds the lands of A. and B., subject to terms for payment of his debts, to the use of himself for life, remainder to E. for life, remainder over, and the lands of X. to Z. and his heirs. Z. died, having devised the lands of X. to his wife, who afterwards married S. After the debtor's death, the judgment creditor proceeded by elegit against the lands of X.; and S. and his wife filed a bill for an injunction against him, and to carry the trusts of the deed into execution, but were ultimately bound to pay the amount due on the judgment. By the decree in the cause, it was ordered that C. should pay S. and wife the amount paid by them and interest, or, in default, that the lands of A. and B. should be sold for the terms, and that S. and wife should be paid the sum decreed to them. S. assigned the benefit of the decree to R., who filed a bill to carry the decree into execution:—Held, on demurrer, that the personal representative of C., who had died in the meantime, was not a necessary party to the latter bill, nor was it necessary to revive the former suit against him. *Rowland* v. *M'Donnell*, 13 Ir. Eq. R. 365.

A., seised in fee, agrees to demise certain lands to P. for three lives and thirty-one years, and covenants that P. shall quietly enjoy the same during the term demised, without the interruption of A., his heirs, or assigns. Subsequently, on his marriage, A. settles the lands on himself for life, remainder to his first and other sons in tail, reserving a power to make leases for three lives only, and covenants that the lands are free from all incumbrances. The settlement is registered before the agreement. A. makes a lease to P., pursuant to the agreement, and dies, having by his will bequeathed to B., the first tenant in tail, certain legacies, and gives the residue of his property to C. and D. The cestuis que vient in the lease die, and then B. brings an ejectment; P. files a bill for injunction, on the ground that the consequence of an eviction would be to give him a right to compensation, either out of the assets of A. received by B., or out of his assets generally, in which latter case the benefits intended by the testator for his residuary legatees would be defeated:—Held, that the plaintiff's right to the injunction upon the first ground depended upon B.'s having received assets to the value of the interest sought to be evicted, and, therefore, that the personal representative of A. was a necessary party, and that his right to relief upon the second ground was dependent upon the equities which the residuary legatees might have to restrain B. doing an act to their prejudice, which did not exist here, as the assets of A. were liable to make compensation for the breach of the covenant against incumbrances contained in the settlement. Semble, to a bill filed upon the latter ground, the residuary legatees would be necessary parties. *Popham* v. *Baldwin*, 2 Jones, 320.

Representation ad litem—Since 15 & 16 Vict. c. 86, s. 44—Dispensing with Legal Personal Representatives or Appointing Representatives ad litem.]—The appointment by the court of a person to represent the estate of a party deceased, under 15 & 16 Vict. c. 86, s. 44, is a matter of discretion in each case. *Tarratt* v. *Lloyd*, 2 Jur. (N.S.) 371.

There being no personal representative of a person before the court, certain persons ordered to represent the estate for the purposes of the particular matter. *Stewart's Trusts, In re*, 22 L. J., Ch. 369; 16 Jur. 1063; 1 W. R. 17.

Appointment of representative of deceased defendant for purposes of the suit. *Finch* v. *Southee*, 1 W. R. 176.

Sect. 44 of 15 & 16 Vict. c. 86, is only intended to apply to cases where there is a difficulty in obtaining representation, owing to the insolvency of the deceased, or some such cause. *Long* v. *Storie*, Kay (App.), xii.

A motion upon notice, and an order thereupon, pursuant to the 44th section of the statute 15 & 16 Vict. c. 86, that a suit by creditors interested in the property comprised in a trust deed made for their benefit, might proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative existed, and the estate was insolvent. *Chaffers* v. *Headlam*, 9 Hare (App.), xlvi.

The court will not, under the 44th section of the statute 15 & 16 Vict. c. 86, dispense with the personal representative of a trustee, where such personal representative has necessarily active duties to perform in the execution of the trust. *Fowler* v. *Bayldon*, 9 Hare (App.), lxxviii.

Sect. 44 of 15 & 16 Vict. c. 86, does not apply to paying money out of court. *Rawlin* v. *M'Mahon*, 1 Drew. 225; 9 Hare (App.), lxxxii.

A personal representative of a deceased party, entitled to a small sum of money (28*l.*), not dispensed with, under the 44th section of the act 15 & 16 Vict. c. 86, by enabling the solicitors of the deceased party to receive such sum. *Ib.*

Sect. 44 of 15 & 16 Vict. c. 86, does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the court. *Silver* v. *Stein*, 1 Drew. 295; 9 Hare (App.), lxxxii.; 21 L. J., Ch. 312. S. P., *Groves* v. *Lane*, 16 Jur. 1061; 1 W. R. 31. *S. C.*, nom. *Groves* v. *Levi*, 9 Hare (App.), xlvii., n. And see *James* v. *Aston*, 25 L. J., Ch. 343; 2 Jur. (N.S.) 224; 4 W. R. 401.

A mortgagee, having filed his claim against the heirs in gavelkind of the deceased mortgagor, who had died intestate, prayed a sale of the mortgaged premises, and the application of the proceeds, so far as it would extend in payment of his debt, and the administration of the personal estate and the other real estate of the debtor, for the benefit of the plaintiff and the other unsatisfied creditors, but there was no personal representative of the deceased mortgagor except an administrator ad litem:—The court held, that the suit could not proceed, under the 44th section of the statute 15 & 16 Vict. c. 86, in the absence of a personal representative of the intestate, where the object was to administer his estate; and that a testator or intestate, whose estate was to be administered, was not intended to be included in the words of the act, "any deceased person who was interested in the matters in question;" and that neither was the

administrator ad litem a sufficient representative, where the object was not merely to bind, but to administer the estate. *Groves* v. *Lane*, 16 Jur. 1061 ; 1 W. R. 31.

A bill of foreclosure was filed by a sub-mortgagee ; the mortgagee had died, and his representative was not known :—Held, that the court could not, under s. 44 of the Chancery Amendment Act, direct the suit to proceed in the absence of a representative of the mortgagee, against whose estate a decree was asked. *Bruiton* v. *Birch*, 22 L. J., Ch. 911 ; 1 Eq. R. 136.

A surviving husband, having mortgaged the reversionary share of his deceased wife in personal estate, died. Upon the death of the tenant for life the mortgagee petitioned the court; and in the proceedings on the petition a person was appointed by order of the court to represent the estates of the husband and the wife, there being no legal personal representative of either. Upon evidence being produced that the commissioners of inland revenue would be willing to accept a sum equal to administration duty, as from an administrator of the wife, without the production of an actual grant of letters of administration, if succession duty was also paid ; and the petitioner being ready to satisfy these demands, the court dispensed with production of letters of administration. *Ranking, In re*, L. R. 6 Eq. 601.

After the hearing of a cause, but before the decree was entered, it was ascertained that one of the defendants had died abroad before the hearing :—Held, that under 15 & 16 Vict. c. 86, the court might direct the decree to be completed in the absence of the personal representative of such deceased party. *Rucker* v. *Scholefield*, 1 N. R. 180 ; 7 L. T. 348.

Where a personal representative of a testator is dead insolvent, there being no outstanding estate, s. 44 of the 15 & 16 Vict. c. 86, does not enable proceedings to be taken in his absence, but with the consent of all parties, including the heir-at-law, the court will authorise such proceedings under its general jurisdiction. *Jones* v. *Foulkes*, 10 W. R. 55.

A deceased defendant, whom the bill seeks to make primarily liable and accountable, is nevertheless a "deceased person who was interested in the matter in question" within 15 & 16 Vict. c. 86, s. 44 ; and accordingly, if he has no legal personal representative, the court may either proceed in the absence of any person representing his estate, or appoint some person to represent his estate for the purposes of the suit. *Ashmall* v. *Wood*, 25 L. J., Ch. 23 ; 1 Jur. (N.S.) 1130 ; 4 W. R. 60, 110.

Abatement by death of the two defendants tenants in common : order to revive against the personal representative of the survivor of them only, the other defendant having left no personal representative. *Attree* v. *Richardson*, 17 W. R. 20.

Sect. 44 of the Chancery Amendment Act gives the court a discretionary power of proceeding with a suit in the absence of the personal representative of a deceased defendant, whose interests were identical with those of the plaintiff. *Coæ* v. *Taylor*, 22 L. J., Ch. 910 ; 1 Eq. R. 122 ; 1 W. R. 6.

Where a party defendant, being interested in a fund, the subject-matter of the suit, dies, the court will proceed without a representative, under the 15 & 16 Vict. c. 86, s. 44. *Ib.*

Pending an action to make several defendants liable for a breach of trust, H. S., one of the defendants, died before decree, having made his will appointing executors, who had not proved the will. It appearing that the liability of the surviving defendants was the same as that of H. S., the court made an order that the suit should proceed in the absence of a personal representative of H. S. *Hibernian Joint Stock Co.* v. *Fottrell*, 13 L. R., Ir. 335.

One of two joint accounting parties died insolvent after the chief clerk's certificate finding the amount due from them had been settled, but before it was actually signed :—Held, that an order could be made under 15 & 16 Vict. c. 86, s. 44, allowing the suit to proceed without a representative of the deceased, and that it was proper it should be made. *Moore* v. *Morris*, 41 L. J., Ch. 161 ; L. R. 13 Eq. 139.

Administration suit ordered to proceed in the absence of any personal representative of one of the executors of the testatrix in the cause, such executor having died intestate and insolvent, and attempts having been made to obtain representation to him. *Band* v. *Randle*, 2 Eq. R. 439 ; 2 W. R. 331.

After order in an administration claim dated April, 1852, one of the executors, defendants, who was also residuary legatee, died insolvent, never having proved nor possessed assets. His widow refused to take out administration, and his children could not be found. An order was made, under s. 44, on application ex parte, that the suit should proceed without making the representative of the deceased executor a party, and that the inquiries before the master should proceed as though such representative had been served with a writ of summons. *Rogers* v. *Jones*, 9 Hare (App.), xlvii., n. ; 16 Jur. 968 ; 1 W. R. 14.

On the refusal of next of kin to administer to a devisee's estate, the suit may proceed in the absence of representatives, under the 44th section of the 15 & 16 Vict. c. 86. *Haw* v. *Vickers*, 1 W. R. 242.

The personal representative of a cestui que trust, entitled to the trust fund in the event of the death of the children under twenty-one, dispensed with on a claim for the appointment of new trustees, the cestui que trust having died indebted, and with no other property. *Magnay* v. *Davidson*, 9 Hare (App.), lxxviii., lxxxii.

Upon a suit to wind up a partnership and for contribution, the representatives of a deceased partner cannot be dispensed with upon an allegation in the bill that the deceased partner had died insolvent, and had no personal representative. *Coæ* v. *Stephens*, 9 Jur. (N.S.) 1144 ; 8 L. T. 721 ; 11 W. R. 929.

Where a plaintiff, beneficially interested in the subject-matter of an administration suit, and also next friend of infants plaintiffs therein, died after the ordinary administration decree, but before certificate, the court, upon being satisfied that the estate was insolvent, ordered the suit to be revived against the same defendant without making the personal representative of such deceased plaintiff a party. *Leycester* v. *Norris*, 10 Jur. (N.S.) 1173 ; 11 L. T. 442 ; 13 W. R. 201.

Where an executor was made a party, and was before the court at the hearing, but having no interest, he took no part in the discussion, and had since died ; and at the hearing on further directions, his estate was not represented :—Held, that the case fell within s. 44 of

15 & 16 Vict. c. 86. *Bessant* v. *Noble*, 26 L. J., Ch. 236.

In a suit for account against a trustee, the court, on the death (before replication or notice of motion for a decree) of a defendant who was a tenant for life of one share of the trust property, made an order ex parte, to continue the suit without any personal representative of the deceased. *Twynam* v. *Porter*, 21 L. T. 351.

A tenant for life, the sole plaintiff in an administration suit, died after the decree, an arrear of income remaining due to him. He left a will, appointing an executor; but the executor died without proving the will. The court, on the application of one of the defendants, made an order to revive the suit against the others, without any representative of the original plaintiff, but without prejudice to any application by a personal representative of the original plaintiff to intervene. *Hayward* v. *Pile*, 41 L. J., Ch. 778; L. R. 7 Ch. 634; 26 L. T. 900; 20 W. R. 736.

Declaration made on the question, whether children took per capita or per stirpes, in the absence of the personal representatives of some of the children who had died. *Abrey* v. *Newman*, 10 Hare (App.), lviii.; 22 L. J., Ch. 627; 17 Jur. 153.

At the hearing a cause was offered to stand over for want of parties, and the plaintiff was to amend his bill by adding the names of such parties or their legal personal representatives. One of them was dead, and had no legal personal representative. A motion by the plaintiff for liberty to proceed in the absence of such representative or for the appointment of a person to represent his estate was refused with costs. *Williams* v. *Page*, 27 Beav. 373.

Order made under s. 44 of the 15 & 16 Vict. c. 86, in a creditor's suit for the appointment of a person to represent the deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that, after payment of incumbrances out of the proceeds of the sale, no surplus would be left, and upon notice being given to the debtor's next of kin who were entitled to take out administration. *Davies* v. *Boulcott*, 1 Dr. & Sm. 23; 8 W. R. 206.

Bill and interrogatories served on E., who took no notice of them. Bill consequently ordered to be taken pro confesso against him. Judgment drawn up accordingly. Upon attempting to serve E. with judgment, it was found that he was dead at date of the decree, leaving no legal representative. Ordered, that, upon filing an affidavit verifying the circumstances under which the application was made, E.'s widow be served with notice that within six weeks from the date of such service, the court would appoint a representative, and direct payment, unless in the meantime the widow appeared to contest. *Alford* v. *Espinach*, 36 L. T. 367.

A person interested in the matters in question in a suit having died without leaving any legal personal representative, his father refused to represent him for the purposes of the suit. Ordered that the father be served with notice of the application under 15 & 16 Vict. c. 86, s. 44; and that if he did not consent to represent the deceased person, some one would be appointed to administer the estate. *Whiteaves* v. *Melville*, 5 W. R. 676.

Order made on the application of the sole defendant appointing a person to represent the estate of the plaintiff, who had died insolvent and apparently intestate, in order that the defendant might have an opportunity to move for dismissal of the action for want of prosecution. *Wingrove* v. *Thompson*, 11 Ch. D. 419; 27 W. R. 910.

Bill by landlord for specific performance of an agreement to take a lease entered into by four persons, all defendants to the bill, in joint tenancy. After the filing of the bill one of the proposed lessees died abroad, and, as alleged, intestate and insolvent. Letters were produced from the place of the alleged death, describing the circumstances of the decease, and the father and brothers deposed to their belief: and the father declined to take out administration on the ground of insolvency:—Held, that this was sufficient evidence to enable the court to act on it; and an order was made, that, the father appearing, and at bar declining to administer, some other person should be appointed to represent the sons' estate, under s. 44 of the 15 & 16 Vict. c. 86. *Turratt* v. *Lloyd*, 2 Jur. (N.S.) 371

If a defendant, having an interest in the estate of a testator which is being administered, dies abroad, and his executors prove the will at the place of his death, but refuse to prove it in England, the court, under the 15 & 16 Vict. c. 16, will order a representative to be appointed, that the suit may be revived. *Bliss* v. *Putnam*, 29 Beav. 20; 30 L. J., Ch. 38; 7 Jur. (N.S.) 12.

Where the entire adverse interest is unrepresented by any party to the suit, the court will not appoint a person to represent that interest, under the 15 & 16 Vict. c. 86, s. 44. *Gibson* v. *Wills*, 21 Beav. 620; 4 W. R. 499.

A vendor of shares in a company filed a bill against the executors in Scotland of the purchaser, who were also the residuary legatees, to set aside the sale. The testator was possessed of personal estate in England, but no administration had been taken out there. The bill prayed that the sale might be set aside, and that an account might be taken of the profits and bonuses received by the purchaser and the executors in respect of such shares, and payment by them of any excess over the amount of the purchase-money, and interest at 4*l.* per cent. The executors demurred, on the ground that there ought to be before the court a legal personal representative of the testator appointed in England; and the demurrer was allowed. *Maclean* v. *Dawson*, 27 Beav. 21, 369; 5 Jur. (N.S.) 1091; 7 W. R. 354.

Held, also, that it was not a case in which the court could appoint a person to act as personal representative, under s. 44 of the 15 & 16 Vict. c. 86. The plaintiff amended his bill, making an administrator ad litem in England a defendant, and treating the claim of the plaintiff as a specific lien upon the shares of the testator. The bill, as amended, also contained an allegation that the executors had received assets more than sufficient to answer all claims upon the estate of the testator, and prayed that they might be declared personally liable to pay what, on taking the accounts, might be found to be due to the plaintiff. A demurrer, on the ground that no legal personal representative of the testator, properly constituted in England, was before the court, was overruled. *Ib.* And see *S. C.*, 1 Sw. & Tr. 425.

One creditor of a deceased debtor, by his bill, stated that the defendant was in possession of all the debtor's estate and effects, and acted as if he was the debtor's personal representative, and

that the defendant alleged that he was entitled to the estate and effects under a deed of gift; and the bill prayed that the deed might be set aside against the creditors, and that, if necessary, the suit might be taken as a creditors' suit:—Held, on demurrer, that the suit must be taken as a creditors' suit; that a personal representative of the debtor was a necessary party; and that the suit being for the administration of the whole estate, the court would not nominate a representative. *James* v. *Aston*, 25 L. J., Ch. 343; 2 Jur. (N.S.) 224; 4 W. R. 401.

Form of order for administration, dispensing with the representatives of deceased executors and trustees as parties to the suit, when incapacitated persons are interested in the estate. *Whittington* v. *Gooding*, 10 Hare (App.), xxix.

Moneys found due to the estate of a deceased person will not be paid over to the representative appointed under the 15 & 16 Vict. c. 86, s. 44, but will be carried over to a separate account. *Byam* v. *Sutton*, 19 Beav. 646.

Note.—Sect. 44 of 15 & 16 Vict. c. 86, was repealed by 46 & 47 Vict. c. 49, and R. S. C. Ord. XVI. r. 46, is now substituted for it.

——**Who Appointed.**]—The person who would be appointed administrator ad litem, is the most proper person to be nominated under the 15 & 16 Vict. c. 86, s. 44, to represent a deceased party who has no personal representative. This enactment extends even to those cases where the party "interested" is sought to be made liable. *Ely* (*Dean and Chapter*) v. *Gayford*, 16 Beav. 561.

A defendant died, and a contest as to one of his testamentary papers prevented probate being granted. The court, on motion, appointed the executor named in his will to represent the deceased's estate in the cause under the 15 & 16 Vict. c. 86, s. 44. *Hele* v. *Bexley* (*Lord*), 15 Beav. 340.

Bill to recover a sum of money in respect of which one defendant was treated as primarily liable, and the other two defendants as secondarily liable only. The defendant alleged to be primarily liable, after having, by his answer, admitted his liability to answer the plaintiff's demand, died, leaving assets altogether inadequate to meet such demand, and having, by his will, appointed two persons to act as his executors, both of whom declined to prove the will. The plaintiff then moved, under 15 & 16 Vict. c. 86, s. 44, that the court would direct the suit to be proceeded with in the absence of any person representing the estate of the deceased defendant, or appoint some person to represent such estate for all the purposes of the suit. The court held, that the deceased defendant was "a deceased person interested in the matters in question" within the meaning of the act, and under the circumstances, appointed the persons named in his will to represent his estate for the purposes of the suit, and intimated that they should be required by the plaintiff to put in an answer. *Ashmall* v. *Wood*, 25 L. J., Ch. 23; 1 Jur. (N.S.) 1130; 4 W. R. 60, 110.

On a petition by the heir-at-law of one who was entitled, upon the death of the tenant for life, to lands which had been taken under the Manchester Improvement Act, for payment out of court of the purchase-money of such lands, the executors named in the will of the deceased party, but who had not proved the will, were, under the 44th section of the 15 & 16 Vict. c. 86, appointed to represent his personal estate for the purposes of the proceeding. *Cramer, Ex parte*, 9 Hare (App.), xlvii., n.

Pending the taking of partnership accounts under a decree, one of the partners died. His will, by which he gave his estate to his widow and appointed her sole executrix, was in litigation in the Probate Court. The Court of Chancery declined, under the 15 & 16 Vict. c. 86, s. 44, to appoint the widow to represent the estate in the suit, pending the litigation. *Rowlands* v. *Evans*, *Williams* v. *Rowlands*, 33 Beav. 202; 3 N. R. 233.

Appointment of the widow to represent the estate of her deceased husband, who had been entitled to a life interest in certain tithes, the subject of the suit, and had died intestate, where no letters of administration of such estate had been obtained. *Ely* (*Dean and Chapter*) v. *Edwards*, 10 Hare (App.), lxv.; 22 L. J., Ch. 630; 17 Jur. 219.

A foreclosure decree gave to seven persons, or any of them, the right to redeem within a certain time. Before that time arrived, one of the seven died, and there was some difficulty about obtaining administration to him. Letters of administration were at length granted by the Ecclesiastical Court to a creditor, but before the proceeding was perfected, another creditor entered a caveat. *Long* v. *Storie*, Kay (App.), xii.

The Court of Chancery made an order under s. 44 of 15 & 16 Vict. c. 86, appointing the former creditor to represent the estate of the deceased, after a week's notice given to the opposing creditor; or, if the former creditor should refuse to be such representative, then, upon evidence by affidavit of such refusal, appointing the other creditor such representative. *Ib.*

The question was between the children who survived and those who predeceased their parents. There had been two of the latter, but neither of their estates was represented in the suit. It was asked, under the 15 & 16 Vict. c. 86, s. 44, that the surviving husband of one might represent the interests of the absent parties. The application was refused. *Gibson* v. *Wills*, 21 Beav. 620; 4 W. R. 499.

In a suit to administer the estate of A. and to take accounts of his business carried on after his decease by B. and C. his executors, who were also beneficially interested under the will, the court will, under the 44th section of the act 15 & 16 Vict. c. 86, appoint C. to represent the estate of B., where B. has made his will and appointed C. and R. (B's heir and a party to the suit) his executors, although B.'s will had not been proved, and although the suit may result in charging B.'s estate. *Goddard* v. *Haslam*, 1 Jur. (N.S.) 251; 3 W. R. 357.

A party went to Australia several years ago; but he had not been heard of since. Assuming that he were dead, but had survived the testator in the suit, there would be arrears of a fund in court to be paid to his personal representative, if appointed:—Held, that a person who was not interested in the subject-matter of the suit might be appointed administrator ad litem of the party. *Mortimer* v. *Mortimer*, 8 L. T. 487; 11 W. R. 740.

C. was, by H., who died in Calcutta, appointed his executor, and he there proved the will, but refused to take out administration to the testator in England. On motion, the court ordered that C. should be appointed to represent the estate of H., in order that the suit might be properly

constituted. *Sutherland* v. *De Virenne*, 2 Jur. (N.S.) 301.

On the hearing of a petition relating to the disposition of a trust fund, it appeared that A. had an interest in it which might be asserted. A. died in the United States, having by his will appointed B. his executor, who proved the will there but not in this country. Counsel appeared for B. at the hearing. The court, at the hearing under the 15 & 16 Vict. c. 86, appointed B.'s counsel to represent B.'s estate. *Hewitson* v. *Todhunter*, 22 L. J., Ch. 76; 1 W. R. 78.

Case in which the executors of a father, who survived and became the sole next of kin of his deceased children, may be appointed by the court, under the 44th section of the 15 & 16 Vict. c. 86, to represent the estates of the deceased children for the purposes of the suit. *Swallow* v. *Binns*, 9 Hare (App.), xlvii.

A person cannot be appointed to represent an estate under the 15 & 16 Vict. c. 86, s. 44, without his consent. *Prince of Wales Association Co.* v. *Palmer*, 25 Beav. 605.

The court cannot, under 15 & 16 Vict. c. 86, s. 44, appoint a person to represent the estate of a deceased person who is not willing to act. *Hill* v. *Bonner*, 26 Beav. 372.

Where a defendant to a bill which prayed relief against all the defendants jointly in respect of an alleged breach of trust as directors, died abroad, and the evidence showed that he was believed to have left a will, and to have named his widow executrix, but that she had not seen the will, and did not know its contents, and that his solicitors on the record had not been instructed since his death:—The court, on the application of the plaintiffs, made an order for the appointment of a person named by the plaintiffs, and consenting to act, to represent the deceased defendant for the purposes of the suit; unless within fourteen days after notice the solicitors and the widow, or one of them, should appear and elect to represent the estate, in which case both, or either, as the case might be, would be appointed. *Joint Stock Discount Co.* v. *Brown*, L. R. 8 Eq. 376; 20 L. T. 692.

—— **Since 15 & 16 Vict. c. 86, s. 42, r. 9—Trustee representing Estate.**]—The 9th rule of the 42nd section of the statute 15 & 16 Vict. c. 86, applies not only to administration suits, but to all suits where the interest of the cestui que trust is represented by, and his powers are vested in, the trustee. *Fowler* v. *Bayldon*, 9 Hare (App.), lxxviii.

An executrix directed to pay debts cannot be considered to represent third parties within the meaning of the 15 & 16 Vict. c. 86, s. 42. *Bolton* v. *Stannard*, 27 L. J., Ch. 845; 4 Jur. (N.S.) 576; 6 W. R. 570.

When a fund has been brought into court in an administration suit, the next of kin are properly represented after decree by the personal representative until the fund has been distributed. *Micklethwait* v. *Winstanley*, 5 N. R. 204.

Distinction as to the necessity of making persons beneficially interested in real estate parties in suits by mortgagees for foreclosure or sale of mortgaged estates, against the persons having the legal interest only, where such persons are executors of the mortgagor, and where they are merely trustees of settlements, of the mortgaged property. *Hanman* v. *Riley*, 9 Hare (App.), xl.

Note.—R. S. C. Ord. XVI. r. 8, is now substituted for s. 42, r. 9, of 15 & 16 Vict. c. 86.

—— **Rules of 26th June, 1876, Ord. XVI. r. 9a.**]—When upon the construction of a will questions had arisen as to what classes of representatives of the testator were entitled, and great difficulty was foreseen in attempting to find the heir, who in the result might be held not entitled, the court made an order under Ord. XVI. r. 9a, appointing persons to represent the various classes of representatives of which some or one might be held to be entitled, before the questions of construction came on to be decided. *Peppitt, In re*, *Chester* v. *Phillips*, 46 L. J., Ch. 95; 4 Ch. D. 230; 35 L. T. 902; 25 W. R. 211. *See now* R. S. C. Ord. XVI. r. 32 (*a*).

—— **Absent Parties—R. S. C. 1883, Ord. XVI.**]—Persons interested in an estate the subject of an administration action to which they have not been made parties, and whose rights or interests may be affected by an order directing accounts and inquiries, are not bound by the proceedings under that order—at any rate where they ought to be served—unless they are served with notice of the order, or an order has been made appointing a member of their class to represent them in the action. The practice of the court as to binding absent parties in an administration action discussed. *May* v. *Newton*, 56 L. J., Ch. 313; 34 Ch. D. 347; 56 L. T. 140; 35 W. R. 363.

Adding Parties by Amendment—Before the Judicature Acts and Orders.]—Executor's name added in decree for account without putting off cause. *Pitt* v. *Brewster*, Dick. 37.

Where one of the defendants died after answer the court will not permit his devisee to be made a party by amendment. *Listowell* v. *Callaghan*, 8 Ir. Eq. R. 472.

To a bill filed for the purpose of obtaining the opinion of the court on a testator's will, more than thirty years after his decease, it was objected that there was no representative of the testator before the court:—Held, that such objection was a valid one; but the court permitted the plaintiff to take out letters of administration de bonis non with the testator's will annexed, and would not put the plaintiff to the expense of amending her bill. *Nonnelay* v. *Balls*, 6 Jur. 550.

The court will not decree a specialty debt to be paid out of the deceased's real estates, unless the creditor sues on behalf of himself and all other the specialty creditors; but leave will be given to amend the bill at the hearing. *Johnson* v. *Compton*, 4 Sim. 47.

After a decree in an administration suit, to which a creditor who had assigned his debt and the securities for it to trustees, was a party, but such assignees in trust were not parties, an order obtained by them from the vice-chancellor to substitute their name for his, and to have the benefit of all future proceedings, was discharged as irregular. *Drever* v. *Mawdesley*, 4 Myl. & C. 94.

An administrator who has become such since bill filed, may be made a party by amendment, notwithstanding the general rule, that a person who acquires a new right after the institution of a suit can be brought before the court only by a new bill. *Beardmore* v. *Gregory*, 2 Hem. & M. 491; 34 L. J., Ch. 392; 11 Jur. (N.S.) 363; 12 L. T. 363; 13 W. R. 674.

A bill was filed by A., a married woman, by her next friend, her husband, joining against an executor de son tort in respect of a legacy given to A. for her separate use. After the bill was

filed, letters of administration were granted to S., and S. by amendment was made a defendant:—Held, that S. was properly made a party to the suit by amendment, the case of an administrator standing on a different footing from that of other persons who gain new rights after the institution of a suit. *Ib.*

Held, also, that the husband (he not setting up any claim adverse to his wife) might properly be joined as a co-plaintiff. *Ib.*

When a plaintiff filed her bill as being the legal personal representative of the person through whom she claimed title, and it was afterwards discovered that she was not the legal personal representative, though she was beneficially interested in a share of the subject-matter of the suit, which was a debt contracted upwards of fifty years before the bill was filed, leave was given, at the hearing of the cause, to add the legal personal representative as co-plaintiff; and the bill being amended by so doing, and by introducing sufficient statements to show the title of the new plaintiff, and also the beneficial interest of the original plaintiff:—Held, that such amendments were proper to be allowed in the discretion of the judge. *Maughan* v. *Blake*, 37 L. J., Ch. 109.

—— **Since the Judicature Acts.**]—When two actions had been consolidated, on an application by the plaintiff to add new defendants to the consolidated action before trial, and to make W., one of the present defendants, a party to the action in a representative character, the court, under the Judicature Act, Ord. XVI. rr. 14, 15, of 1875, ordered that the proposed new defendants should be added without service of any writ, and that W. be made a defendant in his representative character without any further indorsement on any writ, such order to take effect unless the new defendants and W. should respectively show cause to the contrary within eight days after service thereof. *Wortley, In re, Culley* v. *Wortley*, 46 L. J., Ch. 182; 4 Ch. D. 180; 25 W. R. 295. *And see now* R. S. C., 1883, Ord. XVI. rr. 12, 13.

When an action abates on the death of a defendant, on account of its being purely an action for damages occasioned by the defendant's fraud, so that it cannot be simply continued against the deceased defendant's personal representative, but the action is capable of being so stated by the introduction of amendments as to make a primâ facie case against the personal representative, leave may be given to amend the pleadings by the introduction of the necessary allegations, and an order may be made to add the personal representative, as a party. *Ashley* v. *Taylor*, 48 L. J., Ch. 406; 10 Ch. D. 768; 27 W. R. 228.

Both the necessary amendments and the addition of parties may be made by the same order; but the order should be made ex parte, and not upon notice to the person whom it is proposed to introduce into the action. *Ib.*

Revivor.]—Ord. XVII. now governs proceedings on change of parties during the pendency of a suit.

Ord. XLII. r. 23, now governs proceedings on death of parties after judgment.

—— **Order Discretionary.**]—It is in the discretion of the court whether it will allow an action which has become defective by the death of a party or otherwise to be revived. An administration suit in which a decree was made by the Court of Chancery in the year 1833, having become defective by the deaths of some parties and the bankruptcy of another, and no step having been taken in it for thirty-nine years, an order of revivor was allowed for the purpose of enabling a party to appeal from an order made in the year 1836 (in case the Court of Appeal should give leave to appeal), the court being of opinion that no person had altered his position, or incurred any liability, or suffered any loss on the faith of the order, from which it was desired to appeal. *Curtis* v. *Sheffield*, 51 L. J., Ch. 535; 20 Ch. D. 398; 46 L. T. 80.

—— **Administrator de bonis non.**]—Administrator obtains a decree, and dies. The administrator de bonis non may revive this decree within the equity of statute 30 Car. 2, c. 6. *Owen* v. *Curzon*, 2 Vern. 237.

Where a personal representative sues or is sued and dies, the administrator de bonis non may proceed or be proceeded against by bill of revivor, or by bill of revivor and supplement. But he is not bound so to frame his bill; he may at his election file an original bill. Therefore, where an administrator had obtained a decree declaring a judgment to be held on certain trusts, and the judgment was afterwards fraudulently assigned, and the administrator de bonis non filed a bill stating at length the proceedings in the original suit, making the assignee a party, and praying that he might be declared entitled to the benefit of the decree and accounts and inquiries thereby directed, and to an assignment of the judgment, or original relief if he was not entitled to the benefit of the said suit and decree, it was:—Held, on demurrer, that the bill being an original bill as to the assignee, the plaintiff could not have proceeded by bill of revivor; and although the bill might have been framed as a bill of revivor and supplement, as against the representative of the defendant in the original suit, it was sustainable as against him, either as an original bill, or as an original bill in the nature of a supplemental bill. *Banfield* v. *O'Shaughnessy*, 12 Ir. Eq. R. 63.

An administrator of an intestate died in 1817, indebted to a large amount in respect of his receipts as administrator, but leaving sufficient personal estate to pay the amount, and also leaving freehold estates. In the same year a suit was instituted for the administration of his personal estate, and in 1832 it appeared, from the report in that suit, that his personal estate had been misapplied, and that his executor had become bankrupt. Thereupon and in the same year 1832 an administratrix de bonis non of the intestate instituted a suit against the administrator's heir, and the sureties in the usual administration bond, and against the representatives of the archbishop (who had died), praying to have the benefit of the bond, and to charge by means of it the administrator's freehold estates. No decree was made in this suit, the plaintiff having married in 1838, and having died in 1847, without the suit having ever been revived. In 1848 another of the next of kin, who had been a defendant to the suit of 1832, took out administration de bonis non of the intestate, and filed a bill of revivor and supplement, claiming to have the benefit of the suit of 1832. Quære, whether the suit of 1832 was in

its nature one which it was competent for the plaintiff in that of 1848 to revive:—Held, that the suit of 1832 must be considered as having been abandoned, and that the suit of 1848 must be considered an original suit, and, as such, barred by length of time and laches. *Bolton* v. *Powell*, 2 De G. M. & G. 1; 14 Beav. 275; 16 Jur. 24.

A. died, having made B. his executor, who, without proving A.'s will, possessed part of his assets. B. died, and made C. his executrix, who proved his will, and took out administration to A. A bill was filed against C. for an account of A.'s assets, possessed by her and by B. Afterwards C. died, having made D. her executor, and E. took out administration to A. Plaintiff filed a bill of revivor and supplement against D. and E., to which D. demurred, and the demurrer was allowed. *Phelps* v. *Sproule*, 4 Sim. 321.

—— **Executor or Administrator.**]—All the executors who prove the will must be parties to the suit; but others are not necessary parties, although they have not renounced. Where bill of revivor stated that the plaintiff was appointed executor, and in fact he and another were nominated, but he alone proved: Lord Chancellor, considering that to be a misstatement, and that the fact should have been stated exactly as it was, of the appointment of another executor who had not proved:—Held, that inasmuch as the court is never inclined to turn a party round upon a point of form, it might be set right at the hearing by a certificate of the proper officer, that in fact no other executor but the plaintiff had proved, which he directed accordingly. It is not, however, an answer to such an objection, that it should be taken to the bill of revivor. If plaintiff in revivor misstates a fact in his knowledge, it is not incumbent on the defendant so far to distrust that statement as to object to the common routine of revivor. *Cramer* v. *Morton*, 2 Moll. 108.

Pending an account directed by the decree, the accounting party died. An order was made, on motion to revive, against his executor, and that he might either admit assets or account for his testator's estate. *Cartwright* v. *Shepheard*, 20 Beav. 122.

Suit not revived against the administrator of a party named, who did not appear, nor was served with a subpœna, nor can the plaintiff have the benefit of former proceedings against such administrator. *Asbee* v. *Shipley*, 6 Madd. 296.

Upon the death of a defendant, her representatives were made parties to a bill of revivor. They pleaded that the testatrix had assigned pendente lite, and that they never had any interest in the subject-matter of the suit. The plea was allowed. *Nutting* v. *Hebdin*, 14 Beav. 11; 20 L. J., Ch. 555.

A bill of revivor against A. alleged that a defendant to the original bill had died, having by his will appointed B. executrix, and that she had taken on herself the execution of the will, and had possessed the assets, and taken on herself the administration thereof. It prayed revivor against her as such executrix; B. pleaded simply that she was not executrix. The plea was allowed. *Cooke* v. *Gittings*, 21 Beav. 497.

A man marries an administratrix; plaintiff obtains a decree against him and his wife for 1,500*l.*; she dies, plaintiff cannot proceed against the husband without reviving against the administrator of the wife. *Jackson* v. *Rawlings*, 2 Vern. 195.

—— **Administrator, where no Surviving Cause of Action.**]—When an action abates on the death of a defendant, on account of its being purely an action for damages occasioned by the defendant's fraud, so that it cannot be simply continued against the deceased defendant's personal representative, but the action is capable of being so stated by the introduction of amendments as to make a primâ facie case against the personal representative, leave may be given to amend the pleadings by the introduction of the necessary allegations, and an order may be made to add the personal representative as a party. *Ashley* v. *Taylor*, 48 L. J., Ch. 406; 10 Ch. D. 768; 27 W. R. 228.

Both the necessary amendments and the addition of parties may be made by the same order; but the order should be made ex parte, and not upon notice to the person whom it is proposed to introduce into the action. *Ib.*

—— **Executor under later Will, discovered after Judgment.**]—Benefit of decree made in a suit instituted by party claiming as personal representative under a former will, may be obtained by executor under a later will subsequently discovered, by bill in the nature of bill of revivor. *Gough* v. *Latouche*, 2 Moll. 406.

—— **Heir.**]—Heir and administrator of party intestate, must be parties to revive decree for payment of money, and for conveying of lands. *Ferrers* v. *Cherry*, 1 Eq. Abr. 3.

An administration suit—which had abated after decree by the death, intestate as to trust estates, of the sole plaintiff, the executor and devisee in trust of the testator in the cause—was revived on the application of the deceased plaintiff's executors, and two of his co-heiresses, the other co-heiress being already a party to the suit. *Fane* v. *Richards*, 1 N. R. 563.

Where a decree was made in an administration suit, containing a declaration which bound the heir-at-law of a testator, and it was found that at the date of the decree the heir was dead, an order of revivor was made against the representative of the heir. *Fenton* v. *Hawkins*, 4 N. R. 54.

—— **Person served with Notice of Judgment.**]—A person served with a notice of an administration judgment, and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of the sole plaintiff. *Delaney* v. *Delaney* (27 Sol. J. 418) distinguished. *Dobson* v. *Faithwaite* (30 Beav. 228) followed. *Burstall* v. *Fearon*, 53 L. J., Ch. 144; 24 Ch. D. 126; 31 W. R. 581.

In an administration suit by two residuary legatees, as co-plaintiffs, if one die before replication, the proper course is to mark him as dead, and when the cause comes into chambers, to serve his representatives with the decree. *Hinde* v. *Morton*, 5 N. R. 362.

—— **Where Fund has been carried over.**]—Where, upon an administration decree, funds had been ordered to be carried to the separate account of A., an infant, and upon his marriage the funds had been settled, with the approval of the court, as belonging to A. absolutely:—Held, that the

parties beneficially interested were entitled to file an original bill for the purpose of obtaining a declaration of their rights, and that in such a case it would not have been proper to file a bill of revivor, the order to carry to a separate account not being equivalent to a decree finally determining the rights of the parties. *Noble* v. *Stow*, 29 Beav. 409; 5 Jur. (N.S.) 1115; 7 W. R. 709.

—— **In a Creditor's Action.**]—Under the 15 & 16 Vict. c. 86, s. 52, an order to revive a creditors' suit may be made at the instance of a creditor to whom a debt is found due by the master. *Lowes* v. *Lowes*, 2 De G. M. & G. 784; 22 L. J., Ch. 179; 9 Hare (App.), lii., n.; 16 Jur. 991; 1 W. R. 27.

Where one of plaintiffs in creditors' suit dies, after decree, his personal representative has a right to revive. *Burney* v. *Morgan*, 1 Sim. & S. 358; 1 L. J. (O.S.) Ch. 228.

Creditor cannot sue on behalf of himself and others who have no common interest with him. *Ib.*

If creditor file a bill on behalf of himself and other creditors, and obtain decree and die, another creditor may obtain order to file supplemental bill, if representatives of first plaintiff do not revive within a limited time. *Dixon* v. *Wyatt*, 4 Madd. 392.

Upon the death of a plaintiff in a creditors' suit, the common order to revive was made in favour of another creditor, whose debt had been proved, and allowed by the chief clerk's certificate, although the certificate had not been signed. *Inchley* v. *Allsop*, 7 Jur. (N.S) 1181; 9 W. R. 649. S. P., *Bell* v. *Bell*, 33 L. J., Ch. 384; 10 Jur. (N.S.) 14; 9 L. T. 643; 12 W. R. 230.

An order of revivor made in a creditors' suit at the instance of another creditor to whom the conduct of the proceedings had been given. *Scott* v. *Maxwell*, 41 L. J., Ch. 600; 20 W. R. 763.

One of two creditors, plaintiffs in a creditors' suit upon an abatement by the death of an executor of the testator, obtained administration de bonis non to the estate of the testator, and leave was given to the other creditor to file a supplemental claim against him and the executors of the deceased executor, the case not being within the 52nd section of the 15 & 16 Vict. c. 86, which gives to the order on motion the effect of a supplemental decree. *Tate* v. *Leithead*, 9 Hare (App.), li.; 16 Jur. 964.

A creditors' bill is filed by A., on behalf of himself and other creditors, against B. and others. After decree the suit abated by the death of B. C., his executor, filed a bill of revivor on behalf, &c., and the suit was revived. A. afterwards filed other bills, and the proceedings before the master were attended by A., on behalf of the creditors at large:—Held, that C. was not, by the fact of filing the bill of revivor on behalf, &c., incapacitated from compromising for his own benefit a claim on the estate. *Armstrong* v. *Storer*, 9 Beav. 277.

—— **Under 15 & 16 Vict. c. 86, s. 52.**]—Order on motion ex parte by the plaintiff to revive and carry on proceedings in an administration suit commenced by claim upon abatement by the death of the executor, under the 52nd section of the act 15 & 16 Vict. c. 86, upon allegation (without proof) of the facts constituting the abatement. *Martin* v. *Hadlow*, 9 Hare (App.), lii.; 16 Jur. 964. Like circumstances in a case where the suit was by bill: like order. *Cox* v. *Taylor*, 9 Hare (App.), lii., n.

Where in an administration suit a co-plaintiff died, who, it was alleged, had no interest in the estate, leave was given to revive the suit, without making her representatives parties thereto. *Leycester* v. *Leycester*. 5 N. R. 183.

Where an administration suit was instituted by one of two trustees, the other being one of the defendants, and after the hearing on further consideration the trustees were permitted by the court to retire from the trust, and new trustees were appointed; it was held, that under 15 & 16 Vict. c. 86, s. 52, the suit might be revived at the instance of the new trustees, and that accounts directed against the old trustees might be continued against the new. *Williams* v. *Jeffreys*, 3 N. R. 458.

Where the plaintiff in a next-of-kin suit has been found to have no interest, the suit cannot be made perfect by a supplemental order under the 15 & 16 Vict. c. 86, s. 52. *Lawrence* v. *Maule*, 3 N. R. 239.

—— **Effect of.**]—Upon a bill in nature of bill of revivor against devisee, the devisee cannot dispute the justice or validity of decree. *Minshull* v. *Mohun* (*Lord*), 2 Vern. 672. Affirmed, 6 Bro. P. C. 32.

A devisee may bring original bill in nature of a bill of revivor, and shall have the same advantage of a decree as an heir or executor, and the defendant is not at liberty to make a new defence. *Clare* v. *Wardell*, 2 Vern. 548.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead de novo, for the first plea cannot be now argued. *Micklethwaite* v. *Calverly*, Cas. t. Talb. 3.

When, under order made in creditors' suit, leave is given to file supplemental bill by creditor, not party to original suit, on behalf of himself and other creditors, to have benefit of decree in that suit, plaintiff is entitled to the same decree, to have benefit of former proceedings, as representatives of the original plaintiffs would have been entitled on bill of revivor. *Houlditch* v. *Donegall* (*Marquis*), 1 Sim. & S. 491; 2 L. J. (O.S.) Ch. 53.

The propriety of order which authorised creditor to file supplemental bill cannot be questioned at hearing of supplemental cause. *Ib.*

If a person interested under a will, files a bill for an account against the executors, not seeking to charge them for wilful default, and dies pending the suit, his personal representative cannot charge them by bill of revivor and supplement, if the acts complained of were known to the deceased plaintiff. *Garrett* v. *Noble*, 6 Sim. 504; 3 L. J., Ch. 159.

—— **Proceedings by Defendant to obtain Revivor or Dismissal.**]—Motion before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed as against the deceased, granted. *Burnell* v. *Wellington* (*Duke*), 6 Sim. 461.

A suit had been instituted by the curator and committee of a lunatic (a foreigner), and on his behalf, against a party, who, upon the death of the lunatic, became his personal representative. A motion by the defendant, that the bill should be dismissed with costs, unless the plaintiff

revived within a fortnight, was refused with costs. *Toledo* v. *Vieta*, 14 L. J., Ch. 345.

The plaintiff instituted a creditors' suit against the executor. The estate was accordingly administered, and a decree was made on further directions. The executor afterwards brought actions against the plaintiff, for debts alleged to be due from him to the testator, which the court restrained by injunction. The plaintiff having died, the defendant moved, that the suit might be revived by his representatives, or, in default, that the injunction might be dissolved. The proceeding was held irregular, and the motion was refused, with costs. *Oldfield* v. *Cobbett*, 20 Beav. 563.

d. ADMISSION OF ASSETS.

By Pleading.]—If an executor to an action on bond pleads payment, and omits to plead plene administravit, and a verdict is given against him on such plea, it operates as an admission of assets in an action founded on that judgment, suggesting a devastavit. *Erving* v. *Peters*, 3 Term Rep. 685; 1 R. R. 794. S. P., *Palmer* v. *Waller*, 1 M. & W. 689; 5 D. P. C. 172; 1 Tyr. & G. 1014; 5 L. J., Ex. 246.

In an action against an administrator, he, after obtaining time to plead, pleaded a judgment recovered since the commencement of the action, but did not aver that there were no assets ultra. The court gave leave to the plaintiff to sign judgment as for want of a plea; the defendant having, since the commencement of the action, admitted by the latter the possession of assets sufficient to cover the judgment, and also the plaintiff's demand. *Roberts* v. *Wood*, 3 D. P. C. 797.

An executor gives a creditor of the testator, who is suing him at law, a cognovit, with stay of execution: this is not an admission of assets. *Stirling* v. ——, 4 L. J. (O.S.) Ch. 223.

Defendant held to admission of assets by answer. *Roberts* v. *Roberts*, Dick. 573.

An executor, charged with the receipt of rents, stated in the schedule to his examination that he had received in respect of rents, after deductions to a certain amount for bills due from the testator to the tenants, so much; the master charged the executor with the whole amount, including the alleged deductions:—Held, on exception, that although the executor had by this form of admission charged himself with the aggregate sum, yet, as the whole statement must be read, he had also discharged himself primâ facie, by the evidence which it contained of the repayment to the tenants, which repayment it was open to the other parties to impeach. *Inge* v. *Kenny*, 4 Hare, 452; 14 L. J., Ch. 325; 9 Jur. 344.

After the death of the testator, his executrix being sued by a creditor, entered into an arrangement with him, pursuant to which she gave a consent for judgment at law. The demand, which had been ascertained by the report of the master in an equity suit, was transferred to A., who paid off the creditor; and the executrix, in order to secure the debt, assigned her jointure to A., upon trust to pay himself the interest on the debt, and to pay the premiums on a policy of assurance effected in his name on the life of the executrix; and she covenanted that whichever of her sons (who were entitled to the real estate) should first come of age, should execute a mortgage of the real estate to A. for the amount of his demand. The personal assets of the testator never were sufficient to pay his debts. The policy was suffered to expire, and the mortgage was not executed. Upon a suit instituted by A. to raise the demand out of the real estates of the testator:—Held, that the effect of these transactions was not to discharge the real estate from the payment of A.'s demand, and that, under the circumstances, the consent for judgment and report was not admission of assets by the executrix. *Purcell* v. *Blennerhassett*, 3 Jo. & Lat. 24; 9 Ir. Eq. R. 103.

By letting Judgment go by Default.]—If an executor or an administrator confesses judgment, or suffers it to go by default against him, he thereby admits assets in his hands, and is estopped from saying the contrary in an action on such judgment, suggesting a devastavit. *Skelton* v. *Hawling*, 1 Wils. 258.

Judgment by default against an executor in respect of his testator's debt is an admission of assets, and binds the executor's own real and personal estate as fully as if it was his own debt. *Higgins' Trusts, In re*, 2 Giff. 562; 30 L. J., Ch. 405; 7 Jur. (N.S.) 403; 3 L. T. 803.

Therefore, where an executor allowed judgment to go by default in an action against him as executor:—Held, that the judgment creditor was entitled to priority over a subsequent judgment obtained against the executor for a personal debt of his own. *Ib.*

In an administration action notice of motion was served upon a defendant, an executor, for payment into court of money, part of the testator's estate, which it was shewn by affidavit that he had received. The defendant did not appear on the motion:—Held, that, the defendant not having disputed the affidavit, there was a sufficient admission that the money was in his hands, and that he must be ordered to pay it into court. *Freeman* v. *Cox*, 47 L. J., Ch. 560; 8 Ch. D. 148; 26 W. R. 689.

By Submission to Arbitration.]—A submission to an award by an administrator is not of itself an admission of assets. *Pearson* v. *Henry*, 5 Term Rep. 6; 2 R. R. 523. S. P., *Joseph and Webster, In re*, 1 Russ. & M. 496. *Mocher* v. *Frazer*, Beat. 578. See also *Love* v. *Honeybourne*, 4 D. & R. 814; 27 R. R. 517.

If an arbitrator, under a reference between A. and B., an administrator, awards that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that he had no assets. *Worthington* v. *Barlow*, 7 Term Rep. 453.

Obligor under bond conditioned for performance of award cannot plead plene administravit to an action on the bond, for, by submitting to the award, he has admitted assets. *Barry* v. *Rush*, 1 Term Rep. 691; 1 R. R. 360.

Submitting disputed accounts to arbitration, is of itself an admission by an executor that he has assets, unless he protests against its being so taken at the time. *Riddle* v. *Sutton*, 5 Bing. 200; 2 M. & P. 345; 7 L. J. (O.S.) C. P. 60; 30 R. R. 569. S. P., *Robson* v. ——, 2 Rose, 50. See also *Wansborough* v. *Dyer*, 2 Chit. 40.

Where, upon matters being referred to arbitration by an order of the vice-chancellor, with a clause that, in case of the death of any of the parties, before making the award, the reference was not to abate, but their executors or administrators were to be considered and taken as parties to the order:—Held, that the executors of a party who died during the reference, and who

were ordered by the award to pay a sum of money out of their testator's assets, were liable in assumpsit, although it was objected that the promise alleged to have been made by them was a personal promise, and for which no consideration was stated. *Dowse* v. *Coxe*, 3 Bing. 20; 10 Moore, 272; 3 L. J. (O.S.) C. P. 127; 28 R. R. 565. And see *Biddell* v. *Dowse*, 6 B. & C. 255; 9 D. & R. 404; 28 R. R. 574.

Where a cause was referred, the costs being to abide the event, and the action was brought by an administrator, with counts in the declaration on promises to himself as administrator, and the arbitrator awarded that the plaintiff had no cause of action:—Held, that he was liable to an attachment for not paying the costs, and that the terms of submission could not be varied by affidavits shewing that it was not the intention to make him personally liable. *Spivy* v. *Webster*, 2 D. P. C. 46.

By Paying Probate Duty.]—A probate stamp is primâ facie evidence that an executor has received assets to the amount covered by the stamp. *Foster* v. *Blakelock*, 8 D. & R. 48; 5 B. & C. 328; 4 L. J. (O.S.) K. B. 170; 29 R. R. 258. And see *Curtis* v. *Hunt*, 1 Car. & P. 180.

Upon a plea of plene administravit, a probate stamp is presumptive evidence against an executor that he has assets to the amount which the stamp will cover, until the contrary is shewn. *Ib.*

Semble, per Parke and Littledale, that a probate stamp is not primâ facie evidence that an executor has received assets to the amount covered by the stamp. *Steer* v. *Mills*, 1 N. & M. 434; 4 B. & Ad. 657; 2 L. J., K. B. 106.

Upon an issue of plene administravit vel non, the stamp on the probate of the testator's will is admissible. *Mann* v. *Lang*, 3 A. & E. 699; 5 N. & M. 202; 1 H. & W. 441.

But it is not even primâ facie evidence of assets come to the hands of the executor. *Ib.*

The lapse of a long period of years would not make it such evidence. *Ib.*

Payment of probate duty is presumptive evidence of an admission, but not an absolute admission of assets to the extent covered by the amount of duty paid. *Lazonby* v. *Rawson*, 4 De G. M. & G. 556; 24 L. J., Ch. 482; 1 Jur. (N.S.) 289; 3 Eq. R. 89; 3 W. R. 34.

A testator directed that certain legacies should remain at interest in his business. His executor, who was his brother and partner, credited in his books the legatees, who were the executor's sons, and had access to his books, with the amounts of the legacies, and with interest upon them; but in a deed between the parties the accounts were recited to be settled. He returned to the stamp office the estimated value of the estate at an amount more than sufficient for payment of the legacies, and paid duty upon them, and upon a residue beyond:—Held, that those acts did not amount to a conclusive admission of assets. *Hutton* v. *Rossiter*, 7 De G. M. & G. 9; 24 L. J., Ch. 106; 3 W. R. 97.

—— **To what Extent.**]—In an answer to a plea of plene administravit, proof that the deceased's property was sworn under a certain sum, viz. between 2,000*l.* and 5,000*l.*, is primâ facie evidence of assets to the amount of the lesser sum. *Curtis* v. *Hunt*, 1 Car. & P. 180.

On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator which are either desperate or doubtful, and the executor has a right to exercise his judgment fairly and bonâ fide, whether a debt is doubtful or bad. *Moses* v. *Crafter*, 4 Car. & P. 524.

A testator gave his leasehold estate, held for lives, to his son and his heirs, subject to an annuity of 100*l.* for his daughter for life, and charged with the payment after her death of 2,000*l.* to her children, and appointed his son executor. The testator died in 1807, and his son proved his will, and his personal estate, exclusive of the leaseholds, was sworn under 2,000*l.* In 1821 the son signed a document from the legacy duty office, professing to have retained the sum of 2,000*l.*, in respect of the legacy charged on the leaseholds, and on that document there was a formal receipt by the proper officer "for 20*l.* for duty on account of the personal estate within mentioned." The lives in the lease having expired, and the lessors having declined to renew, on a bill filed by a child of the testator's daughter, against the representatives of the son to have the 2,000*l.* secured:—Held, first, that the entire leasehold interest was chargeable with its payment at the testator's death; and, secondly, that the conduct of the son with respect to the payment of the legacy duty, fourteen years after the death of the testator, amounted to a sufficient admission of assets to answer the legacy of 2,000*l.* *Lazonby* v. *Rawson*, 4 De G. M. & G. 556; 24 L. J., Ch. 482; 1 Jur. (N.S.) 289; 3 Eq. R. 89; 3 W. R. 34.

Payment of probate duty is presumptive evidence of an admission, but not an absolute admission, of assets to the extent covered by the amount of duty paid. *Ib.*

By Acknowledgment.] — C. bequeathed a legacy of 150*l.* to S. H., and died in 1811. S. H. attained her majority, and married G. H. In 1825, the executors wrote and signed, as executors, an acknowledgment as follows: "We separately and jointly acknowledge we owe to G. H. 150*l.*, being a legacy left to his wife by C., and 50*l.* interest thereon":—Held, that this memorandum was an admission of assets by both the executors. *Holland* v. *Clark*, 2 Y. & C. C. C. 319; 7 Jur. 213.

Quære, whether an acknowledgment in writing by the executors that they owed the plaintiff 200*l.* for a legacy, and the interest thereon, is an admission of assets; it was held, that unless it did, it created no personal demand enforceable in equity against the executors, and that whether it did or no, it gave no right of action against them at law. *S. C.*, 1 Y. & C. C. C. 151.

A memorandum by the executor, stating the amount of a certain proportion of the residue, which was divisible among the plaintiffs, who were infants at the date of the memorandum:—Held, to be an admission of assets, entitling the plaintiffs to interest on their shares, under the circumstances, beyond the time allowed by 3 & 4 Will. 4, c. 27, s. 40. *Dinsdale* v. *Dudding*, 1 Y. & C. C. C. 265.

An executor believing that there would be assets sufficient to pay a legacy, became trustee in, and executed the marriage settlement of the legatee, in which it was recited that she was entitled to the legacy, and it was agreed that it should be assigned upon certain trusts. A suit was afterwards instituted for a breach of trust by the testator, which was still pending, and, if established, would exhaust the assets:—Held, that there was an admission of assets primâ

facie binding on the executor, and he was ordered to lodge in court the amount of the legacy, without prejudice to the executor (who was the respondent), in the event of there being a decree against him in the suit for a breach of trust by his testator, taking such proceedings as he might be advised, to be relieved against the admission of assets. *Chaigneau* v. *Bryan*, 8 Ir. Ch. R. 251.

By Residuary Account.]—Admission of assets is merely a question of evidence, and an executor may bring evidence to shew that his admission was the result of a mistake in the account. But where an executor had passed his residuary account, stating that a legacy was "retained in trust" out of the residue:—Held, that he was not entitled to shew that he had since discovered that the account had proceeded on a mistake, and that there were not in fact assets for the legacy. *Brewster* v. *Prior*, 55 L. T. 771; 35 W. R. 251.

Although a residuary account signed by an executor is primâ facie evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, and the acknowledgment is not conclusive against him in favour of a debtor to the estate. *Miller* v. *Douglas*, 56 L. J., Ch. 91; 55 L. T. 583; 35 W. R. 122.

A testator gave pecuniary legacies to his widow and other persons, and to his younger children as they came of age or married, and gave and devised to his eldest son certain real estates, purporting to include in such gift and devise a colliery which was, in fact, in settlement, and the plant of the colliery, and charging them with the sum of 50,000*l.* to form part of his personal estate. Under the settlement the colliery, with other real estates, was subject to a charge of 20,000*l.* for portions of the younger children. The personal estate of the testator being insufficient to meet his liabilities and the legacies, an arrangement was made between the eldest son and the executors, and such of the parties interested as were then entitled to their legacies, whereby it was agreed that the eldest son electing to take under the will should take possession of the colliery and plant, and should provide the balance of the money necessary to pay off the legacies then payable, as well as those which should from time to time become due. Upon this basis certain of the legacies were paid in full, and the executors, having paid full duty upon all the legacies, passed their residuary account shewing all the legacies as paid in full. The eldest son subsequently failed to provide sufficient funds to meet all the legacies, and there were in fact insufficient assets to meet the whole of the testator's liabilities. One of the younger children, when he became entitled, claimed payment in full of his legacy from the executors, upon the ground of their having admitted a sufficiency of assets:—Held, that the executors could not be held bound by the admission of assets in their accounts, and that the legatee could not establish a personal claim against them. *Morewood* v. *Currey*, 28 W. R. 213.

By filing Inventory.]—An inventory exhibited in the Ecclesiastical Court by an executor, for the purpose of obtaining probate, is not generally primâ facie evidence of his having received assets. It has never any conclusive effect. *Steer* v. *Mills*, 4 B. & Ad. 657; 1 N. & M. 436; 2 L. J., K. B. 106.

By exhibiting an inventory an administrator admits assets; and therefore where a plaintiff gave in evidence the inventory exhibited by an administrator in the spiritual court, charging himself with effects to a certain amount, it was received as evidence of assets to the amount therein stated. *Hickey* v. *Hayter*, 1 Esp. 313; 6 Term Rep. 384; 3 R. R. 213.

After putting in an inventory, it is for the administrator to discharge himself of the items which it contains. *Giles* v. *Dyson*, 1 Stark. 32; 18 R. R. 743.

In an action against an administrator, who pleads plene administravit præter 367*l.*, and gives in evidence an inventory in the Ecclesiastical Court, in which he stated that 232*l.*, part of the whole sum, was the amount of certain debts due to the deceased, supposed to be recoverable:—Held, that such debts might be considered as separate debts, and as such counted as assets in the administrator's hands. *Young* v. *Corderoy*, 3 Moore, 66. *S. C.*, 8 Taunt. 734; 21 R. R. 523.

By paying Interest.]—Payment of interest for a legacy by an executor from time to time, shall be evidence of assets; not so of a single instance of payment of interest. *Clergymen's Sons* v. *Swainson*, 1 Ves. Sen. 75.

Payment by an executor of interest on a legacy is primâ facie an admission of assets. *Parry* v. *Huddleton*, 18 Jur. 992.

So, payment of interest by an executor, commencing six years after the testator's death, and continuing seven years, is such an admission of assets as to make the executor personally liable. *Att.-Gen.* v. *Chapman*, 3 Beav. 255; 10 L. J., Ch. 90.

Executors having for about three years paid interest on the plaintiff's legacies, the court, at the first hearing, directed accounts, with the view of determining, from the state of the assets, the liability of the executors to pay the legacies. The court, on further directions, refused to hold that by payment of interest the executors had admitted assets, such a conclusion being wholly at variance with all that had been previously done in the suit, and declined to charge them. *Rowley* v. *Adams*, 7 Beav. 395; 8 Jur. 994.

Evidence of admission of assets by payment of interest on a legacy. *Att.-Gen.* v. *Higham*, 2 Y. & C. C. C. 634.

Leasehold property was charged with two demonstrative legacies, being a fixed sum, to the executrix, and another fixed sum, the estimated remainder of its value, to a legatee, who had also the option of purchasing at the estimated value. The property was held of an ecclesiastical corporation for forty years, renewable every fourteenth year, and the executrix twice renewed the term out of her own money, but at the end of thirty years, she declined to renew a third time. The executrix, on passing the residuary account, had valued the leasehold property at the price fixed by her testatrix; upon this statement, a very small general residue appeared. The legatee, who was also tenant of the property, did not exercise the option of purchasing, but he retained the interest on his legacy, and paid the balance of rent, which did not keep down the interest on her legacy to the executrix. On a suit by the legatee:—Held, that there was an admission that the particular property, not the general assets, was sufficient for payment of the

legacy, and that the executrix was not personally liable; but that, by the course of her conduct for thirty years, she had lost her priority. *Severs* v. *Severs*, 1 Sm. & G. 400; 17 Jur. 706; 1 W. R. 320.

A. and B. were partners. A. by his will gave C. and D. 5,000*l.* each, and sums to others, who, as well as D., were infants, and directed that the same should remain in the business, and interest be paid thereon. A. by his will appointed B., and three others, his executors, and died. B. continued the business, and transferred into his books the amount at which he estimated the estate to an account called "The account of the executors of A."; and in the same books opened accounts with C. and with D., in which he credited them respectively with their legacies and interest thereon from time to time. B. paid the legacy duty on C.'s and D.'s legacies, and paid legacy duty on the estimated value of A.'s residuary estate. B. died, and a suit was instituted to administer his estate, and C. and D. claimed to be creditors thereon in respect of their legacies, and one of the vice-chancellors decided in their favour:—Held, upon appeal, that the transactions of B. were not an admission of assets of A., and that as the suit was for the administration of the executor's, and not of the testator's estate, all that the court would do, was to direct the reservation of such dividends as are reserved in cases of claims, leaving C. and D. to take any steps in respect of the administration of the estate of A., and in respect of the dealings of B. therewith. *Hutton* v. *Rossiter*, 7 De G. M. & G. 9; 24 L. J., Ch. 106; 3 W. R. 97.

—— **Payment of Interest to Tenant for Life.**]—Payment by the executor of the interest of a legacy to the tenant for life under the will is not conclusive as an admission of assets by the executor, but such payment may be explained as having been made by mistake or for other reasons, and in that case the usual account of assets may be directed at the suit of parties interested in the estate. *Postlethwaite* v. *Mounsey*, 6 Hare, 33, n.

In January, 1863, P., the executor, wrote to the tenant for life under a will as follows: "In answer to your letter in reference to the trust moneys in which you have a life interest and the family of the late Mr. Payne the ultimate benefit, I beg to say that the money is placed out on different mortgage securities with moneys of my own, realising as much interest as possible. Had it not been for your sake the money should have been placed in the government stocks years ago." From 1854 down to the time of his death in 1874 P. regularly paid to the tenant for life 28*l.* a year by equal quarterly payments of 7*l.* each. In the year 1868 P. passed his residuary account, shewing no assets:—Held, that the letter of January, 1863, and the quarterly payments regularly made by P. both before and after writing that letter, were, under the circumstances, such an admission of assets as to make his estate personally liable. *Payne* v. *Tanner*, 55 L. J., Ch. 611; 55 L. T. 258; 34 W. R. 714.

By Payment of Legacy.]—Admission of assets to one legatee is such to all. *Cook* v. *Martyn*, 2 Atk. 3.

Executor not having exhibited an inventory, and having paid all legacies but one, is a sufficient foundation to charge him with assets as to that legacy, though not positively conclusive: an inventory solemnly exhibited not conclusive on executor, if there has been a variation of circumstances. *Orr* v. *Kaines*, 2 Ves. Sen. 194.

The court will not view the principle of payment of one legacy being an admission of assets for every other legatee as a hard and fast rule, but will, according to the tendency of modern decisions, examine the facts of the case fairly and justly, so as not to subject executors to liabilities which they have never contemplated. *Morewood* v. *Currey*, 28 W. R. 213.

Part payment of a legacy on account not an admission of assets to pay in full. *Smith* v. *Stothard*, 1 Jur. 540.

Payment of a legacy on an erroneous construction of the will, not malâ fide, not an admission of assets on the true construction. *Clark* v. *Bates*, 2 De G. & Sm. 203; 12 Jur. 597.

Annuities given by a will were regularly paid by the executors for six years, and irregular payments, on account, were made by them for the next four years. Semble, that this of itself would be an admission of assets. *Payne* v. *Little*, 22 Beav. 69.

The admission of an executor by his answer in a creditors' suit, that he had paid certain legacies bequeathed by the testator, is not an admission of assets entitling the plaintiff to a decree against the executor for payment of his debt without taking the account, when the bill does not specifically charge the defendant with having made himself personally liable, but prays that an account may be taken and the estate administered in a due course of administration. Whether such admission of the payment of legacies by the executor is a conclusive admission of assets in any case, quære. *Savage* v. *Lane*, 6 Hare, 32; 17 L. J., Ch. 89; 11 Jur. 1053.

Where an executor made payments from time to time on account of a legacy and interest, but did not pass the account at the legacy office until nine years after the death, when there appeared a considerable surplus:—Held, to amount to such an admission of assets as to enable the legatee to obtain a decree for immediate payment, without previously taking an account of the testator's estate. *Whittle* v. *Henning*, 2 Beav. 396.

Held, that an entry by the executors in partnership books of the amount of a legacy to the credit of the legatees, was a sufficient admission of assets. *Townend* v. *Townend*, 1 Giff. 201; 5 Jur. (N.S.) 506; 7 W. R. 529.

—— **Payment of Legacy by Executor out of his own Money.**]—The payment of one legacy by executors, not as such, but out of their own moneys, is not an admission of assets for the payment of others. *Cadbury* v. *Smith*, L. R. 9 Eq. 37; 24 L. T. 52; 18 W. R. 105.

Where one of two executors, who were also residuary legatees, died, a payment by his representatives to the survivor out of the deceased executor's estate, in satisfaction of the surviving executor's claim as such residuary legatee:—Held, not to be an admission of assets for the payment of the other legacies under the will. *Ib.*

W. gave his real and personal estate to trustees to convert the same and pay the income to A. for her life, and after her decease to pay the capital as she should appoint. She by her will, in exercise of her power, appointed the property to her executors (who were also the trustees of the will of W. and her own residuary

legatees), upon trust to pay certain charitable legacies, including 1,000*l.* to a hospital. This legacy was not paid, and thirty years after the decease of A. a bill was filed against the surviving executor and the representatives of one who had died, for its payment:—Held, that, as in the judgment of the court there had been no admission of assets for the payment of the legacy, and no trust had been created, and no sum set apart for the payment of the legacy, the claim was barred by the Statute of Limitations. *Ib.*

By Payment to Executorship Account at Bank.]—The circumstance that moneys were paid in by an executor to his bankers, and placed to the executorship account, is primâ facie evidence that those moneys were in the executor's own hands as assets of the estate. *Crossdail* v. *Phillips*, 5 L. J. (o.s.) Ch. 52.

By Will.]—A., by will, gave money upon mortgage to a charity in Ireland, the wife, by her will, affirming that bequest:—Held to be an admission of assets of the testator, and therefore good though out of land. *Campbell* v. *Radnor* (*Earl*), 1 Bro. C. C. 271.

By filing Bill.]—An executor filing a bill against agents of his testator is liable for the balance and costs only to the amount of assets, the institution of the suit not being an admission of assets. *Mocher* v. *Frazer*, Beat. 578.

Of a Receiver.]—In 1812 the executors of a receiver applied to pass his accounts, and pay in the balance; this was ordered, but payment was not made. In 1841 they were ordered to pay in the balance without interest, and it was held that they could not object the want of assets. *Gurden* v. *Badcock*, 6 Beav. 157; 12 L. J., Ch. 62.

Admission of assets to answer rents by the executor of a receiver, makes him liable to interest if made. *Foster* v. *Foster*, 2 Bro. C. C. 616.

By one Executor.]—Several executors, and some admit assets, yet an account decreed against the rest. *Norton* v. *Turvill*, 2 P. W. 145.

By Married Executrix.]—Executrix marries, and her husband and she admit assets in answer to a bill filed against them. The assets become a debt of the husband in respect of this admission, and may be proved under a commission of bankruptcy issued against him. *M'Williams, In re*, 1 Sch. & Lef. 173.

Whether binding on Heir.]—Where money is sought to be followed into land, the admission by the personal representative of party laying it out will not bind the heir, but it will be ground of inquiry. *Lane* v. *Dighton*, Ambl. 413.

Waiver.]—An admission of assets, by the executor's answer, is waived by the plaintiff's going on to an account of assets, and procuring a receiver to be appointed. *Wall* v. *Bushby*, 1 Bro. C. C. 484.

Retractation.]—Though the court is not strict in holding executors who have acted fairly to an admission of assets, yet in this case circumstances tending to shew that the defendant had admitted assets several years before, and he having obtained a release which the court held to be fraudulent, a personal decree was made against him for the legacy and interest with costs. *Horsley* v. *Chaloner*, 2 Ves. Sen. 83.

Admission of assets not to be retracted, except on clear mistake. *Drewry* v. *Thacker*, 3 Swan. 548; 19 R. R. 274.

Where in an examination put in by two co-executors it was stated that their receipts had been joint, but it appeared, by affidavit, that that statement was made through mistake and inadvertence, and that one of the executors had, in fact, received nothing, liberty was given to him to put in a supplemental examination to correct the mistake. *Hewes* v. *Hewes*, 4 Sim. 1.

A court of equity does not bind executors by an admission of assets, if new claims on the estate afterwards arise. *Payne* v. *Little*, 22 Beav. 69.

Decree on Admissions.]—An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suit, and extends to costs, if the court thinks fit to give them. *Philanthropic Society* v. *Hobson*, 2 Myl. & K. 357; 3 L. J., Ch. 97.

—— **Of Stock in names of Executors.**]—Admission that there is standing in the names of the executors upon the trusts of the will, a considerable sum in the 3 per cents., and offering an appropriation, was held sufficient to entitle the plaintiff, a contingent legatee, to move for that purpose, and by consent the order was made as upon admission of assets sufficient to satisfy the plaintiff's demand, to transfer, &c. *Pullen* v. *Smith*, 5 Ves. 21.

Admission of assets prevents the necessity of setting forth the accounts. *Ib.*

—— **For Payment of Legacies.**]—A decree for payment of legacies was made against an executor, without reference to the state of the assets, upon the ground of his having, by his acts and admissions, rendered himself personally liable for the payment. *Barnard* v. *Pumfrett*, 5 Myl. & C. 63.

An executor denied assets, but his answer disclosed a personal liability for payment of the plaintiff's legacies. The court made an order for immediate payment, without directing the accounts to be taken. *Rogers* v. *Soutten*, 2 Keen, 598; C. P. Cooper, 96; 7 L. J., Ch. 118.

Decree in a legatee's suit, on admission of assets, without taking the accounts. *Gordon* v. *Scott*, 3 Hare, 459, n. *See also* 8 Jur. 894, and *Say* v. *Creed*, 3 Hare, 459.

An executor, in a suit for the arrears of an annuity under a will, disputing the title of the plaintiff to the annuity as a question of law, but admitting assets sufficient to pay funeral and testamentary expenses and legacies, may be decreed to pay the costs of the suit in addition to the arrears, and is not entitled to a decree for an account of the assets prior to any decree being made for costs. *Roch* v. *Callen*, 6 Hare, 531; 17 L. J., Ch. 144; 12 Jur. 112.

—— **For Payment of Residue.**]—If the executors and trustees of a will file a bill for the purpose of having the rights of the defendants in the residue ascertained, without either praying that the accounts of the personal estate

may be taken, or offering to account for it, but admitting that there is a residue, the court will declare the rights of the defendants in the residue, without directing the accounts of the personal estate to be taken, although the defendants apply at the hearing to have the accounts taken. *Blathwayt* v. *Taylor*, 11 Sim. 455.

Circumstances under which a decree may be made against executors, for payment of the ascertained residue, without directing an account. *Lincoln* v. *Wright*, 4 Beav. 427; 10 L. J., Ch. 331

—— **For Payment of Debt.**]—In a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate* v. *Field*, 2 Hare, 211; 11 L. J., Ch. 321; 6 Jur. 871.

—— **For Payment of Dividends—Fund in Court.**]—Order for payment of the dividends of a fund in court to the executors, for distribution amongst the parties interested before the accounts of the estate were taken, the executors admitting assets of the testator for all purposes. *Shewell* v. *Shewell*, 2 Hare, 154; 12 L. J., Ch. 250.

—— **New Decree taken for Account—Account shewing Deficiency—Liability of Executor.**]—Under an order of reference to take an account of assets, the master having reported that there were assets sufficient to satisfy the plaintiff's legacy, although assets to an amount sufficient to satisfy the trusts of the will were not shewn by the accounts, the master grounding his general finding upon the evidence of the defendant's admission of assets, by his answer, upon which a personal decree against him had been made, but which the plaintiff had been advised to abandon and take a new decree for an account of assets under the circumstances, with the view to the more effectual relief:—Held, that the report was right, this being an inference directly arising from, although not strictly within the terms of the reference, and the master not being so purely ministerial as to be precluded from drawing such inferences, but on the contrary bound to do so. Even if matter so reported beyond the terms of the order was surplusage, that is not a ground of exception, it not being the course to send back the report to the master to expunge a few unnecessary words. In the present case the executor having, by admitting assets, prevented the account being taken at the proper time, was ordered to pay the costs of the suit, being precluded thereafter from alleging or relying on a deficiency to the prejudice of the plaintiff; Lord Chancellor observing that the proper course would have been to let the personal decree stand, and come for ancillary order to discover and attach such of the assets as remained in specie, if the personal decree could not be made available. *M'Carthy* v. *M'Carthy*, 1 Moll. 186.

—— **Against Executor of Executor.**]—By admitting assets, the executor of an executor renders himself liable to the same decree as the executor himself, if living, would have been liable to in respect of the personal estate of the original testator. *Davenport* v. *Stafford*, 2 De G. M. & G. 901.

—— **Jurisdiction in Bankruptcy.**]—The court sitting in bankruptcy, has no jurisdiction to order the personal representative of a deceased assignee to account for the personal estate of the bankrupt in his hands. *Crowe, Ex parte*, Mont. & McAr. 281.

The Lord Chancellor thought that an admission of assets on the part of the representative would make no difference. *Ib.*

Other Matters.]—A. S., the sole executrix and tenant for life, died, having 12,500*l.* of the assets in her hands. Her executors admitted assets:—Held, that in the absence of any further proof, they were not liable for interest. *Davenport* v. *Stafford*, 14 Beav. 319.

Executors, having admitted assets in an administration suit by legatees whose legacies are charged on real estate, are not bound to set forth a list of documents relating to the real estate of the testator. *Forbes* v. *Tanner*, 9 Jur. (N.S.) 455; 11 W. R. 414.

In a creditors' suit for the administration of the assets of an intestate, who had joined in a bond as a surety, the bond creditor, being aware of the suit, omitted to prove till the time limited by the advertisements for creditors to come in had expired; a decree on further directions had been made; the administratrix had admitted assets, and the principal debtor in the bond had become bankrupt:—Held, that he might still be let in upon terms, the fund remaining undistributed. *Brown* v. *Lake*, 1 De G. & Sm. 144.

An admission of assets by the administratrix, embodied in an order made on a petition in the cause, qualified by a declaration in a subsequent order. *Ib.*

An executor, dealing with money in his hands, is bound to ear-mark it, but if he cannot answer as to the state of it, the court has no power to act as upon an admission. *Freeman* v. *Fairlie*, 3 Mer. 40; 17 R. R. 7.

e. Plea of Plene Administravit.

Proof on Plea of Plene Administravit.]—In an action against an executor, the only plea being plene administravit, the plaintiff must begin, and give some evidence of assets, and cannot in reply call general evidence in proof of assets. *Webster* v. *Blackman*, 2 F. & F. 490.

It is a question for the jury, whether an executor has committed a devastavit by swearing the property above its value, and so incurring a greater stamp duty than he would otherwise have to pay, seeing that an executor is bound to act promptly, and therefore is not to be held to too close a search for the testator's property. *Jackson* v. *Bowley*, Car. & M. 97.

In an action against an executor on plene administravit, the plaintiff is bound to shew affirmatively that the executor had goods of the testator in his hands unadministered; and though the plaintiff is entitled to a verdict, if he can prove any property unadministered, yet the measure of the damages is not the amount of his debt, but so much as he can shew to remain in the hands of the executor. *Ib.*

On a plea of plene administravit, it was proved on the part of the plaintiff, that at the time of the death of the intestate there were crops on his farm; but that there had been an auction on the premises about a month before, at which these crops were put up for

sale :—Held, that as the crops remained on the premises at the time of the death of the intestate, it lay on the administrator to shew that these crops had not come to his hands. *Stroud* v. *Dandridge*, 1 Car. & K. 445.

On a plea of plene administravit, it appeared that the intestate, six months before his death, had assigned all his effects to trustees by deed, for the benefit of such of his creditors as should execute the deed of assignment. The deed was executed by himself and the trustees, but not by any other creditor :—Held, that the administrator might give in evidence advertisements published soon after the execution of the deed, stating where it lay for execution by the creditors, and calling a meeting of creditors as to the sale of the effects, and also a resolution of that meeting that the effects should be sold, as this evidence went to shew that the deed was acted upon, and was a bonâ fide and not a fraudulent deed. *Ib.*

On a plea of plene administravit, proof of an admission by the executor that the debt was just, and should be paid as soon as he could, is not evidence to charge him with assets. *Hindsley* v. *Russell*, 12 East, 232 ; 11 R. R. 373.

The question of assets or no assets in the hands of an executor is settled by the judgment given on a plea of plene administravit ; and no evidence can be given of assets after the writ sued out. *Mara* v. *Quin*, 6 Term Rep. 1.

In an action against an executor, issue was taken upon a plea of no assets and plene administravit, and replication of assets in hand. The evidence was, that the testator, twelve months before his death, purchased twelve chairs, which were seen in his house shortly before his death :—Held, in the absence of any proof that the goods were lost, primâ facie evidence of assets. *Britton* v. *Jones*, 3 Bing. (N.C.) 676 ; 4 Scott, 393 ; 3 Hodges, 32.

—— **As to Part only.**]—In an action against several executors, who severed in their pleadings, one pleaded plene administravit, except as to 865*l.*, for which judgment was accordingly signed, and upon which an action, suggesting a devastavit, was afterwards brought against him : —Held, that the production of the judgment, and of a fi. fa. thereon, under which goods of the testator of the value of 482*l.* only were seized, was sufficient evidence of a devastavit as to the residue. *Cooper* v. *Taylor*, 6 Man. & G. 989 ; 7 Scott (N.R.) 950 ; 13 L. J., C. P. 92 ; 8 Jur. 450.

—— **Action brought Fifteen Years after Testator's Death.**]—An executor, after payment of all the debts of which he had notice, invested certain parts of the residue of the testator's personal estate remaining in his hands, in the funds, in his own name, received the dividends and paid them over to the legatees in satisfaction of their legacies given by the will :—Held, that the executor could not sustain a plea of plene administravit to an action brought against him, fifteen years after the testator's death, for a specialty debt of the testator, of which he had no notice. *Smith* v. *Day*, 2 M. & W. 684 ; M. & H. 185 ; 6 L. J., Ex. 219.

—— **Payment of Interest on Bond.**]—If payment, by an executor, of interest on a bond due from his testator is not conclusive evidence of assets, "it eases the creditor from proving assets, and throws the onus on the other side." *Cleverley* v. *Brett*, 5 Term Rep. 8, n. ; 2 R. R. 525, n.

How Defence of Plene Administravit can be rebutted.]—Where an executor pleads plene administravit, and shews payments by him to the extent of the assets proved by the plaintiff to have come to his hands, the plaintiff may shew in answer that the funds so applied did not come to the defendant as executor, but were handed to him in trust to pay the testator's debts, and were not part of the assets at first proved to have come to his hands. *Marston* v. *Downes*, 1 A. & E. 31 ; 3 N. & M. 861 ; 6 Car. & P. 381 ; 3 L. J., K. B. 158.

When some Executors have Assets and some have not.]—On a plea by several executors that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict. *Parsons* v. *Hancock*, M. & M. 330 ; 31 R. R. 733.

Effect of Plea.]—Plene administravit and no assets at the time of the exhibiting of the bill, pleaded after the 2 Will. 4, c. 39, was held after verdict to refer to the commencement of the suit, and not to the filing of the declaration. *Rees* v. *Morgan*, 3 N. & M. 205 ; 5 B. & Ad. 1035 ; 3 L. J., K. B. 102.

If an executor pleads plene administravit, he is only liable to the amount of assets in his hands. *Harrison* v. *Beccles*, 3 Term Rep. 688, n. ; 1 R. R. 797.

If an executor or an administrator pleads plene administravit præter a certain sum, and afterwards to another action brought in the same term pleads also plene administravit præter the same sum, and as to that sum that he had confessed in the other action, such plea is a good bar. *Waters* v. *Ogden*, 2 Dougl. 452.

Where an executor pleads the general issue and plene administravit, and the former plea is found against him, and the latter for him, he is entitled to the postea. *Cockson* v. *Drinkwater*, 3 Dougl. 239.

Plea amounting to Plene Administravit.]—An executrix pleaded that she had not, nor at the commencement of the action nor since, had any goods, which were of the testator at the time of his decease, in her hands to be administered ; and the plaintiff replied that the defendant before and at the time of the commencement of the action had divers goods of the testator to be administered ; upon which issue was joined. At the trial, the plaintiff having shewn that the defendant received certain assets, the defendant proved payment to a greater amount, and a verdict was found in her favour :—Held, first, that the evidence of payment was properly received ; and, secondly, that the plaintiff was not entitled to judgment non obstante veredicto, upon the ground that the introductory part of the plea did not state that the executrix had fully administered the testator's goods. *Reeves* v. *Ward*, 2 Scott, 390 ; 2 Bing. (N.C.) 235 ; 1 Hodges, 300 ; 5 L. J., C. P. 67.

Evidence.]—Declaration on a judgment recovered in a court baron of a manor, for debt and damages, to be levied of the goods and chattels of G., deceased, in the hands of the defendant as administrator. Averment, that a

writ of levari facias issued, to which there was a return of nulla bona. Suggestion of devastavit. Plea, first, that the plaintiff did not recover against the defendant; secondly, inducement of plene administravit, and traverse of the devastavit. Verdict for the plaintiff, and final judgment entered for debt and costs:—Held, that evidence of the goods of the deceased having been duly administered was inadmissible. *Dawson* v. *Gregory*, 7 Q. B., 756; 14 L. J., Q. B. 286; 9 Jur. 688.

On a special plea of plene administravit, if assets are proved in the hands of the executor, he may give evidence of the payment of other debts with those assets, previously to the action brought. *Smedley* v. *Hill*, 2 W. Bl. 1105.

Interrogatories.]—In an action against a surviving trustee and the executors of a deceased trustee for alleged breaches of trust, the executors pleaded plene administravit, and the plaintiffs having thereupon administered interrogatories, seeking for particulars of their testator's real and personal estate, and their administration of it, the executors' answer was merely a repetition of their defence:—Held, insufficient, and that the plaintiffs were entitled to a further and more specific answer. *St. George* v. *St. George*, 19 L. R., Ir. 225.

By Executor de son tort.]—Plene administravit by an executor de son tort is no defence, either legal or equitable, in bar of an action of trover, trespass, or for money received, at the suit of the personal representatives of the deceased. *Elworthy* v. *Sanford*, 3 H. & C. 330; 34 L. J., Ex. 42; 10 L. T. 654; 12 W. R. 1008.

f. OTHER PLEAS.

Plea of Ne unques executor.]—An executor may plead ne unques executor and plene administravit. *Tyson* v. *Kendall*, 19 L. J., Q. B. 434; 14 Jur. 1044.

Action against an administratrix with the will annexed, upon promises by the testator. A plea that she is not, nor ever has been, administratrix, is to be taken as merely denying that she ever was administratrix, or liable as such. *Scott* v. *Wedlake*, 7 Q. B. 766; 14 L. J., Q. B. 359; 9 Jur. 1114—Ex. Ch.

A plea by one of two, charged as executors, that the other is not an executor, is bad. *Atkins* v. *Humphrey*, 3 D. & L. 612; 2 C. B. 654; 15 L. J., C. P. 120.

Under a plea of not guilty, an executor cannot be called upon to shew that the testator is dead, unless there is a plea of ne unques executor. *Loyd* v. *Finlayson*, 2 Esp. 564.

In an action against several, as executors, who have pleaded ne unques executors, the plaintiff may have a verdict against the real executor, on counts laying promises by the testator, and the others must be discharged. *Griffiths* v. *Franklin*, M. & M. 146.

An administrator, who has been compelled to pay an annuity for which his intestate was liable, may recover on a plea of ne unques administrator against a party who has covenanted to indemnify the intestate against such payment, though such claim of indemnity has not been taken into account in the amount of the stamp on the letters of administration. *Carr* v. *Roberts*, 1 M. & Rob. 45.

A plaintiff sued as executor, and in his declaration made profert of the letters testamentary, which stated, "whereby it appears to the court that the plaintiff is executor." The defendant did not crave oyer, but pleaded that the plaintiff never was, nor is, executor in manner and form, as alleged. The plaintiff replied that he was and continued to be executor, in manner and form, &c.:—Held, that the plaintiff might recover on this issue, although he had not taken probate till some months after the declaration. *Thompson* v. *Reynolds*, 3 Car. & P. 123.

—— **In Equity.**]—Where a plaintiff sues an executor, but the probate is insufficiently stamped, the defendant, if he pleads to the bill, ought not to state matters affirmatively, in order to shew the insufficiency of the stamp, but ought to plead simply that the plaintiff is not executor. *Roberts* v. *Madocks*, 16 Sim. 55; 17 L. J., Ch. 38; 11 Jur. 638.

Plaintiff sued as administrator, defendant pleaded that plaintiff was not administrator, but did not deny by answer the usual charge as to documents:—Held, that the plea was not bad on that account. *Fry* v. *Richardson*, 10 Sim. 475; 9 L. J., Ch. 171. S. P., *Hill* v. *Neale*, 5 L. J. (o.s.) Ch. 144.

To a bill by a legatee for general administration against the defendant who, it was stated, had proved the will, and had possessed himself of the assets and made various payments, it was pleaded in bar to the whole bill that he had not proved the will, and was not the legal personal representative of the deceased:—Held, that the plea was a good one, and must be allowed, and without liberty to amend. *Cary* v. *Hills*, 42 L. J., Ch. 100; L. R. 15 Eq. 79; 28 L. T. 6; 21 W. R. 166.

An executor who has not proved his testator's will may be made a party to a suit in equity, provided he has acted as executor, and it is not necessary in order to maintain the bill against him, to prove that he has actually received money in the character of an executor. *Vickers* v. *Bell*, 4 De G. J. & S. 274.

Circumstances under which a person named as an executor in a will was held to have so acted as to render himself liable to account as executor, and pay costs as having joined in a vexatious defence. *Ib.*

An executor who has not proved his testator's will, but has received assets, may be made a defendant to an action by a creditor to the extent of the assets he has received. *Ambler* v. *Lindsay*, 45 L. J., Ch. 768; 3 Ch. D. 198; 35 L. T. 93; 24 W. R. 982.

A plea of non administravit is not a sufficient answer to bill, charging that the defendant, as executor, has possessed himself of a part of the estate. *Hinde* v. *Skelton*, 2 Hem. & M. 690; 6 N. R. 22; 34 L. J., Ch. 378; 13 W. R. 675.

To a bill charging that the defendant had been appointed executor, had duly proved the will, was the sole legal personal representative of A. (the testator), and as such executor had possessed himself of real and personal estate of A., more than sufficient to answer the claim of the plaintiff against A.'s estate, the defendant put in a plea denying that he had proved the will or had ever administered the goods of A., as such executor as in the bill in that behalf mentioned:—Held, that the allegation of possession of the assets of A. was not covered by the averment in the plea, that the defendant had never, as such executor, administered, and plea overruled as insufficient. *Ib.*

A bill for the administration of an estate alleged that a defendant was the executor of the will, that he had proved the will and received assets; the defendant pleaded that he was not executor, without answering the other allegations: plea overruled, with costs. *Jones* v. *Williams*, 10 Jur. (N.S.) 1068; 11 L. T. 264; 13 W. R. 1.

The will in this case had been proved by the defendants after bill filed, and the date of the probate was introduced by amendment. Plea to the original and amended bill was filed, that, at the time the original bill was filed, the defendants had not proved the will or possessed themselves of property, overruled. *Haynes* v. *Barton*, 13 Jur. 480.

The administration of devised realty does not generally depend upon probate of the will; and therefore a plea by a devisee of real estate, who was also an executor of the will, that he had not proved, and could not prove, the will, was ordered to stand for an answer. *Tempest* v. *Camoys (Lord)*, 35 Beav. 201; 14 L. T. 8; 14 W. R. 326.

Plea of Judgment recovered.]—If to an action brought by a creditor of a testator, the executrix pleads judgments recovered, and no assets beyond; to which the plaintiff replies per fraudem generally; it is not conclusive evidence of fraud, that the judgments as pleaded were confessed for more than the just debts; but the executrix may shew that they were entered up by mistake for more than was due, and that that was made known to the plaintiff before the action was brought. *Pease* v. *Naylor*, 5 Term Rep. 80.

Where a plaintiff recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in scire facias, upon which judgment he sued the executors, suggesting a devastavit:—Held, that the executors being fixed conclusively with assets by such latter judgment, the issue, upon non detinet, lay upon them to prove the due administration of such assets, otherwise the plaintiff was entitled to recover. *Hope* v. *Bague*, 2 East, 2.

A judgment confessed by an executrix to a creditor of the testator, as well for his own debt as in trust for the debts of many of the creditors, cannot be pleaded in bar to an action brought against her by another creditor of the testator. *Tolput* v. *Wells*, 1 M. & S. 395; 14 R. R. 466.

A plea of judgment recovered on a simple contract, pleaded by an administrator to an action on a bond, must aver that such recovery was had before notice of the bond debt. *Sawyer* v. *Mercer*, 1 Term Rep. 600.

To an action against an executor for goods sold to the testator, he, at Nisi Prius, pleaded a plea puis darrein continuance of judgment recovered in a plea of debt on the simple contract of the testator, commenced since the present action:—Held, first, that it was no answer to this plea, that the judgment pleaded was in a plea of debt on the testator's simple contract; and secondly, that the plea was not invalidated by his having suffered judgment to pass against him voluntarily. *Prince* v. *Nicholson*, 1 Marsh. 280; 5 Taunt. 665; 15 R. R. 612.

Action against executrices, for work and labour done for the testator. Plea, that a judgment had been obtained against the testator in his lifetime, and that they had fully administered except as to chattels of small value, not sufficient to satisfy the judgment. Replication, that the testator paid a large sum in satisfaction and discharge of the debt recovered, and of the judgment; and that the executrices, deceitfully and with intention to defraud the plaintiff of his damages, have deferred and still do defer procuring acknowledgment or satisfaction to be entered up of the debt, or to be released therefrom, and still permit the judgment thereon to remain in full force. A rejoinder, traversing the payment of the sum in satisfaction and discharge of the debt recovered, and of the judgment, was held bad on demurrer; for the material fact to be traversed was the keeping on foot the judgment by fraud; whereas the payment in satisfaction was immaterial and not traversable, being mere inducement. *Jones* v. *Roberts*, 4 Tyr. 48; 2 C. & M. 219; 2 D. P. C. 374; 3 L. J., Ex. 46.

Plea of non est factum.]—If an executor pleads non est factum to a bond, and not plene administravit likewise, he cannot, after verdict, take advantage of what might have been pleaded to the action. The plea of non est factum only, is an admission of assets, and held the same as in a case of a judgment by default against an executor. *Ramsden* v. *Jackson*, 1 Atk. 294.

Other Pleas.]—To an action against an executrix, she pleaded that the testator became bound to A. in 2,800*l.*, conditioned to indemnify him against another bond for 800*l.*, which A. had executed jointly with the testator to B., but for the proper debt of the testator; that the 800*l.* became due in the testator's lifetime, and was still unpaid; that upon the testator's death the indemnity bond became forfeited, and the money therein contained was still unpaid; and that the defendant had administered all, except so much as would satisfy the indemnity bond; this was held a good plea. *Cox* v. *Joseph*, 5 Term Rep. 307.

A. died beyond the sea, and made a nuncupative will; B. took administration here, and brought his bill for a discovery of the supposed intestate's personal estate; the defendant pleaded the will, and that he was executor, and that A. left no assets but what were beyond seas; plea allowed. *Jauncy* v. *Sealey*, 1 Vern. 397.

Bill by a creditor of an intestate, for 100*l.* on note, charging that the administratrix promised to pay as soon as she could get in effects. Plea the Statute of Limitations, and that she made no promise to pay. This is too general, for she should have pleaded she made no promise to pay out of assets. *Anon.*, 3 Atk. 71.

To a bill filed by a residuary legatee against an alleged debtor to the estate for an account, alleging as ground of equity that the executors had refused to call the debtor to account, and that he was the solicitor of the executors, but not expressly charging a collusion, a plea was put in denying the refusal of the executors, setting out a letter from them to show that they had not refused, and averring no collusion:—Held, that the averments did not overrule the plea, nor raise any new issue, and that the plea was good. *Saunders* v. *Druce*, 3 Drew. 140; 24 L. J., Ch. 593; 3 W. R. 301.

Executor, having paid legacies, stands in a situation in which (at least for the security of the fund) it is not competent to him to allege that debts are unpaid. *Freeman* v. *Fairlie*, 3 Mer. 35; 17 R. R. 7.

Plea, by an executor, who has proved a will,

"that the testator was at the date of his will, and also at the time of his death, domiciled in France, and that all the bequests of personal estate affected to be made by it, are by the laws of that country null and void," is a good plea in bar to a suit by a legatee under the will for payment of his legacy, and for administration of the personal estate of the testator. *Campbell* v. *Beaufoy*, Johns. 320; 28 L. J., Ch. 645; 7 W. R. 513.

Such a plea, though it puts two facts in issue, is not double, since neither fact taken would be a complete bar to the suit. *Ib.*

A testator bequeathed to his executors his business premises, fixtures, plant, &c., on trust to permit his son to carry on the business and occupy the premises, and use the plant for that purpose, "upon the terms and conditions" of his paying the testator's daughter, R., an annuity, payable weekly. The executor instituted a suit against the son, and other beneficiaries under the will for the administration of the estate. Pending this suit R. filed her bill against the son, alleging that her annuity had not been paid, and praying, first, a declaration of her being entitled to the annuity; secondly, an account of the amount due in respect thereof; thirdly, payment; fourthly, an account of the profits of the business; fifthly, a declaration that the annuity was a charge on the business premises and effects; sixthly, a receiver; seventhly, sale or mortgage; eighthly, general accounts and inquiries: ninthly, payment of costs; and tenthly, general relief. The defendant demurred as to so much of the bill "as seeks that an account may be taken as prayed by the first paragraph," and to the relief prayed by the third and following paragraphs of the bill on the grounds of the pendency of the executor's suit, want of equity, and want of parties, and as to the remainder of the bill he answered. By his answer he claimed to be entitled, under the will, to the sole beneficial interest in the premises:—Held, that the court would look at the answer filed with the demurrer to see whether the defendant had confessed an equity, that whether the demurrer was taken to apply to the first or second paragraph of the prayer of the bill relief must follow, that since the plaintiff's was a personal demand against the son, the executor was not a necessary party to her suit, and that since, in the executor's suit, full justice could not be done to the plaintiff, she could sustain this bill. The demurrer was accordingly overruled. *Rees* v. *Engelback*, 40 L. J., Ch. 382; L. R. 12 Eq. 225; 24 L. T. 417; 19 W. R. 809.

In an action by an executor upon a promissory note payable to his testator, the defendant pleaded that the testator bequeathed to C. the note, not to be sued upon or made available until he became of age, and that before that time C. was convicted of felony:—Held, that the plea was bad; because, first, the property in the note did not vest in C. under 7 Will. 4 & 1 Vict. c. 26, s. 3; and, secondly, the conviction of C. did not divest the legal interest in the note out of the executor, though he became trustee of the proceeds for the crown. *Bishop* v. *Curtis*, 18 Q. B. 878; 21 L. J., Q. B. 391; 17 Jur. 23.

Action by executors, for work and labour of their testator, money paid by him, and on an account stated with him, for work and labour and money paid by the executors, and on an account stated with them as executors. A plea that the testator, in consideration of the defendant consenting to act on a provisional committee for a projected railway, agreed to indemnify him from any charges on account of the railway, and the work was done and money paid by the testator, and the account stated with him in respect of the same, in surveying the line, and that the work was done and money paid by the executors in and about surveying the line, and the account was stated with them in respect of the same work; that all the causes of action accrued after the promise to indemnify, and that the defendant made the promises, only in his character of member of the committee, that the railway was abandoned, and the work and payments became of no value, and all sums recovered from the defendant in respect thereof would be lost to the defendant, and he would be damnified to that extent, is a good plea for avoiding circuity of action to both counts, since the defendant, on the facts alleged, was entitled to recover, from the testator in his life or from his representatives, as much as they would recover from him. *Connop* v. *Levy*, 5 Railw. Cas. 124; 11 Q. B. 769; 17 L. J., Q. B. 125; 12 Jur. 306.

Another plea, alleging that the testator, in his lifetime, caused the defendant to enter into his promises by fraud, is a good plea, not only to the first count, but also to the second, since, if he was induced by the testator's fraud to make the original contract with him, the same fraud procured the implied promise to the executors for the work they had done, and money they had paid in pursuance of that contract. *Ib.*

Replication.]—In an action by an executor upon a bond given to his testator, a demurrer to a replication traversing a payment, alleged in the plea to have been made to a party stated to have been a co-executor with the plaintiff, but not shewn to be alive, on the ground that the plaintiff has omitted to describe himself as surviving executor, is a frivolous demurrer. *Tuckey* v. *Hawkins*, 4 C. B. 655.

Detention of Testator's Goods—Counterclaim.]—In an action by an executor for the detention of goods of his testator taken possession of after the testator's death, the defendant may counterclaim for the funeral expenses of the testator paid by him, and also for a debt due to him from the testator before his death. *Watkin* v. *Newcomen*, 1 Cab. & E. 113.

g. Statute of Limitations.

When it may be pleaded at Law—Against Personal Representative.]—An executor cannot bring an action after the time limited by the Statute of Limitations has expired, even though he brings it within a reasonable time, unless his testator commenced an action before the time expired, and the action has abated by the act of God. *Penny* v. *Brice*, 18 C. B. (N.S.) 393; 11 L. T. 632; 13 W. R. 342.

Where a person dies abroad to whom a right of action has accrued during his residence there, and he never returned to this country after the accrual thereof, his executors may sue for it, although more than six years have elapsed since it accrued. *Townsend* v. *Deacon*, 3 Ex. 706; 6 D. & L. 659; 18 L. J., Ex. 298; 13 Jur. 366.

In 1833 the plaintiff married, at which time his wife was the holder of a promissory note made by the defendant, and which had been given to her whilst sole. In 1834 the plaintiff's wife died after giving birth to a child. It was

then agreed between the plaintiff (who claimed the note as the representative of his late wife) and the defendant, that the latter should maintain the child, and that in consideration thereof the defendant should receive the rents of certain cottages which had been the property of the plaintiff's wife, and that he should also retain the interest to become payable on the note. In 1839 the defendant signed an indorsement on the note, to the effect that all the interest upon the note was then paid. The defendant continued to maintain the child till the time of its death in 1848. In 1853 letters of administration were granted to the plaintiff, and subsequently in the same year the plaintiff brought an action on the note:—Held, per Alderson, B., Platt, B., and Martin, B. (dubitante Parke, B.), that the agreement between the plaintiff and the defendant, that the future maintenance of the child should be taken in part of the interest on the note, and which had been acted upon within six years before action brought, was a sufficient payment of interest within the proviso of the 2nd section of 9 Geo. 4, c. 14. *Bodger* v. *Arch*, 10 Ex. 333; 2 C. L. R. 1491; 24 L. J., Ex. 19.

—— **By Personal Representative.**]—Where an action by a creditor against his debtor, commenced within six years, abates by reason of the death of the debtor, the reasonable time allowed for commencing a fresh action against the personal representatives of the debtor, in order to prevent the operation of the Statute of Limitations, dates from the granting of the letters of administration; and the right of the creditor in this respect is not affected by delay on the part of the next-of-kin of the debtor in obtaining administration. *Curlewis* v. *Mornington (Earl)*, 7 El. & Bl. 283; 26 L. J., Q. B. 181; 3 Jur. (N.S.) 660; 5 W. R. 266. Affirmed, 27 L. J., Q. B. 439; 4 Jur. (N.S.) 1102; 6 W. R. 682—Ex. Ch.

To a plea of the Statute of Limitations to an action against an executor for goods sold and delivered, and for money lent to his testator, the plaintiff replied, on equitable grounds, that the causes of action accrued within six years before the death of the testator, who by his will devised lands to the executor, and bequeathed to him the residue of his personal estate, upon trust to sell and convert the same into money, and thereout pay his debts and legacies, and to hold the residue in trust for the plaintiff and his other children equally, and averring that the moneys realised were sufficient to pay all debts and legacies:—Held, that the executor was entitled to judgment. *Gulliver* v. *Gulliver*, 1 H. & N. 174; 25 L. J., Ex. 341; 2 Jur. (N.S.) 1051; 4 W. R. 653. And see JOINT AND SEVERAL AUTHORITY, I. *a.* 3, col. 1234, ante.

In Equity.]—Plea of Statute of Limitations, by an executor, the testator having died in 1786, the probate not taken till 1802 allowed, the allegation of the bill upon a fair construction being, that the defendant had possessed the personal estate, and therefore might have been sued as executor de son tort previously to 1792. *Webster* v. *Webster*, 10 Ves. 93. The Statute of Limitations does not run in equity against the right of an executor, or of an executor of an executor, to have his accounts taken and his liability as an accounting party defined by inquiries under the direction of the court. *Smith* v. *O'Grady*, 7 Moore P. C. (N.S.) 106; 39 L. J., P. C. 63; L. R. 3 P. C. 311; 23 L. T. 476; 19 W. R. 22.

The Statute of Limitations does not run in equity against the right of an executor, or of an executor of an executor, to sue the persons beneficially interested in the estate for recovery of payments made in excess of assets in hand. *Ib.*

An executor coming to the court after twelve years' delay, asking to have the accounts of his estate taken, is not disentitled. *Ib.*

A person bequeathed all his real and personal estate in Jamaica, after payment of debts and legacies, to his grandchildren, to be apportioned when they should attain twenty-one, and appointed R. executor of his will and guardian in respect of his real estate. The testator died in 1832, and R. entered into possession of the real and personal estate. R. died in 1850, and appointed S. his executor. The grandchildren attained their majority in 1865, and in that year S. filed a petition praying that an account might be taken of the real and personal estate of the testator:—Held, that he was entitled, notwithstanding the delay, as a matter of right to have an account taken of the personal estate of the testator, and inasmuch as R. had been appointed guardian in respect of the real estate, and had entered into possession of the same, accounts should also be taken of the rents and profits of the real estate of the testator. *Ib.*

—— **Fund in Court, Claim against.**]—A remainderman paid with his own money, after he had come into possession, interest which had accrued, during the preceding estate for life, upon charges affecting the inheritance:—Held, first, that his executors were entitled, in 1870 (as against the personal representative of the tenant for life), to be recouped out of a fund in court, the produce of rents of the life estate brought in, in 1815, by a receiver appointed in an incumbrancer's suit instituted against the tenant for life. *Howlin* v. *Sheppard*, Ir. R. 6 Eq. 38. Affirmed, *Ib.*, 497.

Held, secondly, that the fund having remained in court, during the whole period from 1815 to 1870, in usum jus habentium, the claim of H.'s executor was not barred. *Ib.*

—— **Effect of Bill.**]—A bill filed not on behalf of all creditors of a testator against his personal representative does not keep alive against him the demand of specialty creditors, and a demand in such a case held barred by lapse of time. *Busby* v. *Seymour*, 1 Jo. & Lat. 527; 7 Ir. Eq. R. 433.

—— **Interest.**]—Equitable charge on real estates is not barred by length of time without demand, though considerable, and though at length brought forward under circumstances not favourable yet not equivalent to or affording presumption of release. Account of interest against tenant for life decreed and not limited to six years. *Stackhouse* v. *Barnston*, 10 Ves. 453.

Advertisement for Creditors.]—An executor's advertisement to creditors to send in an account of their claims for examination does not amount to a promise sufficient to revive a statute-barred debt. *Scott* v. *Jones*, 4 Cl. & F. 382; 7 L. J. Ch. 242.

—— **Notice by Creditors.**]—Notice by a creditor of his claim in answer to advertisement by an executor under 22 & 23 Vict. c. 35, s. 29,

does not prevent the Statute of Limitations from running. *Stephens, In re, Warburton* v. *Stephens*, 59 L. J., Ch. 109; 43 Ch. D. 39; 61 L. T. 609.

Debt barred in England by Statute of Limitations — Scotch Judgment — Registration in England.]—Where a creditor, whose claim had been disallowed as barred by the Statute of Limitations in an administration action in England, obtained a decree for the amount of his claim and costs in a Scotch action and registered such decree in the Queen's Bench Division, the assets in the administration being still unadministered:—Held, that the Scotch judgment when registered was a new cause of action, and, such cause of action not being barred by the Statute of Limitations and not having been adjudicated upon, the judgment creditor, though not entitled to issue execution against the assets, was of course entitled to be admitted to prove for his debt in the administration. *Phosphate Sewage Co.* v. *Molleson* (4 App. Cas. 801) distinguished. *Low, In re, Bland* v. *Low*, 63 L. J., Ch. 60; [1894] 1 Ch. 147; 7 R. 346; 70 L. T. 57—C. A.

Statutory Bar to Actions for Recovery of Personal Estate of Intestate.]—The operation of 23 & 24 Vict. c. 38, s. 13, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have accrued" thereby imposed (in analogy to 3 & 4 Will. 4, c. 27, s. 40) upon claims to recover personal estate of "any person dying intestate, possessed by the legal personal representative of such intestate," is not confined to the case of persons dying intestate after the 31st December, 1860, the time fixed by the section for commencement of the operation of the enactment. Accordingly, a claim by next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty-one years from that date; and leave to revive an administration suit relating to the same estate in which no proceeding had been taken since the decree in 1855 was refused. But with respect to assets of the intestate not received by the administrator until 1870 (more than twenty years after the death, and within twenty years before the issue of the writ) the claim of the next of kin to administration, limited to such assets, was not barred; there being no "present right to receive" on the part of the next of kin until the assets had been actually recovered by the administrator. *Johnson, In re, Sly* v. *Blake*, 29 Ch. D. 964; 52 L. T. 682; 33 W. R. 502.

—— **Part Payment.**]—Part payment by the administrator out of a particular asset which has so fallen in will not revive the right to sue for general administration which was at the time of payment barred by statute. *Ib.*

Summons—Right of Residuary Legatee to set up Statute of Limitations.] — Upon the hearing of an originating summons, taken out by the executor, under Ord. LV. r. 3, to determine whether a defendant is a creditor or not, it is competent for the residuary legatee, also a defendant, to set up the objection of the Statute of Limitations, notwithstanding the refusal of the executor to interfere. *Wenham, In re, Hunt* v. *Wenham*, 61 L. J., Ch. 565; [1892] 3 Ch. 59; 67 L. T. 648; 40 W. R. 636.

Action against Deceased—Death before Service—Fresh Action against Executors.]—A writ was issued, but before it was served the defendant died. Within a year from the proof of the will by the executors of the deceased, a fresh writ was issued against them for the same cause of action. In the meanwhile the statutory limitation had expired:—Held, that the executors could not rely on the Statute of Limitations as a defence to the action. *Swindell* v. *Bulkeley*, 56 L. J., Q. B. 613; 18 Q. B. D. 250; 56 L. T. 38; 35 W. R. 189—C. A.

And see LIABILITIES, col. 1365, ante; *and also* TRUST AND TRUSTEE and STATUTE OF LIMITATIONS.

h. JUDGMENT AND SUBSEQUENT PROCEEDINGS.

1. At Common Law.

Effect of, against Executor — Generally.]—The testator's effects cannot be taken in execution for the executor's debt. *M'Leod* v. *Drummond*, 17 Ves. 168; 11 R. R. 41.

On a personal demand against an executor, there can be no judgment de bonis testatoris. *Hawkes* v. *Saunders*, Cowp. 289.

—— **Suggestion of Devastavit.**]—Where judgment is obtained against an executor, in an action on the bond of his testator, execution cannot be issued in the first instance against the goods of the executor, although he has been guilty of a devastavit, and has no goods of the testator in his hands; but an action must first be brought suggesting a devastavit. *Ward* v. *Thomas*, 2 D. P. C. 87; 1 C. & M. 532; 2 L. J., Ex. 217.

If an executor pleads to an action, and does not plead plene administravit, the judgment against him is evidence of a devastavit, and if, after the production of such judgment upon a scire fieri inquiry, the sheriff returns nulla bona testatoris, the court will quash the return and award a new scire fieri inquiry. *Palmer* v. *Waller*, 1 M. & W. 689; 5 D. P. C. 172; 1 Tyr. & G. 1014; 5 L. J., Ex. 246.

In an action upon a judgment by default against an executor, suggesting a devastavit, the plaintiff gave in evidence the record in the original action, and a testatum fi. fa. with the sheriff's return that he had caused to be levied the costs de bonis propriis of the defendant, and that he had no goods or chattels of the testator in his hands to be administered:—Held, that this was primâ facie evidence of a devastavit. *Leonard* v. *Simpson*, 2 Scott, 335; 2 Bing. (N.C.) 176; 1 Hodges, 251; 4 L. J., C. P. 302.

Of Assets quando acciderint.]—The judgment of assets quando acciderint embraces, not only the assets received by an executor after that judgment is signed, but also such assets as came into or ought to be, in his hands between issuing the writ, or the plea, and the judgment, in the due course of administration. *Smith* v. *Tateham*, 2 Ex. 205; 5 D. & L. 732; 17 L. J., Ex. 198.

By taking a judgment of future assets quando acciderint, a plaintiff admits that the executor has fully administered to that time. *Taylor* v. *Holman*, Bull. N. P. 169.

Where judgment has been given for the defendant on demurrer to a plea, the court will not, in a subsequent term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets quando acciderint. *Prince* v.

Nicholson, 1 Marsh. 401 ; 6 Taunt. 45 ; 15 R. R. 612.

In an action upon an obligation against the executors of an executrix, they pleaded fully administered, except goods to the value of 10*l.*: the plaintiff replied, and prayed judgment as to the 10*l.*; and further said, that, on the day of suing forth the original writ the executors had goods of the testator to the value of the residue of the debt over and above the 10*l.* This was held to be a good replication, though it was objected that the plaintiff ought to have accepted the 10*l.*, and prayed judgment for the same, and of assets in futuro quando acciderint, or ought to have replied singly, that the executors had assets in their hands ultra the 10*l.*, and to have gone to issue thereupon. *Lockyer* v. *Coward*, 3 Wils. 52.

In an action against an administratrix, commenced by a specially indorsed writ, the defendant shewed that she was entitled to plead plene administravit, but did not dispute that there were outstanding assets of the deceased. Leave was given to mark judgment of assets quando acciderint. Form of order. *Findlater* v. *Tuohy*, 16 L. R., Ir. 474.

Where an executrix successfully raises the defence of plene administravit, on a motion for judgment, such executrix is entitled to costs of the motion and action against plaintiff; but the plaintiff is entitled to judgment against assets quando for his debt, with the costs of action and motion, also against assets quando. *Millar* v. *Keane*, 24 L. R., Ir. 49. S. P., *Cockle* v. *Treacy*, [1896] 2 Ir. R. 267.—C. A.

2. In Equity.

Form and Contents — Since 3 & 4 Will. 4, c. 104.]—Form of decree in a creditors' suit since the act rendering real estates liable for simple contract debts. *Dawson* v. *Dawson*, C. P. Cooper, 476.

—— **On a Decree for Sale.**]—Decree for sale: directions are to pay creditors' whole demands, according to nature and priority. *Rowe* v. *Bant*, Dick. 151.

—— **Where Assets are Admitted.**]—In a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admits assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodyate* v. *Field*, 2 Hare, 211 ; 11 L. J., Ch. 321 ; 6 Jur. 871.

—— **Account — Direction as to Items to be Included.**]—In a suit by residuary legatees of A., against the personal representatives of B., who was the executor of A., for payment of a debt due from B. to A., the amount of which was not admitted, and also for an account of the personal estate of A.; praying also, unless assets were admitted, an account of the personal estate of B., and that being insufficient seeking to charge his real estate :—Held, that the plaintiff was not entitled to a declaration, that a particular debt or sum constituted an item in the account to be taken, but that evidence tending to shew that the defendant should be charged with such particular debt or sum was admissible. *Tomlin* v. *Tomlin*, 1 Hare, 236.

—— **Direction to make all just Allowances—Legacies, Payments for.**]—Under a decree for an account, and applying personal estate in payment of debts and funeral expenses, and directing the clear surplus to be paid over, making to the parties all just allowances, the master ought to allow payment in discharge of legacies. *Nightingale* v. *Lawson*, 1 Cox, 23.

—— **Special Directions — Evidence Faulty.**]—Where a testator directed his farming business to be carried on by his executors after his decease, and they accordingly carried on the same, and made numerous payments to servants for wages, and expended moneys in the purchase of live stock, seeds, and other agricultural produce for the use of the farm for which receipts in writing were rarely given, the court directed it to be made part of the decree, that as regarded any evidence of such payments the executors were to be at liberty to apply to the court, and the master to be at liberty to state circumstances specially. *Skipworth* v. *Skipworth*, 9 L. J., Ch. 182.

Where, in an administration suit, it is referred to the master to take an account of the debts, &c., and claims are made against the estate of such a nature that the master cannot conveniently dispose of them, application must be made to the court, which will either give special directions to the master to proceed, or direct a suit, action, or such other proceeding as the exigency of the case may require. *Lockhart* v. *Hardy*, 5 Beav. 305.

—— **Insolvent Estate—Judicature Act, 1875, s. 10.**]—In a creditors' administration action, when there is any probability that the estate of the deceased person will prove insufficient for the payment in full of his debts and liabilities, there should be inserted in the judgment a provision to the effect that if the estate is insufficient, the rules in bankruptcy are to apply, following the terms of s. 10 of the Judicature Act, 1875. *Hildick, In re, Hipkins* v. *Hildick*, 44 L. T. 547 ; 29 W. R. 733.

It is unnecessary to include in the judgment upon a creditors' administration action the statutory direction that in case the estate shall prove insolvent the rules with respect to the estates of persons adjudged bankrupt shall prevail and be observed. *Murray, In re, Woods* v. *Greenwell*, 45 L. T. 707 ; 30 W. R. 283.

—— **Infant.**]—Laches not to be imputed to creditors, under a devise for debts, as to an individual devisee, to prevent or limit the account of rents and profits, even against an infant heir. *Kidney* v. *Coussmaker*, 12 Ves. 136.

Where, after a decree and order on further directions in a creditors' suit, there was discovered an infant tenant in tail, born before the bill filed, and he had been made a party :—Held, that the accounts were to be taken afresh as against him, with liberty to the master to adopt any before taken, if beneficial to the infant. The court will not order, as against an infant real estate to be sold, until the accounts have been taken and the cause heard for further directions. *Baillie* v. *Jackson*, 10 Sim. 167.

—— **Married Woman—Separate Estate.**]—The proper form of a decree against the separate estate of a married woman, in a suit by a holder of her written engagement on behalf of himself and all other creditors, for payment of their debts out of the real estate, was an inquiry what debts there were to be paid under the provisions

of the will; and that the plaintiff must therefore prove his debt over again before the master. *Owens* v. *Dickenson*, Cr. & Ph. 48; 4 Jur. 1151. And see *S. C.*, 3 Beav. 48.

—— **Absent Parties.**]—In an administration suit by a single plaintiff, where an inquiry was directed in the decree as to the persons entitled to the residue, and the master made a report finding a great number of persons, nephews and nieces, and descendants of nephews and nieces, answering the descriptions in the testator's will, and consisting in part of married women and infants, and persons out of the jurisdiction, the court declared the rights of the parties, without a supplemental bill being filed to bring them before the court. Form of the order as made. *Williamson* v. *Parker*, 5 De G. & Sm. 419.

The legatees of two-sixths of a residuary fund being out of the jurisdiction, the court made the declaration of right with respect to the other four-sixth parts only. *Morley* v. *Rennoldson*, 2 Hare, 570; 12 L. J., Ch. 372; 7 Jur. 938.

A testator gave the residue of his real and personal estate to five persons in equal shares, and appointed three of the five his executors. All three proved the will. One of the executors then filed a bill for administration and partition against another of the executors, not making the third executor a party. On this bill an administration decree was made, and the third executor and the other residuary legatees were served with the decree. The third executor refused to come in under the decree and account, and the other residuary legatees appealed from the decree on the ground that the decree could not be properly made in the absence of the third executor. The court considered there was great difficulty in making a decree against a person, who ought to be an accounting party, in his absence, and the plaintiff's counsel, at the suggestion of the court, consented to have the decree quashed, with liberty to amend the bill by adding the third executor as a defendant. *Latch* v. *Latch*, 44 L. J., Ch. 445; L. R. 10 Ch. 464; 23 W. R. 686. *And see* PARTIES XIII. c. 1, col. 1737, ante.

After a decree made in an administration suit, in which one executor was defendant, another executor returned from abroad and proved the will:—Held, that he might be made a defendant by supplemental order. *Guthrie* v. *Walrond*, 29 L. T. 377; 22 W. R. 723.

In a creditors' suit, seeking to charge the real and personal estate of the testator, where the debt of the plaintiff was admitted by the executors and trustees, and by such of the parties beneficially entitled as were sui juris, but one defendant was a married woman, and another an infant, a decree for account was made without evidence of the debt, liberty being given to plaintiff to prove it before the master. Two of the defendants were alleged, and in like manner admitted, to be out of the jurisdiction; but the fact was not proved. Liberty was given, under the decree, to exhibit interrogatories for that purpose. *Hughes* v. *Eades*, 1 Hare, 486; 11 L. J., Ch. 297; 6 Jur. 255.

—— **Annuity—Abatement.**]—Form of decree where an annuity abates by reason of deficiency of assets. Amount of abated valuation ordered to be paid to representatives of deceased annuitant. *Long* v. *Hughes*, 1 De G. & Sm. 364.

—— **Declarations of Right—Tacking.**]—If a testator entitled to real and personal estate dies indebted upon mortgage and by simple contract, and a suit is instituted for the administration of his estate, declarations of rights to tack simple contract debts to securities will not be made before the accounts of the testator's estate are taken. *Chester* v. *Rolfe*, 25 L. J., Ch. 247.

—— **Demand for Unliquidated Damages—Proper Directions.**]—Under a decree to take an account of the testator's debts, and to compute interest on such of his debts as carried interest, the master has not jurisdiction to allow a compensation to a party for unliquidated damages on a breach of covenant; but, upon an application to the court, proper directions will be given for the investigation of such a claim. *Cox* v. *King*, 9 Beav. 530; 10 Jur. 236.

Under a decree to take an account of the assets of a deceased person, and for the administration thereof, a demand for unliquidated damages may be proved and reported; the preferable mode of ascertaining the amount of which is by an issue to be directed for that purpose; but they may be ascertained by the officer by the examination of witnesses upon interrogatories. *England* v. *Donnellan*, Jones & C. 270.

—— **Respecting Outstanding Personal Estate.**]—In a creditors' suit, the court will not direct the personal representative how to act with reference to the outstanding personal estate of the debtor. *Jameson* v. *Farrer*, 2 Jones, 634.

In an administration suit a child of the testator, and a party to the suit, was a debtor to the estate. In such a case the proper course is to order him to pay the debt into court immediately. If he were a stranger to the record, an inquiry would be directed. *Walker* v. *Simpson*, 1 Jur. (N.S.) 675.

Inquiries directed in Suit.—Evidence.]—The court will not compel a witness on an inquiry in an administration suit to give information which might be used in a pending action by the administrator against him, there being power to obtain discovery in the action. *Venables* v. *Schweitzer*, 42 L. J., Ch. 389; L. R. 16 Eq. 76; 28 L. T. 462; 21 W. R. 505.

—— **Class Inquiries.**] — Where plaintiffs claim as a class, the regular practice at the hearing is to direct an inquiry, whether the plaintiffs are the parties entitled. *Brown* v. *Clark*, 1 Jur. 838.

Inquiry as to number of children, where they are described as a class. *Raikes* v. *Ward*, 5 Jur. 1008.

Where a testator has left his residuary estate to a number of persons by various class descriptions, the more convenient course in an ordinary administration action is to insert in the judgment a general inquiry as to who are entitled to the estate, and in what shares and proportions, instead of putting in numerous inquiries as to the various classes. *Fooks, In re, Brown* v. *Stone*, 30 W. R. 923.

A testator directed his debts to be paid, and appointed executors in England, and other executors in Italy, directing the English executors to transmit the residue to the Italian executors, and bequeathing such residue amongst classes of persons alleged to reside in Italy:—Held, that the sum to be paid over being the residue after payment of debts, the Italian

executors must be regarded as simply trustees of that fund, and not as executors holding it charged with debts; and that, therefore, inquiries must be directed to ascertain the persons beneficially entitled to the fund under the bequest. *Weatherby* v. *St. Giorgio*, 2 Hare, 624; 12 L. J., Ch. 412; 7 Jur. 717.

—— **Proof by Affidavit.**]—A class of children being interested, the court, instead of directing the preliminary class inquiry, received the affidavit of the parents proving the class, and then allowed the cause to be heard. *Bush* v. *Watkins*, 14 Beav. 33.

—— **Legatee.**]—Legacy, upon condition that the legatee "shall change the course of life he has too long followed, and give up all low company, and frequenting public-houses," &c.: the condition is such as a court will carry into effect; and the evidence not being conclusive, an inquiry was directed, following the words of the will. *Tattersall* v. *Howell*, 2 Mer. 26.

Legacy to A., in case he should come to England and claim within three years; if not, gift over to B. B. cannot claim without reference to ascertain if A. has been in England. *Burgess* v. *Robinson*, 1 Madd. 172.

Court always sends case to master to inquire what testator meant, as well where there is misdescription of fund, as of legatee. *Evans* v. *Tripp*, 6 Madd. 91.

A bill was filed for payment of a legacy, but it appeared from the answer that the plaintiff did not correctly answer the description of the legatee contained in the will. The court refused to direct a preliminary inquiry under the fifth Order of 9th May, 1839. *Wilson* v. *Applegarth*, 10 Sim. 657.

Legacy to A. at twenty-one. A. went abroad when a boy, and had not been since heard of, and if living must now be seventy-seven years old. His personal representatives apply for payment of his legacy, with accumulations, to them. Inquiry directed if living, and whether he ever attained twenty-one years. The representatives of the testator, who died seventy years ago, held not necessary parties. *Hudson* v. *Twining*, Tam. 315.

A legacy having been given to a legatee in a name which she had for many years assumed, the court will direct an inquiry who was the person meant. *Neathway* v. *Ham*, Tam. 316.

—— **Heir-at-Law.**]—The form of minutes asking for an inquiry as to the heir-at-law is, "Let an inquiry be made who was the heir-at-law of the testator (or intestate) at the time of his death, and whether such heir is living or dead, and if dead who, by devise, descent, or otherwise, is now entitled to such real estate (if any) of the testator (or intestate) as descended to such heir-at-law." *Openshaw* v. *Davies*, 22 W. R. 680.

Under a direction, in a decree or order, to inquire who is the heir-at-law of a deceased person, it is not the practice to inquire who is the customary heir, although it appears that the deceased was entitled to land of copyhold tenure. *Freeman* v. *Roberts*, 10 L. J., Ch. 315.

A testator gave personal estate to his own right heirs as personæ designatæ. The plaintiff claimed through the testator's next of kin, and alleged that there was no heir, and therefore the fund was not disposed of. On the hearing of the cause, the defendants adduced evidence showing that the testator left some heir-at-law, but the plaintiff did not adduce any evidence:—Held, that the plaintiff was not entitled as of right to an enquiry whether there was any heir, with a view to a declaration in his favour, in case it was found that there was no heir; and the bill was dismissed with costs. *De Beauvoir* v. *Benyon*, 35 L. J., Ch. 278; L. R. 1 Ch. 212; 12 Jur. (N.S.) 239; 14 L. T. 89; 14 W. R. 324.

—— **Next of kin.**]—The plaintiffs, claiming to be next of kin of the testatrix, filed their bill against the executors in respect of legacies which had failed; the executors answered, but did not admit that the plaintiffs were such next of kin; the plaintiffs moved, under the fifth Order of the 9th of May, 1839, for a reference to inquire who were the next of kin of the testatrix; motion refused. *Topham* v. *Lightbody*, 1 Hare, 289.

A preliminary inquiry under the fifth General Order of May, 1839, as to who was next of kin, was refused, where the plaintiff sued in his right of next of kin; but it was denied by the answer that he filled that character. *Kinshela* v. *Lee*, 7 Beav. 300.

Where a bill was filed by parties claiming as next of kin of a testator, a native of France, resident in England, to set aside a deed by which they had been fraudulently induced to give up a portion of the testator's estate in favour of the executor, a preliminary inquiry was directed as to the domicil of the testator, and whether plaintiffs were next of kin, &c. *Chameaux* v. *Riley*, 2 Jur. 1081.

Four persons, on behalf of themselves and all others the next of kin (who were alleged to be fifty in number), filed a bill for the administration of the estate. At the hearing it was proposed to take an inquiry as to the next of kin. The court directed an affidavit to be made that the next of kin exceeded twenty in number. *Leathart* v. *Thorne*, 15 Jur. 162, 762.

—— **Other Relationship.**]—The bill stated that some of the plaintiffs were children of another plaintiff, and that they and certain defendants were the only children of the marriage. The answers did not deny the statement, but merely stated that the defendants did not know whether these were all the children, and did not raise any objection for want of parties on this ground. There was no evidence of the relationship between the plaintiffs:—Held, at the hearing, that a case was made for inquiry as to this, and for payment into court of the trust fund. *Fowler* v. *Reynal*, 2 De G. & Sm. 749; 15 Jur. 649, 650, n. Affirmed, 3 Macn. & G. 500; 21 L. J., Ch. 121; 15 Jur. 1019.

—— **As to Legitimacy.**]—Bequests to the children of A., described spinsters, and nothing on the face of the will showing that illegitimate children were intended. Inquiry, whether she left illegitimate children, refused. *Osmond* v. *Tindall*, 5 Ves. (2nd edition) 534, *e*.

On a bill by the next of kin of a testator for an account, where a question was raised whether the plaintiff was illegitimate, Lord Eldon directed an issue to try the fact upon an interlocutory application. *Golden* v. *Ulyate*, 5 Jur. 169.

—— **As to Capacity.**]—In a suit to administer the estate of a testator, a devisee infant being incapable of managing his affairs, a motion made

for a decree under the 16th section of 15 & 16 Vict. c. 86, for a reference to chambers to inquire into the devisee's state of mind:—Motion refused, and no order made. Costs reserved. *Adams* v. *Smyth*, 1 W. R. 475.

Where the answer of an executrix alleged a release to have been executed by the plaintiff, a legatee, and that he had then stated that he was of age; but contained admissions from which his minority at the time might be inferred:—Held, that such admissions did not entitle the plaintiff to an inquiry, whether he was a minor at the date of the transaction. *Wright* v. *Snowe*, 2 De G. & Sm. 321.

—— **Devastavits.**]—On a bill filed against an executor, seeking to charge him in respect of devastavits committed by his co-executor who had died, the defendant, by his answer, denied that he had ever interfered in the testator's affairs in the lifetime of his co-executor, and it was admitted that he had not proved the will till the death of that executor:—Held, nevertheless, upon the evidence of two witnesses speaking to different facts, but corroborated by circumstances, more especially by the fact of a composition-deed having been executed by the surviving executor with the executor of the deceased, that there was sufficient ground for inquiring into the acts of the surviving executor, The court accordingly directed special inquiries on the subject. *James* v. *Frearson*, 1 Y. & C. C. C. 370.

—— **Respecting Breaches of Trust.**]—Where, in a suit for the administration of the estate of a deceased trustee, which was instituted by persons claiming to be his creditors by virtue of a breach of trust, against his executor and devisee in trust subject to the payment of debts, and the persons beneficially interested under his will, and in which the executor and devisee in trust by his answer admitted his testator's breach of trust, but the person beneficially interested by their answer denied it, and in which no evidence was entered into on the part of the plaintiffs, the court made the common administration decree in a creditor's suit, but without any special direction for inquiry respecting the breach of trust. *Teague* v. *Fisher*, 1 Jur. (N.S.) 1037; 3 W. R. 587.

—— **Prices of Stocks.**]—Trustees and executors under the will of a testator, who had directed them to invest a share of his residuary estate, either in the public funds or on mortgage, at 5 per cent., having admitted, by their answer, that they had from time to time balances in their hands, and it being proved, that many years after the death of the testator, they had not invested the share, either in the funds, or on mortgage, inquiries will be directed at the original hearing concerning the balances retained by them, and the prices of 3 per cent. stock at the several times when such balances were in their hands. *Hockley* v. *Bantock*, 1 Russ. 141; 25 R. R. 16.

—— **Propriety of taking Proceedings.**]—Inquiries as to the propriety of the proceedings proposed to be taken for the beneficial management and realisation of the estate of a testator or intestate, will not be directed in a creditors' suit. *Collinson* v. *Ballard*, 2 Hare, 119.

—— **Legality of Consideration for an Annuity.**]—In a case of competition between creditors and an annuitant on the legality of the consideration of whose annuity there was some doubt, an inquiry by master into the consideration was properly directed. *Hunt* v. *Maunsell*, 1 Dow, 211; 14 R. R. 49.

—— **Agreement for a Settlement.**]—Where an inquiry as to personal estate was directed in a suit, commenced by administration summons, and a question arose, in the course of such inquiry, whether there was a binding agreement for a settlement, which it became necessary to determine, in order to ascertain what the personal estate consisted of, and the chief clerk determined that question, and this finding was objected to as being ultra vires:—Held, that the chief clerk had power to decide the question, it being necessary to do so to carry out the inquiry. *Wadham* v. *Rigg*, 2 Dr. & Sm. 78; 8 Jur. (N.S.) 206; 6 L. T. 180; 10 W. R. 365.

—— **Propriety of Expenditure.**]—On a reference to the master to inquire, whether certain expenditure, not authorised by a will, had been properly made, he is to consider the case without reference to the question of authority. *Umbleby* v. *Kirk*, C. P. Cooper, 254. And see *Pelley* v. *Bascombe*, 4 Giff. 390; 33 L. J., Ch. 100; and on appeal, 34 L. J., Ch. 233; 11 Jur. (N.S.) 52; 13 W. R. 306—L.JJ.

When loans are made to an executor upon his personal security, without any security or contract for a security upon the assets being made at the time, and afterwards a security on the assets is given, the court will not assume that the loan was for the purposes of the administration of the estate, but will direct an inquiry whether it was so applied. *Miles* v. *Durnford*, 2 Sim. (N.S.) 234. Affirmed, 2 De G. M. & G. 641; 21 L. J., Ch. 667.

—— **Material Facts not Stated in Claim.**]—Where, by the decree upon the claim of a legatee, it would be necessary to take the accounts of a trade carried on by persons who were not parties to the claim,—of the assets by which it was alleged that the trade had been carried on,—and of the allowances which should be made in remuneration of the persons employed in it who were not parties to the claim, and the claim contained no statement of the facts upon which such accounts and inquiries might depend, the court refused to direct inquiries into the facts necessary to be shown in order to sustain the claim, but dismissed the claim without costs, and without prejudice to a bill. *Penny* v. *Penny*, 9 Hare, 39; 20 L. J., Ch. 339; 15 Jur. 445.

—— **Liberty to Prosecute — Delay.**]—The court refused upon petition or motion to prosecute an inquiry directed by a decree many years ago, but never pursued; the party applying, being born some years after the decree, only two months old at the date of the general report, and made a party some years afterwards, but several years before the application. *Shipbrooke* (*Lord*) v. *Hinchinbrooke* (*Lord*), 13 Ves. 387.

—— **Incumbrancer's Suit—Solicitor's Lien on Deeds.**]—Form of inquiry in an incumbrancers' suit, where the deeds are in possession of a solicitor, a defendant, who claims a lien for costs, which is disputed. *Walcott* v. *Graves*, 11 Ir. Eq. R. 396.

Further Consideration—Where it is desired to obtain Personal Judgment—Notice.]—When

notice of an administration judgment has been served on parties interested, and afterwards, on further consideration, it is desired to obtain a personal order against them, they should be served with notice of the action having been set down for further consideration, even though they have not obtained an order to attend the proceedings. *Rees, In re, Rees* v. *George*, 49 L. J., Ch. 568 ; 15 Ch. D. 490.

—— **Liability of Executors determined on.**]—A bill was filed against executors, and at the hearing the accounts were directed to be taken, and the parties to be ascertained :—Held, that the liability of the executors could be properly determined at the hearing on further directions. *Pattenden* v. *Hobson*, 22 L. J., Ch. 697 ; 17 Jur. 406 ; 1 W. R. 282.

An executrix and tenant for life unnecessarily and improperly sold out a sum of stock ; a common decree for an account was made against her representatives :—Held, that her estate was liable to replace the stock and dividends, and that relief might be had on further directions, though the particular matter was not charged by the bill. *Davenport* v. *Stafford*, 14 Beav. 319.

—— **Distribution of small Fund.**]—In a creditors' suit for the administration of the estate of a testator it appeared, from the master's report, that there were forty-eight creditors, that many of the debts were for small amounts, and that the fund distributable among them was small and insufficient to pay the debts in full. Upon the cause coming on for directions, the court, on the request of the counsel for the defendants, the executors, made an order for the ratable apportionment of the fund among the creditors, on the amounts apportioned being verified by the joint affidavit of the plaintiff and one of the defendants, the executors ; and that the sums apportioned under 10*l.* should be paid to the plaintiff's solicitor on his undertaking to pay the same to the creditors respectively. Form of such order. *Bear* v. *Smith*, 5 De G. & Sm. 92 ; 21 L. J., Ch. 176 ; 16 Jur. 708.

In a suit by an executor to administer his testator's estates where the fund to be administered was divisible in equal shares among many persons ascertained by the master, the court ordered the apportionment to be made by affidavit at the hearing. Where the share of a married woman was subject to payment of costs unascertained, which might be expected to reduce it to 200*l.* or less, the court, to save further expense, ordered it to be paid to the husband, and dispensed with any examination as to the consent of the wife. *Roberts* v. *Collett*, 1 Sm. & G. 138.

—— **Further Accounts and Inquiries.**]—Upon further directions under the usual decree, for an account against an administratrix, an inquiry as to balances in her hands from time to time, with a computation of interest thereon, prayed by petition upon affidavits of her conduct, before the master, by attempting to support her charge by forgery, &c., was granted. *Parnell* v. *Price*, 14 Ves. 502.

In a suit instituted by residuary legatees under a will against A. and B., the executors (B. having become bankrupt, and at the time of his bankruptcy being largely indebted to the testator's estate), the ordinary decree only was made at the hearing of the cause, no distinct case of malversation having been adduced against A. ; and the master, by his report, charged B. alone with the receipt of the testator's estate. The court, on further directions, on the application of the plaintiffs, declined to direct an inquiry as to the balances of the testator's estate retained in B.'s hands from time to time, for the purpose of enabling the plaintiffs to establish a case of liability against A. in respect of such balances. *Terrell* v. *Matthews*, 11 L. J., Ch. 31 ; 5 Jur. 1074.

Where, after an order had been made for the administration of assets, a summons was taken out for the purpose of obtaining an inquiry, to be added to the order, as to whether a trustee had granted leases of the testator's estates, in accordance with the trusts of the will, and other inquiries, the court held, that under the 20th order of October, 1832, it was not necessary that the suitor who suggested an additional inquiry should fortify the summons by evidence in a formal way, to be met by evidence against the matter sought by the summons, but that inasmuch as without formal pleadings a suitor might have an estate administered upon any reasonable suggestion which would justify the inquiry, or any fact reasonably apparent, without the expense of formal evidence, and of discussing the same, the judge had ample power to direct any further accounts and inquiries which might seem to be necessary, where it was suggested that the leasehold estates had been let at rents less than those taken in the testator's lifetime : —Held, that the better course would have been, not to have had a discussion upon affidavits or evidence as to whether there should be any further inquiry, but that the court should have called upon the trustee to give an account of the circumstances attending the granting the leases. *Mutter* v. *Hudson*, 2 Jur. (N.S.) 34.

After several references to the master, and after the cause had been argued and judgment given on further directions, the court refused to stay the distribution of the fund, and direct a further reference with respect to a new case, as against certain creditors, which case it did not appear that the parties might not have previously brought forward, and which was not proved by the evidence adduced. *Philips* v. *Philips*, 3 Hare, 301 ; 13 L. J., Ch. 445.

—— **What Evidence Admissible.**]—An action was brought by the beneficiaries under the will of a testator against the trustees thereof to administer the estate of the testator. The action was heard as a short cause, when the usual judgment was made directing accounts and inquiries, and the further consideration was adjourned. The judgment contained no special reservation as to costs. When the action came on upon further consideration, the plaintiffs desired to read an affidavit which contained charges against the defendants. The charges related for the most part to the conduct of the defendants between judgment and further consideration, and partly also to the conduct of the defendants before action brought. The object of the affidavit was to make the defendants liable to pay the costs of the action, or some part thereof, occasioned by reason of the acts complained of in the affidavit and otherwise appearing by the evidence in the action. The defendants objected to this affidavit being read, contending that the court had no jurisdiction to admit it:—Held, that as to the conduct of the defendants between

judgment and further consideration, the plaintiffs were entitled to read an affidavit, but that as to the conduct of the defendants before action, no affidavit could be read. Semble, that if persons who had been served with the judgment desired to read on the further consideration an affidavit as to conduct of the defendants before action, they would be entitled to do so. *Revill, In re, Leigh* v. *Rumney*, 55 L. T. 542.

Under Ord. XXXVII. r. 1, the court may in an administration action, and after the chief clerk has made his certificate, receive, if it thinks fit, fresh affidavit evidence on further consideration. *May* v. *Newton*, 56 L. J., Ch. 313; 34 Ch. D. 347; 56 L. T. 140; 35 W. R. 363.

Where it is sought, either to make executors and trustees pay costs, or to deprive them of their costs upon allegations of vexatious and harassing conduct before the chief clerk in chambers, the court will not allow an affidavit to be read going into the details of such misconduct. *Pierce* v. *Hammond*, 12 W. R. 686.

Supplemental Bill after Decree under the old practice.]—A testator, who died in 1767, directed his estates to be converted and invested, and he gave the same to his wife for life, remainder to his daughter, with remainder to the plaintiffs. The executors neglected to convert some leaseholds, and permitted the successive tenants for life to enjoy the same until their expiration. After their deaths, the plaintiffs filed their bill against the representatives of the executors for a general account. The executors, who had no personal knowledge of the matter, represented the residue to consist of a sum in the funds, and they, by their answer, amongst other papers, admitted the leases to be in their possession. At the hearing the plaintiffs waived the accounts, and took the money in the funds. They afterwards discovered the breach of trust in respect of the leaseholds and filed a supplemental bill to obtain relief in respect thereof. The court, notwithstanding the former decree, decided in their favour, but without costs. *Mehrtens* v. *Andrews*, 3 Beav. 72.

Where a bill was filed by a legatee against executors, seeking to charge them with a sum which they might have received but for their wilful default, and an administration decree had already been made in a suit by the executors, to which the present plaintiff was a party, under which the usual accounts and inquiries were directed:—Held, that it was a supplemental bill, in the nature of a bill of review, which could not be filed without the leave of the court. *Harvey* v. *Bradley*, L. R. 4 Eq. 13.

A defendant to an administration suit instituted by executors can allege by his answer, and prove by evidence, a case of wilful default against the executors, when the necessary inquiries and directions will be added to the decree, without a cross bill being filed. *Ib.*

A common administration decree having been made, and an infant interested in the estate some years afterwards having presented a petition by her next friend for leave to file a supplemental bill, with the object of charging a trustee of the estate with a breach of trust, which she alleged had been discovered since the date of the decree, the court granted leave accordingly, without requiring an affidavit by the next friend that the alleged breach of trust could not with reasonable diligence have been discovered at the date of the decree. *Hoghton, In re, Hoghton* v. *Fiddey*, 43 L. J., Ch. 758; L. R. 18 Eq. 573; 22 W. R. 854.

Residuary legatees filed a bill against the executor, charging him with wilful default, for which some grounds appeared by his answer. No evidence was entered into, and the common accounts were directed. The widow, who was a defendant, and was interested in the estate, afterwards filed a supplemental bill, without leave, to charge the executor with wilful default:—Held, that the proceeding was regular, and a decree was made, supplemental to the former proceedings. *Berrow* v. *Morris*, 10 Beav. 437; 16 L. J., Ch. 506; 11 Jur. 790.

A supplemental bill was filed by some of the cestuis que trustent under a will, against the remaining cestuis que trustent, and the trustees and executors, stating that the original bill had been filed by all the cestuis que trustent against the trustees and executors, for the establishment of the will and the administration of the testator's real and personal estate; that a decree in the nature of the usual administration decree had been made therein; that circumstances had arisen which rendered it inconvenient that the plaintiffs to the supplemental bill should be represented by the same solicitors as the remaining cestuis que trustent; that it was, under the circumstances, impossible that the original suit should go on; and praying that the suit might be prosecuted between the parties thereto in the same manner as it was carried on by the parties to the original suit. Demurrer by the cestuis que trustent. Demurrer allowed. *Peareth* v. *Peareth*, Johns. 58; 28 L. J., Ch. 118; 5 Jur. (N.S.) 60; 7 W. R. 84.

Supplemental Judgment—Infant.]—The birth of one of a class, entitled as such, after the institution of a suit, is within the fifty-second section of the Chancery Improvement Act, and justifies an order for the usual supplemental decree. *Fullerton* v. *Martin*, 1 Drew. 238; 1 W. R. 378.

The 52nd section of the Chancery Practice Amendment Act, 15 & 16 Vict. c. 86, providing that on a suit becoming defective by reason of transmission of interest, an order to the effect of the usual supplemental decree may be obtained as of course, upon an allegation of the transmission of interest, applies to cases where the rights of the plaintiff are affected by a settlement executed after the institution of the suit. *Atkinson* v. *Parker*, 2 De G. M. & G. 221; 22 L. J., Ch. 20; 16 Jur. 1005; 1 W. R. 43.

A decree was made in the absence of an infant who was interested; nothing having as yet been done under it, and it appearing to be for her benefit, the court made a supplemental order, under the 15 & 16 Vict. c. 86, s. 52, to carry on the decree. *Jebb* v. *Tugwell*, 20 Beav. 461; 24 L. J., Ch. 670.

Examination pro interesse suo.]—Where the claim of the next of kin is raised on the record, and one person in that character is a party, other persons found by the master to be next of kin may be heard by the court, though not parties to the suit; but where the claim is not raised on the record, and none of the next of kin are in that character parties to the cause, there must be a supplemental bill to bring them before the court. *Waite* v. *Temple*, 1 Sim. & S. 319.

Omissions from Judgment—How rectified.]—Omission in decree, if perfectly of course,

supplied on motion with notice; in this instance the common direction to examine all parties upon interrogatories being omitted, an order was made that master should be at liberty to examine, &c. *Wallis* v. *Thomas*, 7 Ves. 292.

So also, in the usual decree upon creditors' bill against executors, the direction for account of personal estate. *Pickard* v. *Mattheson*, 7 Ves. 293.

Effect of Judgment.]—A decree directing the trusts of a will to be carried into execution, does not imply that all the trusts are valid. *Gooch* v. *Gooch*, 3 De G. M. & G. 366; 22 L. J., Ch. 1089.

In an administration suit, a fund was directed to be paid to a married woman for life for her sole and separate use. When the order was made, the court had not determined any question with respect to the interest, which by the terms of the will was not for her sole or separate use: —Held, that the language of the decree was simply inaccurate, and not binding as a declaration of her interest. *Moore* v. *Walter*, 8 L. T. 448.

—— **How far binding.**]—A party who comes in in a creditors' suit, intrusting the management of the suit to the plaintiff, must upon an application to review the proceeding, stand in the place of the plaintiff, and, in the absence of fraud, be bound by his knowledge. *Gwynne* v. *Edwards*, 9 Beav. 22; 15 L. J., Ch. 84.

Where, in a creditors' suit, one of the defendants, a creditor, permitted the bill to be taken as confessed against him, and did not file a charge under the decree to account in the master's office:—Held, that he was bound by the declaration as to priorities in the final decree. *Murtagh* v. *Tisdall*, Fl. & K. 20; 3 Ir. Eq. R. 85.

Every party in a cause which is stopped is presumed to have notice of the decree to account made in the cause which occasioned the order. *Moore* v. *Berry*, 2 Moll. 384.

Though the distribution of an intestate's estate, under a decree of the court, among persons found to be the next of kin, does not conclude the rights of persons who may have an equal or paramount title, yet the court will not assist other next of kin who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims. *Sawyer* v. *Birchmore*, 1 Keen, 391. Reversed, *Ib.*, 825; 2 Myl. & C. 611; 6 L. J., Ch. 277, on ground that notice of proceedings was not conclusively proved.

After a decree had been enrolled, declaring A. entitled to a particular fund, as next of kin to a testator, a stranger to the suit presented a petition to be allowed to come in and prove his claim to be entitled to the fund, instead of A.:—Held, that even if the petitioner could show such a case as would insure his succeeding, the court had no power to disturb the decree, and the petitioner could only establish his rights by filing a bill for that purpose. *Bauer* v. *Mitford*, 29 L. J., Ch. 268. And see *S. C.*, 9 W. R. 135.

—— **Erroneous—Appeal.**]—To impeach a decree, directing a distribution of assets by an executor as erroneous, the parties interested must come in due time. *O'Brien* v. *Grierson*, 2 Ball & B. 336.

The representatives of a party who was held to be rightly made a party to a suit as legatee of leaseholds, not having been served with a petition of rehearing, on which a decree was made, affecting the party, time was allowed to present a petition of appeal to have the matters reheard. *Hickling* v. *Boyer*, 3 Mac. & G. 635; 21 L. J., Ch. 388; 16 Jur. 137.

—— **Right of Action against Party inducing Error.**]—A defendant in an administration suit made an inaccurate statement in his answer as to the number of a class of beneficiaries, and an order was made on further consideration that the fund in court should be divided among the class in the proportion in which it would have been divisible if the statement had been correct:—Held, that the person aggrieved by the error could not maintain an action against the defendant who had made the mistake. *Laing* v. *Harle*, 34 L. T. 728; 24 W. R. 728.

When a party to a suit has made a misrepresentation in his pleadings as to the number of a class, and the fund has been distributed by the court in accordance with that misrepresentation, the court will not assume that the mistake was due to this misrepresentation, as it is itself responsible for the making of due inquiries; and will not, therefore, hold the party making the misrepresentation liable for more than what he has himself received in excess of his proper share. *Ib.*

—— **Power to litigate matters dehors the Suit.**]—Under the usual decree against an executor to account, the master is not at liberty to investigate a disputed account arising out of partnership transactions between the testator and executor, the latter swearing that the balance is in his favour; but under such circumstances, the plaintiff may have relief by supplemental bills, without exhibiting an interrogatory in the original suit for the examination of the executor. *Cropper* v. *Knapman*, 2 Y. & C. 338; 6 L. J., Ex. Eq. 9.

The court will not, on the motion of a creditor coming in under a decree directing a sale of lands devised for payment of debts, set aside a lease obtained pendente lite from the devisee under the will, with a leasing power. *Moore* v. *M'Namara*, 2 Ball & B. 186; 12 R. R. 73. See *Walker* v. *Smallwood*, Ambl. 676.

A bill having been filed in 1802, by one of the legatees to carry the trusts of the will into execution, and for an account of the assets:—Held, that a party to that suit might raise the question whether a renewal of a lease belonging to the estate was a graft on the original lease in the master's office, although not put in issue in the pleadings. *Jackson* v. *Welsh*, Ll. & G. t. Plunk. 346.

—— **Power to make Order where consequential on Judgment.**]—A testator gave his property after the death of his wife to trustees, in trust to pay the interests and profits to his two daughters J. and E. to their separate use, with a direction to pay to and supply for the benefit of A., the son of E., 200*l.* annually when he attained the age of twenty-one years; and before that period such part of the 200*l.* bequeathed to him as might be judged proper; he then gave his daughters power to dispose of the principal by will to their children or grandchildren respectively, "except that proportion of principal given to E. and from which the interest is to arise, to my grandson, namely 4,000*l.*, which

sum shall be my grandson's property"; and in case either of the daughters died without issue, he limited her share of the fund over to the other daughter, her children, or grandchildren. The executrix, having in mistake made payments to A. in respect of his annuity for two years before he attained twenty-one, was entitled to retain them out of the future payments of the annuity. An order authorising her to retain them, and made upon petition after the decree had been passed and entered, is regular. *Livesey* v. *Livesey*, 3 Russ. 287. Reversed in part, *Ib.*, 542; 6 L. J. (o.s.) Ch. 13; 7 L. J. (o.s.) Ch. 120.

—— **Certificate—Inquiry as to Debts—Purchase of Debts by Plaintiff's Solicitor.**]—The solicitor to the plaintiff in a creditors' action bought up debts; the estate was insolvent:—Held, that the question whether the solicitor was trustee for the creditors of any profit on the purchase could not be raised by the certificate of the chief clerk, in the absence of any direction on the subject in the order under which the certificate was made. *Tillet, In re, Field* v. *Lydall*, 55 L. J., Ch. 841; 32 Ch. D. 639; 54 L. T. 604; 35 W. R. 6.

For Account—Interrogatories under Common Decree before Judicature Acts.] — In a creditors' suit against executors and infant devisees, a decree directing accounts of the personal estate and debts, with liberty to exhibit interrogatories to prove the will, was made on the admission of the debts by the executors. *Nash* v. *Benton*, C. P. Cooper, 192.

The examination of an executor, under the usual decree for an account, ought to contain an interrogatory, whether he is indebted to the testator, the debt from himself being assets; liberty was therefore given, upon the suggestion of co-defendants, legatees, without affidavit, to exhibit an interrogatory for that purpose, not to go into an account, which must be the subject of a distinct bill. *Simmons* v. *Gutteridge*, 13 Ves. 262.

If, in a creditors' suit, a decree is made in the usual form, no special interrogatory for the examination of the defendants ought to be allowed, although a case for directing special inquiries is made on the record. *Moore* v. *Langford*, 6 Sim. 323; 4 L. J., Ch. 228.

A bond, given by a testator to his daughter, was assigned by her and her husband to trustees for the daughter and children. The husband and wife subsequently assigned it to A. B. to secure a debt. After the testator's death, his executor, without notice, as he alleged, of the first assignment, paid to A. B. the amount of the debt. A decree was made for taking the usual accounts of the testator's estate, and the trustees claimed the amount of the bond; but the master being of opinion that, as the matters stood, the payment of the executor to A. B. was good, an application was made to the court by the wife and children (defendants in the cause) for liberty to examine the executor as to the fact of notice, but it was refused with costs. *Ford* v. *Bryant*, 9 Beav. 410; 15 L. J., Ch. 261; 10 Jur. 484.

Under the usual decree in a creditors' suit, the master allowed an interrogatory to be exhibited for the examination of the administratrix, which was in very special terms, containing inquiries not suggested by the pleadings as to moneys which she had not received, and why the same had not been received. The interrogatory was disallowed. *Hopkinson* v. *Bagster*, 1 Y. & C. C. C. 13; 5 Jur. 1033.

Under a common decree against an executor to take the accounts, the executor was interrogated as to two specified sums, and he fully answered. A new set of interrogatories were exhibited with a view of throwing discredit on this answer:—Held, that the master was wrong in allowing them. *Suckermore* v. *Dimes*, 9 Beav. 518.

Under the usual decree against an executor to account, the master is not at liberty to investigate a disputed account, arising out of partnership transactions between the testator and executor, the latter swearing that the balance is in his favour; but, under such circumstances, the plaintiff may have relief by supplemental bill, without exhibiting an interrogatory in the original suit for the examination of the executor. *Cropper* v. *Knapman*, 2 Y. & C. 338; 6 L. J., Ex. Eq. 9.

In a creditors' suit against the administrator of a deceased intestate, a decree was made in the usual form. The defendant's discharge, in which he claimed a right to retain certain moneys of the intestate come to his hands as administrator, was allowed by the master. Subsequently, the master declined to review the discharge, but, by his certificate, allowed certain special interrogatories exhibited by the plaintiff for the examination of the defendant, in respect to his right of retainer:—Held, on exceptions taken by the defendant to the master's certificate, that the interrogatories ought not to have been allowed. *Thompson* v. *Cooper*, 8 Jur. 164.

In a suit for the administration of assets, the examination of the executors (defendants) to interrogatories exhibited by plaintiff, a co-executor, under a decree for an account, is taken for the benefit of all parties; and therefore the other defendants, creditors and legatees may take copies. *Dyott* v. *Anderton*, 3 Ves. & B. 176.

Account on the footing of wilful Default.]—The general rule is, that if the question of wilful default be not raised by the pleadings, it cannot be raised either at the original hearing or on further directions, but where the pleadings do raise the point, it is the duty of the plaintiff, if he can make a case for it, to get a declaration by the decree, or, if he cannot make a case for an immediate decree, to get an inquiry of such a character that on the result of it the court may, on further directions, make a declaration. But if the point is raised in the pleadings, and the court, by its decree, passes it by, and neither makes any declaration nor directs an inquiry, it must be taken that the court did not mean to give any such relief. *Jones* v. *Morrall*, 2 Sim. (N.S.) 241; 21 L. J., Ch. 630.

In an administration suit, the pleadings raised questions of wilful default, and liability to pay interest on balances in hand against executors; but the decree taken at the original hearing neither contained any declaration against the executors nor any inquiries as to wilful default, but was merely a decree for the common account of what had been received:—Held, that the court could not, on further directions, make any decree for wilful default; but that the question of interest on balances in hand was still open, inasmuch as, although there was no declaration at the hearing, yet, applying the above rule, there was that which was the first step towards it, a direction to take the common account of

what had been received, which, if properly answered by the master, ought to show what personal estate had been received from time to time, and then the court might, on further directions, either make an immediate declaration, or direct further inquiry. *Ib.*

A case was alleged on the pleading to charge executors for what they might but for their wilful default, &c., have received: at the hearing the common accounts only were directed against them. The case coming on for further directions, on the master's report:—Held, that the executors could not be charged as for their wilful default, &c., and that no inquiry could then be directed on the subject, although the master's report laid a foundation for such an inquiry. *Garland* v. *Littlewood*, 1 Beav. 527; 8 L. J., Ch. 369.

When, in a bill for administration of assets, it is sought to make the personal representative chargeable for default, the plaintiff, in order to entitle himself to the special direction (without which the master cannot travel out of the ordinary account of receipts and payments to inquire touching default), ought to make a primâ facie case of default; the giving the special direction raising an inference that loss has accrued by the neglect of the defendant. *Sandford* v. *Seymour*, 1 Moll. 181.

In a suit for an account of an intestate's personal estate, the bill sought to charge the administrator with wilful default, and contained charges to that effect. The decree directed only the ordinary accounts:—Held, that nevertheless the court would direct an inquiry as to wilful default, if on the master's report there appeared facts to warrant it. *Cuffe* v. *Cuffe*, 3 Ir. Eq. R. 469.

A plaintiff in an administration suit, upon a reference for taking the accounts, cannot include an inquiry as to wilful neglect and default, unless there is a specific charge to that effect in the bill. The general charge of neglect and default is not sufficient. *Sawyer* v. *Mills*, 20 L. J., Ch. 80.

Proof of improper expenditure of money by executors will not support a decree against them for an account on the footing of wilful neglect or default. *Smith* v. *Chambers*, 2 Ph. 221; 16 L. J., Ch. 291; 11 Jur. 359.

—— **Proceedings for, founded on Master's Report — Where maintainable.**]—The general rule is, that to ground a direction to charge an executor for default, not only must the fact be put in issue, but some case be made by evidence to shew the fact is probable and the inquiry proper. But if that has not been done, and no direction is originally given, yet it appears, from the facts stated in the report, that the testator's estate might have been made available with reasonable diligence on the part of the executor, the court will apply itself to that on further directions, but it must point the further inquiry to specific items. *Travers* v. *Townsend*, 1 Moll. 496.

A bill was filed against trustees, praying that the amount of the trust fund which the trustees "had, or but for their wilful neglect or default might have, received, might be ascertained." At the hearing the bill was dismissed as against one trustee, and the amount and particulars of the trust fund were directed to be ascertained. Nothing was said about wilful default, nor did the trustee ask that the bill might be dismissed as to wilful default. The master made his report, which stated certain facts, and referred to certain documents, from which it was alleged that it would appear that there had been wilful default. At the hearing upon further directions, a decree was made, referring it to the master to inquire whether the trustee "could, with due diligence and without wilful neglect or default, have received" more than a particular stated fund, but, upon appeal, it was held, that the direction as to wilful default should be struck out of the decree. *Coope* v. *Carter*, 2 De G. M. & G. 292; 21 L. J., Ch. 570.

As a general rule, in order to obtain a direction for inquiring as to wilful default against an executor or trustee, the bill must allege a case, pray for it, and one case at least must be proved; and, semble, that if from admission or proof, a suspicion arises whether wilful default has or has not been committed, and it appears likely that further evidence can be obtained, the court ought to direct an inquiry, short of directing wilful default, but in such a way as to call the defendant's attention to it, with the view to ground thereon a new order at a future stage, directing an inquiry as to wilful default. *Ib.*

In order to obtain an inquiry, with a view to a decree for wilful default at a future stage of the suit, the plaintiff must rest upon one or more specific charges. *Massey* v. *Massey*, 2 John. & H. 728; 32 L. J., Ch. 13; 7 L. T. 311; 11 W. R. 19.

The observations in *Coope* v. *Carter* (2 De G. M. & G. 298) were not meant to let in general allegations of default, but to meet the case of specific allegations imperfectly proved at the hearing. Therefore, where a widow and executrix, who was empowered by will to carry on testator's trade, did so for a short time, and her co-executors, in answer to an allegation that the book debts had not been got in, stated that the widow had got in some, that they believed the rest were bad, but that they had taken no steps themselves to recover any:—Held, that a sufficient case was not made to justify any inquiry as to wilful default. *Ib.*

Shortly after a testator's death in 1825, an inventory and appraisement were made by his executors, or one of them, of all and singular the goods and chattels, rights and credits of the testator, shewing that the same were of the value of 28,665*l.* odd. Upon a bill filed in 1856 for an account, and for an inquiry as to wilful neglect and default, in case the estimated amount had not been realised, the defendants failed, as to a large portion of the estimated amount, to shew that it had been realised:—Held, nevertheless, that the plaintiff was not entitled at the hearing either to any inquiry expressly directed to wilful neglect or default, or even to a preliminary order of the kind indicated in *Coope* v. *Carter* (2 De G. M. & G. 297), viz. an inquiry short of wilful neglect and default, but upon which a new order, expressly so directed, might be founded at a future stage; the court being of opinion, first, that upon the pleadings the fact of wilful neglect and default could not be treated as an issue between the parties; and, secondly, that, even if it could be so treated, there was no evidence upon it. *Sleight* v. *Lawson*, 3 Kay & J. 292; 26 L. J., Ch. 553; 5 W. R. 589.

Semble, in an administration action under the Judicature Act, an order charging an executor with wilful default may, in a proper case, be made at any time during the progress of the action. *Job* v. *Job*, 6 Ch. D. 562; 26 W. R. 206.

Where a plaintiff has obtained a common administration judgment against a defendant, he cannot maintain a subsequent action against the same defendant charging him with wilful default in the administration of the same estate, unless he has obtained the leave of the court to bring such action. The practice in this respect has not been altered or varied by the Judicature Acts or the rules thereunder. *Laming* v. *Gee*, 48 L. J., Ch. 196; 10 Ch. D. 715; 40 L. T. 33; 27 W. R. 227.

In an administration action by a residuary legatee, an order for accounts and inquiries on the footing of wilful default may be made, not only at the hearing, but at any subsequent time, e.g. at the hearing on further consideration, if wilful default was charged by the pleadings. In an administration action brought against the executor and trustees of a will by the residuary legatee thereunder, who was also the specific devisee of certain real estate, wilful default was charged by the plaintiff in his statement of claim, and denied by the defendants in their statement of defence, but the administration judgment was not taken on that footing. The plaintiff sought in chambers to surcharge the defendants with certain sums in respect of wilful default, and evidence was tendered on both sides, but without result, owing to the form of the judgment. On the further consideration of the action:—Held, that the plaintiff was entitled to obtain relief on the footing of wilful default at that stage in the action, notwithstanding that the original judgment had not been taken on that footing, since the point had been distinctly raised by the pleadings, and the defendants could not say that they had had insufficient notice of the charge. *Symons, In re, Luke* v. *Tonkin*, 52 L. J., Ch. 709; 21 Ch. D. 757; 46 L. T. 684; 30 W. R. 874.

Where in an administration action against executors misconduct by them was alleged, and special declarations and accounts claimed; at the trial the court refused to reserve the question of the plaintiff's right to special relief. *Armitage, In re, Smith* v. *Armitage*, 52 L. J., Ch. 711; 24 Ch. D. 727; 49 L. T. 236; 32 W. R. 88.

—— **Not in Proceedings originated by Summons.**]—The only administration decree which can be obtained upon summons in chambers, under the 15 & 16 Vict. c. 86, s. 45, is the usual decree to make an executor or administrator account for the personal estate which he may have received. *Partington* v. *Reynolds*, 4 Drew. 253; 27 L. J., Ch. 505; 4 Jur. (N.S.) 200; 6 W. R. 388.

The court cannot, in any stage of a suit, engraft upon such a decree, whether made upon bill or upon claim, or upon summons in chambers, a decree to make an executor or administrator account for what he might, without his wilful neglect or default, have received; a decree of this nature being totally different in its principle from the usual decree. *Ib.*

In taking the accounts under the usual order obtained on summons, an executor and trustee can only be charged with money actually received by him, and not with money which he might have received but for his wilful neglect or default. *Blakeley* v. *Blakeley*, 1 Jur. (N.S.) 368; 3 W. R. 288. But see *Brooker* v. *Brooker*, 3 Sm. & G. 475; 26 L. J., Ch. 411; 3 Jur. (N.S.) 381; 5 W. R. 382. S. P., *Fryer, In re*, 26 L. J., Ch. 398; 3 Jur. (N.S.) 485; 5 W. R. 552: *Hengler, In re*, W. N. 1893, p. 37.

—— **After Common Decree in Suit by another.**]—A creditor, who makes out a primâ facie case of misconduct in trustees, is entitled to a decree that they shall account for whatever they might have received without their wilful default or neglect; though, in a prior suit instituted by another creditor, and conducted without collusion, a common decree for an account has been previously made against them. *Shepherd* v. *Towgood*, Turn. & R. 379.

—— **Amendment Charging.**]—After the ordinary decree in a suit against trustees, agents or executors, in which wilful default has not been charged or proved, the court will not give leave to amend or bring a supplemental action charging such default, where the plaintiff had knowledge, or the means of knowledge, of the circumstances on which he proposed to rely, as acts of wilful default. *Blount* v. *O'Connor*, 17 L. R., Ir. 620.

—— **In Respect of what Matters.**]—When a case is made out of a debt having been lost to a testator's estate, it is the constant practice of the court to direct an inquiry whether such debt has been lost by the wilful default of the executors. *Rowley* v. *Adams*, 5 Jur. 906.

Shares held by a testator as mortgagee, were proved to have been transferred after the testator's death, but they were not accounted for by the executors, and it was certain that the surviving trustee had not received anything in respect of them. The court, in an administration suit, refused to make the shares an item in the account, as a charge of wilful default could not be introduced into it. *Shuttleworth* v. *Bristo*, 9 L. T. 317; 12 W. R. 40.

Executors who had retained the assets in their hands for seven years uninvested, there being no debts, ordered to pay the costs (to the hearing) of a legatee's suit to administer the estate. *Tickner* v. *Smith*, 3 Sm. & G. 42; 1 Jur. (N.S.) 990; 3 W. R. 224.

Semble, in an administration suit by legatees against executors, alleging that the legacies ought long since to have been paid, and seeking to charge the defendant with the costs, the plaintiffs may adduce evidence of wilful default, though not specifically charged by the bill. *Ib.*

General allegations of wilful neglect in a petition against a land agent, though supported by specific evidence of neglect in particular cases, are not sufficient to entitle the petitioner to an inquiry respecting wilful neglect. *Bond* v. *M'Watty*, 13 Ir. Ch. R. 174.

Form of Lease — Approval — Certificate of Counsel.]—In an administration suit, the court, upon the certificate of counsel, will authorise a lease, without reference back to the master to settle it. *Day* v. *Croft*, 14 Beav. 219.

Other Matters.]—After a decree had been made on the construction of a will and for the administration of the testator's estate in accordance therewith, a will of later date was found duly executed and almost an exact counterpart of the earlier will. Questions having arisen as to the effect of the new will on certain legacies, named in both wills, which by the decree had been held to be superseded, the court, on the application of the trustees, directed an inquiry as to who were the persons interested in setting up the alleged new will, and that notice should be given to such persons that, unless they within a limited time, took steps to recall the

existing probate, and to prove the new will, the court would proceed to administer the estate on the will as proved. *Harrison* v. *Every*, 34 L. T. 238.

On the motion of defendant before answer, it was ordered that reference be made to master to ascertain debt, &c., claimed by bill, which was to be paid by a given day and suit to be stayed, and if not paid, plaintiff's costs given him, and to be at liberty to proceed in the cause. *Boys* v. *Ford*, 4 Madd. 40.

Where, in a decree in a residuary legatee's administration suit, an inquiry was directed, under the 17 & 18 Vict. c. 113, whether the testator's estates were charged with any debts by way of mortgage, such inquiry was directed to be without prejudice to any question on the construction of the will. *Moore* v. *Moore*, 9 W. R. 825.

i. LIABILITY FOR COSTS.

1. At Common Law.

a. *When Suing in Representative Character.*

Since Judicature Acts and Orders.]—Under and subject to the provisions of O. LXV. all costs are in the discretion of the court.

Before Judicature Acts—Discretion of Court as to.]—The court has no jurisdiction to relieve an executor plaintiff from costs to which he was liable before 3 & 4 Will. 4, c. 42, s. 31. *Ashton* v. *Poynter*, 5 Tyr. 322; 1 C. M. & R. 738; 3 D. P. C. 465; 1 Gale, 57; 4 L. J., Ex. 71.

Where an executor seeks to be relieved from costs under the discretionary power of the court, the application should be made before taxation; otherwise, if it is granted, it will be on payment of the costs of the application. *Ib.*

Executors declared in one count on a contract by the defendant with their testator, and in another on a contract by the defendant with them to pay money due to the plaintiffs as executors on an account stated between them, with a promise to pay them as executors, and a verdict was found for the defendant:—Held, that he was entitled to his costs of the last count under 23 Hen. 8, c. 15, and that the court has no power to interfere under 3 & 4 Will. 4, c. 42, s. 31, in favour of the executors. *Ib.*

The discretion as to costs in actions by executors, given by the court or a judge, is not to be governed by the fact of the action having been properly brought, but it must be shewn that the plaintiff was induced to bring it by something like fraud or misrepresentation on the part of the defendant. The mere fact that the defendant when applied to refuses to state the ground of his resistance of the claim, will not suffice. *Southgate* v. *Crowley*, 1 Scott, 374; 1 Bing. (N.C.) 519; 1 Hodges, 1; 3 D. P. C. 386; 4 L. J., C. P. 102.

The 3 & 4 Will. 4, c. 42, s. 31, as to payment of costs by executors and administrators, in actions brought by them, was held (Littledale, J., dissentiente) to apply to actions tried after the passing of the act, whether commenced before or not; although the cause had been made a remanet before the passing of the act. *Freeman* v. *Mayes*, 3 N. & M. 883; 1 A. & E. 338.

—— **Right to—Depends on Conduct of Defendant.**]—The court will not relieve an executor or an administrator from costs, unless there has been some misconduct on the part of the defendant, which led the plaintiff to proceed with the action, or unless some other very peculiar ground is laid for the interference of the court. It is not enough that the action was brought bonâ fide; that the plaintiff had apparent reasonable grounds for suing, and that he was taken by surprise by the defence. *Godson* v. *Freeman*, 2 C. M. & R. 585; 4 D. P. C. 543; 1 Gale, 329; 1 Tyr. & G. 35; 5 L. J., Ex. 41.

In order to induce the court to exempt an executor, who has failed in an action brought by him in that character, from costs, it is not sufficient that the action has been brought bonâ fide, under counsel's advice, and that it has been defeated on a difficult point of law, unless there is improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct; nor is the omitting to give the executor information which might have prevented his proceeding with the action, if he did not apply for the information. *Farley* v. *Briant*, 3 A. & E. 839; 1 H. & W. 775; 5 N. & M. 42; 4 L. J., K. B. 246.

On an application to exempt executors from costs, the court will look not so much as to whether they have proceeded bonâ fide in the action, and with a fair and reasonable belief as to the justice of their claim, as to whether the defendant has been guilty of any misrepresentation or deception to induce them to bring their action. *Birkhead* v. *North*, 2 B. C. Rep. 9; 4 D. & L. 732; 16 L. J., Q. B. 284; 11 Jur. 436.

Mere silence by a defendant, as to the nature of his defence, is not sufficient ground for such an application, although it may have induced the executor to proceed with the action. *Ib.*

In order to exempt an administrator who has failed in an action, from payment of costs, it is not enough that the defendant, being in possession of evidence which he knows will defeat the plaintiff's case at the trial, or may prevent him from bringing the action, does not volunteer a disclosure of it. But if the administrator applies to the defendant for information, the result of which may decide the case, the defendant is guilty of misconduct if by suppression or concealment or miscolouring he leads him astray, and induces him to continue his action. In this latter case, if he fails in the action, the administrator will be exempt from payment of costs. *Redmayne* v. *Moon*, 25 L. J., Q. B. 311; 2 Jur. (N.S.) 691.

—— **Decision of Judge or Court final.**]—An order to exempt an executor from costs after a verdict for the defendant, is a matter within the discretion either of a single judge or of the whole court; and if a single judge has made an order, such order cannot be reviewed, the decision, either of the whole court or of a single judge, being final. *Maddocks* v. *Phillips*, 5 N. & M. 370; 1 H. & W. 251; 3 A. & E. 198.

—— **Illegality of Contract of Testator.**]—In an action by an administratrix, on a bond given to her intestate, a verdict having been found for the defendant, on the ground of an illegality in the contract upon which the bond had been given, and which illegality was fully disclosed by the plea, the court refused to exempt the plaintiff from costs. *Prole* v. *Wiggins*, 3 Scott, 607; 2 Hodges, 204; 2 Bing. (N.C.) 230; 6 L. J., C. P. 2.

—— **Executors defeated on collateral Ground.**]—The defendant effected a policy of insurance on the life and for the benefit of G., and, on his death, received the sum insured. The executors of G. sought to recover this sum in an action for money had and received by the defendant to their use as executors, and were nonsuited on a

ground collateral to the merits of the cause :—The court ordered the judgment of nonsuit to be entered up with costs against the executors. *Lysons* v. *Barrow*, 4 M. & Scott, 463 ; 10 Bing. 563 ; 2 D. P. C. 807 ; 3 L. J., C. P. 192.

—— **Account stated with Executors.**]—Upon a declaration containing an account stated with the plaintiffs as executors, though it also contains counts on promises to the testator, the defendant is, in case of a nonsuit, entitled to costs as of course. *Spence* v. *Albert*, 4 N. & M. 385 ; 2 A. & E. 785 ; 1 H. & W. 7 ; 4 L. J., K. B. 97.

—— **Executors guilty of Laches.**]—Where an executor has commenced an action, without using due diligence to ascertain that he can proceed with a reasonable prospect of success, or is guilty of any laches, so as to cause unnecessary expense or vexation to the defendant, the court will not exempt him from costs. *Wilkinson* v. *Edwards*, 1 Scott, 173 ; 1 Bing. (N.C.) 301 ; 3 D. P. C. 137 ; 4 L. J., C. P. 6.

An administrator arrested the defendant on a bond given to the intestate more than twenty years before his death, and no interest had been paid upon it. The defendant pleaded his discharge under the Insolvent Act, and the verdict was found in his favour. It appeared that the plaintiff had knowledge that the defendant had applied for his discharge before the action was brought :—Held, that the administrator was not entitled to be relieved from the payment of costs to the defendant. *Engler* v. *Twysden*, 2 Bing. (N.C.) 263 ; 2 Scott, 427 ; 4 D. P. C. 330 ; 1 Hodges, 303 ; 5 L. J., C. P. 1.

—— **Continuing Action, Costs of—Execution for.**]—A widow, who had remained for two years in possession of premises held by her late husband as tenant from year to year, afterwards obtained administration to him ; and, having continued by suggestion an action brought by him in his lifetime for trespass to the premises, was nonsuited, and judgment was entered against her de bonis propriis :—Held, that the interest in the premises was not liable to be seized in execution and sold for the costs of the nonsuit. *Williams* v. *Hepenstal*, Ir. R. 7 C. L. 514 ; 22 W. R. 412.

—— **Other Cases.**]—Where a defendant pleaded the general plea of bankruptcy, to an action brought by an executor or an administrator, and obtained a verdict, the plaintiff was not liable to costs under 5 Geo. 2, c. 30, s. 7. *Martin* v. *Norfolk*, 1 H. Bl. 528.

Where an executor was nonsuited upon evidence being given at the trial that the supposed testator was still alive, the court refused to allow costs to the defendant, it appearing from affidavits on both sides to be still at least doubtful whether the supposed testator was living or not. *Zachariah* v. *Page*, 1 B. & Ald. 386.

A plaintiff suing as executor, having been appointed under a former will, which the testator had afterwards revoked, and having surreptitiously obtained a probate of the first will, which was soon after annulled by the Ecclesiastical Court, who also revoked the probate, but not till after the action had been commenced against the defendant, who was the executor of the last will, was held liable to the costs of the cause. *Shaw* v. *Mansfield*, 7 Price, 709.

An executor suing in his representative character upon a contract made with his testator, was liable to costs upon a judgment as in case of a nonsuit, where such costs had been occasioned by his wilful default. *Woolley* v. *Sloper*, 3 M. & Scott, 248 ; 9 Bing. 754 ; 2 D. P. C. 208.

b. *When Defendant.*

Plea of Plene Administravit—Succeeding on.]—An administrator who pleads the general issue and plene administravit, and succeeds on the latter plea, is entitled to the general costs of the cause. *Iggulden* v. *Terson*, 2 D. P. C. 277 ; 4 Tyr. 309.

Where executors pleaded non assumpserunt, and the Statute of Limitations, and plene administraverunt, and the two first issues were found for the plaintiff, and the last for the defendants, the defendants having established an absolute bar, were entitled to the postea and the general costs. *Ragg* v. *Wells*, 8 Taunt. 129.

Where an executrix pleaded non assumpsit, ne unques executrix, and plene administravit, and the issues on the first two pleas were found for the plaintiff, and on the last for the defendant :—Held, that the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial. *Edwards* v. *Bethel*, 1 B. & Ald. 254.

An executor having pleaded non assumpsit, as well as plene administravit, and plene administravit præter, &c., and thereby forced the plaintiff to go to trial, the plaintiff obtaining a verdict on the non assumpsit, and being entitled to judgment of assets quando acciderint, is entitled to the general costs of the trial, though the issue of plene administravit was found for the defendant. *Hindsley* v. *Russell*, 12 East, 232 ; 11 R. R. 373.

Upon the pleas of non assumpsit and plene administravit, the plaintiff joined issue, and omitted to pray judgment of assets quando ; the first issue being found for the plaintiff and the second for the defendant, the defendant is entitled to the postea and general costs. *Hogg* v. *Graham*, 4 Taunt. 135

On a plea of plene administravit præter, the plaintiff is entitled to judgment of assets in futuro for debt and costs. *Cox* v. *Peacock*, 2 Scott, 125 ; 4 D. P. C. 134 ; 1 Hodges, 272.

Where an executor is sued in respect of a claim against his testator's estate for damages for misrepresentation and breach of warranty, and denies the cause of action, at the same time pleading plene administravit præter, he is liable for costs de bonis propriis, if he fail upon the general issue, notwithstanding that he succeeds upon the plea of plene administravit præter. *Squire* v. *Arnison*, 1 Cab. & E. 365 ; 48 J. P. 758.

And see *Gorton* v. *Gregory*, 3 B. & S. 90 ; 31 L. J., Q. B. 302 ; 6 L. T. 656 ; 10 W. R. 713—Ex. Ch.

False Pleas.]—A bankrupt executor, pleading a false plea, after commission, is liable to costs. *Howard* v. *Jemmett*, 3 Burr. 1368 ; 1 W. Bl. 400.

Judgment of Assets Quando.]—Upon a judgment of assets quando acciderint, on a plea by an executor of a judgment outstanding and plene administravit, the plaintiff is entitled to costs de bonis testatoris. *Anon.*, 1 Chit. 629, n.

A plaintiff who takes judgment of assets quando upon plene administravit, and obtains a verdict on non assumpsit of the testator, is entitled to judgment for the costs de bonis testatoris, et si non, de bonis propriis. *Marshall* v. *Wilder*, 4 Man. & Ry. 607 ; 9 B. & C. 665 ; 7 L. J. (o.s.) K. B. 325.

Where an executor successfully raises the

defence of plene administravit on a motion for judgment, he is, apart from misconduct, entitled to costs of the motion and action against the plaintiff; but the plaintiff is entitled to judgment against assets quando for his debt, with the costs of action and motion, also against assets quando. *Cockle* v. *Treacy*, [1896] 2 Ir. R. 267—C. A. S. P., *Millar* v. *Keane*, 24 L. R. Ir. 49.

Discontinuance by Plaintiff.]—Where an administratrix has been made a defendant in an action commenced against the intestate, by a suggestion under 15 & 16 Vict. c. 76, s. 138, and has pleaded to the suggestion, the court will not allow the plaintiff to discontinue without payment of all the costs of the cause. *Benge* v. *Swaine* or *Page*, 15 C. B. 784; 2 C. L. R. 1382; 23 L. J., C. P. 182.

Costs of Adjournment—Death of Defendant—Liability of Executrix.]—The trial of a cause at an assize was postponed by an order of nisi prius, on payment by the defendant of the costs of the day, to be taxed. The defendant died before any verdict in the cause and before the order of nisi prius was made a rule of court. The suit having abated (17 Car. 2, c. 8, s. 1), the court discharged a rule calling on the defendant's executrix to shew cause why the costs should not be taxed; the remedy for recovering the costs under 1 & 2 Vict. c. 110, s. 18, not being clear as against an executrix. *Hill* v. *Brown*, 16 M. & W. 796.

Other Cases.]—An executor having pleaded non assumpsit, and a specialty debt sufficient to cover the assets, may be permitted to withdraw the first plea, on payment of the costs occasioned only by that plea. *Dearne* v. *Grimp*, 2 W. Bl. 1275.

Executors were liable to costs in error in cases where they would be liable in the original action. *Williams* v. *Riley*, 1 H. Bl. 566.

2. In Probate Court.

Of Maintaining Will.]—Executors took legacies under the will of their testator, which also gave them the residue. The will was disputed by the next of kin, but was established, except the residuary clause. In an administration suit the executors were allowed all costs of proving the will, including costs ordered by the house of lords to be paid to the next of kin. *Fulton* v. *Andrew*, 46 L. J., Ch. 131; 24 W. R. 979.

A testator by his will gave 2,000*l.* to be equally divided among certain legatees, and the residue of his estate to his executrix. The will was proved, but an action to set aside probate was shortly afterwards commenced in the probate division against the executrix by certain of the legatees, who were also next of kin of the testator, some of the plaintiffs being married women, suing without their husbands. Judgment, with costs of that action, was entered for the executrix on February 7th, 1879, and on March 1st, 1879, an action to administer the testator's estate was commenced in the chancery division by some of the plaintiffs in the probate action and some legatees, the husbands of the married women being now joined as plaintiffs against the executrix as defendant. The executrix thereupon paid the 2,000*l.* (less duty) into court, under an order which provided against its being paid out without notice. The probate division made an order on August 1st, 1879, directing the plaintiffs in the probate action to pay the specified taxed costs thereof to the solicitors of the executrix, and the executrix thereupon obtained a charging order in the administration action against the share in the fund in court of one party only, not being one of the married women. All the shares in question had been assigned or incumbered before the date of judgment in the probate action:—Held, that the costs of the probate action were expenses of administration caused by the acts and conduct of the legatees, and proper to be deducted from the legacies themselves, and to be considered a charge upon them as against assignees, incumbrancers and husbands taking in right of their wives. *Knapman, In re, Knapman* v. *Wreford*, 50 L. J., Ch. 629; 18 Ch. D. 300; 45 L. T. 102—C. A.

Held, further, that the executrix had not, by payment into court of the specific fund, resigned any claim she might have against it for expenses of administration, and she was entitled, in priority to all parties claiming, to set off against such share therein, and to be paid the proportionate share of the taxed costs of the probate action. *Ib.*

Held, also, that the costs of the administration as between party and party were, under the circumstances, properly chargeable on the residuary estate. *Ib.*

—— **Whether Testamentary Expenses.**]—A testatrix, by her will, after making various specific devises of her real estate and giving certain legacies, charged her real estate, in exoneration of her personal estate, with the payment of her debts, funeral and testamentary expenses, and the legacies which she gave. The will was disputed in the probate division by, amongst other persons, her co-heiresses-at-law. The action in that division was compromised, and the will proved in solemn form, it being provided in the agreement for the compromise that the costs of that action should be paid out of the estate in accordance with the rules and practice of the court. The question arose whether the costs incurred by the co-heiresses in that action were testamentary expenses, so as to be payable out of the real estate under the charge of those expenses upon the real estate made by the will:—Held, that such costs were testamentary expenses, inasmuch as they were incurred in establishing the will, and that they were therefore payable out of the real estate. *Brown* v. *Burdett*, 53 L. J., Ch. 56; 48 L. T. 753; 31 W. R. 854.

Probate and Administration Actions—Plaintiff's Costs.]—An action was brought in the probate division by an executor to propound a will. The court pronounced in favour of the validity of the will, and ordered the defendant to pay the costs, which he failed to do. Subsequently a creditor brought an action for the administration of the testator's real and personal estate, to which the executor was made a defendant. It then appeared that the testator had left no personal estate, but only real estate, which was insufficient to satisfy the creditors in full:—Held, that the executor was not entitled to be paid his costs incurred in the probate action in priority to the debts; but that the

estate was distributable in paying (1) the executor's costs in the administration action as between solicitor and client; (2) the plaintiff's costs in that action as between solicitor and client; and (3) the debts. *Pearce, In re, McLean* v. *Smith*, 56 L. T. 228; 35 W. R. 358.

Where, in a probate suit, the costs of either party are ordered to be paid out of the assets, and subsequently an administration suit is instituted and the estate proves deficient, the probate costs have priority next after the costs of administration suit and before the debts of the deceased. *Kelly* v. *Kelly*, 21 L. R. Ir. 243.

A testator by his will made several specific legal devises of real estate, of which one was to J., one of his executors, and another was to L. He devised the remainder of his real estates, and bequeathed his personal estate to trustees, upon trust for sale and conversion, and to stand possessed of the proceeds upon trust, after payment of his debts and funeral and testamentary expenses, to pay certain pecuniary legacies, and he gave the residue of the trust moneys unto and equally between his paternal next of kin. J. alone proved the will. The estates devised to J. and L. had, under the provisions of a settlement, been respectively liable to have two sums of 3,000*l.* and 1,200*l.* respectively raised out of them. The right to those sums had become vested in the testator. An action to administer the testator's estate was brought by W., one of the residuary legatees, against J. and L., the only question in dispute being whether the two sums of 3,000*l.* and 1,200*l.* were raisable as part of the testator's personal estate. It was held that they were not raisable, but that they had become merged in the estates on which they were respectively charged. The result of this decision was, that the personal estate was deficient. An action had been previously brought in the probate division, by W. and another residuary legatee, against J., impeaching the validity of the testator's will. The court pronounced for the validity of the will, but ordered that the costs of all parties to the action should be paid out of the personal estate. On the further consideration of the administration action:—Held, that the personal estate and the proceeds of the sale of the residuary real estate must be applied in paying: (1) the costs, as between solicitor and client, of the executor, and his costs, charges and expenses properly incurred (including his cost of the probate action); (2) the costs, as between party and party, of the plaintiff, and of the defendant L. ratably; and that, there being a deficiency, the costs of the action (so far as not provided for) must be borne by the specifically devised real estates ratably, according to their respective values at the time of the testator's death. But, that there was no jurisdiction to charge the costs of the probate action (other than the executor's costs) on the real estate. The above order was made, though some of the specific devisees were not before the court. But, whether the order could be enforced against the absent specific devisees, quære. *Price, In re, Williams* v. *Jenkins*, 55 L. J., Ch. 501; 31 Ch. D. 485; 54 L. T. 416; 34 W. R. 291.

—— **Realty and Personalty.**]—In administration proceedings in the chancery division the court will only under special circumstances order that the costs of a probate action shall fall on the realty. An order of the probate division directing that the costs of a party to proceedings before it shall be paid imports that they shall be paid out of the personalty. *Shaw, In re, Bridger* v. *Shaw*, 64 L. J., Ch. 47; [1894] 3 Ch. 615; 8 R. 555; 71 L. T. 515; 43 W. R. 159. And see *Price, In re, Williams* v. *Jenkins*, supra.

—— **Priority.**]—Costs of litigation in the ecclesiastical court for determining what is the testator's will, although ordered by the ecclesiastical court to be paid out of the estate, are postponed to the costs of administration in this court. *Major* v. *Major*, 2 Drew. 281; 23 L. J., Ch. 718; 2 Eq. Rep. 155; 2 W. R. 382.

One of the creditors of a testator cited the executrix in the probate division to prove the will, and an order was made that she should prove it within a time limited, and that, in default of her doing so, administration should be granted to the creditor. The executrix proved the will, and another friendly creditor then commenced an action in the chancery division against her to administer the estate, and the ordinary administration decree was made. Afterwards the creditor who had issued the citation obtained in the probate division an order that his costs of the proceedings there should be paid out of the estate in priority to other claims:—Held, that the costs of the administration action must be paid in priority to the costs in the probate division. *Mayhew, In re, Rowles* v. *Mayhew*, 46 L. J., Ch. 552; 5 Ch. D. 596; 37 L. T. 48; 25 W. R. 521.

3. In Equity.

a. *Of Administration Action.*

When given to Plaintiff on Dismissal of Bill.]—Cases in which costs may be given to a plaintiff out of an estate, notwithstanding the dismissal of the bill. *Westcott* v. *Culliford*, 3 Hare, 274; 13 L. J., Ch. 136; 8 Jur. 166.

If through the exertions of a plaintiff the court is enabled to distribute a fund, or make a declaration of rights necessary for an administration, there, although the plaintiff may fail in his claim, the court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund. *Wedgwood* v. *Adams*, 8 Beav. 103.

In a suit to obtain the decision of the court on a very doubtful will, the plaintiff turned out to have no interest. The court, upon making a declaration of rights, ordered the costs of all parties out of the fund. *Thomason* v. *Moses*, 5 Beav. 77; 6 Jur. 403.

A bill in an administration suit raised a question regarding a will, upon the decision of which depended the plaintiff's title to any interest in the deceased's estate. The decision being against his taking any interest, the bill was dismissed with costs. *Anderson* v. *Anderson*, 41 L. J., Ch. 247; L. R. 13 Eq. 381; 26 L. T. 12; 20 W. R. 313.

Costs out of an estate directed to be paid to the plaintiff, who wholly failed in her suit, the trustee, who was a defendant, having asked for a declaration as to the construction of the will. *Merlin* v. *Blagrave*, 25 Beav. 125.

Although the court decides against the plaintiff in a suit relating to the construction of a will, it may order the costs of all parties to be

paid out of the estate. *Lee* v. *Delane*, 4 De G. & Sm. 1; 14 Jur. 861.

A suit by a party in the character of a creditor under a covenant, against the executors of the covenantor, for payment of the claim out of the assets, and for the application of the estate, in the event of assets not being admitted, in a due course of administration, in payment of the claim:—Held, not to fall within the class of cases in which costs may be given to a plaintiff out of the estate, notwithstanding the dismissal of the bill. *Jones* v. *How*, 7 Hare, 267; 19 L. J., Ch. 324; 14 Jur. 145.

When letters of administration are revoked the administrator will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer. *Houseman* v. *Houseman*, 1 Ch. D. 535; 34 L. T. 633; 24 W. R. 592—C.A.

A plaintiff in an administration suit was a specific devisee, and also claimed to be a creditor of the testator. His title as devisee was admitted, but he failed to establish his claim as a creditor:—Held, that he must pay the costs of his unsuccessful attempt to establish his claim as a creditor. *Lancefield* v. *Iggulden*, 44 L. J., Ch. 203; L. R. 10 Ch. 136; 31 L. T. 813; 23 W. R. 223.

Out of what Fund—When out of Estate.]—In an administration action no costs ought to be given out of the estate, except for those proceedings that are in their origin directed with some show of reason and a proper foundation, for the benefit of the estate, or which have in their result conduced to the benefit thereof. *Croggan* v. *Allen*, 22 Ch. D. 101; 47 L. T. 437; 31 W. R. 319. S. P., *Bartlett* v. *Wood*, 30 L. J., Ch. 614; 4 L. T. 692; 9 W. R. 817.

A tenant for life under a will, who had duly received the income of the estate, and whose solicitors had expressed themselves satisfied with the accounts down to the date of a certain arrangement made with consent of the tenant for life as to the mode of paying the income, commenced an action for the administration of the estate, and insisted on the trustees furnishing an account of the income, which, in consequence of the arrangement, they could only do by obtaining a copy of the plaintiff's banking account, and verifying it:—Held, that the plaintiff must have no costs of the action, and must pay the cost of rendering the income account. *Ib.*

—— **Taxation—Delay.**]—The court will not permit the costs occasioned by improper litigation, or by negligent conduct of administration proceedings, to be paid out of an estate under its care. The amount of costs allowed by a taxing master as between the client and his solicitor is not conclusive of the amount which the court will allow out of the estate. *Brown* v. *Burdett* 40 Ch. D. 244; 60 L. T. 520; 37 W. R. 533—C. A.

An administration action, which was commenced in May, 1875, came on in November, 1887, upon second further consideration. The judge finding that the costs would probably amount to nearly the whole value of the estate, and believing that there had been unreasonable delay in the conduct of the proceedings, directed the taxing master under Ord. LXV. r. 11, to inquire and report as to the delay and the costs occasioned thereby. The taxing master reported that there had been great delay in the suit caused by the conduct of the solicitor for the plaintiff, and disallowed considerable sums from the costs as between the various solicitors and their clients. The judge ordered that only a portion of the costs allowed by the taxing master to the several parties, including the costs of the plaintiff, who was a trustee, should be paid out of the estate; and the court of appeal affirmed this decision. *Ib.*

The court, in the exercise of its discretion as to costs under Ord. LXV. r. 1, will order the plaintiff—if an infant, then the next friend—to pay the costs of any unnecessary or improper administration proceedings. *Blake, In re, Jones* v. *Blake*, 54 L. J., Ch. 880; 29 Ch. D. 913; 53 L. T. 302; 33 W. R. 886—C. A.

—— **Where Two Suits.**]—In a decree in a second suit only, it is improper to order the costs of that suit to be paid out of funds in a former suit, and that, too, without regard to the costs in a former suit, which constituted the first lien and claim on those funds. *Taylor* v. *Southgate*, 4 Myl. & C. 203; 8 L. J., Ch. 137; 3 Jur. 214.

—— **Where Will is Ambiguous.**]—Whenever a testator has expressed himself so ambiguously as to create such a difficulty as to his meaning, as to make it necessary to come into a court of equity, his general assets must bear the costs. Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs shall be paid out of the assets of the testator, who, by his will, has occasioned the difficulty. *Studholme* v. *Hodgson*, 3 P. W. 308. *Baugh* v. *Reed*, *Id.* 195; 1 Ves. J. 257. *Att.-Gen.* v. *Hurst*, 2 Cox, 365. *S. C.*, nom. *Att.-Gen.* v. *Winchelsea*, 3 Bro. C. C. 380. And it makes no difference that the doubt was introduced by the parol evidence for the defendant. *Nourse* v. *Finch*, 1 Ves. J. 362. S. P., *Joliffe* v. *East*, 3 Bro. C. C. 25. *Barrington* v. *Tristram*, 6 Ves. 345; 5 R. R. 322. *Wilson* v. *Brownsmith*, 9 Ves. 108. *Pearson* v. *Pearson*, 1 Sch. & Lef. 12; 9 R. R. 1. *Charitable Donations Commissioners* v. *Cotter*, 1 Dr. & War. 498. *Miller* v. *Rowan*, 5 Cl. & F. 99.

Costs, the difficulty having been caused by the testator, directed to come out of the estate. *Murton* v. *Markby*, 18 Beav. 196.

The costs of a bill filed to determine the rights of the plaintiff under a will of difficult construction, and to which a demurrer was allowed, given out of the testator's estate. *Evans* v. *Rosser*, 3 N. R. 685.

Where litigation is occasioned by the ambiguity of a will, the costs of all parties shall come out of the testator's general personal estate. *Lamphier* v. *Despard*, 1 Con. & L. 200. And see *S. C.*, 2 Dr. & War. 59; 4 Ir. Eq. R. 334.

Costs of a suit occasioned by the ambiguity of a will, though the suit is confined to a particular fund, come out of the general estate. *Ruddock* v. *Poole*, 1 Jur. 980.

Costs of all necessary parties to an administration suit occasioned by a question on a will, come out of the general assets, and cannot be thrown on a particular fund, though the only difficulty arises between the parties interested in that fund, and there is no question as to the rest of the assets. *Williams* v. *Armstrong*, 12 Ir. Eq. R. 356.

In a suit to obtain the decision of the court on a very doubtful will, the plaintiff turned out to have no interest. The court, upon making a declaration of rights, ordered the costs of all parties out of the fund. *Thomason* v. *Moses*, 5 Beav. 77 ; 6 Jur. 403.

A bill in an administration suit raised a question regarding a will, upon the decision of which depended the plaintiff's title to any interest in the estate. The decision being against his taking any interest, the bill was dismissed with costs. *Anderson* v. *Anderson*, 41 L. J., Ch. 247 ; L. R. 13 Eq. 381 ; 26 L. T. 12 ; 20 W. R. 313.

The court of exchequer, on an information filed by the attorney-general for legacy duty, had held that L. took an estate tail. On a bill to carry into effect the trusts of the will, the vice-chancellor held that L. took a life estate only. The vice-chancellor's decision was affirmed ; but as the testator had himself created the difficulty, the costs were ordered to come out of the estate. *East* v. *Twyford*, 3 H. L. Cas. 517.

B., by will, devised a piece of land in N. to S. By the same will he gave a large sum of money to the trustees of his will (S. being one) to erect almshouses and found a charity, "if any person should within twelve months after his decease, at his or her expense, purchase or give a suitable piece of land in N. aforesaid as a site." Within the twelve months S. conveyed the piece of land so devised to him to four trustees, upon trust to apply it to the purposes directed in the will of B. In case his wishes should not be fulfilled, the testator gave the same sum to the trustees of St. George's Hospital :—Held, that the first bequest was not void, but as there was no question of construction occasioned by the obscurity of the will itself, the costs were ordered to come out of the fund bequeathed. *Philpott* v. *St. George's Hospital*, 6 H. L. Cas. 338 ; 3 Jur. (N.S.) 1269 ; 5 W. R. 845. Reversing 21 Beav. 134.

Where the testator has created such a difficulty that the estate cannot be administered without coming to the court, his estate bears the costs ; but where a claim is made which prevents the executors acting, and which turns out unfounded, the party making the claim must bear the costs. *Cherry* v. *Mott*, 5 L. J., Ch. 65.

Costs of plaintiffs in unsuccessful suit relating to construction of ambiguous will, ordered to be paid out of the estate in question. *Ryall* v. *Hannam*, 16 L. J., Ch. 491 ; 11 Jur. 76. S. P., *Cooper* v. *Pitcher*, 4 Hare, 485.

Where a bill is filed in consequence of a difficulty arising upon a will, under which the adverse parties claim, the court, in dismissing it, will not give costs. *Graham* v. *Thynne*, 2 Ir. Eq. R. 407.

If a bill for the payment of a legacy be dismissed, plaintiff will not be entitled to his costs out of the estate, though there be ambiguity in the will. *Lister* v. *Sherringham*, 1 Newland's Chancery Practice, 397.

In a suit for administering a testator's estate, a legacy was claimed by two legatees adversely to each other :—Held, that as the question arose on the testator's will, the costs must be borne by his estate and not by the legacy. *Wilson* v. *Squire*, 13 Sim. 212 ; 12 L. J., Ch. 139.

A testator bequeathed certain legacies to the children of A. ; A. had no legitimate but three illegitimate children, who claimed the legacies ; the executors took out an originating summons to have the question decided :—Held, that the costs of the proceedings must be borne by the residuary estate. *Haseldine, In re, Grange* v. *Sturdy*, 31 Ch. D. 511 ; 54 L. T. 322 ; 34 W. R. 327 ; 50 J. P. 390—C. A.

The plaintiff having filed a bill against the remainderman, the court gave no costs to anybody, so far as the suit related to the construction of the will of the party creating the entail ; but gave the remainderman the costs of the residue of the suit against the plaintiff. *Flood* v. *Digby*, 2 Jones, 582.

A plaintiff litigating a question depending upon the construction of a doubtful instrument not being a will, if the construction be decided against him, must pay the costs of the suit. *Patching* v. *Dubbins*, Kay, 1 ; 17 Jur. 1113.

In a suit between claimants under a will and an inconsistent deed, executed by the testator, the costs are not to be paid out of the assets on the ground that the difficulty was created by the testator, but are subject to the ordinary rule in adverse suits. *Irwin* v. *Rogers*, 12 Ir. Eq. R. 159.

The rule that the costs arising from difficulties of construction fall on the residuary estate, does not apply to an unappointed portion of a fund. *Trollope* v. *Routledge*, 1 De G. & Sm. 662 ; 11 Jur. 1002.

A will purported to be, but was not, in exercise of a power of appointment ; the fund purported to be appointed, except so much as passed as separate estate, fell into the general residue : —Held, that the fund which passed by the will was liable to the costs of letters of administration with the will annexed. *Wilson, In re, Menteath* v. *Campbell*, 26 W. R. 848.

The costs of an appeal to the house of lords upon the construction of a will were ordered to come out of the estate ; but the trustee having unnecessarily printed certain documents for the hearing of the appeal, the costs of such printing were disallowed. *Prendergast* v. *Prendergast*, 3 H. L. Cas. 195 ; 14 Jur. 989.

Where the parties claiming under a will had acquiesced for nine years in a particular construction of the will, and one of them filed a bill to have it construed by the court, the court refused to allow him his costs out of the estate, although the question was considered sufficiently doubtful to justify the application. *Yockney* v. *Hansard*, 8 Jur. 822.

—— **Where Action for Administration of Real and Personal Estate.**]—It is the now settled practice of the chancery division that the costs of an administration action so far as they have been increased by the administration of the real estate are to be borne by that real estate. *Middleton, In re, Thompson* v. *Harris*, 51 L. J., Ch. 273 ; 19 Ch. D. 552 ; 46 L. T. 359 ; 30 W. R. 293—C. A. And see *Sanders* v. *Miller*, 25 Beav. 154.

An action was brought by the heir-at-law of a testatrix who had given by will certain legacies, but had died intestate as to her real estate and residuary personalty, for the administration of her real and personal estate :—Held, by Fry, J., that the entire costs of the action were payable primarily out of the residuary personal estate. But held, by the court of appeal, that the costs of the action, so far as they had been increased by the administration of the real estate, must be borne by the real estate. *Ib.*

When an estate is sufficient the plaintiff does not necessarily get his costs in priority to the defendants. Semble. *Ib.*

Where an action is brought for the administration of real and personal estate, the general costs of administration must be borne by the personal estate, and any additional costs caused by administering the real estate must be borne by the real estate; and it is the duty of the judge, not the taxing master, to apportion the costs between the realty and personalty. *Patching* v. *Barnett*, 51 L. J., Ch. 74; 45 L. T. 292—C. A.

—— **Of Sale of Realty.**]—Costs incurred in selling real estate in an administration suit before decree charged on such real estate, and not on the personal estate. *Barnewell* v. *Iremonger*, 1 Dr. & Sm. 255; 3 L. T. 462; 9 W. R. 88.

When it is ordered that real estates which are charged with incumbrances shall contribute ratably to the payment of costs, such estates must be valued for the purposes of such contribution at the net values, after payment of incumbrances. *Ib.*

—— **Where Action not Confined to Administration of Estate.**]—Trust moneys were lent on mortgage to the tenant for life. On his death a suit was instituted mainly for the administration of his estate, and also the realisation of the mortgage, and involving the execution of the trusts of the settlement:—Held, that the costs ought to be paid as of an administration suit out of the assets; but that the costs ought, so far as they had been increased by its being a suit for the execution of the trusts of the settlement, to be borne by the settlement fund. *Irby* v. *Irby*, 24 Beav. 525.

—— **Where Fund Provided for Testamentary Expenses.**]—A testator devised part of his real estate in trust for sale to pay his debts, "and the costs and charges of providing and attending the execution of his will, and the several trusts therein contained":—Held, that the costs of an administration suit were charged upon this estate. *Alsop* v. *Bell*, 24 Beav. 451.

A direction in a will to pay debts, testamentary and legal expenses, includes the costs of an administration suit. *Coventry* v. *Coventry*, 2 Dr. & Sm. 470; 13 L. T. 83; 13 W. R. 985.

The expression "testamentary and other expenses under this my will":—Held, to include the costs of a suit to administer the estate. *Webb* v. *Beaucoisin*, 31 Beav. 573.

A testator directed that a specific fund given to trustees should be liable and applicable by the trustees to and in the payment of his debts, testamentary and other expenses, and legacies under his will. There was a residuary gift of all his property, subject to the provisions in his will named:—Held, that the costs of an administration suit were included under the words "other expenses under the will," and that they were payable out of the specific trust fund, to the exoneration of the general personal estate. *S. C.*, 2 John. & H. 194; 32 L. J., Ch. 217; 11 W. R. 132.

A direction by a testator that his "testamentary expenses" shall be paid out of certain specified property includes the costs of a suit for the administration of his estate. *Gray* v. *Warner*, *Biel*, *In re* (L. R. 16 Eq. 577), distinguished. *Harloe* v. *Harloe*, 44 L. J., Ch. 512; L. R. 20 Eq. 471; 33 L. T. 247; 23 W. R. 789.

A testator directed by his will that his "testamentary expenses" should be paid out of a specified part of his estate:—Held, that the costs of a suit to administer the estate were included under "testamentary expenses." *Penny* v. *Penny*, 48 L. J., Ch. 691; 11 Ch. D. 440; 40 L. T. 393.

A testatrix had by her will created two residues of her estate, the one impure and the other pure personalty. Bequests to charities were made out of the pure personalty, and her debts and funeral and testamentary expenses were directed to be paid out of the impure personalty. The person interested in the pure personalty, subject to the charitable gifts, brought an action against the executor and trustees for the administration of the estate, and prayed that the costs thereof should be paid out of the impure personalty:—Held, that the action had been properly brought, and that by virtue of the will the costs of the action were payable out of the impure personalty. "Testamentary expenses" include the cost of such a reasonable and proper administration suit as would, in the absence of any direction by the testator, have been ordered to be paid out of the general residue. *Young, In re, Young* v. *Dolman*, 44 L. T. 499.

Contra, *Browne* v. *Groombridge*, 4 Madd. 495; 20 R. R. 326. *Stringer* v. *Harper*, 26 Beav. 585; 28 L. J., Ch. 643; 5 Jur. (N.S.) 401. *Gilbertson* v. *Gilbertson*, 34 Beav. 354; 12 L. T. 876; 13 W. R. 765. *Mulock* v. *Mulock*, 20 W. R. 696. *Linley* v. *Taylor*, 1 Giff. 69; 28 L. J., Ch. 686; 7 W. R. 639. *Lees* v. *Lees*, Ir. R. 6 Eq. 259. *M'Cormick* v. *Patten*, Ir. R. 5 Eq. 295.

Semble, it would be the duty of the court to deprive any plaintiff of the costs of an improper administration suit, notwithstanding there being a direction in the will that costs are to be paid out of a particular fund. *Ib.*

A testatrix, by her will, after making various specific devises of her real estate, and giving certain legacies, charged her real estate in exoneration of her personal estate, with the payment of her debts, funeral and testamentary expenses, and the legacies which she gave. The will was disputed in the probate division by, amongst other persons, her co-heiresses-at-law. The action in that division was compromised, and the will proved in solemn form, it being provided in the agreement for the compromise that the costs of that action should be paid out of the estate in accordance with the rules and practice of the court. The question arose whether the costs incurred by the co-heiresses in that action were testamentary expenses, so as to be payable out of the real estate under the charge of those expenses upon the real estate made by the will:—Held, that such costs were testamentary expenses, inasmuch as they were incurred in establishing the will, and that they were therefore payable out of the real estate. *Brown* v. *Burdett*, 53 L. J., Ch. 56; 48 L. T. 753; 31 W. R. 854.

A testator gave the residue of his personal estate, which consisted of both pure and impure personalty, to trustees to sell and convert into money, and out of the proceeds and out of his ready money to pay his debts, funeral expenses, and legacies, and to pay the income to his wife for life, and after her death to raise sufficient to purchase certain life annuities. He then gave some pecuniary legacies, including a legacy of

100*l.*, to a charity school, and bequeathed all the residue of his personal estate to three charities in equal shares, and directed that the three last-mentioned bequests should be paid and satisfied out of such part of his personal estate as could be lawfully applied to the payment thereof, and which should be reserved by his trustees for that purpose :—Held, that the costs of the suit were included under testamentary expenses, and must be paid primarily out of the impure personalty. *Miles* v. *Harrison*, L. R. 9 Ch. 316; 22 W. R. 441.

A testator directed that his business should be carried on for the benefit of his widow or until her second marriage, with powers to the trustees to carry on the same; and "to increase or abridge his business, and his capital, stock, and implements therein," and generally to act "as most advantageous and mostly for the benefit of the persons claiming under his will." He also directed that all his debts, funeral and testamentary expenses, and the "costs, charges and expenses of carrying into effect the trusts of his will," should be paid out of the capital of the business :—Held, that the debts, funeral and testamentary expenses, and the costs of suit, should be borne out of the capital of such business. *Dixon* v. *Dutfield*, 5 L. T. 741.

A testator devised his freehold farm, called W., upon certain trusts, and bequeathed his leasehold farm at H. upon trusts for sale and payment thereout of his debts, funeral and testamentary expenses, in exoneration of his general personal estate; and subject thereto, in trust for the trustees (who were also his executors) beneficially. There was a general residuary gift, subject only to the payment of such of the testator's debts as the proceeds of the leaseholds at H. should be insufficient to pay :—Held, that the costs of suits to determine whether certain leasehold land was comprised in the devise of W., the bequest of H., or the gift of the residue, were properly payable out of the proceeds of H. *Morrell* v. *Fisher*, 4 De G. & Sm. 422.

B. bequeathed 1,000*l.* to E. (a natural son of her sister deceased, and one of her executors), and legacies to other persons. By codicil she, after stating that her intention was to give to W., the other executor, the residue of her estate, after payment of the legacies, free of all deductions in respect of probate duty or on any other account, declared that all the legatees should contribute ratably towards the payment of her funeral and testamentary expenses in exoneration of the residue :—Held, that the costs of the suit for the administration of her estate must be paid out of the residue. *Gray* v. *Warner*, *Biel*, *In re*, L. R. 16 Eq. 577.

A testatrix gave the residue of her estate and effects, whatsoever and wheresoever, after conversion into money, to the trustees of a charity, and declared that the legacies which might savour of charitable gifts should, if necessary, be paid and discharged out of such parts of her personal estate as might be lawfully applied for the purpose, "in which event my real estate, if any, shall be first charged with and be liable to the payment of my debts and legacies not savouring of charitable gifts." She never had any real estate, but left leasehold property and pure personalty :—Held, that there was a sufficient direction to exonerate the pure personalty from payment of the debts and legacies, but that, testamentary expenses not being mentioned, the cost of administration must be borne ratably by the pure and impure personalty. *Fitzgerald*, *In re*, *Adolph* v. *Dolman*, 26 W. R. 53.

T. directed "all his just debts and funeral and testamentary expenses to be paid by his executors out of such part of his estate as could not by law be bequeathed for charitable purposes," and then devised and bequeathed all his real and personal estate which he could not bequeath for charitable purposes to legatees, and bequeathed all that could be lawfully bequeathed for charitable purposes to a charity :—Held, that the charity was not relieved from the costs of a suit in which a question was raised as to whether a certain part of the property, from its nature, was bequeathable to the charity or not, and that the costs must be apportioned between the two funds. *Linley* v. *Taylor*, 1 Giff. 69; 28 L. J. Ch. 686; 5 Jur. (N.S.) 701; 7 W. R. 639.

A testator gave the residue of his estate to his trustees upon trust for sale and conversion; and directed that out of the proceeds they should pay his "testamentary expenses," debts and legacies. By a codicil he bequeathed 4,000*l.* to his trustees upon trust (after the death of his son W.) for the benefit of "the two children of his said son W. by his late wife." At the date of the codicil there were living four children of W. by his late wife, two sons and two daughters, all of them infants out of the jurisdiction :—Held, that the costs of an action brought by the trustees to determine which of the children were entitled to the legacy must be paid out of the residuary estate and not out of the legacy. *Groom*, *In re*, *Booty* v. *Groom*, 66 L. J., Ch. 778; [1897] 2 Ch. 407; 77 L. T. 154. *And see* (e), col. 1887, post.

A testatrix created a fund upon trust for payment thereout of her funeral and testamentary expenses, debts and legacies, and bequeathed the surplus to W. After payment of the expenses, debts and legacies, there remained a surplus, which would be liable to the costs of an administration action if instituted. No such action seemed probable :—Held, that the trustees should retain the surplus for a year from the testatrix's death, and then pay it over to W. *Cope*, *In re*, 36 L. T. 437.

—— **Costs of Administration of Real Estate not Testamentary Expense.**]—Where a testator directs his executor to pay his "testamentary expenses," the term includes the costs of an action for administration of the personal, but not of the real, estate. *Patching* v. *Barnett*, 51 L. J., Ch. 74; 45 L. T. 292—C. A.

Notwithstanding a direction in the will as to the fund for payment of testamentary expenses, where the costs of administration are increased by the administration of real estate, such increased costs must be borne by the real estate. *Capland*, *In re*, *Mitchell* v. *Bain*, 44 W. R. 94.

—— **Liabilities of different Parts of General Residue.**]—A testator bequeathed a sum of consols and the residue of his personal estate to trustees to hold in equal fifth shares on certain trusts :—Held, that the costs of the suit for the administration of the estate were payable out of the general personal estate, and not primarily out of one of the fifth shares which had lapsed. *Fenton* v. *Wills*, 47 L. J., Ch. 191; 7 Ch. D. 33; 37 L. T. 373; 26 W. R. 139.

A testatrix, after directing payment of her just debts, funeral and testamentary expenses, gave her residuary and personal estate amongst four persons by name, one of whom died in her life-

time:—Held, that the lapsed share was not primarily liable for the costs of an administration suit, but that the costs must be paid before the residue was divided. *Trethewy* v. *Helyar*, 46 L. J., Ch. 125; 4 Ch. D. 53.

A testatrix, by will made in 1855, gave to A. the residue of her estate up to the end of 1855; and gave all accumulations from that date to B. She died in 1869. She left no real estate; A. died in her lifetime. In the course of a suit to administer her estate, the respective amounts of her residue at the end of 1855, and at the time of her death, and the difference between these two amounts, being the amount of the accumulations fund, had been ascertained. All her debts had been paid out of the amount of her residue at the end of 1855:—Held, that the gift of the accumulations fund was a pecuniary legacy, and not a gift of residue; and that, therefore, there being only one residuary gift, which lapsed, the costs of the suit must be borne entirely by the next of kin, in exoneration of the accumulations fund. *Gowan* v. *Broughton*, 44 L. J., Ch. 275; L. R. 19 Eq. 77; 31 L. T. 533; 23 W. R. 332.

The cases in which a lapsed share of real or personal estate will be the primary fund for payment of costs of administration, discussed. *Jones, In re, Jones* v. *Calcss*, 10 Ch. D. 40; 39 L. T. 287; 27 W. R. 108.

A. devised his real estate to a brother who predeceased him, and bequeathed his personal estate upon trust, after payment of his debts, funeral and testamentary expenses, for his nephews and nieces:—Held, that the expenses of administration must fall on the personal estate. *Ib.* And see *Scott* v. *Cumberland*, L. R. 18 Eq. 578; 31 L. T. 26; 22 W. R. 840.

Semble, the rule laid down in *Gowan* v. *Broughton* (L. R. 19 Eq. 77) is merely that lapse of the residue does not exonerate it from the expenses of administration. *Ib.*

In an administration suit, in which the validity of charitable gifts and the question of conversion between the heir and next of kin were the points in dispute, it was held, that the different parts of the property must bear pro ratâ the costs of the suit. *Johnson* v. *Woods*, 2 Beav. 409; 9 L. J., Ch. 244.

A gift of a share of real and personal residue to a charity having failed except as to pure personalty:—Held, that the costs of an administration suit ought nevertheless to be borne by the general estate. *Blann* v. *Bell*, 47 L. J., Ch. 120; 7 Ch. D. 382; 31 L. T. 533.

A testator by his will directed his executors to pay so much of his residuary personal estate as they could by law dispose of for charitable purposes, to the "Lincoln Penitent Female Home," and made no further disposition of such residuary estate:—Held, that the cost of a suit to administer the estate ought to be paid out of the residuary personal estate, inapplicable by law to the payment of the legacy to the charity, and consequently undisposed of by the will. *Taylor* v. *Mogg*, 27 L. J., Ch. 816; 5 Jur. (N.S.) 137.

A testatrix, after bequeathing specific legacies, gave the residue of her estate to charitable purposes, and directed the charitable bequests to be paid out of the property by law applicable:—Held, that the costs must be paid out of the residue. *Llewellyn* v. *Rose*. 17 W. R. 984.

Costs of administration suit payable pro ratâ out of a raised fund composed of realty and personalty. *Hopkinson* v. *Ellis*, 10 Beav. 169; 16 L. J., Ch. 59.

The costs of an action for executing the trusts of a will which bequeaths realty and personalty together as a mixed fund by a disposition that fails as to part, are borne ratably by the part effectually given and that which lapses, and this notwithstanding that the whole may be vested in trustees. *Luckcraft* v. *Pridham*, 48 L. J., Ch. 636.

A suit to administer an estate having been rendered necessary by the form of the will of the testator, who had blended his real and personal estates into one common fund, the costs were directed to be paid pro ratâ, by the heir and personal representatives, out of accumulations devolving on them in consequence of the directions of the testator to accumulate having partially exceeded the limits prescribed by the Thellusson Act. *Eyre* v. *Marsden*, 2 Keen, 564; 7 L. J., Ch. 220; 2 Jur. 583. Reversed on this point, 4 Myl. & C. 231; 3 Jur. 450.

Where an intestacy as to part of the personal estate arising from the intention of the testator being defeated by the happening of some event, or the operation of law, the part so falling to the next of kin shall, in this hands, be subject to no more liability as to costs than it would have been subject to if the gift had taken effect. *S. C.*, 4 Myl. & C. 246.

A fund arisen from accumulations of a testator's estate, made after the period prescribed by the Thellusson Act, was claimed by the residuary legatees and by the next of kin adversely to each other. The court decided in favour of the next of kin, and ordered the costs of suit to be paid out of the fund composed of the capital of the residue and lawful accumulations, and out of the fund in dispute pro ratâ. *Elborne* v. *Goode*, 14 Sim. 165; 13 L. J., Ch. 394; 8 Jur. 1001.

—— **Liabilities of Descended and Devised Realty.**]—In an administration suit by one of a class interested in a specific devise, the only disputed question being among those interested in this devise, the costs, so far as they related to the real estate, were thrown upon the heir, who was made a defendant in respect of a void charitable devise of other specified land which had descended on him. *Saunders* v. *Miller*, 6 W. R. 454.

An estate was devised for sale, and a portion undisposed of descended on the heir:—Held, that the costs of a suit to administer the real estate fell on the devisees and heir pari passu. *Maddison* v. *Pye*, 32 Beav. 658.

When, in a suit for general administration, it was found upon the usual accounts and inquiries that there was no personalty, and that there were no debts, but questions had arisen in the suit as between devisees inter se, and the heir-at-law:—Held, that the administration being for the benefit of all parties, the costs of the suit must be borne by the descended and devised estates pro ratâ, including some portions of the estates as to which no question had arisen in the suit. *Bagot* v. *Legge*, 2 Dr. & Sm. 259; 34 L. J., Ch. 156; 10 Jur. (N.S.) 1092; 11 L. T. 263; 13 W. R. 1.

A testator devised the whole of his real estate specifically to trustees upon certain trusts, the will containing no residuary devise. Some of the gifts of the realty were held void for uncertainty, and lapsed to the heir-at-law. The personal estate was insufficient to pay the debts:—Held, that the costs of administering the estate must, as between the heir-at-law and the

specific devisees, be borne primarily by the real estate descended. *Row* v. *Row*, L. R. 7 Eq. 414; 17 W. R. 485.

In a suit to administer specifically devised real estate a question was raised as to whether certain land was comprised in the devise or passed to the heir-at-law. It was held to be comprised in the devise, but there were other lands which descended:—Held, that the costs of the suit could not be thrown on the descended estates in exoneration of the devised estates, since the descended estates were not being administered in the suit; but the heir-at-law might be ordered to pay a proportional amount of the costs of the suit, corresponding to the value of the descended estates. *Hardwick* v. *Hardwick*, 42 L. J., Ch. 636; L. R. 16 Eq. 168; 21 W. R. 719.

As between the heir-at-law and specific devisees, real estate descended is the primary fund for payment of costs, whether such real estate is real estate undisposed of at the date of the will, or real estate, which, in the event, becomes undisposed of. *Scott* v. *Cumberland*, L. R. 18 Eq. 578; 31 L. T. 26; 22 W. R. 840.

Specific and residuary devisees must contribute ratably to the payment of such part of the costs of an administration suit as the personal estate is insufficient to satisfy. *Jackson* v. *Pease*, L. R. 19 Eq. 96; 23 W. R. 43.

Real estate which had descended to a testator's heir-at-law, not because it was not originally disposed of by the will, but by reason of a subsequent forfeiture by the devisee under the provisions of the will:—Held, not liable to pay the costs of an action to administer the testator's estate in priority to specifically devised and bequeathed freehold and leasehold estate. *Scott* v. *Cumberland* (L. R. 18 Eq. 578), *Gowan* v. *Broughton* (L. R. 19 Eq. 77), and *Row* v. *Row* (L. R. 7 Eq. 414), distinguished. *Hurst* v. *Hurst*, 54 L. J., Ch. 190; 28 Ch. D. 159; 33 W. R. 473.

—— **Rents and Profits of Realty.**]—Costs of an administration suit directed to be paid out of the rents and profits of the real estate. *Biggar* v. *Eastwood*, 15 L. R. Ir. 219.

—— **Liabilities of Legatees inter se.**]—Cost of general administration should not, in favour of legatees, be thrown upon descended realty, but such costs only as are incident to the administration of the realty. *Harrison* v. *Harrison*, 42 L. J., Ch. 495; L. R. 8 Ch. 342; 28 L. T. 545; 21 W. R. 164.

It is still the rule in administering assets that when the residuary personal estate is insufficient to pay the costs of a suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees. *Tomkins* v. *Colthurst*, 1 Ch. D. 626; 33 L. T. 591; 24 W. R. 267.

The costs of a suit for administration:—Held, there being no other assets, to be payable out of the specific legacies pari passu. *Bristow* v. *Bristow*, 5 Beav. 289.

Apportionment of costs between shares of younger children. *Crone* v. *Odell*, 3 Ir. Eq. R. 12.

Accounts of personal estate not specifically bequeathed had been directed in an administration suit. Ultimately, the costs of all parties, as between solicitor and client, were paid out of a specific legacy in the absence of the specific legatee. In a subsequent suit, instituted by the specific legatee for her legacy, liberty was given to her to surcharge and falsify the accounts, and the plaintiff's costs were directed to be allowed as between party and party. *Walrond* v. *Walrond*, 29 Beav. 586.

In a suit occasioned by a bequest, involving a secret trust, of leasehold and personal estate, and in which it is declared that the leaseholds belonged to the crown, the costs must be paid ratably out of the leaseholds and personalty. *Johnstone* v. *Hamilton*, 14 L. T. 282.

A direction that legatees shall contribute, in exoneration of residue, to the payment of testamentary expenses, does not apply to costs of an administration suit. *Biel, In re, Gray* v. *Warner*, 42 L. J., Ch. 556; L. R. 16 Eq. 577; 28 L. T. 835; 21 W. R. 808.

Where a testator gave the income of all his residuary realty to A. for life, and after specific devises of part of his estate to other persons, ultimately gave the residue of his realty to A. absolutely:—Held, that the life interest of A. was applicable for costs before the property specifically devised. *Hibon* v. *Hibon*, 32 L. J., Ch. 374; 9 Jur. (N.S.) 511; 8 L. T. 195; 11 W. R 455.

—— **No Personal Estate.**]—Where, in a creditor's action to administer real and personal estate, it is found, upon taking the accounts, that the deceased had not any personal estate, the personal representative having appeared and been declared entitled to costs, the plaintiff is entitled to have those costs, along with his own, paid out of the real estate. *Barry* v. *Quinlan*, 21 L. R. Ir. 11.

Set-off.]—In a suit for the administration of assets, a debtor to the estate, who is entitled to have his costs of suit out of the fund, will not be allowed to receive payment of them while his debt continues unsatisfied, but the costs due to him will be set off pro tanto against the debt due from him. *Harmer* v. *Harris*, 1 Russ. 155; 25 R. R. 20.

—— **Insolvent Legatee Debtor to Estate.**]—By the decree, sums due from a legatee were ordered to be set off against her share of the testator's estate, and her costs were ordered to be paid to her solicitor. It being found that the claims against her exceeded her portion of the estate, and the legatee being insolvent, an application was made by motion that the costs ordered to be paid to her solicitor might be carried to the credit of her account. The court stayed the payment of the costs for a month, in order that the matter might be set right. *Nicholson* v. *Norton*, 7 Beav. 67; 13 L. J., Ch. 140.

—— **Insolvent Executor Debtor to Estate.**]—In an administration or creditors' suit against an executor becoming bankrupt or insolvent, and who is at the same time indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debts; and the costs of the same executor, incurred in the proper performance of the duties of his trust after the bankruptcy or insolvency, will be allowed off the estate. *Samuels* v. *Jones*, 2 Hare, 246; 12 L. J., Ch. 496; 7 Jur. 845.

—— **Debt Payable in Futuro.**]—Executor held entitled to immediate payment of his costs of an administration suit, though, by the

master's report, he was found to be indebted to the testator's estate to an amount exceeding the costs, upon security payable on a future day. *Stephens* v. *Pillen*, 17 L. J., Ch. 214; 12 Jur. 282.

—— **For Costs of Unsuccessful Motion.**]—In an administration suit a decree was made against a defendant, and he was ordered to pay the costs. He changed his solicitor, and subsequently a motion by the plaintiff for leave to issue an attachment for disobedience to the decree and order was refused with costs:—Held, that the plaintiff had a right to set off. *Roberts* v. *Buée*, 47 L. J., Ch. 414; 8 Ch. D. 198; 26 W. R. 393.

—— **For Costs of Probate Action.**]—Legatees, who were also next of kin of the testator, brought an action against the executor, seeking a revocation of the probate, but failed, and were ordered to pay the executor's costs of the action. While the action was pending, some of the plaintiffs assigned and others mortgaged their shares, whether under the will or on an intestacy. Afterwards the legatees commenced an action against the executor in the chancery division for the administration of the estate:—Held, that the executor was entitled to set off the costs in the probate suit against the legacies, notwithstanding the assignments and incumbrances. *Knapman, In re, Knapman* v. *Wreford*, 50 L. J., Ch. 629; 18 Ch. D. 300; 45 L. T. 102; 30 W. R. 395—C. A.

Application to stay Payment out of Court for—Summons to review Taxation.]—A motion was made by a plaintiff for an order to stay payment out of court of a sum payable under an order of the court to the defendant's solicitors as taxed costs until a pending summons by the defendant to review taxation should be disposed of. The grounds of the motion were the defendant's impecuniosity and also the absence of any liability on the defendant's part to her solicitors for any further sum than taxed costs. The motion was refused, as being an unprecedented attempt to extend the practice as to requiring security to be given for costs. *Barber, In re, Burgess* v. *Vinnicome*, 55 L. J., Ch. 624; 54 L. T. 728; 34 W. R. 578.

Priority of Payment.]—In a creditor's suit, bringing the heir-at-law and also the devisee of the debtor before the court, as well as his personal representative, if the fund is not sufficient for the payment of the taxed costs of all the parties, all must abate proportionably. *Torey* v. ——, 3 L. J. (o.s.) Ch. 46.

Order of priority of payments of costs, in a cause properly instituted for administration of assets, plaintiff to have his costs in the first instance. Heir-at-law, devisees, and trustee of the real estate to have their costs against plaintiff; he to have them over against the fund, and the other defendants to have their costs out of the fund, in the same order with their respective demands. *Hamilton* v. *Hamilton*, 1 Moll. 535.

By the decree on further directions in a creditor's suit the costs of all parties were directed to be taxed as between solicitor and client, and paid out of a fund in court. The fund proving insufficient to pay the costs, the defendants, the heir and administrator of the debtor, petitioned to be paid their costs in the first instance; but the court directed the funds to be divided amongst all the parties in proportion to their costs. *Swale* v. *Milner*, 6 Sim. 572.

It is not the invariable rule either that plaintiff's costs in a creditor's suit are to be the first payment out of the fund brought in, or that they are to abide the order and degree of plaintiff's demand. *Egan* v. *Baldwin*, 1 Moll. 539.

A married woman being entitled to a share of a residue for her life, with remainder to her children who were infants, a bill was filed by her and her husband and their children, by their father as their next friend, against the executor and the co-residuary legatees for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into court. Afterwards he paid the whole of testator's debts remaining unsatisfied, some of them before and the rest after the usual decree, whereby a balance greater than the fund in court became due to him, and the master so found. After the report had been absolutely confirmed the husband died, and the widow having declined to take any step towards the further prosecution of the suit, the executor filed a supplemental bill, praying to have the fund in court, exempt from all costs, paid to him, in part of the balance found due by the master. The court ordered the executor's costs of both suits, as between solicitor and client, to be first paid out of the fund; then the costs of the defendants, the co-residuary legatees, of both suits; and, lastly, the costs of the widow and children of the supplementary suit, but not of the original suit. *Jackson* v. *Woolley*, 12 Sim. 12; 10 L. J., Ch. 197.

Where, in a suit by legatees against an executor, he was ordered to pay in the funds in his hands, which funds, together with the sums in court, were insufficient for the payment of all the costs, on a petition for a ratable division of them:—Held, that the executor was entitled to priority only for such portion of the bill as was exclusively his, and that as to a part in which he had joined with other defendants he was only entitled to an apportionment. *Blenkinsop* v. *Foster*, 3 Y. & C. 207; 8 L. J., Ex. Eq. 8.

It was also held, that the plaintiff, although he might have been the means of increasing the fund, was not entitled to priority over the other parties in the same interest. *Ib.*

A testator empowered his trustees to charge his estate for certain purposes, and he devised it on trusts for A. and B. The charge was raised, and became vested in A., who filed a bill to raise the charge, and to ascertain the rights of the parties in the surplus:—Held, that A.'s costs of suit had priority over those of B. *Howard* v. *Prince*, 13 Beav. 72.

In an administration suit by a simple contract creditor (whose debt was also secured by an equitable mortgage, which proved insufficient), the assets of the testator, being insufficient for payment of his debts and the costs of the suit, were applied (subject to a retainer by the executors of any debt due to them from the testator) in payment of the costs, first, of the executors (as between solicitor and client); secondly, of the plaintiff; thirdly, of the other defendants (devisees of the mortgaged estate); and fourthly, of the debts, including any balance due to the plaintiff. *Tipping* v. *Power*, 1 Hare, 405; 11 L. J., Ch. 257; 6 Jur. 434.

In a bill by a legatee for the administration of an estate, it was probable that the assets would

not even be sufficient to pay the costs:—Held, that the costs were payable in the following order: first, the costs of the legal personal representatives as between solicitor and client; secondly, the costs and expenses of the plaintiff in selling and getting in the estate, and the costs of the heir in executing deeds; and thirdly, the other costs of all parties as between party and party, pari passu. *Wetenhall* v. *Davis* or *Dennis*, 33 Beav. 285; 9 Jur. (N.S.) 1216; 9 L. T. 361; 12 W. R. 66.

In an administration suit instituted by a creditor who was mortgagee of certain real estate of the testator, an order was made directing the sale of the mortgaged estate, and out of the proceeds the plaintiff's mortgage and the testator's debts were paid. The remaining assets being insufficient to pay all the costs:—Held, that the costs, charges, and expenses of the executor must be paid in priority to the plaintiff's costs of sale. *Harrison* v. *Spensley*, 42 L. J., Ch. 21; L. R. 15 Eq. 16; 27 L. T. 600; 21 W. R. 95.

The conduct of proceedings in an action for the administration of a testator's estate was given to the B. company, who were creditors. The company, with leave of the judge, took out a summons to compel a firm of solicitors to refund money which they had received out of the estate for costs. The summons was dismissed, and the company was ordered to pay the costs of the firm. The company was afterwards wound up by the court, and could not pay anything. All the costs of the administration action had been paid, except the costs in respect of the summons. There remained to the credit of the action a sum not sufficient to pay either the costs of the company or the costs of the firm in relation to the summons:—Held, that the firm of solicitors to whom the company had been ordered to pay the costs had a better equity, and that the fund must be paid to the solicitors, and not to the liquidator of the company. *Blundell, In re, Blundell* v. *Blundell*, 59 L. J., Ch. 269; 44 Ch. D. 1; 62 L. T. 620; 38 W. R. 707—C. A.

Concurrent Suits.] — Where, pending an administration, such a suit is instituted by legatees, praying no further relief than might be had in the administration suit, the parties to the administration suit ought to apply to have the proceedings in the legatees' suit stayed; otherwise the costs of the latter suit may be dealt with as costs in the former. *Therry* v. *Henderson*, 1 Y. & C. C. C. 481; 6 Jur. 386.

Where a decree had been obtained in chancery for the general administration of a testator's assets, a bill previously filed in this court by an annuitant under the will against the executors was dismissed; and as the annuitant's bill had been filed with undue haste, she was not allowed the costs of the application to stay proceedings, although she was allowed her costs up to the time of notice of the decree. *Hayward* v. *Constable*, 2 Y. & C. 43.

A claim being filed by A., as next of kin, for the administration of an estate in which infants were interested, another claim was filed by the mother of the infants for the same purpose; on reference to the master to inquire which should proceed, he reported in favour of the mother:—Held, that the plaintiff was entitled to costs of filing the original claim, and no costs subsequent to the filing of second claim. *Oppenheim* v. *Henry*, 1 W. R. 126.

Four suits were consolidated, and the conduct given to the plaintiff in one of them, who was a devisee and legatee:—Held, that he was entitled to his extra costs, which he had properly incurred in the prosecution of the decree. *Lockhart* v. *Hardy*, 10 Beav. 292.

Where a second suit for administration of a deceased person's estate was instituted after decree in a previous suit for objects which could have been well attained in the first suit, and a decree had been pronounced dealing with the costs of the second suit on a wrong principle, an appeal for costs only was held not within the rule which prohibits such appeals. *Menzies* v. *Connor*, 3 Mac. & G. 648.

In a creditors' suit, the plaintiff moved, after decree, to restrain proceedings in another suit for administration of the debtor's estate. The registrar's statement of the practice as to costs in such cases. *West* v. *Swinburne*, 19 L. J., Ch. 81; 14 Jur. 360.

Pending a litigation in the ecclesiastical court as to the validity of a will, a creditor filed a bill for a receiver, &c. The alleged will being held invalid, an administrator was appointed, whereupon another creditor filed a cross suit and rapidly obtained a decree. The plaintiff in the first suit was declared entitled to his costs out of the estate. *Frowd* v. *Baker*, 4 Beav. 76.

W. filed a creditor's bill to administer C.'s estate. An administration decree having shortly afterwards been made in a second suit, an order was made staying proceedings in the first suit, and directing W.'s costs to be taxed, and to be paid by the executrix out of the assets. An order on further consideration was made in the second suit, ordering payment, first, of the costs of the executrix and then of the plaintiff, but not providing for W.'s costs. W. then applied by summons for an order for payment of his costs of the first suit. He was offered an order for payment of them pari passu with the costs of the plaintiff, but declined it, upon which his application was refused. W. then appealed:—Held, that the order for payment of W.'s costs by the executrix out of the assets did not give them priority over the costs of the second suit; and that, as W. had refused to accept an order giving him all he was entitled to, his appeal must be dismissed. *Clark, In re, Cumberland* v. *Clark*, L. R. 4 Ch. 412; 17 W. R. 524.

Where an order is made for staying one of two suits which are instituted by different creditors against the executor of a deceased debtor for the administration of his estate, the form of order as to the payment of the costs of the plaintiff in the suit which is stayed is, that the executor shall pay them if he have assets in hand, but if he have not, then that the plaintiff shall add them to his debt, and prove for his debt and the amount of his costs in the other suit. *Canham* v. *Neale*, 26 Beav. 266; 28 L. J., Ch. 69; 5 Jur. (N.S.) 52.

—— **Suit as to Personalty—Second Suit as to Realty.**]—Two administration suits having been instituted to obtain the decision of the court upon the construction of a will, one as to the testator's real, and the other as to his personal estate:—Held, that the costs of both must be borne by the personal estate in the first instance. *Pickford* v. *Brown*, 2 Kay & J. 426; 25 L. J., Ch. 702; 2 Jur. (N.S.) 781; 4 W. R. 473.

—— **Breach of Trust charged in one Suit.**]—There were two suits brought against the repre-

sentatives of a testator, one a creditors' suit, and the other for a breach of trust. The accounts were taken in the first suit, and the debts, &c., ascertained, but the assets were insufficient to pay the debts in full, if the plaintiff in the second suit succeeded. The second cause not having been heard, the court ordered a part of the assets to be set apart to answer the claims of the plaintiff in the second suit, with the costs; and the residue was apportioned and paid to the creditors in the first suit. *Illingworth* v. *Nelson*, 7 L. J., Ch. 163; 2 Keen, 776, n. And see *Swan* v. *Nelson*, 2 Keen, 776, n.

A suit was instituted against the representatives of a testator in respect of a breach of trust, and a decree was afterwards made in a creditors' suit against the same representatives, and an account of the debts, &c., was directed to be taken. The plaintiff, in the first suit, established his claim, so far as he could, in the creditors' suit, and afterwards brought on the first suit for hearing, when, there appearing a deficiency of assets, he waived further relief, and took the securities on which the trust fund had been improperly invested:—Held, that the plaintiff in the first suit was entitled to his costs out of the assets in the second. *Costerton* v. *Costerton*, 2 Keen, 774; 7 L. J., Ch. 302.

A bill was filed by persons interested as residuary legatees under a will against the executors and the other persons having interests, praying the usual accounts and the administration of the estate. The executors put in their answer, not however setting out the accounts which the bill asked. Afterwards, under an arrangement to which all parties consented, the executors verified their accounts by affidavit, and the sums thereby appearing to be in their hands were paid into court in the cause. Two of the defendants then filed a second bill against the executors and against all the other parties to the former suit, and thereby, in addition to the relief prayed by the first bill, sought to charge the executors personally, on the ground of fraud and breach of trust. In May, 1835, a decree by consent was made in the first suit by which all the accounts and inquiries usual in an administration suit were directed. The plaintiffs in the second suit afterwards brought on their suit to a hearing, but wholly abandoned the case of alleged fraud and breach of trust; and a decree was made dismissing their bill, but directing that their costs, up to the date of the decree in the first suit, should be taxed and paid out of the fund in court in the first suit. Upon appeal, this decree was varied by directing that so much of the second bill as sought to charge the executors personally be dismissed with costs, and that the plaintiffs pay to all the defendants so much of the costs of the rest of the suit as had arisen since the decree in the first suit, and that the residue of the costs of all parties be taxed, with a declaration that the same ought to be paid out of the estate; any of the parties to be at liberty to apply in the first suit relative thereto, and all proceedings in the second suit to be stayed. *Taylor* v. *Southgate*, 4 Myl. & C. 203; 8 L. J., Ch. 137; 3 Jur. 214.

Of Inquiries—Generally.]—Mere liberty to attend the proceedings under an administration judgment does not entitle the parties having the liberty to the costs of their attendance in chambers as a matter of course. In order to entitle such parties to such costs, the order giving the liberty to attend should expressly provide that they are to be entitled thereto. *Day* v. *Batty*, 21 Ch. D. 830.

To entitle a person interested in an administration action to the costs of attending proceedings in chambers under the decree, he must attend by special leave of the judge; and if he attends under the common order of course and without special leave, he may be ordered to pay, in addition to his own costs, the extra costs occasioned by his attendance. *Sharp* v. *Lush*, 48 L. J., Ch. 231; 10 Ch. D. 468; 27 W. R. 528.

Practice as to the mode of taking accounts in administration actions stated. *Ib.*

Costs of parties originally brought before the court by the executor, but declared by the decree to be unnecessary parties, but who, nevertheless, remained before the court and attended the inquiries, ordered to be paid out of the parties' own share. *Girdleston* v. *Creed*, 1 W. R. 228.

—— **Inquiry as to Heir.**]—In an administration action an inquiry was ordered as to who was the heir of the testator. The chief clerk found that R. K. was the heir, but that, in default of heirs on the paternal side, the heir-at-law was J. S. P. J. S. P. took out a summons to vary the certificate, and the court held that the claimant R. K. had not proved his relationship to the testator. The unsuccessful claimant asked for costs:—Held, that there was no general rule entitling a claimant coming in on an inquiry in chambers in an administration action, and failing, to have his costs out of the estate. The rule is correctly stated in Seton on Decrees, 4th edit., vol. 1, part 1, pp. 66 and 67: "A claimant failing in chambers to make out his claim may be ordered to pay costs":—Held also, that the decision of the court depended upon the special circumstances of each case; that in this case R. K. had not proved that the hearsay evidence upon which he relied was that of a person a member of the family; that the justice of the case would be met by not giving the claimant any costs of the inquiry in chambers, and ordering him to pay the costs of the adjournment into court. *Knight, In re, Knight* v. *Gardner*, 57 L. T. 238.

—— **Next of Kin.**]—General rule is, that next of kin going before master to establish their claims pay costs; but if afterwards they are permitted to mix in cause, as if they had been parties, they are entitled to costs. *Waite* v. *Waite*, 6 Madd. 110.

In a suit for the administration of the estate of a person who died partially intestate, certain persons, not parties to the suit, who proved themselves next of kin before the master, were allowed their costs of so doing out of the estate of the deceased. *Buckwell* v. *Paget*, 2 Jur. 699.

In a suit for the distribution of an intestate's estate, certain persons, not parties to the suit, proved themselves to be next of kin before the master:—Held, that they were entitled to be paid the costs of so doing out of the intestate's estate. *Bennett* v. *Wood*, 7 Sim. 522; 6 L. J., Ch. 330.

Where, in a suit for administration of the estate of an intestate, persons not made parties went in before the master, and established their title as next of kin, but no supplemental bill was filed, but they appeared at the hearing:—Held, that they were entitled to stand on the same footing as to costs as if they had been made parties. *Hutchinson* v. *Freeman*, 4 Myl. & C. 409; 10 L. J., Ch. 3, n.; 3 Jur. 694. S. P., *Shuttleworth*

v. *Howarth*, 4 Myl. & C. 492 ; 10 L. J., Ch. 2 ; 5 Jur. 2.

Costs allowed to a party who filed a bill claiming as next of kin, upon which an inquiry was directed as to who were next of kin, but who failed to prove her title, and a supplemental suit for the administration was necessary ; it being more beneficial to have that inquiry in a suit where parties claimed as next of kin than by a mere advertisement. *Taylor* v. *Haygarth*, 8 Jur. 135.

The plaintiffs, stating themselves and some of the defendants to be next of kin, filed a bill for the administration of a testator's estate. Their claim was displaced upon inquiries directed by the court ; and other persons, not parties to the cause, established their right, and became entitled to a large residue. The case being one of great difficulty and doubt, and an investigation being absolutely necessary for the administration of the estate, the plaintiffs and the defendants were allowed their costs out of the fund. *Johnston* v. *Todd*, 8 Beav. 489.

A testator devised his real estates to a trustee for a term of one thousand years, to raise by sale or mortgage 2,000*l.*, to be equally divided amongst such of his next of kin, both maternal and paternal, as should be living at the time of his death :—Held, that the parties entitled to the 2,000*l.*, as next of kin of the testator, were entitled to have the costs of making out their title before the master raised out of his estate, and that the costs did not fall on the fund. *Dugdale* v. *Dugdale*, 12 Beav. 247 ; 19 L. J., Ch. 42 ; 14 Jur. 234.

Executor having three guineas per annum for collecting rents, a trustee as to the residue of personal estate, and not having brought an action to recover a bond debt, was charged therewith ; having put the next of kin to prove the relationship, ordered to pay the costs of taking the accounts. *Lowson* v. *Copeland*, 2 Bro. C. C. 156.

The deceased had, by a writing purporting to be a codicil, given a legacy to a party, but no will could be found, nor was any executor appointed by the codicil ; the next of kin having been ascertained by the master, were held entitled, upon entering into recognisances for refunding in case of a will being found, to receive the residue ; and certain persons who proved themselves to be next of kin, although not parties to the suit, were allowed the costs of doing so. *Bakewell* v. *Tugart*, 3 Y. & C. 173 ; 2 Jur. 699.

A testator bequeathed his residuary personal estate amongst six persons equally. Three of the residuary legatees predeceased the testator, and their shares lapsed :—Held, that the costs of ascertaining the next of kin of the testator entitled to the lapsed shares ought to be paid out of the general residuary estate, and not out of the lapsed shares. *Giles, In re*, 55 L. J., Ch. 695 ; 55 L. T. 51 ; 34 W. R. 712.

—— **Legatees.**]—Legacy to such person of the name of M. as should, within a certain time, prove his relationship to testator. Such a person established a claim in the master's office, and he was held entitled to all his costs out of the general assets (the executors admitting assets), except those of making out his pedigree. *Wallis* v. *Williams*, Beames on Costs, 338.

The costs incurred by a legatee who has instituted an administration suit in attending before the master, by counsel, in support of his state of facts :—Held, not to be within the 120th Order of May, 1845, as incurred upon a question relating to title. *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357.

A. filed her bill for payment of a particular legacy given her by the will of B., and also for payment to her, as one of the next of kin of B., of one-third part of B.'s residuary personal estate, against the three executors of B., and the husbands of two of them, who were married women, and who were two of B.'s next of kin. The defendants by their answer disputed the legitimacy of A., although she was described in the testator's will as his granddaughter. On a reference directed, A.'s legitimacy was proved. A., by her will, did not specifically pray for payment of interest on her share of the testator's residuary estate, nor did she ask for any inquiry as to the interest due to her thereon, until after two separate references had been directed to the master :—Held, that the plaintiff was entitled to have her costs, relating to the inquiry into her legitimacy, paid personally by the defendants ; that she was not entitled, on the cause coming on for the third time, to any inquiry as to the amount of interest due to her on her share of the residuary personal estate, and that there could be no contribution as between co-defendants with respect to the receipts by them of the testator's estate, the same being matter proper for a distinct suit. *Green* v. *Challenor*, 9 L. J., Ch. 183.

After a verdict, on an issue directed, found against the legitimacy of a person claiming a legacy as a legitimate child, the court refused costs against him, as he had always borne the name of the family, and been received in it. *Forbes* v. *Taylor*, 1 Ves. J. 99.

—— **Class Inquiries.**] — Where a testator charges his estate with a specific bequest in favour of a particular class, *e.g.*, "the grandchildren of A.," the money will be raised at the cost of the general estate ; but the costs incurred by persons claiming to compose such class, in substantiating their claim, must come out of the fund specifically bequeathed. *Boycott* v. *Newman*, 2 Jur. (N.S.) 702 ; 4 W. R. 707.

Where a testator gave his residuary estate, both real and personal, upon trust to be divided in certain proportions among certain classes of persons, although some of the classes turned out to be much more numerous than others, it was held that the cost of establishing the claims of the individuals composing the different classes were not to be paid exclusively out of the portions payable to such classes respectively, but that the costs of all the persons who established their claims as falling within the several classes were to be paid indiscriminately out of the residuary fund before any apportionment of it took place. *Shuttleworth* v. *Howarth*, Cr. & Ph. 228 ; 5 Jur. 499.

A residue being given to a class of persons, and it being referred to the master to ascertain who belonged to that class, a person, whom the master has admitted as one of the class, may obtain an order to attend the proceedings at the expense of the estate, if one solicitor acts in the suit both for plaintiff and defendant, and also for persons claiming to be interested in the residue. *Anon.*, 5 L. J. (O.S.) Ch. 104.

Real estates were devised in trust to raise a legacy for a class of next of kin. The legacy was raised and carried to a separate account in the suit, and afterwards costs were incurred in

ascertaining the class in the master's office. Upon petition of the legatees, such costs were held to be a charge on the estate, and were ordered to be raised. *Dugdale* v. *Dugdale*, 12 Beav. 247; 19 L. J., Ch. 42; 14 Jur. 234.

When there is a gift of residue to be divided among certain persons and classes of persons, the costs of ascertaining of whom such classes consist are payable out of the whole residue before the same is divided. *Reere, In re*, 46 L. J., Ch. 412; 4 Ch. D. 841; 36 L. T. 906; 25 W. R. 628.

—— **As to Incumbrances.**]—If in an administration suit an inquiry is directed in chambers as to incumbrances by persons interested under the will, the costs of such inquiry must be treated as part of the general costs of the suit, and be paid out of the estate. *Gee* v. *Mahood*, 23 W. R. 71.

—— **Payment into Court.**]—Executors by payment into court under the Trustee Relief Act of a sum of money bequeathed to a class, or by any other severance of the legacy, cannot relieve the residue in their hands from bearing the costs of and incident to an inquiry for the purpose of ascertaining who are the persons entitled to take. *Trick's Trusts, In re* (L. R. 5 Ch. 170), and *Birkett, In re* (9 Ch. D. 576), followed. *Gibbons, In re*, 56 L. J., Ch. 911; 36 Ch. D. 486; 58 L. T. 8; 36 W. R. 180.

—— **Inquiries Unnecessary and Improper.**]—The plaintiff was the sole executor and trustee of the will of George Dale, a grocer. The property had been realised in the action, and the total amount of the proceeds was about 370*l.* The testator died in 1878, having by his will left all his property upon trust for his wife during widowhood, with power to carry on the business, and on her death or marriage upon trust for sale, the residue to be divided among his children, and the issue then living of any deceased. On the 30th May, 1879, the writ was issued in this action. In April, 1880, the statement of claim was delivered, in which the number and names of the testator's children were stated, the only reason given for the action being that difficulties had arisen in the administration of the trust. The widow and Joseph Dale, an adult son, were the defendants. On the 17th November, 1880, the plaintiff applied for and obtained an order for accounts and inquiries. The certificate was not made until the 5th June, 1889:—Held, that many of the inquiries, particularly that concerning the children, were unnecessary and improper:—Held, however, that, the suit being instituted and the order for accounts and inquiries made before the General Orders of 1883 came into operation, the trustee, under the old practice, was not so much to blame as to be ordered to pay the costs; that it was a case to which the new rule, Ord. LXV., r. 38, of the Rules of Court, 1883, applied. *Dale, In re, Stubbs* v. *Dale*, 62 L. T. 28.

A testator left his property to his wife for life, his business to be carried on for the support of her and his children, charged with debts. There was no personalty, the trustees disclaimed, and a bill was filed by one child, a legatee, for the administration of the estate, alleging an improper carrying on of the business, and asking an account and receiver. On the question of costs:—Held, that, this court being put in the place of trustees, the inquiry as to the business was necessary, and no costs could be reserved, but must be paid as usual. *Cooper* v. *Cooper*, 1 W. R. 501.

—— **Other Cases.**]—Several defendants entitled to a fund in equal shares; and long inquiries being necessary as to one share only, the costs were apportioned. *Baseri* v. *Serra*, 14 Ves. 313.

A testator having, by his will, directed his executors to transfer 500*l.*, part of his residuary estate, to H. N., and made a specific disposition of the other parts, and having afterwards drawn a pen through the name of H. N., and by a codicil declared that he razed her name out of his will with his own hand, the 500*l.* belongs as undisposed of to his next of kin. The costs of ascertaining the right to that sum paid thereout in exemption of the general residue. *Skrymsher* v. *Northcote*, 1 Swanst. 566; 1 Wils. 248; 18 R. R. 142.

The testator having directed the expenses of investing all accumulations to be paid out of the fund bequeathed to grandchildren, the lord chancellor would not cast the costs of the suit upon the excess of accumulations beyond the legal period, and which would go to the heir-at-law or next of kin; and varied the decree below therefore by directing the costs of the suit, except as to the inquiries and proceedings incident to the excess of accumulations, to be paid out of the general estate, and the costs of such inquiry apportioned pro ratâ between the funds of the heir and next of kin: under such circumstances, costs would be a proper subject of appeal. *Eyre* v. *Marsden*, 4 Myl. & C. 231; 3 Jur. 450. Reversing on this point 2 Keen, 564; 7 L. J., Ch. 220.

A plaintiff deprived of the conduct of an administration suit, who attended the taking of the accounts in chambers, is not entitled to his costs. *Armstrong* v. *Armstrong*, L. R. 12 Eq. 614.

Separate Sets of Costs — Assignee in Bankruptcy.]—A party entitled to a share of a residue became bankrupt:—Held, that he and his assignees were entitled only to one set of costs between them. *Garey* v. *Whittingham*, 5 Beav. 268; 11 L. J., Ch. 334; 5 Jur. 545.

In a bill filed by a married woman to administer the estate of a testator, and to establish her equity to a settlement to which her husband and his assignees in bankruptcy were made defendants, the court held the husband was entitled to his costs, but refused to give the assignees their costs. *Rotherham* v. *Battson*, 2 Sm. & G. (App.) viii.

The plaintiff in an administration suit, one of the executors and residuary legatees, being insolvent, his assignees in insolvency had been made defendants to the suit:—Held, that the plaintiff and the assignees were entitled to separate costs. *Chilwell* v. *Hocknell*, 2 Eq. Rep. 1160; 2 W. R. 630.

—— **Incumbrancers.**]—Where one of a class of persons interested in a testator's residuary personal estate files a bill for its administration, the general costs of the suit are to be satisfied out of the fund generally; but where some of the parties beneficially interested have incumbered or absolutely assigned their portions of the fund, the costs of the assignors only will be allowed, the same to be paid to their assignees respectively, and the rest of the costs incurred by the assignees.

must be satisfied out of the assigned shares respectively. *Greedy* v. *Lavender*, 11 Beav. 417; 18 L. J., Ch. 62.

Where shares of parties beneficially interested under a will have been incumbered, one set of costs is allowed in respect of each share, but without deducting the additional expense incurred by reason of the incumbrances. *Greedy* v. *Lavender* (11 Beav. 417) not followed. *Coates* v. *Coates*, 3 N. R. 355. And see *Remnant* v. *Hood*, 27 Beav. 613, infra.

—— **Parties in same Interest.**]—Parties in the same interest with the plaintiff, and not joining as co-plaintiffs, are not entitled to the costs of a suit which, as to their interests, is successful. Trustees neglecting their trust not entitled to their costs. *England* v. *Downs*, 6 Beav. 279.

Where several parties in the same interest have liberty to attend the proceedings in an administration suit, they should not appear separately; and if they do, only one set of costs will be allowed. *Stevenson* v. *Abington*, 8 L. T. 719; 11 W. R. 936.

The court does not compel persons who have different shares in an estate to appear by the same solicitor because their interests as regards their opposition to the claim of the plaintiff are identical. *Remnant* v. *Hood*, 27 Beav. 613.

Therefore, the bill being dismissed with costs, each of such persons gets his separate costs; but a trustee and his cestui que trust get but one set of costs between them; and so the person entitled to a share and all his incumbrancers have but one set of costs, which is payable to the first incumbrancer. *Ib.*

In an administration suit by the heir, being one of the next of kin of a testator, other persons claiming as next of kin, but appearing in separate classes by several solicitors, were not allowed separate costs out of the general estate beyond the costs of proving their respective titles. *Hubbard* v. *Latham*, 35 L. J., Ch. 402; 14 L. T. 616; 14 W. R. 553.

In an administration suit by a residuary legatee, other residuary legatees served with notice of the decree, and having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the accounts in chambers, unless the plaintiff and the accounting defendant employ the same solicitor, and in that case will be allowed one set of costs between them. *Taylor, In re, Daubney* v. *Leake*, 35 Beav. 311; 35 L. J., Ch. 347; L. R. 1 Eq. 495; 14 W. R. 413.

A fund was left to M. for life, and then to C. and S. equally between them, or the survivor, unless either should die leaving children, in which case his share was to go to his children. C. died first, leaving no children. S. died, leaving three, and M. died afterwards, the court holding that the children of S., who all appeared separately and argued on the petition, took nothing:—Held, that, it being a case for costs, each interest was entitled to one set of costs. *Larkin, In re*, 2 Jur. (N.S.) 229.

But one of these three children being a married woman, whose husband had become bankrupt, and she and her husband's assignees appearing by different counsel in order to argue, if it arose, her equity to a settlement:—Held, that there could be but one set of costs allowed in respect of her share, and that the husband's assignees, and not the wife, were entitled to that set of costs. *Ib.*

In an administration suit W., an executor, severed from his co-executors, and appeared by a separate solicitor and counsel throughout the proceedings. The testator had given his executors power to carry on his business, and W.'s co-executors had, in spite of his remonstrances, carried on the business at a loss. The chief clerk, by his certificate, found that no profits had arisen from the testator's business since his death, and that another of the co-executors was largely indebted to the estate:—Held, that W., who had died pendente lite, was justified in severing from his co-executors, and that his legal personal representatives were entitled to a separate set of costs. *Meldrum* v. *Hayes*, 21 W. R. 746.

Residuary legatees not parties to the record, but having by leave of the court attended in chambers, are entitled to one set of costs amongst them. *Lewis* v. *Matthews*, 38 L. J., Ch. 510; L. R. 8 Eq. 277; 17 W. R. 841.

Blended Estates.]—Costs where two estates, those of the testator and the executor, are administered in the same suit. *Culsha* v. *Cheese*, 7 Hare, 246.

Where the estates of two testators have been blended so as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's debt. *Sandys* v. *Watson*, 2 Atk. 80.

The costs of proceedings to administer two separate estates which have been dealt with as one fund must be borne by the two estates in equal shares, notwithstanding the estates are unequal. *Dean* v. *Morris*, 5 W. R. 345.

On Proof of Debts or Claims—Since Judicature Acts and Orders.]—Ord. LV., r. 58, gives a creditor the costs of establishing his debt in chambers.

—— **Before Judicature Acts.**]—If a prior creditor, not a party in the cause, requires a reference to ascertain what is due to him, and an order on the receiver to pay him the amount when ascertained by the master, the costs of the motion and reference must in general be paid by the applicant. *Wilmot* v. *Smith*, 2 Hog. 149.]

Where creditors merely come into the office to prove their demands, they are not allowed the costs of the hearing afterwards, as it is a mere voluntary act their coming into court; otherwise where a question arises, and it is necessary to bring them to the final hearing. *Madden* v. *O'Callaghan*, 2 Moll. 522.

Extra costs occasioned by a mistake of the Master allowed to a creditor proving his debt against a lunatic's estate. *Buckle, In re*, 1 Russ. & M. 360.

A creditor who proves his demand under a decree for the administration of assets will not be heard upon the final hearing of the cause to ask for costs incurred by him in the office in reducing the plaintiff's demand, there being no special case made for that purpose by the report. *Loughny* v. *Dillon*, 3 Ir. Eq. R. 55.

The 49th Order of August, 1841, giving costs to creditors who prove their debts before the master, does not affect the costs to which the plaintiffs in the cause are entitled. *Flintoff* v. *Haynes*, 4 Hare, 309.

Claim by a creditor in an administration suit to prove the penalty of a bond, as damages for the non-performance of a contract. The master reported the claim. On exceptions, the court gave the creditor liberty to bring an action on

the bond. The action was brought, and the jury found a verdict for the plaintiff (the creditor), with but nominal damages. The court, upon this result, refused the creditor the costs of making the claim before the master and the costs of the action, but gave him the costs of the exceptions. *Morgan* v. *Elstob*, 4 Hare, 477. And see *King* v. *King*, 12 W. R. 1095.

A person claiming to be a creditor under a decree to administer the testator's estate, having failed to establish his debt, after a long and expensive examination of witnesses, was ordered to pay the cost of the proceedings. *Hatch* v. *Searles*, 2 Sm. & G. 147; 23 L. J., Ch. 467; 2 W. R. 242.

Where a creditor takes in a claim under a decree in an administration suit, and fails in substantiating it, and large costs are incurred in opposing it, although an appeal is pending, the court will, on motion, order the creditor to pay such costs, including the costs of the motion. *Colyer* v. *Colyer*, 10 W. R. 748.

Where there is a deficiency of assets, the costs of creditors of proving their debts are not payable in the first instance, but are added to their debts and apportioned with them. *Morshead* v. *Reynolds*, 21 Beav. 638.

In an administration suit, a creditor's claim was admitted as a claim only by the master's report, to which the creditor did not except. Shortly afterwards the result of a suit tended to establish his debt. After more than a year the creditor petitioned to be admitted as a creditor against the estate:—Held, that he might be admitted without being charged with the cost, which had not been increased by the delay. *Lee* v. *Flood*, 2 Sm. & G. 250.

An alleged creditor carried in a claim, in an administration suit, for a debt alleged to be due from the testator. The claim having been disallowed, the claimant was ordered to pay the costs of the proceedings. *Yeomans* v. *Raynes*, 24 Beav. 127.

Proof for calls. Petitioners entitled to their costs. *Wentworth* v. *Chevell*, 5 W. R. 743.

Three guineas is a proper sum to allow to each successful claimant to a fund in court for the costs of establishing his claim. *Waterton* or *Waterlow* v. *Burt*, 39 L. J., Ch. 425; 18 W. R. 683.

Raising by Sale or Mortgage.]—"Costs to be paid out of estate;" no subpœna lies against defendant, but part of estate to be sold. *Cannon* v. *Beely*, Dick. 115; Beames on Costs (App.), vii.

Where costs are decreed to all parties out of a real estate, though one of them die before taxation, the costs are a lien upon the estate, and the heir-at-law of the deceased party is entitled; and there being nothing in the decree executory, there is no occasion to revive. *Blower* v. *Morrets*, Dick, 254; 3 Atk. 772.

Real estates were devised in trust to raise a legacy for a class of next of kin. The legacy was raised and carried to a separate account in the suit and afterwards costs were incurred in ascertaining the class in the master's office. Upon petition of the legatees, such costs were held to be a charge on the estate, and were ordered to be raised. *Dugdale* v. *Dugdale*, 12 Beav. 247; 19 L. J., Ch. 42; 14 Jur. 234.

In a suit to ascertain the construction of a will of real estate, and to carry the trusts thereof into execution, the court has power, if necessary, to direct a sale or mortgage of a sufficient part of the property for the purpose of raising the taxed costs of the suit, although some of the plaintiffs are infants. *Mandeno* v. *Mandeno*, Kay (App.), ii.

Sect. 55 of the 15 & 16 Vict., c. 86, gives power to direct a sale before the hearing in those cases only in which the court could, under the old practice, have given such direction at the hearing. *Ib.*

The court has no discretion to order a sale for payment of costs of an estate the subject of an administration suit, devised in undivided shares to several parties, if one of the persons interested is sui juris, does not consent to the sale, and offers to pay his own share of the costs. *Lees* v. *Lees*, 42 L. J., Ch. 319; L. R. 15 Eq. 151; 27 L. T. 743; 21 W. R. 215.

Interest on.]—The rule that interest on costs in an administration action ordered to be raised out of a fund is not recoverable except by express provision to that effect contained in the order is not affected by the Solicitors' Remuneration Act, 1881, General Order VII., nor by the Rules of Supreme Court, 1883, Ord. XLI., r. 3, and XLII., r. 16. *Marsden's Estate, In re, Withington* v. *Neumann*, 58 L. J., Ch. 260; 40 Ch. D. 475; 60 L. T. 696; 37 W. R. 525.

Scale.]—The costs of an administration suit are taxable on the higher or lower scale according as the actual amount of the estate to be administered is, at the time of the institution of the suit, above or below 1,000*l.* *Judd* v. *Plumm*, 29 Beav. 21; 30 L. J., Ch. 94; 7 Jur. (N.S.) 12; 9 W. R. 27.

Where an estate, which is being administered, is above 1,000*l.* at the time of the institution of the suit, but is subsequently reduced below that amount, the higher scale of fees is applicable. *Reece's Estate, In re, Gould* v. *Gould*, 35 L. J., Ch. 794; L. R. 2 Eq. 609; 12 Jur. (N.S.) 614; 14 L. T. 881; 14 W. R. 1008.

In administration actions, where the gross value of the estate to be administered amounts to 1,000*l.* at the time of the institution of the action, the higher scale of costs applies; and in estimating such value where the estate to be administered comprises an equity of redemption, the value of the equity of redemption only, and not of the entire mortgaged estate, is to be regarded. If, however, in such a case the equity of redemption has been valued at the time of the institution of the action at such a sum as, with the rest of the estate to be administered, amounts to 1,000*l.* or upwards, but it afterwards turns out, on a sale by the mortgagees, that the proceeds of such sale, together with the rest of the estate to be administered, amount to less than 1,000*l.*, the lower scale applies. *Sanderson, In re*, 7 Ch. D. 176; 38 L. T. 379; 26 W. R. 309.

A husband devised his wife's freehold to the wife for life, remainder in fee to the plaintiff. The wife received other considerable benefits under the will. She elected to assert her rights over the freehold, and sold it, upon which the plaintiff brought an action and recovered, under the equitable rule of compensation, the value of the freehold so sold. The action sought administration of the testator's estate and also of the estate of the wife, who had since died. The costs were taxed by the master on the lower scale. The plaintiff appealed to the judge:—Held, that this was not an action assigned to the chancery division, as it might have been brought anywhere, being substantially an action

for the recovery of land or damages; that it was only accidentally an administration action; and that even if the plaintiff had obtained an administration decree, which he did not, as the estate did not exceed 1,000*l.* in value, the costs ought to be taxed on the lower scale. *Rogers* v. *Jones*, 7 Ch. D. 345; 38 L. T. 17.

Of Appeal.]—An appeal on the construction of a will, if unsuccessful, will in general be dismissed with costs. *Clark* v. *Henry*, L. R. 6 Ch. 885.

The rule that costs should follow the event of an appeal does not hold in an appeal properly brought in a suit which is necessary for the administration of the estate. In such a case, costs will be given out of the estate. *Maxwell* v. *Maxwell*, 39 L. J., Ch. 698; L. R. 4 H. L. 506; 23 L. T. 325; 19 W. R. 15.

—— **Security for—Set-off.**]—In an administration action P. was found to be heir-at-law. K., who claimed to be heir, appealed against this decision. P. then died, and K. revived against H., his executor and devisee in trust. H. applied for security for the costs of the appeal on the ground of K.'s proved insolvency. K. resisted on the ground that P. had been ordered to pay to him the costs of a previous appeal, which were of sufficient amount to be a security:—Held, that if P. had been the respondent this would have been a sufficient answer, but that H., being only a representative, was entitled to be indemnified, and that security must be given. *Knight, In re, Knight* v. *Gardner*, 38 Ch. D. 108; 58 L. T. 699—C. A.

b. *Of Executor or Administrator.*

In General.]—It is not an invariable rule, that an administrator should be allowed costs at all events. *Wilkins* v. *Hunt*, 2 Atk. 151.

Executors usually are to be exempt from paying costs, even though great difficulties and delay have been occasioned by them, for the court will overlook these circumstances if it can. *Hall* v. *Hallett*, 1 Cox, 141; 1 R. R. 3.

The only way in which executors can obtain complete exoneration is by passing their accounts in a court of equity, and the court is consequently anxious not to deter them from so doing by visiting them with costs. *Low* v. *Carter*, 1 Beav. 426.

It is a general rule that an executor is entitled to costs as far as goes to the taking the account. *Newton* v. *Bennett*, 1 Bro. C. C. 362.

Though an administrator is entitled to his costs up to the account, the subsequent costs will be reserved if his conduct be such as to induce the court to do so. *Landen* v. *Green*, Barnard, 389.

An executor ordered to pay a fund into court does not thereby lose his lien thereon for his costs. *Blenkinsop* v. *Foster*, 3 Y. & C. 207; 8 L. J., Ex. Eq. 8.

The administrator ad litem gets his costs, although no personal estate, but an executor volunteering to take out probate must abide by the personal estate, and cannot get costs out of the real in default of personal assets. *Nash* v. *Dillon*, 1 Moll. 236.

As to costs of executor where account formerly rendered is found to be correct. *Hubbard* v. *Child*, 14 Jur. 544.

—— **As between Solicitor and Client.**]—One of two executors and trustees commenced an action against the other for the administration of the estate, and a decree was made. There was no allegation of any misconduct on the part of the defendant. On the action coming on for further consideration, Kay, J., gave the plaintiff his costs as between solicitor and client, but gave the defendant costs only as between party and party, holding that two sets of costs as between solicitor and client ought not to be allowed to the trustees:—Held, on appeal, that a trustee is entitled to costs as between solicitor and client in an administration action, unless a case of misconduct is made out against him, and that the defendant must have costs as between solicitor and client. *Love, In re, Hill* v. *Spurgeon*, 54 L. J., Ch. 816; 29 Ch. D. 348; 52 L. T. 398; 33 W. R. 449—C. A.

Security for.]—Executors and administrators must give security for costs like other persons. *Shaw* v. *Dempsey*, Sau. & Sc. 628.

A plaintiff suing as executor, and residing out of the jurisdiction, may be compelled to give security for costs. *Cathcart* v. *Hewson*, Hayes, 173.

Where Plaintiff.]—Executor plaintiff cannot be distinguished in respect to costs from the party represented. *Westly* v. *Williamson*, 2 Moll. 458.

Bill by an administrator; defendant demurs, and the demurrer is allowed. Bill dismissed with costs, and so said to be the constant course in equity. *Frazer* v. *Moore*, Bunb. 63.

When letters of administration are revoked the administrator will not get his costs of an administration suit instituted by him with knowledge that another person claimed to administer. *Houseman* v. *Houseman*, 1 Ch. D. 535; 34 L. T. 633; 24 W. R. 592—C. A.

Executors who instituted an improper suit for the administration of the personal estate of a testator were refused any costs out of that estate. *Richards* v. *Att.-Gen. Jamaica*, 13 Jur. 197.

It would be the duty of the court to deprive any plaintiff of the costs of an improper administration suit, notwithstanding there being a direction in the will that costs are to be paid out of a particular fund. Semble. *Young, In re, Young* v. *Dolman*, 44 L. T. 499.

A., on death-bed, desires executor not to trouble B. for bond debt; executor puts bond in suit; bond ordered to be delivered up to be cancelled, and costs of law and equity paid by executor; but reversed as to costs. *Wekett* v. *Raby*, 2 Bro. P. C. 386.

A testator lent a son 100*l.*, for which the son gave him a promissory note. The testator by his will, executed some years before the loan, gave the son a legacy of 100*l.* The son having denied the debt, the executrix brought an action on the note, whereupon the son filed a bill, praying a declaration that the 100*l.* was not a debt, and that the note should be given up to be cancelled, and a declaration that he was entitled to his legacy. A verdict having been given for the amount of the 100*l.* due on the note, the court dismissed the bill, directing the son, the plaintiff, to pay the executrix so much of the costs of the suit as were occasioned by his denying that he was indebted to the testator. *Woods* v. *Woods*, 12 Jur. 994.

The plaintiff, as administrator of a deceased party, instituted a suit for discovery of assets, whereupon a will, which had been suppressed, was produced, and the administration revoked:—Held, that the costs claimed by the plaintiff were incurred by him, not merely in his private

right as a party in another cause, but in his official character of administrator; and as the grant of administration to him, though voidable, was not void, and conferred on him during its continuance the right of a lawful administrator, he was entitled to be paid out of the personal estate of the deceased, the expenses properly incurred in the duties of the office:—Held, secondly that as the demurrer as to costs was overruled, the plaintiff was entitled to the costs of the hearing. *Howlett* v. *Lambert*, 2 Ir. Eq. R. 254.

An executor finds certain promissory notes in his testator's handwriting, and demands payment, but is met with a receipt in writing, signed by the testator. The notes are made the subject of bequest in the will to the maker, and the executor upon the advice of counsel, brings an action and files a bill:—Held, that he was entitled to retain the costs of such action and suit out of the estate. *Foster* v. *Dawber*, 6 W. R. 47.

The executors of a solicitor held entitled to the costs of a suit, instituted by them to raise the amount of certain judgments given for untaxed bills of costs, on account of the dealings between the conusor of these judgments and his devisee with the conusee; though more than one-sixth was struck off one of the bills on taxation, and though the defendant had offered to submit the matters in dispute to arbitration, and to pay whatever might be found due after the bills of costs had been taxed and all proper credits allowed. *Humfrey* v. *Gurley*, 1 Dr. & Wal. 183.

An executor was allowed, under the circumstances, the costs of a cross cause for administration of the estate instituted by him against his cestui que trust. *Nelson* v. *Duncombe*, 9 Beav. 211; 15 L. J., Ch. 296; 10 Jur. 399.

—— **Continuing Proceedings instituted by Deceased.**]—Executors, by reviving, rendered themselves liable to costs from the commencement, on dismissal of bill. *Lyon* v. *M'Kenna*, 2 Moll. 460.

An executor, after a bill filed by his testator had been dismissed with costs, revived the suit, alleging that he had intended to appeal. The executor was ordered to pay the costs of the suit. *Horlock* v. *Priestley*, 8 Sim. 621.

An order under the modern practice, allowing an executor to continue the proceedings in an action instituted by his testator, which order has been obtained by him after a judgment in favour of his testator, and after notice of an appeal against that judgment, is equivalent to the old order for revivor, and subjects him to the same liabilities. He becomes in effect a substantive party to the suit, and is personally liable for costs. *Boynton* v. *Boynton*, 4 App. Cas., 733; 41 L. T. 450; 27 W. R. 825—H. L.

Where Defendant.]—The rule, in relation to costs, to be paid by an executor defendant, is the same in equity as at law. *Jefferies* v. *Harrison*, 1 Atk. 468.

Where a debt of a testator is recovered against an executor at law, costs are given de bonis propriis; but in equity it is discretionary whether the executor shall pay costs or not. *Uvedale* v. *Uvedale*, 3 Atk. 119.

Bill for an account against an administrator; the Master reported assets sufficient in defendant's hands. Costs given generally against defendant, and not out of assets: as at law, when defendant pleads plene administravit, judgment is given de bonis propriis si non, &c. *Davy* v. *Seys*, Mos. 204. S. P., *Prissick* v. *Vigures*, Colles, P. C. 346.

Where an executor had spent more about the legatee than the amount of the legacy, the court thought it too hard to give costs against him, though there was a decree for the payment of the legacy. *Davies* v. *Austen*, 1 Ves. J. 247.

Where a plaintiff brings before the court, as a defendant, a party who had been named executor, but had refused to act, and states the fact upon his bill, such defendant is entitled, as against the plaintiff, to the costs of an answer in the nature of disclaimer. *Weldon* v. *Weldon*, 1 Dr. & Wal. 379.

An executor who ought to have been a co-plaintiff was made a defendant, and Lord Chancellor for some time doubted whether he was entitled to his costs, but at length ordered them to be paid to him. *Blount* v. *Burrow*, 3 Bro. C. C. 90.

Where an executor institutes a suit properly, and a co-executor refusing to join in it is made a defendant, this co-executor will not be allowed his costs. *Collyer* v. *Dudley*, Turn. & R. 421; 2 L. J. (o.s.) Ch. 15.

Where the same solicitor acts for an executor and the other co-defendants, the estate will be charged, in respect of the executor's costs only, with that proportion of the sum due to the solicitor from his clients which the executor, as between himself and the co-defendants, ought to bear. *Harmer* v. *Harris*, 1 Russ. 155; 25 R. R. 20.

Proceedings were stayed as against the legal personal representative. A petition having been presented, professing to deal with funds standing to the general credit of the cause, he was served therewith, and with a notice not to appear:—Held, nevertheless, that he was entitled to his costs of appearance. *Rowley* v. *Adams*, 16 Beav. 312.

Plaintiff's demand in a suit for the administration of assets, being on foot of costs untaxed, but the bill delivered agreeably to the statute 2 Geo. 2, c. 23, the decree directed the costs to be taxed to ascertain what was due to the plaintiff; the administratrix being held not to be concluded, so as to establish as the debt due the full amount of the bills delivered. The general submission to pay the costs when taxed in such case, is out of assets, but a personal undertaking was required of her to pay the expenses of taxation, if less than a sixth was reduced. *Hartford* v. *Humphreys*, 1 Moll. 142.

A suit was instituted by a next friend, on behalf of infants interested in the administration of a testator's estate, for the purpose of setting aside an agreement which had been entered into by the executors and trustees for the disposal of the testator's business, and the bill contained charges of gross misconduct against T., one of the trustees and executors. T. defended the suit, and the bill was dismissed with costs, the court being of opinion that the agreement was for the benefit of the estate, and that the charges against T. were unfounded. The next friend being insolvent, T. applied in a suit for the administration of the testator's estate to be allowed his costs out of the estate, but they were refused, on the ground that he had not previously obtained leave to defend. But, on appeal, the decision was reversed and the costs were allowed. *Walters* v. *Woodbridge*, 47 L. J., Ch. 516; 7 Ch. D. 504; 38 L. T. 83; 26 W. R. 469—C. A.

A bill by residuary legatees prayed an account against the defendants, the executors, on the footing of wilful neglect and default, but made no case of misconduct against them, except that they had improperly defended an action in which they had failed, and the costs of which they claimed to retain out of the estate. The court, at the hearing, although of opinion that the action ought not to have been defended, gave the defendants their costs of the depositions which had been taken relative to that subject, on the ground that, having no connection with a case of wilful neglect and default, it was not a proper matter to be put in issue at that stage of the suit. *Smith* v. *Chambers*, 2 Ph. 221; 16 L. J., Ch. 291; 11 Jur. 359.

Executors not allowed the costs of an action which had been successfully brought against them by a surgeon for medicine and medical attendance furnished to the testator. *Chambers* v. *Smith*, 2 Coll. C. C. 742.

An action was brought against the executor and trustee of a will by the beneficiaries, in which they alleged he had committed certain breaches of trust, and claiming the administration of the estate, the appointment of a new trustee, and of a receiver. At the trial an order was made by consent by which certain inquiries, consisting of the common administration inquiries and others with reference to the alleged breaches of trust, were referred to an official referee. The referee reported altogether in favour of the defendant, and the cause came on for further consideration:—Held, that the plaintiff must pay all the costs of the action up to and including the hearing on further consideration, except such costs as would have been incurred in obtaining a simple administration judgment. *Brook, In re, Sykes* v. *Brook*, 50 L. J., Ch. 744; 45 L. T. 172; 29 W. R. 821.

T. K. having in 1846 died intestate, letters of administration were, upon the assumption that he had left no next of kin, granted to A. B., the solicitor of the treasury, on behalf of the Crown. In 1853 these letters were revoked, and administration was thereupon granted to M. K., who had been pronounced to be one of the next of kin of T. K. On claim by M. K. against A. B. for the payment to her of the proceeds of the estate and effects received by A. B.:—Held, that A. B. was not entitled to retain the costs occasioned in opposing M. K.'s title to the property. *Kane* v. *Reynolds*, 23 L. J., Ch. 638; 18 Jur. 1010; 2 Eq. R. 672; 2 W. R. 541.

An order to tax the costs of an executor in a suit, including any costs, charges and expenses properly incurred by him in the execution of the trusts of the will, does not include the costs of his defence to other suits instituted against him as executor. *Payne* v. *Little*, 27 Beav. 83.

Under an order in an administration suit to tax the costs of executors, including any costs, charges and expenses properly incurred by them as executors not being costs in the cause, their costs of litigation, though unsuccessful, in other suits in their fiduciary character, may be allowed; and the omission of any directions in those other suits respecting the executors' costs, is not equivalent to a refusal of them out of a testator's estate. *Graham* v. *Wickham*, 2 De G. J. & S. 497; 34 L. J., Ch. 220; 11 Jur. (N.S.) 168; 12 L. T. 39; 13 W. R. 396.

An order on further consideration having been made in an administration suit containing the usual direction for taking and paying costs, charges and expenses, properly incurred, of the executors, the executors claimed, under the head of costs, charges and expenses, the costs incurred by them since the decree in the administration suit, in unsuccessfully defending a suit in which a decree had been made against them without saying anything as to their costs. A motion for a direction to the Master to review his certificate disallowing these costs having been refused, on the ground that they had been adjudicated upon in the suit in which they had been incurred:—Held, on appeal, that the motion ought not to have been disposed of on that ground, but that the question whether the costs were costs, charges, or expenses properly incurred ought to have been entered into. *Ib.*

After an ordinary decree in a creditors' suit had been made at the Rolls against executor as, bill was filed, in the court of one of the vice-chancellors, against the executors, and against a former partner of their testator, to establish a claim arising out of a misrepresentation made by the testator and his co-partner, in respect of which the plaintiff had already recovered at law against the surviving partner. The executors, without applying for directions in the administration suit, defended this new suit, and a decree for an account, without costs, was ultimately made against their testator's estate:—Held, that having regard to the previous proceedings at law, the executors ought not to be allowed the costs of defending the second suit down to the hearing. *Ib.*

Held, also, it appearing that a claim had been carried in, in the first suit, by the plaintiff in the second suit, but adjourned until after the decision in the second suit, that they ought to be allowed their costs of the second suit subsequent to the decree. *Ib.*

Held, that the question, whether they were to be allowed their costs, was not decided by the order in the second suit. *Ib.*

Held, that such costs might be taxed under a decree in the creditors' suit, directing taxation of costs, and costs, charges and expenses properly incurred. *Ib.*

Where an administration suit is pending, and another suit is instituted against the executors of the testator in the former suit, it is the practice, if they are entitled to their costs of the latter suit, to direct in that, that they shall be allowed to prove in the administration suit for such costs, as part of their discharge. *S. C.*, 11 L. T. 438.

A defendant, having died after appearance but before answer, was struck out of the bill with costs by side bar rule, and his administrator was made a party by amendment:—Held, the administrator was entitled to the costs incurred by the deceased defendant. *Short* v. *Carroll*, 9 Ir. Eq. R. 468.

Priority.]—In a creditors' suit for the administration of assets, the executor of the deceased is entitled to his costs, although the estate prove insufficient to pay the debts; the rule of costs according to priorities does not apply to such a case. *Harwood* v. *Bland*, 2 Ir. Eq. R. 11. But see *Adair* v. *Shaw*, 1 Sch. & Lef. 280.

Notwithstanding an order on further direction in a creditors' suit that the costs of all parties should be taxed as between solicitor and client, and paid out of a fund in court—the fund proving insufficient to pay all the costs—the court ordered the costs of the executors to be paid in the first.

place. *Gaunt* v. *Taylor*, 2 Hare, 413. Contra, *Swale* v. *Milner*, 6 Sim. 572.

When the fund is deficient, the executors' costs of an administration suit are paid thereout in priority of those of the other parties. *Tanner* v. *Dancey*, 9 Beav. 339.

Where, upon a bill filed by a simple contract creditor, the only specialty creditor is restrained by injunction from proceeding in his action at law, and it turns out, upon the Master's report, that the assets are insufficient to pay the specialty creditors, the executor will have his costs out of the assets. *Young* v. *Everest*, 1 Russ. & M. 426.

Where, in a creditors' suit, the assets prove insufficient for the payment of the costs of all parties, the executors are entitled to be paid in priority, notwithstanding they have voluntarily confessed judgments, and thus denuded themselves of the assets. *Sanderson* v. *Stoddart*, 32 Beav. 155; 9 Jur. (N.S.) 1216; 7 L. T. 662; 11 W. R. 275.

In a suit by a mortgage creditor for administration, where the mortgaged estate had been sold by consent of the plaintiff and the debts paid, and the remaining assets were insufficient to pay the costs:—Held, that the executors were entitled to their costs, charges and expenses in priority to the plaintiff's costs of sale. *Spensley, In re, Spensley* v. *Harrison*, 42 L. J., Ch. 21; L. R. 15 Eq. 16; 27 L. T. 600; 21 W. R. 95.

An equitable mortgagee by deposit of title deeds filed a bill, praying for an account and payment of what was due upon his security; for a sale of the premises in default of payment, and payment out of the proceeds of sale; and for payment of any balance which might remain due out of the general assets of the mortgagor; and that, so far as was necessary for this purpose, the estate of the mortgagor might be administered. On the decree a sale was directed, but no bidding was made, and the mortgagee offered himself to buy the premises if he was allowed to retain his principal, interest and costs, the surplus to be paid by him into court. The estate was insolvent, and a question having arisen between the mortgagee and the administrator of the mortgagor as to whether the costs of the former as mortgagee were to be paid in priority to the costs of the latter, Wood, V.-C., decided (1 John. & H. 126; 29 L. J., Ch. 548; 2 L. T. 565; 8 W. R. 302) that the mortgagee was entitled to the priority he claimed. The administrator having appealed, the court made an order (but by the consent of the parties) that the sale to the mortgagee should be confirmed, that he should be allowed to deduct from the purchase-money the principal and interest due to him on his mortgage, and that the balance of the purchase-money after these deductions should be paid into court, but without prejudice to any question as to the costs of the parties. *Tuckley* v. *Thompson*, 3 L. T. 257.

In a legatees' suit, where the assets prove insufficient for the payment of debts, the plaintiff, and the other parties, with the exception of the legal personal representative, are entitled to the costs of suit as between party and party only, and the plaintiff is not entitled to any priority in respect thereof. But the plaintiff is entitled to the costs, as between solicitor and client, of getting in and realising the estate, and in priority to all other parties, except the legal personal representative. *Wettenhall* v. *Davis* or *Dennis*, 33 Beav. 285; 9 Jur. (N.S.) 1216; 9 L. T. 361; 12 W. R. 66.

A married woman being entitled to a share of a residue for her life, with remainder to her children who were infants, a bill was filed by her and her husband, and their children, by their father as their next friend, against the executor and the residuary legatees for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into court. Afterwards he paid the whole of the testator's debts remaining unsatisfied, some of them before and the rest after the usual decree, whereby a balance greater than the fund in court became due to him, and the Master so found. After the report had been absolutely confirmed the husband died, and the widow having declined to take any steps towards the further prosecution of the suit, the executor filed a supplemental bill, praying to have the fund in court, exempt from all costs, paid to him in part of the balance found due by the Master. The court ordered the executor's costs of both suits, as between solicitor and client, to be first paid out of the fund; then the costs of the defendants, the co-residuary legatees, of both suits; and lastly, the costs of the widow and children, of the supplementary suit, but not of the original suit. *Jackson* v. *Woolley*, 12 Sim. 12; 10 L. J., Ch. 197.

A husband, whose wife was the executrix and residuary legatee of her father, opened an account at his banker's in the name of his wife as such executrix. He afterwards closed his separate account, but moneys belonging to him were from time to time paid into the wife's account, and the wife drew against it cheques for the payment of the husband's debts and of household expenses. The account remained for six years, when the husband died. The wife died shortly afterwards:—Held, that as the account was a mere agency account, and the balance belonged to the husband's estate, the representative of the husband and the wife must have his costs of two suits for administering their respective estates, in priority to the costs of the other parties, for the right of priority rested upon principle, and was not within the discretion of the judge. *Lloyd* v. *Pughe, Evans* v. *Pughe*, 42 L. J., Ch. 282; L. R. 8 Ch. 88; 28 L. T. 250; 21 W. R. 346.

Where a joint creditor takes the benefit of a decree for administering the estate of the insolvent partner, and obtains an order for payment of his debt and costs, the executors' costs are prior charges, but where the executors have denied assets, their costs are postponed to the debt and costs of the joint creditor. *Lodge* v. *Pritchard*, 4 Giff. 294; 11 W. R. 532.

Retainer of Fund against Beneficiary for.]—Where a legatee is admittedly one entitled to a certain fund under a will, but claims more than his title to is admitted, and threatens a suit for payment, the executors are entitled to retain the fund to which the legatee's title is admitted to meet the costs of the suit. *Ridge* v. *Newton*, 2 Dr. & War. 239; 1 Con. & L. 381; 4 Ir. Eq. R. 389.

An estate was represented to a legatee by the personal representatives as barely sufficient to pay the debts, but the accounts were not shewn. A bill was filed, and afterwards an offer was made to produce the accounts, which was declined; ultimately a small surplus was ascertained to exist, and to be due from the representatives, but which was totally insufficient to pay the legacies, which were of a very considerable amount. The court disapproved

of the litigation, and gave the plaintiff no costs, but directed the representatives to retain their balance in discharge of their costs. *Ottley* v. *Gilby*, 8 Beav. 602; 14 L. J., Ch. 177.

Misconduct of Executor or Administrator.]—It is a general rule that an executor is entitled to costs as far as goes to the taking the account; but where an executor, by his delay, had caused all the expenses, except the taking the first account, the court said they could not separate the expenses, and therefore gave him no costs. *Newton* v. *Bennett*, 1 Bro. C. C. 362.

Executors guilty of a breach of trust, ordered to pay costs. Order confirmed on appeal, with a direction that the costs having been taxed ex parte, the court should send them back to the Master to be retaxed. *Bretland* v. *Cope*, Colles, P. C. 97.

An executor, guilty of misapplying trust funds:—Held, liable to pay the costs as far as related to the transaction in question. *Pocock* v. *Redington*, 5 Ves. 800.

Where executors make an unfair appraisement, and otherwise misbehave themselves in their trust, they shall be liable to costs. *Sheppard* v. *Smith*, 2 Bro. P. C. 372.

Where an answer of an executrix was falsified by proof, and she appeared to have acted fraudulently, she was made to pay costs. *Vaughan* v. *Thurston*, Colles, P. C. 175.

If an executor commit a fraud, he will not be allowed costs out of the estate, though the testator has directed that his executors, for any expenses they might be put to, should be allowed their costs out of his estate. *Hide* v. *Haywood*, 2 Atk. 126.

An executor filed a bill to prove the will against the heir, and to have a defective surrender supplied, charging that the estate was otherwise insufficient. The heir, by a cross bill, insisted that there was more than sufficient to pay all the debts, exclusive of the copyhold not surrendered, whereupon the original bill was dismissed with costs against the executor as to that point, because the executor confessed the matter in a second answer to the cross bill, but had suppressed it in the first answer, and charged the contrary in the original bill. *Malabar* v. *Malabar*, Ca. t. Talb. 79.

In taking the account of an intestate's estate the plaintiff, in consequence of the evasive and fraudulent conduct of the administratrix, had been under the necessity of employing an accountant. Before the hearing of further directions, the administratrix was ordered to pay the costs of employing the accountant. *Toner* v. *Thompson*, 7 Sim. 145.

Administration is taken out in 1771. Distribution to a certain extent is made, but a large sum is retained on fraudulent pretences. No effectual stir is made against administration till 1802, and that is protracted by admonition in court below till 1810:—Held, notwithstanding lapse, that administrator should pay interest with annual rests for whole period, on sum undistributed, with costs incurred since original decree. *Stacpoole* v. *Stacpoole*, 4 Dow, 209.

Costs were given personally against an executor up to the decree, when the defence was on a wrong footing, and the answer evasive and contradictory. *Reech* v. *Kennegal*, 1 Ves. Sen. 126.

So where an executor has obtained a release of a legacy without any consideration. *Horsley* v. *Chaloner*, 2 Ves. Sen. 84.

W., by will, in 1849, directed his executors and devisees in trust to sell his real and personal estate, and to pay legacies to his nephews and nieces in classes, and to distribute the residue also among his nephews and nieces. They were empowered to postpone the sale and conversion for five years, but ordered to pay the income to the persons entitled in the meantime. For five years before the bill was filed they kept the estate in their hands, without suggesting any difficulties as to the ascertainment of the classes; kept no accounts; paid only a small part of the legacies, and to the residuary legatees neither principal nor interest; gave no information; and when applied to for accounts, sent no reply. Although illiterate men, and the estate large, they were ordered to pay the costs of the suit for administration, with the exception of costs of proving the pedigree. *Wroe* v. *Seed*, 4 Giff. 425; 9 Jur. (N.S.) 1122; 9 L. T. 254.

Where a testatrix by her will gave all her property to executors, upon trust to sell and convert the same, and after payment of debts and expenses to pay and divide the trust moneys amongst certain legatees, and the executors had paid some of the legatees part of their legacies, but had for seven years never paid anything to the other legatees, who had applied to them for payment, or for part payment, out of the moneys received by the executors, the court decreed that the executors were chargeable with the costs of the suit, they consenting to pay interest on the moneys improperly remaining in their hands, and also to strike off a considerable part of their solicitor's bill of costs. *Tickner* v. *Smith*, 3 Sm. & G. 42; 1 Jur. (N.S.) 990; 3 W. R. 224.

Semble, in an administration suit by legatees against executors, alleging that the legacies ought long since to have been paid, and seeking to charge the defendant with the costs, the plaintiffs may adduce evidence of wilful default, though not specifically charged by the bill. *Ib.*

A testator, by his will, made A. and B. his executors. B. died, and a suit was instituted to administer his estate. After decree and report made in this suit, but before B.'s assets had been distributed, a residuary legatee of the original testator filed a bill against A. and the personal representative of B., seeking to fix A. and the estate of B. with liability in respect of balances improperly retained by A. and B. as executors:—Held, that notwithstanding the pendency of the former suit, a decree in the latter suit directing accounts as against A. and B.'s personal representative, was properly made. *Birks* v. *Micklethwait*, 34 L. J., Ch. 362; 13 L. T. 31—L. C. Reversing 33 Beav. 409.

After decree in a creditors' suit against the executors of a deceased testator, a bill was filed by a residuary legatee seeking to charge the executors in respect of balances improperly retained, and under a decree made in the latter suit (adopting the accounts in the creditors' suit, but giving leave to surcharge and falsify) large balances were found due from the executors:—Held, that the executors ought not, even upon the condition of making good the balances, to be allowed any costs in the latter suit. *Ib.*

A testator, after some small bequests, appointed his daughter residuary legatee, and appointed her executrix, and another person executor of his will. Part of the estate consisted of leaseholds. The executor was guilty of great misconduct and obstruction, which occasioned much expense to the executrix and delay in the administration of

the estate. His solicitors took out an administration summons on behalf of an assignee of a pecuniary legacy, whose name they had refused to give to the executrix, that she might satisfy his claim. The executor commenced an action for the administration of the estate:—Held, that notwithstanding the executor's misconduct, he was entitled to obtain an indemnity in respect of the leaseholds, and, therefore, to such costs of the action as would have been occasioned by a simple administration summons, but that he must pay all costs of the legatee's administration summons, including the costs of the affidavits used there and in the action, and that he must be disallowed all other costs, charges and expenses incurred since a certain date, when he declined to entertain a reasonable scheme for the administration of the estate submitted to him by the executrix, but that, subject as aforesaid, he should be allowed his costs, charges and expenses properly incurred before the commencement of the action. *Bosworth, In re, Howard* v. *Easton*, 45 L. T. 136; 29 W. R. 885.

If a suit would have been proper, and the executor a necessary party, though the executor had misconducted himself, he ought not to pay all the costs of such suit, though in the course of the suit it appears that he has misconducted himself; but if the misconduct of the executor was the sole occasion of the suit, he ought then to pay costs. Semble. *Tebbs* v. *Carpenter*, 1 Madd. 290, 308; 16 R. R. 224.

In this case his honour allowed executors their costs up to the time of the decree, but charged them with the costs of subsequent inquiries, which were solely occasioned by their breach of trust. *Ib.*

Executors, against whom an inquiry has been directed as to what part of the testator's assets might, but for their wilful default, have been got in, and who have been guilty of some act of negligence, may, nevertheless, be entitled to their costs of an administration suit brought against them. *Bailey* v. *Gould*, 4 Y. & C. 221; 9 L. J., Ex. Eq. 43.

Costs of an administration suit given to an executor, though charged with the consequences of an improper investment. *Knott* v. *Cottee*, 16 Beav. 77; 18 Jur. 752.

Executors having retained in their hands large balances arising from the estate without investing them, an inquiry was directed as to the propriety of their conduct, and they were charged with interest at 4*l.* per cent. upon a portion of such balances:—Held, that in pursuance of the general principle, the executors could not be allowed the costs occasioned by the inquiry. *Colyer* v. *Colyer*, 32 L. J., Ch. 101; 7 L. T. 522; 11 W. R. 79.

Where Interest given against.]—Trustees or executors charged with interest do not therefore lose their costs. *Woodhead* v. *Marriott*, C. P. Cooper, 62.

When the court gives interest against executors as a remedy for a breach of trust, the costs follow of course. *Seers* v. *Hind*, 1 Ves. J. 294. S. P., *Rocke* v. *Hart*, 11 Ves. 62; *Mosley* v. *Ward*, id. 583.

The Master of the Rolls in giving costs against executors, went into the circumstances as a ground for it, observing that he did so, seeing the rule laid down in so general a manner in *Seers* v. *Hind* (1 Ves. J. 294), to which he was not quite prepared to accede, as there might be many cases in which executors must pay interest which would not be cases for costs. *Ashburnham* v. *Thompson*, 13 Ves. 404.

An executor was charged with interest, and with the costs of the inquiries and accounts relating to the breach of trust; but on the cause coming on for further directions, he was allowed such costs of the subsequent proceedings as were consequential on those of which the costs were allowed him by the former decree, and which arose principally by a necessary investigation as to the rule by which they were to be charged. *Raphael* v. *Boehm*, 13 Ves. 590; 8 R. R. 95.

Executor directed to lay out testator's personalty in the funds, &c., unnecessarily selling out stock, keeping large balances in his hands, and resisting payment of debts by a false pretence of outstanding demands charged with 5 per cent. interest and costs; but the court refused to make rests in the account. *Crackelt* v. *Bethune*, 1 Jac. & Walk. 586; 21 R. R. 241.

Executor, though in the result made answerable for default, by reason of loss incurred through neglect, or chargeable with interest for retaining money in his hands, yet, if there is nothing beyond such negligence or retention of money, is still entitled to the costs of the suit. *Travers* v. *Townsend*, 1 Moll. 496.

An executor retaining balances, and therefore charged with interest, gets his costs notwithstanding if his accounts are not falsified. *Flanagan* v. *Nolan*, 1 Moll. 84.

An executor or trustee, who retains a balance in his hands, and against whom a suit is instituted, will not be charged with the costs of the suit, except under circumstances of considerable misconduct. Where a suit is instituted with unnecessary haste against an executor or trustee, who has not greatly misconducted himself, he will be allowed his costs. *Bennett* v. *Athins*, 1 Y. & C. 247; 4 L. J., Ex. Eq. 35.

The court will allow an administrator his general costs of an administration action brought against him by a next of kin of the intestate, even where the greater part of his claim for expenses of realisation has been disallowed, provided that such claim was not improper, dishonest, or monstrous. Nor will the administrator under such circumstances be ordered to pay interest on the balance of the estate in his hands retained to meet such claim. *Jones, In re, Christmas* v. *Jones*, 66 L. J., Ch. 439; [1897] 2 Ch. 190; 76 L. T. 454; 45 W. R. 598.

Neglect of Duty.]—Mere neglect of duty in an executor, as, for instance, the omission to invest balances pursuant to a direction in the will, if unaccompanied by fraud, is not such misconduct as to disentitle him to the general costs of a suit for the administration of the estate, although it may subject him to the costs of so much of the suit as was occasioned by such neglect. *Heighington* v. *Grant*, 1 Ph. 600; 10 Jur. 21. Affirming 11 L. J., Ch. 171. And see *S. C.*, 10 L. J., Ch. 12; 9 L. J., Ch. 142.

The estate of a testator who died in 1832 was distributed in 1847, at the written request of the persons beneficially entitled. Another part of the estate, which fell in, in 1852, was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees. A bill filed in 1872 by one of the beneficiaries and her husband against the surviving trustee, and the representative of the deceased trustee, for administration, was

dismissed; but owing to the negligence of the trustees in not keeping accounts and vouchers, without costs. *Payne* v. *Evens*, L. R. 18 Eq. 356.

Neglect or Refusal to Render Accounts.]—The mere fact that an executor neglected to render accounts when asked, is not of itself sufficient to make him liable to the costs of a suit for administering the estate. *White* v. *Jackson*, 15 Beav. 191.

Where executor had refused an account, but on bill filed he gave one in his answer, and plaintiff took a decree for account, and it turned out on Master's report that account was correct, court gave plaintiff costs up to decree, and defendant those of subsequent proceedings. *Anon.*, 4 Madd. 273.

Neglect or delay in furnishing accounts, or even refusal to furnish accounts, will not, in every case, be sufficient to induce the court to order a trustee or executor to pay the costs of an administration suit; but where the neglect, delay or refusal is accompanied by improper dealing with the trust fund, he will be ordered to pay the costs except in so far as they are clearly not occasioned by his misconduct. *Heugh* v. *Scard*, 33 L. T. 658; 24 W. R. 51.

S., a solicitor, was executor of the will of the testator in the cause, who left his residuary estate to be divided between H. and G. H., G. H. being trustee of H.'s share. S. paid 50*l.* to G. H. on account of his share, but refused or neglected to furnish accounts, although repeatedly requested to do so, on the plea that he had mislaid them. The suit was instituted, but on S. furnishing an account, the plaintiff agreed to compromise, but his offers were refused, and an order was obtained against S. to pay the fund into court. S. had also dealt improperly with the fund:—Held, that he was liable for the costs of the suit, except in so far as they were not incurred through his misconduct. *Ib.*

An executor and trustee who had acted, but not proved, refused, and insisted that he was not bound to account, and he placed every impediment in the plaintiff's way. Having failed in his contention, the court, on making a decree for an account, directed him to pay the costs of suit to the hearing. *Boynton* v. *Richardson*, 31 Beav. 340.

An executor having neglected to render any accounts, and vexatiously obstructed the taking of them in a suit, the court on an administration summons refused to allow him any costs. *King, In re, Gilbert* v. *Lee*, 34 Beav. 574; 11 Jur. (N.S.) 899; 12 L. T. 818; 13 W. R. 1012.

Executors who had neglected to produce their accounts, deprived of their costs of suit up to the hearing. *Gresham* v. *Price*, 35 Beav. 47.

To an administration suit, the executors put in their answer that the suit was vexatious, and that nothing was due, and resisted the demand for an account; but an account being decreed, they claimed, first 400*l.*, and subsequently 60*l.*; but the chief clerk having certified that 220*l.* was due from them, the court ordered them to pay the costs of the suit. *Eglin* v. *Sanderson*, 3 Giff. 434; 8 Jur. (N.S.) 329; 6 L. T. 151.

When trustees refused information and an account of the property to the plaintiffs, who had an interest in the estate, and other proceedings had subsequently been taken whereby the costs of the suit were greatly increased, the trustees were directed to pay the costs of the suit up to the hearing, as if it had been an ordinary administration suit, and as to the rest of the costs each party to bear his own. *Talbot* v. *Marshfield*, L. R. 3 Ch. 622; 19 L. T. 223.

Trustees and executors, when called upon to render an account, offered to allow the plaintiffs, who were residuary legatees, or an accountant, or any other person named by the plaintiffs, to inspect the accounts. Notwithstanding this offer, the acting executor and trustee refused to allow the plaintiff's solicitor to interfere with the accounts, alleging that he was inquiring, not in the plaintiff's interest, but in his own, he having advanced money to the plaintiffs. The executors and trustees were ordered to pay the costs of the suit up to the hearing. *Kemp* v. *Burn*, 4 Giff. 348; 1 N. R. 257; 9 Jur. (N.S.) 372; 7 L. T. 666; 11 W. R. 278.

When executors and trustees had, prior to an administration action, distributed three-fourths of the residuary property, but had been irregular in paying the income of the other one-fourth (which was held by them in trust for a person during her life, and afterwards for her children), and had persistently neglected to furnish accounts in respect of this share, on an administration action being brought by the persons entitled to the one-fourth share:—Held that the costs of the action, including those of the hearing, but excepting those of the accounts and inquiries, must be paid by the trustees personally, and that the remainder of the costs must in the first instance be thrown on the whole of the residuary property, the proportion of them which would have been payable out of the three-fourths, if such parts had not been distributed, being borne by the trustees personally, and the remainder being paid out of the one-fourth share actually administered in the action. *Bell, In re, Bath* v. *Bell*, 39 L. T. 422.

Under the Judicature Act if an administration action be rendered necessary solely by the neglect of a trustee to furnish accounts, the decree should be so framed as to enable the court to throw the whole costs of the action on the party in default. *Hayter, In re, Wallett, In re, Hayter* v. *Wells*, 32 W. R. 26.

Items disallowed in taking Account.]—A residuary legatee objected to the account rendered by the executors, and on their refusing to pay, in discharge of all her claims, a sum larger than the amount thereby shewn to be due to her, filed a bill against them for administration. In the suit they were disallowed certain items of disbursement, and in consequence the balance found due from them was larger than the amount which the plaintiff had offered to accept:—Held, that the executors ought not to be ordered to pay the costs of the suit, which was consequent on their mistake, but that they were entitled to retain their costs out of the fund in the usual way. *Smith* v. *Cremer*, 24 W. R. 51.

A residuary legatee objected to certain items in accounts furnished by the executors, amounting in all to about 100*l.*, and issued a writ for an account specially indorsed under Judicature Act, Ord. III. r. 8, and payment of the balance. An account was taken under Ord. XV. r. 1, without any pleadings being delivered, and the chief clerk disallowed all the items objected to, and made his certificate accordingly:—Held, that the executors must pay the costs of the action. *Radclyffe, In re, Pearce* v. *Radclyffe*, 50 L. J., Ch. 317; 44 L. T. 96; 29 W. R. 420.

Unreasonable Conduct.]—Executor refusing to act on will without the sanction of the court,

ordered to pay costs when construction plain. *Harvey* v. *Harvey*, 3 Jur. 919.

A trustee refusing to pay a legacy without the direction of the court, in a case which admits of no doubt, was refused his costs, but was not made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive. *Knight* v. *Martin*, 1 Russ. & M. 70; Tam. 237.

A party was unable to obtain payment of his legacy and his portion of the residue without suit. The case being clear, and the remaining portion of the residue having been paid by the executor, he was charged with costs. *Curtis* v. *Robinson*, 8 Beav. 242.

Plaintiff, a trustee and executor under a will, brought an action for the administration of a small estate, on the ground that it was in the interest of all parties, as there were doubts as to the true construction of the will, and difficulties and disagreements with regard to the interpretation of the trusts, and that he needed the protection of the court. The defendants, the beneficiaries (who, after the commencement of the action, had suggested that the quickest and least expensive mode would be to state a special case for the opinion of the court), denied that it was in the interest of all parties that the estate should be administered under the direction of the court, and contended that the question of construction was in no respect doubtful. They submitted that the action should be dismissed, as being unnecessary, harassing, and destructive of the trust property:—Held, that the action must be dismissed with costs to be paid by the trustee personally, as the court will not allow itself to be made an instrument or mere agent of oppression, nor interfere where the only result must be to despoil of their property persons unable to protect themselves, and in this case there was no ground whatever on which the court could be asked to interfere except the question of construction of the will, and that was not in doubt. *Cubburn, In re, Gage* v. *Rutland*, 46 L. T. 848.

Executors of trustees decreed to pay the costs of a suit rendered necessary by their having refused to pay over the trust fund on reasonable evidence of a person's death; but, inasmuch as the trustees had been guilty of a breach of trust in relation to the fund, the costs were decreed to be paid out of the assets of the trustees, and not personally by the executors. *Lyse* v. *Kingdon*, 1 Coll. C. C. 184; 8 Jur. 418.

An executor, who, as alleged, occasioned the suit by not admitting the sufficiency of the evidence of residuary legatees in support of their title:—Held, not entitled to retain a portion of the assets paid over to his solicitors to defray the costs of defence. *Willets* v. *Jones*, 5 Jur. 623.

Legacy assigned upon certain trusts. Trustee, notwithstanding notice of former decree for administration of assets, files bill for payment of legacy. Court refused to assign legacy to him, he having acted improvidently, or to give him costs; and executors refused costs, because they should have moved to stay proceedings, instead of answering trustees' bill. *Packwood* v. *Maddison*, 1 Sim. & S. 232; 1 L. J. (O.S.) Ch. 107.

On motion, the executor not objecting, if the record is in a condition to obtain a decree, the order of reference may be made to take the account. It is cheap and convenient, and executor refusing to consent to have his account taken in this way, has his costs refused to him. *Black* v. *Creighton*, 2 Moll. 555.

The testator left the bulk of his property (all personal) to his wife, after a few pecuniary legacies. The testator left a large contract for wheat incomplete at his death, and was the personal representative of his deceased father's and brother's estates, in respect of which there were still unsettled claims. The executors paid the small legacies; but before paying over anything to the widow, required, as an indemnity, to have a large portion of the residue impounded for twenty years. The widow at first agreed, but afterwards withdrew her consent, and filed this bill for administration, and payment over. No additional claims were established either in respect of the wheat or the estates which the testator represented or otherwise:—Held, that though the period of twenty years was too long to ask to have the indemnity fund impounded, yet that the executors, the defendants, were entitled to their costs. *Cumbray* v. *Draper*, 16 Jur. 735.

Credits taken in error in Accounts.]—Executor's account surcharged by the amount of a credit taken for proportion of annuity payable by testator to executor for life of testator, which was not apportionable, being honest mistake, is not a ground to disentitle him to costs. A disallowance of credit honestly claimed, though mistaken by the executor, is not a disaffirmance or falsification of the account rendered; it is not like receipts found to have been had, which the executor did not disclose; nor payments alleged, which the executor did not make. Executors' costs are the first charge on the personal assets; and then plaintiff's costs in the cause on a bill to administer, &c. When the suit has been fairly instituted, the old rule that plaintiff's costs are to abide his priority, does not apply. *Bennett* v. *Going*, 1 Moll. 529.

Admission of Assets.]—The executor having, by admitting assets, prevented the account being taken at the proper time, was ordered to pay the costs of the suit, being precluded thereafter from alleging or relying on a deficiency to the prejudice of the plaintiff. *Macarthy* v. *Macarthy*, 1 Moll. 186.

An executor, in a suit for the arrears of an annuity under a will, disputing the title of the plaintiff to the annuity as a question of law, but admitting assets sufficient to pay funeral and testamentary expenses and legacies, may be decreed to pay the costs of the suit in addition to the arrears, and is not entitled to a decree for an account of the assets prior to any decree being made for costs. *Roch* v. *Callen*, 6 Hare, 531; 17 L. J., Ch. 144; 12 Jur. 112.

Upon motion, after an administration decree, to restrain a creditor from prosecuting an action, the administrator admitting assets, but disputing the debt, the costs of the action, down to notice of the decree, together with the costs of the motion, were ordered to be paid by the administrator immediately upon the creditor establishing his debt. *King* v. *King*, 34 Beav. 10; 34 L. J., Ch. 195; 10 Jur. (N.S.) 762; 10 L. T. 882; 12 W. R. 1095.

Of unfounded Claims by.]—Bill for a residue. Defendant, the executor, by his answer, stated declarations of the testatrix that the other relations should have no more than their express legacies, and hoped to prove that the surplus was intended for the executor. He was made to pay costs for thus insisting on the surplus. *Bayly* v. *Powell*, Pre. Ch. 92; 2 Vern. 361.

Where the administratrix of a deceased person claimed a portion of the estate beneficially, and a suit was instituted to recover that portion from her, in which the plaintiffs were successful:—Held, that the administratrix must bear the costs of the suit. *Bruin* v. *Knott*, 12 Jur. 616.

In consequence of a groundless claim of an administratrix to free-bench out of her intestate's copyhold estate, she is made defendant in a suit. Under an order of reference to take an account of the costs and expenses incurred by her solicitor in his character of solicitor to her as personal representative of her intestate, the Master must allow the costs of that suit, and has no authority to disallow them because he may think that the suit was occasioned by the improper claims of the administratrix herself. *Watkins* v. *Maule*, 1 L. J. (o.s.) Ch. 82.

Where executor sues in the joint character of creditor and legatee, he is liable to pay additional costs if any caused by claim as a creditor unsupported. *Sharples* v. *Sharples*, M'Clel. 506; 13 Price, 745.

Plaintiff being himself an executor, filing bill as creditor and legatee for an account of the estate of testator, is entitled, having obtained a decree, to costs out of fund in court, although he had obtained no more information than had been offered to him. *Ib.*

Executor's Cross-examination of Creditor.]—A., being entitled to a life interest in a fund over which she had a testamentary power of appointment, borrowed, in 1871, from B. 350*l.* on the security of a covenant that 1,250*l.* should be paid one month after her death. She died in 1884, having by her will appointed executors, and directed payment of her debts, and also that C., one of her executors (a solicitor), should be entitled to charge and receive payment for all professional business to be done by him under the will. C. was one of the attesting witnesses. In an administration action by B. on behalf of himself and all other creditors, the estate being insolvent:—Held, that the executors could not be deprived of the costs out of the assets of a cross-examination for the purpose of investigating B.'s claim, though no proceedings to set aside the deed were subsequently taken. *Barber, In re, Burgess* v. *Vinnicome*, 55 L. J., Ch. 373; 31 Ch. D. 665; 54 L. T. 375; 34 W. R. 395.

Further Consideration.]—Although applications for an order on further consideration are by Ord. LV. r. 2, sub-r. 16, where the estate is insolvent, business to be disposed of in chambers, a plaintiff will not be disallowed his costs of further consideration in court where the distribution of the insolvent estate gives rise to questions of difficulty. *Ib.*

Summons adjourned into Court by Executor.]—A testator made a voluntary settlement which was admitted to be void against his creditors. The trustee of the settlement paid 580*l.* into court. An administration action was necessary to find out the amount of debts. The claims of the creditors amounted to 504*l.* The chief clerk ordered the clear balance to be paid to the trustee, leaving the creditors only a dividend. The summons was adjourned into court by the defendant the executor:—Held, that the order of the chief clerk was right, and that the defendant must pay the costs of the adjourned summons personally. *Turner, In re, Turner* v. *Turner*, 51 L. T. 497.

Of defaulting Executor or Administrator.]—In an administration or creditors' suit against an executor becoming bankrupt or insolvent, and who is, at the same time, indebted to the estate of his testator, the costs of the executor incurred before his bankruptcy or insolvency will be set off against his debt, and the costs of the same executor incurred in the proper performance of the duties of his trust after his bankruptcy or insolvency will be allowed out of the estate. *Samuel* v. *Jones*, 2 Hare, 246; 12 L. J., Ch. 496; 7 Jur. 845.

In a creditors' suit, a defaulting administrator and his assignees, appointed pendente lite:—Held, not entitled to any costs. *Carr* v. *Henderson*, 11 Beav. 415; 18 L. J., Ch. 39.

In a creditors' suit, the assignees of a bankrupt, who is a defaulting executor of the deceased debtor, are not entitled to their costs of the suit out of the testator's estate; but if the plaintiff sought to charge the assignees with the receipt of specific parts of the testator's estate and failed to do so, the assignees might be entitled to costs. *Mussey* v. *Moss*, 1 Hare, 319; 11 L. J., Ch. 299; 6 Jur. 638.

Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and under s. 49 of the Bankruptcy Act, 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default. But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy—as where the bankruptcy has taken place prior to the Bankruptcy Act, 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt. *Lewis* v. *Trask* (21 Ch. D. 862) followed. *Clare* v. *Clare* (21 Ch. D. 865) not followed. *Basham, In re, Hannay* v. *Basham*, 52 L. J., Ch. 408; 23 Ch. D. 195; 48 L. T. 476; 31 W. R. 743.

A sole executor, who was a defendant to an administration action, became bankrupt after the administration judgment. He was a debtor to the estate in respect of money advanced to him by the testator in his lifetime:—Held, that the executor must have his costs subsequently to the bankruptcy, but that his prior costs must be set-off against the debt due from him. *Basham, In re* (23 Ch. D. 195) followed. *Vowles, In re, O'Donoghue* v. *Vowles*, 55 L. J., Ch. 661; 32 Ch. D. 243; 54 L. T. 846; 34 W. R. 639.

Of Defaulting Co-Executor.]—A decree was made for the payment by two executors of the balance found due to their testator's estate; and it was ordered, that upon payment they should be allowed separate costs of suit. One of the executors was insolvent, and the whole amount would have to be paid by the other. In drawing up the decree, the registrar made the payment of costs to the defaulting executor dependent upon his paying his proportion of the balance found due:—Held, that they were payable in any event, a direction being inserted in the decree, that if the one executor paid more than his proportion, the costs of the defaulting executor should be carried

to a separate account, with liberty to his co-executor to apply. *Birks* v. *Micklethwait*, 33 Beav. 409; 33 L. J., Ch. 510; 10 Jur. (N.S.) 302; 10 L. T. 85; 12 W. R. 505. But costs were not allowed on appeal; *see* 34 L. J., Ch. 362; 13 L. T. 31.

Two executors in an administration suit appeared by the same solicitor, to whom they had given a joint retainer. One of them was a debtor to the estate, and subsequently became bankrupt:—Held, as to the costs incurred by them prior to the bankruptcy, that the solvent executor was to be allowed only his own proportion of them out of the fund; the defaulter's proportion of those costs being set off against the debt due from him. But the costs incurred subsequently to the bankruptcy were allowed in full. *Watson* v. *Row* (next case) dissented from. *Smith* v. *Dale*, 50 L. J., Ch. 352; 18 Ch. D. 516; 44 L. T. 460; 29 W. R. 330.

Two executors jointly retained solicitors. One of them, largely indebted to the estate, died insolvent:—Held, that as the other was liable to the solicitors for the whole of their costs, they must be allowed to him out of the estate. *Watson* v. *Row*, 43 L. J., Ch. 664; L. R. 18 Eq. 680; 22 W. R. 793.

The insolvent trustee being indebted to the estate, and the solvent trustee not being responsible for that debt, and the Bankruptcy Act, 1869, having made a debt arising from a breach of trust to continue notwithstanding the bankruptcy:—Held, that a reference be directed to the taxing master to apportion the costs of the trustees appearing by the same solicitor, and that the costs of the solvent trustee be paid out of the estate, and the costs apportioned as the costs of the insolvent trustee be set off against the amount found due from him to the estate. *McEwan* v. *Crombie*, or *Porter* v. *Grant*, 53 L. J., Ch. 24; 25 Ch. D. 175; 49 L. T. 499; 32 W. R. 115.

Whether under this direction the whole of the common costs of the two trustees would be allowed to the solvent trustee or divided, must depend on the settled practice of the taxing master's office. *Ib.*

Executor of an Executor.]—Where the estates of two testators have been blended so as to create confusion, the executor of an executor shall be excused costs, though it appeared he had assets enough to pay the plaintiff's debts. *Sandys* v. *Watson*, 2 Atk. 80.

Where a bill sought either to charge the surviving executors of a testator personally with a demand, or to have the debt paid out of the assets of the testator, and the court decided that the surviving executors were personally liable:—Held, that the representatives of a deceased executor were entitled to have the bill dismissed against them, with costs. *Bradley* v. *Heath*, 3 Sim. 560.

Where a cause is continued after the death of an executor who had been declared a party, he will be declared entitled to his costs up to the time of his death; but the administrator de bonis non of the original testator will not be declared entitled to those costs. *Wood* v. *St. George*, 1 Con. & L. 365.

A., who was defendant as an acting executor, died. The court gave leave to the plaintiff to amend, by making the other executors parties in the place of A., without paying A.'s costs. *Rye* v. *Coppinger*, 12 Ir. Eq. R. 314.

A suit was instituted by husband and wife against the personal representative of the executor of a testator, for the wife's share of a specific legacy bequeathed to four persons. The personal representative of the executor died, and thereby the suit became abated. This suit was abandoned, and another against other parties was instituted. The costs of the representative of the executor of this abandoned suit were allowed in the accounts as against the original testator's general personal estate. *Trail* v. *Bull*, 1 Eq. Rep. 9.

Executor of Defaulting Executor.]—The representative of a defaulting executor, fairly accounting, is entitled to deduct his costs of suit out of the assets, though they may be insufficient to repair the breach of trust. *Haldenby* v. *Spofforth*, 9 Beav. 195; 15 L. J., Ch. 328.

An executrix charged with breach of trust by investing in her own name dies, and her executor puts in an answer denying any residue, and scheduling certain documents. Inquiries are directed, and, after some contention, it appears upon those documents that there is a residue. The executor of the executrix is then sought to be charged personally with the costs of the inquiries, inasmuch as it appeared from the scheduled documents that there was a residue:—Held, that he was not liable for such costs. *Lilley* v. *Medlicott*, 5 W. R. 412.

An executor, A., died indebted to the estate of his testator B., and a suit was afterwards instituted by the administrator de bonis non of B. against the representatives of A. to administer his estate and to ascertain and recover the amount due to the estate of B.:—Held, that the costs must fall on the estate of A. *Hyatt* v. *Hyatt*, 30 Beav. 630.

An executor died insolvent, having misapplied the assets. An administration suit having been instituted against his executors, who had received part of the testator's estate, they duly accounted for what they had received:—Held, that they were entitled to the costs of accounts against themselves, not to costs of accounts against the estate of the insolvent executor, and that as to other costs of suit, being parties in both capacities, they should have half the costs. *Palmer* v. *Jones*, 43 L. J., Ch. 349.

Where an action was brought for the administration of a testator's estate against the executrix of his defaulting executor whose estate was insolvent, it was held that the executrix was entitled to the costs of taking an account against herself, but to no costs of taking an account against the defaulting executor, and that she should have the general costs of the action. *Kitto, In re, Kitto* v. *Luke*, 28 W. R. 411.

In a suit for administration by the administrator de bonis non of an intestate against the executor of a deceased administrator, the plaintiff had a balance in his hands sufficient to pay his costs of the suit, and the defendant had in his hands a balance insufficient to pay his costs:—Held, that the plaintiff, as legal personal representative of the intestate, was entitled to retain his costs in full out of the balance in his hands, and that the defendant, as a stranger to the estate, was not entitled to have both the balances paid into court, and the costs paid ratably to each party, but was only entitled to retain his balance so far as it went in payment of his costs. *Rice* v. *Orgles*, 25 L. T. 263.

Three executors allowed an investment of 500*l.* to remain (under a power in the will) upon an

insufficient security. One died. The legatee claimed the legacy. The surviving executors opposed her claim on an administration summons. They gave no notice to the executor of the deceased executor of the proceedings:—Held, that the estate of the deceased executor was not liable to pay the costs of such proceedings. *Paull* v. *Mortimer*, 29 L. T. 418.

Where an action was brought for the administration of a testator's estate against the executor of a defaulting executor, whose estate was insolvent:—Held, that the defendant being before the court in a double capacity, should have his costs of taking the accounts of the original testator's estate and half the rest of the costs of the action out of the estate. *Palmer* v. *Jones* (43 L. J., Ch. 349) and *Kitto* v. *Luke* (28 W. R. 411) followed. *Griffiths, In re, Griffiths* v. *Lewis*, 53 L. J., Ch. 1003; 26 Ch. D. 465; 51 L. T. 278—C. A.

(c) *Of Creditor.*

When Plaintiff.]—On a bill by creditors, a sale was decreed by consent, and the creditors to be paid according to their priorities. Costs shall, notwithstanding, be paid to all in the first place. *Brace* v. *Marlborough (Duchess)* Mos. 50.

It is not the invariable rule, either that plaintiff's costs in a creditor's suit are to be the first payment out of the fund brought in, or that they are to abide the order and degree of plaintiff's demand. Where a puisne creditor files a bill on foot of a debt, which he might have known was desperate, his costs in that case are not of course, and advance of money out of the fund to prosecute the suit, will be refused. But if the debt was a hopeful debt, and the suit instituted bonâ fide, the accident of the fund not reaching the plaintiff's demand, is not a reason for mulcting him further, and his costs ought to be paid first. *Egan* v. *Baldwin*, 1 Moll. 539.

Where there are no incumbrances prior to his, a petitioner having the carriage of the suit is entitled to his costs out of a fund the produce of real estate, in the first instance, and in priority to the demand and the costs of creditors in equal priority with him. *Watson* v. *Fitzpatrick*, 11 Ir. Ch. R. 213.

In suits for administration of real and personal estate, where there are no specific incumbrances affecting the real estate, the petitioner is entitled to his costs out of the fund, in priority to all the creditors. *Smith* v. *Murphy*, 10 Ir. Ch. R. 42.

Costs of the suit given to the plaintiff, a simple contract creditor, in priority to the demands of judgment and specialty creditors; the suit being necessary, and having been properly conducted. *Jameson* v. *Farrer*, 3 Ir. Eq. R. 346.

In a creditors' cause, where other creditors apply for liberty to prosecute it, in consequence of delay in plaintiff, they must indemnify plaintiff against future costs. *Anon.*, 2 Moll. 467.

After a decree for an account, by which costs were given to all parties generally out of the estate, creditors, parties to the suit, were held entitled to their costs before any of the creditors coming in before the Master could be paid their debts; and where regular proceedings are taken after the decree between the parties, plaintiffs and defendants, there is no occasion to give notice of such proceedings to the creditors before the Master. *Hare* v. *Rose*, 2 Ves. Sen. 558.

Decree for costs to prior creditors to be paid by plaintiff, plaintiff to have them over, plaintiff is not to pay the costs forthwith. Creditors must wait until the fund is available; but if a deficiency, then plaintiff must make up that deficiency. *Jackson* v. *Curtis*, 2 Moll. 463.

A., as creditor of B., files a bill against the proper parties for a sale of B.'s estate, alleging that he had by his will charged it with the payment of his debts. On the trial of ejectment, a verdict was found against the will; whereupon A.'s bill was dismissed with costs. But, on appeal, decree as to costs was reversed. *Squire* v. *Pershall*, 2 Bro. P. C. 396.

The final decree ordered a defendant to have his costs against the plaintiff, and the plaintiff to have them over, with his own costs, out of the money arising from the sale. The plaintiff was a puisne reported creditor. The court refused to pay him the amount of those costs (for payment of which the defendant was proceeding against him by attachment) out of rents brought in by the receiver; but stayed the defendant's proceedings until further order. Such a decree for costs is not to be enforced against the plaintiff unless the fund be insufficient, or he be guilty of laches in the prosecution of the suit. *Crofts* v. *Poe*, 3 Ir. Eq. R. 151.

A creditor instituted a suit against the real and personal representatives of the principal debtor and against one of the sureties, omitting the other surety, and obtained a decree to account. He afterwards filed a supplemental bill against the representatives of the other surety; but inasmuch as they did not derive any benefit from the proceedings in the original suit, and as the creditor might have framed the original suit so as to have had in it the relief sought by the supplemental bill:—Held, that the plaintiff was not entitled, as against the representatives of the second surety, to the costs of the original suit. *Cuffe* v. *Young*, 2 Jo. & Lat. 17.

In a creditors' suit, the plaintiff did not establish his debt at the hearing, but the court retained the bill, giving him liberty to bring an action. He produced other evidence, and recovered in the action. Decree for payment of the debt and costs in equity, but no costs given of the proceedings at law. *Gregson* v. *Booth*, 5 Hare, 536.

The costs of a plaintiff in a creditors' suit in opposing a motion to dismiss for want of prosecution, by a party named executor, who had renounced probate and disclaimed, was refused to a creditor whose bill was dismissed upon payment of his claim by the acting executor. *Kenny* v. *Beavan*, 7 Hare, 133; 18 L. J., Ch. 64; 12 Jur. 936.

The mere offer from a defendant to pay a claim and costs (without motion):—Held, not to disentitle the plaintiff to his costs of the subsequent proceedings in the suit. *Ib.*

Pending a reference under an order, whereby, inter alia, the Master was directed to report the costs of the reference, and of the order to pay out the funds, the Master transferred the carriage of the decree, &c., from J. C. to M. W., another creditor, and reported that the costs of the reference would be payable to M. W., then having the carriage of the decree:—Held, that J. C. was entitled to so much of the costs of the reference as were incurred up to the

time when the carriage of the decree, &c., was transferred to M. W. *Kelly* v. *Kelly*, 1 Ir. Eq. R. 317.

If the notice of a motion does not require that the party should have the costs, they will not be awarded to him by the court in granting the motion, unless his adversary gave notice of using affidavits or documents to oppose the motion. A creditor who applies for and obtains an order on the plaintiff to procure a report within a limited time, will not be awarded the costs of the motion to be paid by the plaintiff; but if a plaintiff disobeys that order, and the creditor applies for the carriage of the decree, the plaintiff will be ordered to pay him the costs of the motion, if they are asked by the notice. *Magrath* v. *Veitch*, 1 Hog. 443.

A creditor's summons was taken out in chambers in a cause. Upon the return of the summons, the chief clerk, finding that he had no jurisdiction, adjourned the summons into court at the suggestion of all parties, to come on with the cause upon further consideration: —Held, that the application by summons was regular, but that it ought to have been referred to the judge in chambers, and not adjourned into court. *Halliley* v. *Henderson*, 4 Jur. (N.S.) 202.

No order was made upon the summons, the claim being barred by the Statute of Limitations; but the plaintiff was ordered to pay the creditor 5*l.* for his costs, and to add them to his own; the costs of all other parties costs in the cause. *Ib.*

A plaintiff who has been removed from the conduct of a creditors' suit will be allowed his costs of appearing at the hearing on further consideration to ask for costs due to him before his removal, but will not be allowed his costs of attending the taking of the accounts in chambers subsequently to his removal. *Joseph* v. *Goode*, 23 W. R. 225. S. P., *Armstrong* v. *Armstrong*, L. R. 12 Eq. 614; 25 L. T. 199; 19 W. R. 971.

—— **No Assets for Payment of Plaintiffs' Debt.**]—In a creditors' suit, it appearing that there were no assets applicable to the payment of the plaintiffs' debts, the plaintiffs ordered to pay the costs: but other creditors entitled to a specific lien, having proved, they were ordered to pay the costs of the proceedings relative to their debts. *Bluett* v. *Jessop*, Jacob, 240; 23 R. R. 35.

A simple contract creditor, who had instituted and prosecuted a suit for administration, in the face of information furnished by the legal personal representative (which turned out to be correct), that there were no assets for the payment of simple contract debts, was ordered to pay the costs of the suit. *King* v. *Bryant*, 4 Beav. 460. *S. C.*, nom. *King* v. *Hammett*, 11 L. J., Ch. 14; 5 Jur. 1025. S. P., *Fuller* v. *Green*, 24 Beav. 217.

A simple contract creditor obtained an order to administer the intestate's estate. He afterwards had notice that the estate was insufficient to pay the specialty creditor and the costs of the administratrix, but he still persisted in prosecuting the suit:—Held, that the fund must be applied, first, in paying the costs of the administratrix, then in paying the plaintiff's costs down to the notice, and the residue in payment of the specialty creditor. *Sullivan* v. *Bevan*, 20 Beav. 399.

A creditor files a bill against an executrix, and she states by her answer that there are no assets for the payment of his debt; he, however, persists in the suit, and the result of the account in the Master's office is, that there are no assets unadministered, though the executrix is charged with more than she had admitted:—Held, that the bill is to be dismissed without costs as against the executrix. *Robinson* v. *Elliott*, 1 Russ. 599.

—— **Laches.**]—Where a bill by a creditor to have the benefit of a decree to account, was dismissed for laches in plaintiff, the court doubted as to the costs; but as the laches were not all on one side, the bill was dismissed without costs. *Hercy* v. *Dinwoody*, 2 Ves. J. 87.

As between Solicitor and Client.]—In a creditors' suit, the plaintiffs are entitled to their costs, as between solicitor and client, where the fund is insufficient to pay the debts. *Tootal* v. *Spicer*, 4 Sim. 510. S. P., *Hood* v. *Wilson*, 2 Russ. & M. 687.

The plaintiff, a creditor, was allowed costs in an administration suit, commenced by summons, as between solicitor and client, where the fund realised was insufficient to pay the creditors in full. *Flynn, In re, Guy* v. *McCarthy*, 17 L. R., Ir. 457.

In a creditors' suit, costs as between solicitor and client cannot be given, even with the consent of all parties, unless it clearly appears that the estate is insufficient for the payment of the debts. *Blackett* v. *Blackett*, 5 L. J., Ch. 213.

The insufficiency of the fund to pay the debts is the only case in which the plaintiff in a creditors' suit is entitled to his costs as between solicitor and client. *Brodie* v. *Bolton*, 3 Myl. & K. 168.

In a creditors' suit, the assets being sufficient to pay the debts, but insufficient to pay the debts and the costs of suit taxed as between party and party, the court ordered the plaintiff's extra costs, as between solicitor and client, to be paid out of the fund. *Sutton* v. *Doggett*, 3 Beav. 9; 9 L. J., Ch. 335; 4 Jur. 959.

In a suit by creditors to administer the realty, there being no personalty, and the realty proving deficient, the court ordered the costs of the plaintiffs and of the defendants, who were beneficial devisees, to be taxed as between party and party, and paid pari passu out of the fund, and the balance of the fund then remaining to be applied in payment of the plaintiffs' extra costs between solicitor and client, and then in payment of debts. *Henderson* v. *Dodds*, L. R. 2 Eq. 532; 14 L. T. 752; 14 W. R. 908. S. P., *Ferguson* v. *Gibson*, 41 L. J., Ch. 640; L. R. 14 Eq. 379.

The rule that a plaintiff in a creditors' suit is allowed his costs as between solicitor and client, if the estate has proved insufficient, extends to parties to whom the conduct of the proceedings has been given. *Joseph* v. *Goode*, 23 W. R. 225.

The rule that a creditor who brings an action on behalf of himself and all other creditors for the administration of an estate which turns out to be insufficient for the payment of debts, is entitled to his costs as between solicitor and client, applies equally to the case of a creditor who obtains the conduct of an action originally commenced by a legatee or next of kin. *Richardson, In re, Richardson* v. *Richardson*, 49 L. J., Ch. 612; 14 Ch. D. 611; 43 L. T. 279; 28 W. R. 942.

—— **Simple Contract and Specialty Creditor.**]—Costs as between solicitor and client given out of the fund to a simple contract creditor who was plaintiff in a suit to administer his deceased debtor's estate, although the assets had proved insufficient to satisfy the specialty creditors. *Barker* v. *Wardle*, 2 Myl. & K. 518. S. P., *Jenkins* v. *Robertson*, 22 L. J., Ch. 874; 1 W. R. 298. *Larkins* v. *Paxton*, 2 Myl. & K. 320. But see *Rowlands* v. *Tucker*, 1 Russ. & M. 635; *Young* v. *Everest*, 1 Russ. & M. 426.

—— **Joint and Separate Creditors.**]—In an action by a separate creditor, on behalf of himself and all other the creditors of a testator, who was one of a firm of traders, for a general administration of the testator's estate, the general estate was realised and turned out sufficient to pay in full the separate creditors, but insufficient to pay in full the joint creditors of the testator:—Held, that the plaintiff was entitled to costs out of the estate as between solicitor and client. *McRae, In re, Norden* v. *McRae*, 55 L. J., Ch. 708; 32 Ch. D. 613; 54 L. T. 728.

Contribution by Creditors other than Plaintiff.]—The direction for creditors coming in under a decree to contribute to the costs, not enforced in practice. *Blunt* v. *Jessop*, Jacob, 243; 23 R. R. 35.

Note.—It is not the present practice to insert such a direction.

If in a creditors' suit plaintiff does not call for contribution according to decree, before creditor is admitted to prove, he waives all claim to contribution. *Shortley* v. *Selby*, 5 Madd. 447.

In a creditors' suit, the plaintiff's solicitor having refused to attend the accountant-general with Master's report, unless a contribution was made to him of 1*s.* in the pound, on motion, he being ordered to attend on payment to him of the fee of 6*s.* 8*d.* for attendance with each creditor, and his claim disallowed, the costs thereof were allowed to such as had tendered him the 6*s.* 8*d.*, but not otherwise. *Ib.*

The usual direction in decrees in creditors' suits that the creditors shall, before they are admitted, contribute their proportion to the expenses of the suit, does not prevent the court on further directions, if the case warrant, from ordering the plaintiff to pay all the costs of the suit; but if the suit be anything more than a mere creditors' suit, the direction for contribution ought to be limited to the costs of that part of the suit in which all the creditors have a common interest with the plaintiffs. *Dunning* v. *Hards*, 2 Ph. 294; 16 L. J., Ch. 403; 11 Jur. 549.

Where the fund in a creditors' suit is insufficient to pay the plaintiff his costs, the creditors, who have had the benefit of the suit by proving and obtaining payment of their debts, must contribute to the plaintiff's costs, and it is not matter of exception to the rule that they obtained payment by reason of being associated as joint creditors with a person who had a right of retainer against the estate. *Thompson* v. *Cooper*, 2 Coll. C. C. 87; 14 L. J., Ch. 318; 9 Jur. 768.

In a creditors' suit, instituted by simple contract creditors, in which the assets, after the payment of the costs, being insufficient for the discharge of the specialty debts, are apportioned among the specialty creditors, these specialty creditors are entitled, without contributing to the extra costs of the plaintiff, to the use of the order for the payment of the money and of the report founded upon it, so as to enable them to get the fund out of court. *Lechmere* v. *Brazier*, 1 Russ. 72; 4 L. J. (o.s.) Ch. 95.

A creditor who has been stayed from proceeding in his suit, and compelled to come in under the decree in another suit, will not be ordered to contribute to the costs of the plaintiff in that suit, as between attorney and client. The rule only applies to persons coming in voluntarily under the decree. *O'Brien* v. *Fitzgerald*, 3 Ir. Eq. R. 159.

Creditors who prove under a decree obtained in a suit instituted by a legatee for the administration of the assets of the deceased, are not bound to contribute to the difference between the plaintiff's costs between attorney and client, and party and party. *Lynch* v. *Skerritt*, 3 Ir. Eq. R. 504.

Upon the distribution of the funds in a creditors' suit, there being no specific incumbrancer, the several defendants and creditors were directed to pay to the plaintiff their proportions of the difference of the costs between party and party, and attorney and client, in proportion to their demands, although neither the bill prayed, nor did the decree direct, that they should so contribute. *Bracken* v. *Drought*, 2 Jones, 114.

The plaintiff, a specific incumbrancer, filed a bill for a sale:—Held, that judgment creditors, proving under a decree to take an account of prior incumbrances, were not bound to contribute to the payment of plaintiff's costs, though their demands exhausted the funds and left nothing for the plaintiff. *Downshire (Marquis)* v. *Tyrrell*, 2 Jones, 805.

Upon the distribution of the funds, the produce of real estates, in a suit instituted by a simple contract creditor on behalf of himself and other creditors, who should come in and contribute to the expenses of the suit, the fund being a sufficient one, the plaintiff is not entitled to make judgment creditors contribute in proportion to their demands to his costs between solicitor and client. *Newby* v. *Drew*, 10 Ir. Eq. R. 58.

On Stay of Proceedings by — At Law.]—A decree against an executor is in nature of a judgment at law; after that, he may, on motion, without filing a bill for an injunction, restrain a creditor suing at law. The executor must pay the costs till the notice, but not after notice; and he must make an affidavit as to funds in his hands. *Paxton* v. *Douglas*, 8 Ves. 520. And see *Dyer* v. *Kearsley*, 3 Mer. 483, n. And the rule is the same as to legatees. *Jackson* v. *Leaf*, 1 J. & W. 229.

Pending an action by a creditor against an executor, a decree is made in chambers in a creditor's suit, and notice of the decree given to the creditor. On the question of costs in the action, on motion:—Held, on the authority of certain of the registrars as to the practice, that the creditor is entitled to both sets of costs out of assets if admitted, but otherwise must add them to his debt; but quære. *White* v. *Leatherdale*, 1 W. R. 405.

Where a motion is made after a decree in a creditors' suit to restrain a creditor from suing at law, the creditor is entitled to the costs of the motion. *Jones* v. *Jones*, 5 Sim. 678.

Costs at law down to time of notice of the injunction given to a creditor to be paid by the executor, and also the costs of the application in equity. *Bookless* v. *Crummack*, C. P. Cooper, 125. And see *Curre* v. *Bowyer*, 3 Madd. 456;

Anon., 2 Sim. & S. 424; *Anon.*, 3 L. J. (o.s.) Ch. 227; *Powell* v. *Powell*, 12 Ir. Eq. R. 501.

The usual decree for an account having been pronounced in a creditors' suit, and the usual notice of the same having been published, a creditor brought an action against the executors for an alleged debt of the testator. On motion by the executors the action was restrained; but the costs both at law and in equity were reserved, till it should appear whether the creditor would establish his claim. *Burnett* v. *Burnett*, 10 Jur. 4.

Injunction to stay proceeding at law was granted, a decree of reference to take an account having been obtained on a creditors' bill against executors before action brought; but defendant not having notice of decree or of this application, it was ordered that all his costs should be first paid. *Farlow* v. *Wilson*, 11 Price, 95.

Upon a motion, after decree in a creditors' suit to restrain a creditor from suing the administratrix at law:—Held, under the circumstances, that the creditor was not entitled to the costs of the action, or of the motion for the injunction; and that the cost of the administratrix should be costs in the cause. *Jones* v. *Brain*, 2 Y. & C. C. C. 170.

An action by a creditor, whose debt was disputed, being stayed after a decree for the administration of the intestate's estate:—Held, that the creditor was not entitled to his costs of the action, nor of the motion to stay it, until he had first established his debt in chambers. *King* v. *King*, 34 Beav. 10; 34 L. J., Ch. 195; 10 Jur. (N.S.) 762; 10 L. T. 832; 12 W. R. 1095.

A suit was instituted by a creditor, for the administration of a testator's estate, and another creditor, the estate being insolvent, proceeds at law against the administratrix who does not apply for an injunction, or tender the debt and costs. Notice of a decree in the suit was given to the plaintiff in the action, who nevertheless continued the action, and obtained a verdict for his debt and costs:—Held, that the creditor was not entitled, as against the other creditors in the suit, to his costs in the action after notice of decree. *Sharrod* v. *Wingfield*, 25 L. J., Ch. 176; 1 Jur. (N.S.) 1154.

The answer of the executrix in a legatees' suit contained no accounts, and the decree did not direct an account of real estate. A creditor proceeding at law, after notice of the decree, restrained, on motion, without being allowed his costs of the application. *Bush* v. *Windey*, 13 Jur. 273.

After the usual decree has been obtained in a creditors' suit against the real and personal representatives of an intestate, this court will restrain all further proceedings in an action by a bond creditor of the intestate against the heir, although the heir may have pleaded riens per descent, and issue may have been joined to such plea; and as the heir will be ordered to pay to the creditor his costs of the action up to the time when he had first notice of the decree, any delay in applying for the injunction will in most cases resolve itself into a question of costs. *Roose* v. *Jones*, 1 Ph. 462; 14 L. J., Ch. 4.

A creditor having continued his proceedings at law after notice of a decree for administration, was ordered to pay the costs of a motion to restrain him, but was allowed to set them off against the costs of the proceedings at law incurred prior to the notice. *Gardner* v. *Garrett*, 20 Beav. 469.

A judgment creditor prosecuting an action upon his judgment against the executors of his debtor after notice of decree in administration suit will be restrained, and must pay the costs of the executors, of proceedings in the action taken after such notice (which costs will be set off against his judgment debt when proved), and also the costs of the application to restrain his proceedings at law. *Boston* v. *Richardson*, 3 W. R. 432.

—— **In Equity.**]—From the moment a creditor has notice of a decree to account against his debtor's representative, any further costs he incurs in his own proceedings will not be allowed to him. *Moffet* v. *Smith*, 2 Moll. 359.

Where there is an effectual decree under which a creditor can come in, he shall not, after he has notice of it, be allowed against the fund, the costs of any proceedings which he shall either institute or continue. *Biddulph* v. *Fitzgerald*, 2 Moll. 251.

Prior incumbrancer coming in in a subsequent creditors' suit, entitled in taking the account to be allowed the costs of suit theretofore instituted by him, for recovery of his demand, so far as incurred by him, he undertaking to discontinue further proceedings. *Farrer* v. *Brereton*, 2 Moll. 93.

Where the proceedings in a creditors' suit are stayed upon motion by an executor, on the ground that a decree for administration has been obtained in another suit, under which the plaintiff has a right to go in and prove his debt, the practice is to reserve the costs when the debt is disputed or not admitted by the executor. *Davey* v. *Plestow*, 19 L. J., Ch. 491; 14 Jur. 388.

Where there are several creditors' suits, and proceedings in the last instituted are stayed, and the plaintiff ordered to go in under the decree in the first cause, and prove his demand, including his costs properly and necessarily incurred, and the costs which he should be liable to pay to the several defendants, he is personally liable, in the first instance, to pay the costs of the defendants, who are not obliged to wait until funds are allocated or realised in the first cause. But where the restrained cause, though unnecessary, was not vexatiously instituted, and the plaintiff had been compelled to pay the costs of some of the defendants, the court ordered the receiver in the first cause to pay to him the amount of the costs which he had been so compelled to pay. *Loftie* v. *Forbes*, 2 Ir. Eq. R. 443.

Where a cause in which there had been a decree to account was abandoned by the plaintiff therein, who, without any restraining order having been served upon him, came in and proved his debt in another cause:—Held, that a defendant in the abandoned cause (a creditor whose demand was puisne to that of the plaintiff) was not entitled to have the costs incurred by him in the abandoned cause, paid out of the plaintiff's portion of the fund brought into court in the other cause. *Downshire* v. *Tyrrell*, 2 Ir. Eq. R. 66.

Semble, the defendant should have applied for the carriage of the decree in the abandoned cause, and had his costs added to his demands. *Ib.*

Where a creditor, without notice of a decree in an administration suit, had commenced an action in Scotland against the administratrix,

and afterwards had come in under the decree, but declined to undertake to discontinue his action, he was fixed with the costs of a motion for an injunction to restrain proceedings at law. After a decree in an administration suit, it is no ground for allowing a creditor, in the first instance, to proceed at law to ascertain his claim, that the cause of action arose in Scotland, and the witnesses are resident there, and that questions of Scotch law are involved. *Graham* v. *Maxwell*, 1 Mac. & G. 71; 1 Hall & Tw. 427; 18 L. J., Ch. 225; 13 Jur. 217. And see *Beauchamp* v. *Huntley* (*Marquis*), Jacob, 546; 23 R. R. 143.

Priority.]—By the settled practice of the Court of Chancery, a plaintiff is entitled to his costs only in the priority of his demand, except such costs as have been plainly incurred for the benefit of the parties in the cause, such as making out title to the estate to be sold. *Nelson* v. *Brady*, 1 Con. & L. 239; 2 Dr. & War. 143; 4 Ir. Eq. R. 359.

In administration suits concerning personal estate, where there is no fund to pay the plaintiff, the general rule is, that plaintiff does not get his costs out of a fund belonging exclusively to creditors of a higher degree, unless they are salvage costs, or there are special circumstances; and where plaintiff, a simple contract creditor, knew that the judgment debts would exhaust the assets, as they did, and her object in the suit was to have a certain fund decreed to be equitable assets, in which she failed, no costs were given. *Fisher* v. *King*, 11 Ir. Eq. R. 460.

A simple contract creditor, who institutes a suit for the administration of personal assets, and seeks to have his costs as against judgment and specialty creditors, who may come in under the decree, ought to make a case for it by his bill, and shew that a suit was necessary for the due administration of the assets and payment of his debt, or else that, by his exertions, he has made a fund available which would otherwise have been lost. *Drake* v. *Ford*, 3 Ir. Eq. R. 56.

The plaintiff in a creditors' suit is entitled in priority to the demands of the other creditors, to be paid the costs which he has incurred bonâ fide, and for the benefit of all parties, and with their assent, in making out title to the premises decreed to be sold. Semble, the plaintiff in a creditors' suit is entitled to his costs in the cause in the same priority with his demand; but if by his exertions he realise a personal fund for the benefit of all the creditors, he is entitled to his costs as the first charge upon the funds so realised. *Thornley* v. *Dundas*, Jones & Carey, 2. *S. C.*, nom. *Maguire* v. *Dundass*, 1 Ir. Eq. R. 25.

The costs of a creditor bonâ fide carrying the decree into effect, for the benefit of all parties, and making the fund available, is an exception to the general rule that the plaintiff's costs should stand in the same decree with his demand. The rule in *Taylor* v. *Gorman* (1 Dr. & Wal. 235, n.) qualified. *Kelly* v. *Kelly*, 1 Ir. Eq. R. 317.

In a creditors' suit when after final decree J. C. obtained the carriage of the decree, and was ordered to proceed without delay to have a sale:—Held, that J. C. was entitled in priority to the costs of making out title, though the funds realised did not reach his demand. *Ib.*

Secured Creditor.]—A secured creditor upon an estate, which upon realisation under the order of the court is found deficient, cannot after proving his claim at chambers, without valuing his security, claim priority over the plaintiff's costs. The time when the creditor's rights are fixed by election is the time when he sends in his proof. *Cloghessy, In re, McDonald* v. *Cloghessy*, 21 L. R. Ir. 388.

Where a puisne incumbrancer brought an action against other incumbrancers, and the trustees of a will, for administration of the estate, on further consideration:—Held, that, so far as the administration proceedings were proper, and also for the benefit of the prior mortgagees, the plaintiff was entitled to his costs of such proceedings out of the estate in priority to the prior mortgagees, but must add the rest of his costs to his security:—Held, also, that the trustees' costs of the action, so far as such costs were costs of administration of which the prior mortgagees had had the benefit, must come out of the fund as between solicitor and client. *Barne, In re, Lee* v. *Barne*, 62 L. T. 922.

See also ADMINISTRATION—DEBTS—INSOLVENT ESTATE, *b.* 3, (c), ii., col. 1662, ante.

Salvage Costs.]—Where in a creditors' suit a fund had been realised by the diligence of the plaintiff, and the assets were more than sufficient for payment of the debts, the costs of the plaintiff, as between party and party, were ordered to be paid out of the general fund, and the extra costs of the plaintiff were under the circumstances directed to be paid pro ratâ, by all the creditors who partook of the benefit of the suit. *Stanton* v. *Hatfield*, 1 Keen, 358.

If through the exertions of a plaintiff the court is enabled to distribute a fund, or make a declaration of rights necessary for an administration, there, although the plaintiff may fail in his claim, the court will not permit the other parties to carry off the fruit of his exertions without defraying his costs out of the fund. *Wedgwood* v. *Adams*, 8 Beav. 103.

A creditor plaintiff in an administration suit to carry out the trusts of a voluntary deed, including personal estate, is entitled to his costs in the first estate, having put the personal estate in a train to be realised. *O'Dowda* v. *O'Dowda*, 11 Ir. Eq. R. 464.

The costs incurred by a plaintiff in litigating and reducing considerably the demand of a creditor whose demand is prior to that of the plaintiff, are not costs which the plaintiff is entitled to be paid in preference to the demand of such creditor, who at the final hearing had a decree for payment of his prior demand, and his costs. *Jauge* v. *Jackson*, Fl. & K. 45.

Rent paid by the plaintiff to a head landlord of the premises in the pleadings mentioned, to preserve them from eviction, is the first charge on the fund produced by the sale of those lands. *Gray* v. *Crawford*, Jones & Carey, 174; 1 Ir. Eq. R. 274.

Other Cases.]—Where a creditor had, by an unconscientious use of legal process, acquired possession of an estate, he was deprived of costs subsequent to the payment of money into court. *Cranstown* (*Lord*) v. *Johnston*, 5 Ves. 277; 3 R. R. 80.

Creditor defendant, contesting the mode of taking the accounts, and failing, knowing a balance to be against him, is liable to costs. *Skirrett* v. *Athy*, 1 Ball & B. 435.

A creditor insisting by his answer on more than is really due, shall lose his costs in equity,

though entitled to them at law. *Forward* v. *Duffield*, 3 Atk. 555.

A creditor had obtained a separate report as to her debt, and presented a petition to have it confirmed and the debt paid. The plaintiffs presented another petition, stating that report, and another report as to debts generally, and praying to have the latter report confirmed and the creditor's debt paid. His honour made an order in both petitions, according to the prayer of the second, and ordered the creditor to pay the costs of his petition. *Turner* v. *Connor*, 12 Jur. 1082.

A., previously to the marriage of his daughter B., gave to the trustee of her settlement a bond, whereby he bound himself to pay an annuity upon trusts for the benefit of B. and her children. A. died, leaving C., another of his daughters, his sole devisee and executrix. On a bill filed by B. against C.:—Held, that B. was entitled to a decree declaring that she had a lien on the testator's real estate to the amount of the value of the annuity, but that B. should pay the costs of all parties to the cause. *Norman* v. *Johnson*, 29 Beav. 77; 6 Jur. (N.S.) 905; 8 W. R. 300.

A person, who was not a party to a suit, came in under the usual advertisements to prefer a claim against the testator's estate. The summons being adjourned into court, the claim was disallowed as against the estate, but was held to be good as against the executrix of the estate in respect of the share which she took under the will:—Held, that the cost of so much of the summons as related to the claim against the testator's estate must be paid by the party making such ineffectual claim. *Bentley* v. *Bentley*, 7 L. T. 819.

Upon the son's death an action of *Bennett* v. *Samuel* was instituted by a creditor in another branch of the court for the administration of his estate. In that action an order was made giving the plaintiff leave to apply in the present action (*Samuel* v. *Samuel*) to "intervene therein by appearing at the trial and contending that there was no forfeiture of the son's interest." Upon production of this order the chief clerk to the Master of the Rolls made an order giving the plaintiff in *Bennett* v. *Samuel* leave to "intervene" in *Samuel* v. *Samuel* accordingly, whereupon that plaintiff appeared at the trial of *Samuel* v. *Samuel* to contend against the forfeiture: — Held, that, although, under the circumstances, plaintiff was entitled to his costs of appearance, both orders were irregular, and that the proper course was for him to have obtained an order in *Bennett* v. *Samuel* for leave to appear in *Samuel* v. *Samuel* in the name of the son's widow, her interest as his executrix being in conflict with her beneficial interest under his father's will. *Samuel* v. *Samuel*, 47 L. J., Ch. 716; 12 Ch. D. 152; 26 W. R. 750.

(d) *Of Heir-at-Law.*

In General.]—An heir is entitled to his costs, for it is the law which casts the descent upon him. *Humphrey* v. *Morse*, 2 Atk. 408.

Where an heir-at-law is brought by order before the court, though there is no resulting trust in his favour, he shall have his costs. *Att.-Gen.* v. *Haberdashers' Co.*, 4 Bro. C. C. 178.

Of Administration Action.]—An administrator having claimed his debt before the Master, that is sufficient to entitle him to retain it. The administrator entitled to his costs out of the produce of the sale of real estate, his intestate having been a trader. The heir-at-law entitled to his costs from the plaintiff, who may be reimbursed out of the fund in court, without prejudice to the costs of the administrator. *Winter* v. *Hicks*, Tam. 475.

In a creditors' suit the heir-at-law of the debtor, who has been decreed his costs out of the surplus fund, cannot have them against the plaintiff if that fund prove deficient. *Hunt* v. *Bateman*, 1 Longf. & T. 379.

Where, under a decree in an administration suit, the solicitor for the inheritor was declared entitled to be paid his costs out of the surplus, if any:—Held, under the particular circumstances of the case, that although the fund was deficient he was entitled to his costs. *Grey* v. *Matthews*, Fl. & K. 309; 3 Ir. Eq. R. 430.

Where a suit had been instituted respecting the disposal of accumulations (void by Thellusson's Act), which arose from a mixed fund of realty and personalty, and which by the decree were given proportionably to the heir and next of kin, the court directed the costs of the suit to be paid pro ratâ by the heir and personal representative; but the decree was reversed as to this point. *Eyre* v. *Marsden*, 2 Keen, 564; 7 L. J., Ch. 220. Reversed, 4 Myl. & C. 231; 3 Jur. 450.

In an administration suit of an intestate's estate, where the whole of the real and personal estates was insufficient to pay the claims made by creditors:—Held, that the heir-at-law and administratrix were entitled to their costs as between solicitor and client, and also to all costs, charges and expenses properly incurred by them in respect to the intestate's estate. *Tardrew* v. *Howell*, 2 Giff. 530; 30 L. J., Ch. 191; 7 Jur. (N.S.) 937; 3 L. T. 661; 9 W. R. 296.

Where an infant heiress-at-law filed a bill for the administration of her intestate's real and personal estate, and his assets were found insufficient for the payment of his debts:—Held, that the plaintiff was, nevertheless, entitled to her costs as between solicitor and client out of the estate. *Shittler* v. *Shittler*, 10 L. T. 833.

Of Litigating Will.]—Heir-at-law disputing will, though on trial there were shewn no grounds for disputing it, yet held he was entitled to his costs at law and equity. *Crew* v. *Jolliff*, Pre. Ch. 93.

Heir-at-law, defendant, contesting the will and failing, but establishing a claim in the cause as creditor against testator's estate, charged with payment of his debts, is entitled to his costs. *Burne* v. *Breen*, 1 Ball & B. 308.

Heir-at-law, defendant, desiring an issue upon a will, in which he failed, entitled to his costs in equity; no costs on either side as to the issue; ordered to pay costs of a groundless motion for a new trial. *White* v. *Wilson*, 13 Ves. 87.

Heir-at-law has a right to his costs, though he cross-examine plaintiff's witnesses; but if he examine witnesses on his own part, he shall not have costs as to that. *Vaughan* v. *Fitzgerald*, 1 Sch. & Lef. 316.

Where the heir-at-law is brought into court he is entitled to his costs, though he examines witnesses on his own behalf: but praying an issue he puts himself into the situation of a plaintiff, and failing in it he must pay the costs at law. *Tuthill* v. *Scott*, 2 Moll. 468.

Heir-at-law raising a point against a will and

failing, costs were refused to and against him; but an executor or trustee merely submitting a point for opinion of court, though they fail, he shall have costs. *Rashleigh* v. *Master*, 1 Ves. J. 205.

Where the heir-at-law, being made a defendant, impeaches the testator's will by his answer, although the decree afterwards established the will, yet he is entitled to his costs of suit. *Wilson* v. *Simpson*, 7 Ir. Eq. R. 336.

Heir-at-law, being also the devisee in trust, misconducting his defence, ordered to pay all the costs of the suit. *Man* v. *Ricketts*, 7 Beav. 93; 13 L. J., Ch. 194; 8 Jur. 159.

In a suit as to the construction of a will, in which the heir-at-law is a necessary party, and is made a party by order of the court, he will be allowed the costs both of proving his heirship, and also of the general suit between the parties, even though he is ultimately unsuccessful. *Singleton* v. *Tomlinson*, 3 App. Cas. 404; 38 L. T. 653; 26 W. R. 722.

In Suits for establishing Wills and on Issue Devisavit vel non.]—*See also* WILL.

(e) *Respecting Legacies and Shares of Residue.*

Out of General Residue.]—Costs of a suit for legacy out of the residue; the suit being rendered necessary either by the conduct of executrix, who was the residuary legatee, or by the disposition of the testatrix. *Wilson* v. *Brownsmith*, 9 Ves. 180.

The costs of a suit for payment of a legacy which the executor and residuary legatee had offered to pay, ordered to come out of the testator's general estate, because the executor had qualified his offer to pay, by a restriction which he had no right to impose. *Walter* v. *Patey*, 1 Russ. 375.

In a suit for administering a testator's estate, a legacy was claimed by two legatees adversely to each other:—Held, that as the question arose on the testator's will, the costs must be borne by his estate and not by the legacy. *Wilson* v. *Squire*, 13 Sim. 212; 12 L. J., Ch. 139.

A testator bequeathed certain legacies to the children of A.; A had no legitimate but three illegitimate children, who claimed the legacies; the executors took out an originating summons to have the question decided:—Held, that the costs of the proceedings must be borne by the residuary estate. *Haseldine, In re, Grange* v. *Sturdy*, 31 Ch. D. 511; 54 L. T. 322; 34 W. R. 327; 50 J. P. 390—C. A.

Where a claim to a bond as a donatio mortis causâ was established, the costs of the suit were given out of the estate. *Gardner* v. *Parker*, 3 Madd. 185; 18 R. R. 213.

On account of the imbecility of an adult legatee, the executors in proper time, and bonâ fide, set apart the amount of her legacy, and, after payment of the legacy duty and incidental expenses, invested the balance in consols, in their own names, and accumulated the dividends (the 36 Geo. 3, c. 52, not applying to the case), and did not, on the passing of the 10 & 11 Vict. c. 96, transfer the amount into court under that act. A bill was filed in 1846 for payment of the legacy in cash, with interest; but the court refused to disturb the investment, and directed it and its accumulations to be brought into court. It appearing, however, that the legatee was of imbecile mind at the date of the testator's will, the court, on that ground, gave the costs out of the testator's general estate. *Pothecary* v. *Pothecary*, 2 De G. & Sm. 738; 18 L. J., Ch. 48; 12 Jur. 1016.

—— **Of Specific Legatee.**]—When a specific legacy is claimed in this court, the legatee must have his costs out of the testator's general estate, for otherwise it would be to abridge his specific legacy. *Bayshaw* v. *Newton*, 9 Mod. 283. S. P., *Nisbett* v. *Murray*, 5 Ves. 158. Except costs of inquiries as to the specific legacy. *Barton* v. *Cooke*, 5 Ves. 464. And see *Kirby* v. *Potter*, 4 Ves. 752; 4 R. R. 342.

Where a question is raised between specific and general residuary legatees on the construction of part of a will, whether a specific sum does or not fall into the general residue, the costs form part of the general administration costs, although in fact there is no question of an administration of the whole estate. *Lonsdale* v. *Berchtold*, 3 Jur. (N.S.) 328.

Out of Legacy or Share.]—Though it is true that the rule that costs shall come out of the estate prevails, where a question arises between the individual and the person taking the bulk of the estate, how far the bulk of the estate is to answer for a legacy, a sum of money, or a portion, yet if there is no question between the latter and persons claiming against him the bulk of the estate, but after he has paid out of the bulk, and done all that is incumbent on him, a question arises as to the interest in that property, clearly severed from the bulk, the expense of questions touching that fund ought to be thrown on the fund itself. *Jenour* v. *Jenour*, 10 Ves. 579.

The costs of an action to determine whether specific property passed under a gift to A. or a gift to B. ought not to be charged on the residue. *Wollaston* v. *Wollaston*, 47 L. J., Ch. 117; 37 L. T. 631; 26 W. R. 77.

Where the question was, whether a legacy lapsed or not, and it was held it did, the costs of ascertaining the right to it were ordered to be paid out of it, in exoneration of the general residue. *Skrymsher* v. *Northcote*, 1 Swanst. 566, 572; 1 Wils. Ch. 248; 18 R. R. 142. And see *Cresswell* v. *Cheslyn*, 2 Eden, 123.

Costs of an administration suit were directed to be paid out of the share of the residue destined for two legatees, as to which alone the question in the cause arose. *Barber* v. *Barber*, 3 Myl. & C. 688; 8 L. J., Ch. 36; 2 Jur. 1029. And see *S. C.*, 7 L. J., Ch. 70; 1 Jur. 915.

Where a legacy has been severed from the general estate, and becomes the subject of a suit, by the result of which the estate will not be affected, the costs of the suit are borne by the fund constituting the legacy; but the appropriation or investment by the executor of a particular sum to answer the legacy, where the question which arises upon it is a question between the general estate and the legacy, does not relieve the general estate from the costs of the suit. *Att.-Gen.* v. *Lawes*, 8 Hare, 32; 19 L. J., Ch. 300; 14 Jur. 77.

An administrator settled with three out of four next of kin, and the fourth having instituted a suit for administration:—Held, that his share was only liable to one-fourth of the costs. *Holgate* v. *Haworth*, 17 Beav. 259.

When a legacy has been properly severed from the residue, and a question subsequently arises respecting it, in the issue of which the residuary legatee is not interested, the costs must come

out of the legacy. *Martineau* v. *Rogers*, 8 De G. M. & G. 328; 25 L. J., Ch. 398; 4 W. R. 502.

Executors and trustees having appropriated a legacy and divided the residue:—Held, that the costs of a suit to secure the particular legacy must be paid thereout. *Governesses' Benevolent Institution* v. *Rushbridger*, 18 Beav. 467.

A stock legacy, bequeathed to several in succession, was appropriated by the executors and the residue paid over. In a suit between the remainderman and the executors alone, the legacy was transferred into court and the costs of suit were paid thereout. The tenant for life afterwards filed a claim to have the amount of costs recouped out of the residue. It was dismissed with costs. *Richardson* v. *Rusbridge*, 20 Beav. 136.

Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther* v. *Allen*, 1 Hare, 505.

Infants entitled to share in a residue, having filed a bill for an account against the executors and other adult residuary legatees who had received their shares and deprecated the proceedings: the accounts proving correct, the costs ordered to be paid out of the plaintiffs' share alone. *Mackenzie* v. *Taylor*, 7 Beav. 467.

Executors had made a division and appropriation of the residue. The husband of one of the residuary legatees, in ignorance of what had been done, filed a bill for an account. At the hearing, the plaintiff, with notice of what had taken place, persevered in having the accounts taken, and no substantial variation resulted therefrom:—Held, that the plaintiff was entitled to costs out of the estate up to the hearing, but that the plaintiff's share alone must bear the subsequent costs. *Thompson* v. *Clive*, 11 Beav. 475.

—— **Partial Distribution.**]—Personal estate was given by will to a large number of legatees. The executors and trustees, after deducting 10*l.* from each share to form an indemnity fund against certain possible claims, paid off the adult legatees, and invested the share of each infant legatee in his name and theirs jointly. A general release, to which the accounts were scheduled, was then executed by all the adult legatees. Some years after this a bill for the administration of the estate was filed by six of the infant legatees, their next friend being the managing clerk of their solicitor, acting at the request of their father, who had executed the release. The result of the accounts was to shew that the suit was not for their benefit:—Held, that the next friend was entitled to his costs; that the fund for payment of costs consisted of the indemnity fund and the undistributed shares of all the infant legatees; but that any residuary legatees who had been paid, including the trustees, asking for costs, should bring in the shares which they had received; and (the trustees taking large shares, and being therefore unwilling to bring them in) that any surplus remaining should be paid to the trustees towards their costs. *Gravatt* v. *Tann*, 38 L. J., Ch. 459; L. R. 7 Eq. 436.

When executors have made a right partial distribution and have properly accounted, and the remaining legatees then bring an action for administration, the costs will be borne by the shares remaining undistributed. *Hilliard* v. *Fulford*, 46 L. J., Ch. 43; 4 Ch. D. 389; 35 L. T. 750; 25 W. R. 161.

But when executors had made a wrong partial distribution, on the assumption that the estate was divisible into five shares instead of six, and their accounts were also incorrect, the costs of a subsequent administration suit were ordered to be paid out of the whole estate, as if no distribution had taken place, so as to charge the executors with the share of costs attributable to the distributed shares of the estate. *Ib.*

—— **Fund in Court—Lapsed Shares.**]—A question arose as to whether the next of kin (of which there were sixteen) of the testator's wife were entitled to a sum of money bequeathed to them as a class, or whether only such of the class were entitled as were living at the death of the testator. The trustees paid the amount into court. The court, having decided that as to five shares, such shares lapsed and went to the residuary legatees, directed the eleven shares to be paid in full, and that the costs of all parties should be paid out of the five lapsed shares. *Ham's Will, In re*, 2 Sim. (N.S.) 106; 21 L. J., Ch. 217; 15 Jur. 1121.

By Beneficiary personally.]—Legatees applying by petition for the payment of their legacies in an administration suit, before or at the time the cause is heard for further directions, must pay the costs of all parties of such petition. *Edwards* v. *Hall*, 8 De G. M. & G. 74.

H. devised and bequeathed all his real and personal estate to two trustees to sell and convert, and to stand possessed of the proceeds upon trust to set apart and appropriate 10,000*l.* for the benefit of the plaintiffs, one a tenant for life, and the other tenant in remainder, if the latter should attain twenty-one. One of the trustees was made residuary legatee. The plaintiffs by letter requested the trustees to pay the legacy into court under the Trustee Relief Act of 1847; but they declined to do so, and stated that they had invested the money as directed by the will, and that they did not wish to divest themselves of the trust. The trustees, by their answer to a suit instituted for payment of the legacy into court, said that it was unnecessary and improper, but they admitted that the plaintiffs had a right to have the legacy brought into court. Upon the language of the will, and upon established principles of equity, the court held that the expenses of severing, appropriating and securing a legacy must be borne by the residuary legatee; and held that the costs of the legatee, who had been by the conduct of the trustees forced to institute a suit for the payment of the legacy into court, which might have been done under the trustee relief act, must also be borne by the residuary legatee. *Handley* v. *Davis*, 28 L. J., Ch. 873; 5 Jur. (N.S.) 190.

Legatee Plaintiff.]—An executor is not justified upon a claim of interest by the legatee in imposing terms as to the payment of the legacy for the purpose of obtaining an abandonment of the claim for interest. Semble, that if a legatee has not exhausted every possible means of obtaining his legacy short of a suit, he will not receive costs upon a suit instituted by him for that purpose. *Aylmer* v. *Winterbottom*, 4 Jur. (N.S.) 19.

Between Solicitor and Client.]—A residuary legatee, plaintiff in an administration action, is

entitled to his costs as between solicitor and client where the estate is insufficient for payment of legacies, provided it is sufficient for payment of debts, but not otherwise. *Harvey, In re, Wright* v. *Woods*, 53 L. J., Ch. 544; 26 Ch. D. 179; 50 L. T. 554; 32 W. R. 765. S. P., *Thomas* v. *Jones*, 1 Dr. & Sm. 134; 29 L. J., Ch. 570; 6 Jur. (N.S.) 391; 8 W. R. 328. *Cross* v. *Kennington*, 11 Beav. 89. *Waldron* v. *Frances*, 10 Ha. (App.) xxvi. *Wilkins, In re, Wilkins* v. *Rotherham*, 54 L. J., Ch. 188; 27 Ch. D. 703; 33 W. R. 42.

A residuary legatee who brought an action for administration was, prior to the rules of 1883, entitled to costs out of the estate unless some special grounds were shewn for depriving him of them. *Farrow* v. *Austin* (18 Ch. D. 58) followed. *McClellan, In re, McClellan* v. *McClellan*, 54 L. J., Ch. 659; 29 Ch. D. 495; 52 L. T. 741; 33 W. R. 888—C. A.

Where a legatee files a bill for the administration of a testator's estate, whether it is expressed that he does so on behalf of himself and the other legatees or not, he does in fact represent them, and when all the debts are paid the fund belongs to the legatees, and the plaintiff is entitled to his costs of suit as between solicitor and client, the fund not being sufficient to pay all the legacies in full. *Thomas* v. *Jones*, 1 Dr. & Sm. 134; 29 L. J., Ch. 570; 6 Jur. (N.S.) 391; 8 W. R. 328.

In a legatees' suit, where the assets prove insufficient for the payment of debts, the plaintiff and the other parties, with the exception of the legal personal representative, are entitled to the costs of suit as between party and party only, and the plaintiff is not entitled to any priority in respect thereof. But the plaintiff is entitled to the costs, as between solicitor and client, of getting in and realising the estate, and in priority to all other parties, except the legal personal representative. *Wettenhall* v. *Davis* or *Dennis*, 33 Beav. 285; 9 Jur. (N.S.) 1216; 9 L. T. 361; 12 W. R. 66.

In an administration suit by legatees, the fact of one of the legatees being a large creditor will not entitle him to costs as between solicitor and client. *Horne* v. *Horne*, 14 W. R. 957.

In a suit by a residuary legatee against the executor of the will, the testator's estate proved insufficient to pay his debts:—Held, that the plaintiff was entitled to his costs, not as between solicitor and client, but as between party and party only. *Burkitt* v. *Ransom* (2 Coll. C. C. 536) disapproved. *Weston* v. *Clowes*, 15 Sim. 610.

In a suit instituted by a residuary legatee, the assets proved insufficient for the payment of the expenses and the general legacies:—Held, that the plaintiff was not entitled to his costs as between solicitor and client, except so far as the general estate had been increased by the proceeding. *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357.

Costs of a residuary legatee, in a suit for administering an insufficient estate, which he had commenced in chambers, allowed as between solicitor and client. *Burrell, In re, Burrell* v. *Smith*, 39 L. J., Ch. 544; L. R. 9 Eq. 443; 22 L. T. 263.

Where in a suit by a residuary legatee against the executor and other residuary legatees, the costs of all parties were directed as between solicitor and client, the court refused to vary the order on the ground of non-consent by the residuary legatees. *Blenkinsop* v. *Foster*, 3 Y. & C. 205; 8 L. J., Ex. Eq. 8.

Bill by one residuary legatee against the other, for the administration of estate; usual decree made; and held, on further directions, costs should not be taxed as between solicitor and client. *Fenner* v. *Taylor*, 5 Madd. 470.

When Legacy incumbered or assigned.]—Where one of a class of persons interested in a testator's residuary personal estate files a bill for its administration, the general costs of the suit are to be satisfied out of the fund generally; but where some of the parties beneficially interested have incumbered or absolutely assigned their portions of the fund, the costs of the assignors only will be allowed, the same to be paid to their assignees respectively, and the rest of the costs incurred by the assignees must be satisfied out of the assigned shares respectively. *Greedy* v. *Lavender*, 11 Beav. 417; 18 L. J., Ch. 62. Contra, *Coates* v. *Coates*, 3 N. R. 355. *And see* col. 1851, ante.

Executor having assigned his legacy, and having afterwards been decreed to pay costs, the legacy which had been assigned was held subject to make good these costs, although the liability had arisen after the assignment. *Hopkins* v. *Gowan*, 1 Moll. 561.

A party to whom a legacy was assigned upon certain trusts having filed a bill against the executors, to recover the legacy, notwithstanding he had notice of a subsisting suit for the administration of assets, the court refused him his costs, on the ground that he had acted improvidently. *Packwood* v. *Maddison*, 1 Sim. & S. 232; 1 L. J. (O.S.) Ch. 107.

In a suit for account of residue, one of the residuary legatees having, by assigning and taking benefit of insolvent act, rendered two supplemental bills necessary, the additional costs are to be borne by his share. *Brace* v. *Ormond*, 2 J. & W. 435.

A legatee who before a suit for the administration of the estate had assigned her interest, and who, with her assignee, was made a party to the suit, joined her co-legatees in her defence; and the court held, that the benefit of her having joined in defence should belong to the general estate, and the assignee's costs must come out of his own fund. *Heywood* v. *Grazebrook*, 18 L. J., Ch. 303; 13 Jur. 619.

If in an administration suit an inquiry is directed in chambers, as to incumbrances by persons interested under the will, the costs of such inquiry must be treated as part of the general costs of the suit and be paid out of the estate. *Gee* v. *Mahood*, 23 W. R. 71.

In an administration suit, where a legatee has assigned his interest under the will, he and his assignee are entitled to be allowed out of the general fund such an amount of costs only as the assignor would have got had he made no assignment. And as between the assignor and assignee, even where the assignment does not include the whole of the assignor's interest under the will, and where consequently the assignor remains a necessary party to the suit, the assignee is entitled to be paid his costs in full out of the amount so allowed in priority to the assignor. *Turner* v. *Sowdon*, 23 L. T. 799; 19 W. R. 403.

On Failure of Claim.]—In a suit instituted on fair grounds to establish a claim to a residuar

bequest, the court will give the plaintiff, though failing, his costs out of the estate. *Turner* v. *Frampton*, 2 Coll. C. C. 331 ; 10 Jur. 24.

It being admitted by the defendants, in a suit against the executors and parties charged with misapplying the trust property, that an account had been settled between the residuary legatee, the executor and the other defendant, upon an erroneous footing, by which the other defendant was benefited, and the residuary legatee was prejudiced, the court, on dismissing the bill of the residuary legatee, on the ground that he had no title to the relief prayed, did so without costs. *Portloch* v. *Gardner*, 1 Hare, 594 ; 11 L. J., Ch. 313 ; 6 Jur. 795.

Where executor sues in the joint character of creditor and legatee, he is liable to pay additional costs, if any, occasioned by the claim as a creditor unsupported. *Sharples* v. *Sharples*, M'Clel. 506 ; 13 Price, 745.

Plaintiff, being himself an executor, filing bill as creditor and legatee for an account of the estate of testator, is entitled, having obtained a decree, to costs out of fund in court, although he obtained no more information than had been offered to him. *Ib.*

A bill was filed for the administration of the testator's estate, by a party entitled to a contingent reversionary interest, and a decree for an account was obtained. Before the report, the plaintiff's interest wholly failed :—Held, that the plaintiff was not entitled to his costs of suit, either as against the defendants or the fund, and a petition for the purpose was dismissed with costs. *Hay* v. *Bowen*, 5 Beav. 610 ; 12 L. J., Ch. 78 ; 6 Jur. 1119.

There being no residuary gift, the next of kin filed a bill for administration. The debts exhausted the residue, but there remained assets specially bequeathed :—Held, that the plaintiff must bear his own costs, but that the executor was entitled to his costs out of the specific legacies. *Newbegin* v. *Bell*, 23 Beav. 386.

W. devised the whole of his real estate (some parts of which were subject to mortgage) specifically to his nine sons and daughters, and granddaughter. The personal estate was found to be insufficient to pay his debts. The representatives of one of the sons filed a bill praying for the administration of the real and personal estate ; and they submitted that one of the devises had lapsed ; that the whole of the real estate was charged with payment of the debts, and that the three daughters took only life estates. They failed in all points, the court holding that there was no descended estate, that the real estates devised to the sons were alone charged with debts, in exoneration of the daughters' estate, and that the daughters took an estate in fee. The real estates devised to the sons were ordered to be sold, and the proceeds paid into court. Upon the question of costs :—Held, that the daughters and granddaughter, who could not have enjoyed their estates except subject to the questions which the court had decided, must pay their own costs. *Wisden* v. *Wisden*, 5 Jur. (N.S.) 86.

Held, also, that though the plaintiffs had failed, they were not, under the circumstances, to be compelled to pay their costs out of their own estate, but were entitled to have their costs, as between party and party, out of the fund in court. *Ib.*

Where a beneficiary under a will files a bill for administration of the testator's estate, and in his bill sets up a claim to rank as a creditor of the estate, he will have to pay the costs of his claim if it is successfully resisted. *Lancefield* v. *Iggulden*, 44 L. J., Ch. 203 ; L. R. 10 Ch., 136 ; 31 L. T. 813 ; 23 W. R. 223.

Other Cases.]—A legatee agreeing after a decree for the administration of the estate obtained in chancery by another legatee, to stop proceedings in a suit previously instituted by him in the exchequer, allowed his costs up to the time of his having notice of that decree. *Jackson* v. *Leaf*, 1 J. & W. 229.

Plaintiff, in an administration suit, held not liable to pay the costs of certain legatees, who were made defendants, but disclaimed. *West* v. *Cole*, 3 Y. & C. 582.

A party against whom a decree to account had been made died, and a bill was filed against his representatives to continue the accounts. The representatives submitted by their answers whether certain legatees were not necessary parties. Those legatees, having been made parties by amendment, stated by their answer that their legacies had been paid. The bill was dismissed, as against them, with costs, to be paid by the plaintiff, who was to have them over against the representatives. *Trevelyan* v. *Charter*, 6 L. J., Ch. 274.

Plaintiff prosecuting, to a decree, a suit for the arrears of an annuity under a will, after the arrears had been paid, entitled to the costs ; the defendant not having tendered the costs up to the time of payment, and disputing by answer the will, and making it necessary for the plaintiff to establish by decree the will. Plaintiff also entitled to the costs of defendant, the heir of a deceased trustee, who could not be co-plaintiff ; but not to the costs of a necessary party made a defendant by amendment, but omitted in the original bill. *Lill* v. *Robinson*, 1 Moll. 83.

In an administration suit instituted by legatees in a county court, the costs were ordered to be paid by the plaintiffs :—Held, that the costs must be paid out of the general assets of the estate. *Cooper* v. *Busbridge*, 16 L. T. 5.

A bill for an account of the personal estate of W. J., an intestate, was filed by the legal personal representative of E. B. against the personal representatives of the deceased administrators of W. J., alleging that the administrators of W. J. had got in the greater part of the estate, and that E. B. was the sole next of kin. The suit was revived in 1877 by M., a subsequent personal representative of E. B., against X. and Y., as representatives of one of the administrators, and Z., as representative of the others, and was ultimately dismissed in 1880 with costs, as against all three defendants, on the ground that the title of E. B., as next of kin, was not proved. After this M. took out administration de bonis non to W. J., and brought his action as such administrator against Z. for an account of the personal estate of W. J. received by the administrators whom Z. represented :—Held, that although M. formerly sued as personal representative of E. B., and now sued as personal representative of W. J., the action was in substance a second proceeding for the same matter under the same alleged title, and that proceedings must be stayed until the costs of the old suit had been paid. *Martin* v. *Beauchamp* (*Earl*), 53 L. J., Ch. 1150 ; 25 Ch. D. 12 ; 49 L. T. 334 ; 32 W. R. 17—C. A.

A party beneficially interested in a testator's estate, employed counsel to attend for him before the master, on a question as to the propriety of allowing certain items in the executor's discharge:—Held, notwithstanding the question was one of considerable difficulty, that the expenses of employing counsel ought not to be allowed in taxing costs as between party and party. *Russell* v. *Nicholls*, 15 Sim. 151; 15 L. J., Ch. 289.

The costs of the bank, when made parties for the security of a legacy, must come out of the capital of the legacy. *Hammond* v. *Neame*, 1 Swanst. 38; 18 R. R. 15.

The attorney-general, appearing in support of a bill for a legacy, the bill being dismissed:—Held, not entitled to costs. *Gloucester Corporation* v. *Wood*, 3 Hare, 149.

(f) *Other Matters.*

An admission of assets for the payment of a legacy is an admission of assets for the purposes of the suits, and extends to costs, if the court thinks fit to give them. *Philanthropic Society* v. *Hobson*, 2 Myl. & K. 357; 3 L. J., Ch. 97.

Costs of a litigation in the course of administering a will are given out of general assets, or, in case of a deficiency, out of the fund. *Hampson* v. *Brandwood*, 1 Madd. 394.

Devisee cannot retain his own debt in priority to costs. *Loomes* v. *Stotherd*, 1 Sim. & S. 461; 24 R. R. 209.

A letter written by the defendant, the executor, after bill filed, offering to submit to arbitration, may be looked at on the question of costs. *Meader* v. *M'Cready*, 1 Moll. 119.

In a creditors' suit instituted by the plaintiff, on behalf of himself and all other creditors, the defendant is entitled on motion, at any time before decree, to have the bill dismissed, on payment of the demand of the plaintiff and his costs as between party and party; but if there be other defendants their costs must also be paid. *Pemberton* v. *Topham*, 1 Beav. 316; 2 Jur. 1009.

On a bill by a creditor for administration of an estate, making others jointly liable parties, who immediately appeared and offered to pay the debt, the court stayed the proceedings against them without costs. *Holden* v. *Kynaston*, 2 Beav. 204; 9 L. J., Ch. 198.

Costs of unsuccessful defence of an infant charged, not upon general fund, but on his own share. *Orford (Earl)* v. *Churchill*, 3 Ves. & B. 59.

In the case of a deficient fund, if a creditor who has obtained a separate report after the final hearing rehears the cause, the decree may be altered by refusing costs to a defendant who had formerly been decreed them; the facts detailed in the report being such that, if known at the final hearing, the court would not have given him his costs. *Robinson* v. *Harris*, Hayes & J. 412.

Where after an order to pay out a deficient fund to the parties as reported, the plaintiff was obliged to take further proceedings in the cause for the costs of which the order did not provide, and no application was made until after all the creditors except one had drawn out the sums respectively allocated to them:—Held, that the plaintiff was entitled to be paid the amount of the costs necessarily incurred by such further proceedings out of the remaining share. *Birch* v. *Alt*, 1 Ir. Eq. R. 228.

Where a supplemental bill was filed merely for the purpose of bringing a tenant in tail before the court, who had come in esse since the pronouncing of the decree in the original cause, and all the defendants in that cause having again appeared at the hearing of the supplemental suit:—Held, that as they appear in consequence of a notice served by the plaintiff, they were entitled to their costs of the hearing as against the plaintiff; but that the plaintiff should not have the same over. *Wallace* v. *Blake*, 1 Dr. & Wal. 378.

Under a decree in an administration suit, certain parties only were allowed to attend before the master. The master approved of some suits being instituted by the receiver, who was to be indemnified out of the estate. The funds appearing by the affidavit to be "abundantly ample," the court ordered the institution of the suits, and the payment of costs out of the fund standing to the general credit of the cause, upon service of those only whom the master had authorised to attend him on the conference. *Lockhart* v. *Hardy*, 6 Beav. 267; 13 L. J., Ch. 50.

An abatement having happened after a decree to account, and the plaintiff neglecting to revive, the defendant filed a supplemental bill to carry on the decree; and having made certain parties who took an interest under the will of the original defendant, defendants, such defendants were entitled to their costs, there not being sufficient unity of interest to make them co-plaintiffs. *Drought* v. *Redford*, 1 Moll. 572.

A suit was instituted for administration of the estate of A., who was supposed to have died intestate. Letters of administration had been granted to H., one of the next of kin. Subsequent to the decree being made and the accounts taken, a letter, of which probate was afterwards granted, was produced by another of the next of kin, in whose favour the will was made. By the production of the will the proceedings in the suit were rendered useless, the former letters of administration revoked, and letters of administration granted, with the will annexed:—Held, that the costs incurred in the suit must be borne by the party interested under the will who had the possession thereof, and had, by delaying to assert his right, occasioned the litigation. *Mirehouse* v. *Herbert*, 3 Jur. (N.S.) 1238; 5 W. R. 583.

A. made a will, giving his personal estate to his five infant children by his first wife; he afterwards marries a second wife, by whom he had one child who died soon after his birth. On the death of A., the executors attempted to prove the will, but were opposed by the widow, on the ground that the will was revoked by the second marriage. A deed was then executed, by which the wife agreed, on certain considerations, to permit the will to be proved. The widow having married a second husband, they filed their bill in this court to set aside the deed, as having been obtained by fraud or surprise, and to have the assets administered, as in the case of an intestacy. The court directed the parties to proceed in the prerogative court, and reserved further directions. The prerogative court decided in favour of the will. The plaintiff appealed to the delegates, but afterwards agreed to abandon the appeal on payment of 300*l.* The court then directed the accounts of the personal estate, &c. Notwithstanding the plaintiffs failed in setting aside the will, yet as, in any case, it was necessary that the accounts

should be taken in this court, the plaintiffs had their costs out of the fund. *Thompson* v. *Sheppard*, 2 Cox, 161.

An administrator settled with three out of four next of kin, and the fourth having instituted a suit for administration:—Held, that his share was only liable to one-fourth of the costs. *Holgate* v. *Haworth*, 17 Beav. 259.

Persons interested under a will and unnecessarily made parties to a suit for the administration of the estate, ordered to bear their own costs, they not having objected to their being parties in their answers or at the hearing. *Williams* v. *Williams*, 17 Jur. 434; 1 W. R. 237.

A bill was filed for the administration of a testator's estate, and for determining, among other questions, whether it was liable to bear the costs of completing a column left unfinished by the testator. By agreement between the parties, all questions were waived except as to the costs of completing the column, and the costs of the suit. The question as to the column was determined against the plaintiff:—Held, that the costs of the suit must follow the ordinary rule in administration cases, and be paid in the usual way. *Joliffe* v. *Twyford*, 28 L. J., Ch. 93; 4 Jur. (N.S.) 1165.

Next of kin appearing in opposition to a charitable bequest, and failing, are not entitled to costs as between solicitor and client. *Wilkinson* v. *Barber*, 41 L. J., Ch. 721; L. R. 14 Eq. 96; 26 L. T. 937; 20 W. R. 763. But see *Carter* v. *Green*, 3 Kay & J. 591; 5 W. R. 856.

Where a residue was disposed of to charitable purposes, costs were given to the executor, next of kin and attorney-general, out of the fund. *Moggeridge* v. *Thackwell*, 7 Ves. 36; 6 R. R. 76.

A married woman entitled to residuary estate is only entitled to the residue subject to the payment of costs. Therefore, when by consent in court of a married woman entitled to the residue of an estate, which had been the subject of a common administration suit, an order had been obtained for the settlement of the funds on her, but the minutes, as taken down in the registrar's book, did not provide for costs, leave was given, in drawing up the order, to provide for costs out of the said residue, without any further consent on the part of the married woman, as being a dealing with the fund in which she had no voice. *Musgrove* v. *Flood*, 1 Jur. (N.S.) 1086.

J. F. W.

EXHIBITS.

See EVIDENCE.

EXONERATION OF REAL OR PERSONAL ESTATE.

See EXECUTOR AND ADMINISTRATOR.

EXPECTANT HEIRS.

See FRAUD.

EXPLOSION.

See BOILER EXPLOSION.

EXTENT.

See CROWN (CROWN DEBTS).

EXTORTION.

See SHERIFF.

END OF VOLUME VI.

BRADBURY, AGNEW, & CO LD., PRINTERS, LONDON AND TONBRIDGE.